December 1975

THE ARMY LAWYER

DA PAMPHLET 27-50-36 HEADQUARTERS, DEPARTMENT OF THE ARMY, WASHINGTON, D.C.

GROUND RULES FOR INSTALLATION-LEVEL LABOR NEGOTIATIONS

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The negotiation of collective bargaining agreements between an exclusive labor representative and an agency component is a determinative stage in the federal labor-management relationship. Although there is no requirement in the federal sector for execution of a written contract between a union local and the management of a bargaining unit, both parties normally prefer to agree formally on how they will fulfill their respective obligations to negotiate. An effective labor agreement benefits both the union representative and management. Mutual responsibilities are delineated in writing, and the working relationship is stabilized. The parties are provided with a contractual basis for predicting the success or failure of proposals, and disputes are more easily resolved. Contrariwise, an ineffective or ill-conceived bargaining agreement promotes continual conflict that impedes both mission accomplishment and employee satisfaction.

An important preliminary step in the contract negotiation process is the negotiation of an agreement upon "ground rules", or a memorandum of mutually acceptable procedures for the conduct of negotiation sessions.[1] Section 11(a) of Executive Order 11491, *as amended*, provides that the parties "[m]ay negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with [impasse procedures], to assist in such negotiations; and execute a written agreement or Memorandum of Understanding." [2] Put simply, the parties should first agree on *how* they will agree.

Since ground rules usually affect the course of subsequent negotiations and can influence the substantive content of the final agreement, due care must be taken in their drafting and negotiating. Failure to agree on mutually acceptable negotiation procedures is apt to lead to misunderstanding that can negate long hours of bargaining effort. Well prepared ground rules will minimize disruptive controversy over significant procedural questions such as how the parties will express their agreement to specific proposals, as well as trivial matters such as the responsibility to provide coffee. Management officials should prepare their proposed ground rules well before the anticipated date of substantive negotiations. A management action plan should be formulated to reflect an itinerary for all pre-negotiation steps. Responsible parties and target dates should be designated. The initial management proposals should be developed concurrently with the ground rules, so that the first meeting with the exclusive representative for agreement on the ground rules will normally be the final step prior to commencement of substantive negotiations.[3]

Generally, management will negotiate as a team, headed by a chief-spokesperson who is usually either a managing official of the bargaining unit or a representative from the Civilian Personnel Office. Assisting the chief spokesperson at the bargaining table are several "resource" members, usually including a supervisor, a civilian personnel or labor relations specialist and, in some cases, an Army lawyer.[4]

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The Army Lawyer is published monthly by the Judge Advocate General's School. By-lined articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Manuscripts on topics of interest to military lawyers are invited to: Editor, The Army Lawyer, The Judge Advocate General's School, Charlottesville, Virginia 22901. Manuscripts will be returned only upon specific request. No compensation can be paid to authors for articles published. Funds for printing this publication were approved by Headquarters, Department of the Army, 26 May 1971.

Once the installation commander has formally designated the management team as his authorized representative,[5] the team members should meet to formulate proposals for ground rules. In planning the ground rules, a detailed knowledge of working conditions in the bargaining unit is less valuable than proper draftsmanship and experience in negotiating with labor unions. The labor relations specialist and the lawyer are, therefore, the logical drafters of the ground rules.[6] Other members of the management team should carefully review the draft ground rules for useful suggestions to improve the procedures.[7] Close familiarity with the ground rules is essential, because failure to observe the agreed upon ground rules may be an unfair labor practice.[8] Remaining doubts as to the effect of particular provisions in the proposed ground rules may be resolved by coordination with higher headquarters.[9]

Drafters of ground rules should review any bargaining history of the parties concerned, and examine prior ground rules that may be available.[10] Demonstrated attitudes of union representatives should be evaluated.[11] The likelihood of a union resorting to tactics which are unfavorable to a good faith bargaining atmosphere may warrant the drafting of contingent provisions that would restrict such tactics.

Management drafters should also anticipate what ground rules the union negotiators might propose. Trained and experienced union negotiators will present ground rules with the expectation that there will be some give-and-take prior to final agreement. Accordingly, certain management proposals may be drafted to include more than the minimally acceptable procedures, but should not be so complex as to ensure protracted negotiations.[12] The initial negotiations on ground rules are apt to be nonproductive if there is no ready agreement on at least some basic procedures, and management must maintain a flexible approach toward reasonable counter-proposals.[13] It is preferable to offer a counter-proposal to the union, in lieu of a flat denial. Most union negotiators are concerned about the establishment of favorable ground rules, and will play an active role in their negotiation. Whenever possible, however, for-

mal meetings of both teams to negotiate the ground rules should be avoided in order to eliminate the restrictive mood of a potentially adversary proceeding. If mutually agreeable, the chief spokespersons from each team should first attempt to meet informally. When union representatives do not propose ground rules of their own, it is often worthwhile to leave unsettled some issues such as the time, place or dates of the negotiations, so that the union president or spokesperson can show his participation in the drafting of the rules without feeling they were thrust upon him.[14] If any initial management proposals are rejected, the union may insist on more formal negotiations, and management must be prepared to more fully justify its proposals on an item-by-item basis.[15] The management drafters should caution their chief spokesperson not to sign any union proposals or make verbal agreement without first consulting with the "resource," labor-counselor.

In securing union agreement to proposed ground rules, management negotiators must be alert for several potential problem areas. Care should be taken to determine if the union representative who is negotiating the rules has actual authority to bind the union and its negotiators. It is advisable to seek the signature of the local's president, or at least to request that the union provide management a written list of its team members, specifying the chief spokesperson and alternates, before ground rules negotiations are commenced.[16] Any variation from the designated team membership could be evidence of bad faith negotiation.[17] Management negotiators should also be careful to note any oral "gentlemen's agreement" or "informal understanding" with union negotiators that might alter the terms of the written ground rules.[18] A particular verbal amendment of the written agreement may appear beneficial to management, but the written contract diminishes in force and effect to the extent it is subject to oral modification. Finally, management should insist on following the ground rules once there has been agreement. Passive acceptance of the union's failure to observe the ground rules could be construed as a waiver should management later decide to seek enforcement.

Selection of the various clauses which drafters might include in their ground rules depends on the nature of the relationship between the two parties, and all other relevant factual considerations existing at each activity. Before drafting the ground rules, drafters should decide what clauses will be phrased in narrow, specific terms and which should purposely be worded in a general fashion.

The Department of the Army (DA) has indicated that "ground rules should provide general procedural guidelines; they should not interfere with the bargaining process." [19] Unlike other types of contracts, the wording of labor agreements is sometimes better written in relatively vague terms in order to avoid "legalistic, protocol-ridden procedures which will lessen rather than insure true understanding and cooperation." [20] Thus, the final decision to include or eliminate detail in a given clause in the ground rules is sometimes best left to the individual negotiators.

Specific Considerations.

In planning the provisions of proposed ground rules, the following suggestions should be considered.

1. *Physical arrangements.* The ground rules should specify the place where negotiations will occur [21] and the date they will commence, including the maximum number of hours to be spent in negotiations each day. The negotiating sessions should be normally limited to four or five hours per day, including lunch breaks. Long, fatiguing sessions affect sound judgment and may lead union negotiators to procrastinate on important issues until management is tired, and perhaps quicker to agree. Allowance should be made for holidays, mutual extensions, emergencies and recesses. A provision that management will make available copies of applicable orders, regulations and other pertinent documents available should be included. Seating arrangements are negotiable and can be important, although inclusion in the ground rules may not always be warranted. Finally, some provisions for the taking of minutes may be advisable. If stenographers are unavailable, tape recordings may be acceptable (recorders

tend to inhibit the free exchange of ideas when used continuously). Regardless of the method of recordation, a typist should be available to promptly prepare new proposals and agreements as finalized.[22]

2. *Negotiation teams.* The ground rules should indicate the names of the two parties, the number of members on each team, and the relationship of principal to alternate members.[23] If the names of all members are not initially available, provision may be made for their designation in writing before commencement of the substantive negotiations. If nonemployee representatives are included, allowance should be made for their access to the installation. It may be desirable to make the composition of negotiation teams permanent, thereby preventing a change in membership during negotiations except for emergencies. The transfer of personnel, illness or other unavoidable absence may necessitate some changes in team composition, especially when negotiations are extended. The drafters must therefore balance stability against flexibility. The rules might also either require a quorum of each team to be present at every session, or permit the relatively unrestricted absence of individual members (except chief spokespersons). Allowance for technical advisors by mutual consent is appropriate when technical advice is relative to the agenda. These decisions must be based largely on negotiating history, the anticipated duration of negotiations and the relationship between the union spokesperson and their team members.[24]

The ground rules memorandum should require that each party designate a chief spokesperson and one or more alternate spokespersons. The rules should also reflect that only the chief spokesperson will speak for the negotiation team. Other members should be recognized only if permitted to speak by their chief, but intra-team communications in the form of notes or whispered consultations should be permitted.[25] Provision should also be made for caucuses, indicating where they may be held, how frequently, for how long, and whose approval, if any, is necessary.[26] A procedure for the establishment of joint fact-finding committees, with determination by the chief spokespersons of their purpose, authority and procedures is also advisable.[27]

3. *Official time.* The ground rules should specify to what extent employee negotiators will be in a pay status, a subject of great importance to participating employees. Section 20, Executive Order 11491, *as amended,* provides that employees may negotiate on duty time for the first 40 hours of negotiations or for one-half of all time spent on negotiations.[28] Since management must, in the absence of a waiver, negotiate "mid-contract changes," it is likely that negotiations will continue after the execution of a collective bargaining agreement.[29] It is usually preferable for management to provide that the first forty hours of all negotiations during the life of the collective bargaining agreement will be on official time. If union officials expect lengthy negotiations, labor will almost always prefer that one-half of the entire time spent on negotiations be on official time. Or, if the ground rules cover all negotiations during the life of an agreement, union negotiators may instead prefer the "first 40 hours" rule while negotiating the basic collective bargaining agreement, but the "one-half time rule" for all subsequent negotiations.[30] If the union insists on one-half time on the clock, instead of 40 hours, management should normally concede this issue. The status of employees on the union team during travel periods should depend upon whether the member is coming from or returning to work, as opposed to coming from or returning home.

4. *Proposals and discussions.* One essential ground rule is an order of business provision for the consideration, submission and receipt of substantive proposals. Each party should be required to present its written proposals by a certain date before the commencement of formal negotiations. The deadline should be well enough in advance of the first session to allow both parties time to study the other's substantive proposals and to frame counterproposals. If feasible, management should consider submitting its substantive proposals as soon as the ground rules are negotiated, thereby providing incentive for the union to present its own proposals early in the bargaining relationship. Pro-

posals made after the deadline should be considered only by mutual consent. A distinction should be made between late proposals raising new matters, and "counterproposals" to original matters raised in a timely manner. To keep discussions within the bounds of Executive Order 11491, *as amended*, the scope of negotiations should be defined. In particular, management should insist that negotiation sessions not be used to adjust individual grievances in lieu of statutory or previously negotiated procedures. A clause stating the goals of management and labor should be included. Similarly, a "mutual respect" clause will help commit union and management negotiators to dignified and meaningful bargaining. To facilitate the exchange of proposals, the ground rules should provide that each side will explain its proposals on request, before actual discussions commence. Initial disagreements should be followed by counterproposals, instead of flat denials. Some provision may also be made for determining discussion priority for different types of proposals.[31]

5. *Impasses.* Impasse procedures distinguish between the initial inability to agree and the continued failure to reach agreement despite good faith and diligent efforts. The word "impasse" should be clarified by the parties. Provisions should be made for tabling a proposal for later discussion when agreement is not reached after a reasonable time.[32] It is often advisable to establish a procedure for handling proposals that appear to conflict with DA or Department of Defense (DOD) regulations or policies. When a true impasse is reached, the ground rules might restate the procedures outlined in Executive Order 11491, *as amended*, although such reference is not strictly necessary.[33] Since management is obliged to negotiate "mid-contract changes," consideration should be given to a clause that would permit management to implement the proposed changes after an impasse is reached, but before resorting to impasse procedures in E.O. 11491.[34]

6. *Information releases.* Closely related to the handling of impasses is the procedure for issuing information releases. Both parties may wish to keep the public and employees informed of negotiation developments. All releases of information, however, should be issued jointly and distributed in an agreed upon manner and in accordance with applicable regulations. Failure to provide for joint releases may result in distorted or inaccurate unilateral releases by the union for purposes of favorable publicity. Each team should retain the right to consult internally with other persons not participating in negotiations, so long as such consultation is not made public.[35] Casual observers should not be allowed.

7. *Scope of the ground rules.* The ground rules should indicate the period during which they will govern negotiations. Since Executive Order 11838 has expanded the scope of negotiations considerably, [36] it may be beneficial to both sides if the ground rules govern not only the negotiation of the basic collective bargaining agreement, but also any amendments or supplements to that agreement and any "mid-contract changes" required to be negotiated during the life of the agreement.[37] For convenience, the ground rules should specify that they will be attached as an appendix to the basic collective bargaining agreement once it is negotiated. The ground rules should become effective upon the signatures of the management chief spokesperson and the appropriate union representative, and should continue in effect until the expiration of the basic agreement.

8. *Authority to negotiate.* Implicit in the expression of agreement is the possession by both negotiating teams of sufficient authority to bind the principals they represent. While it is DOD and DA policy for negotiating teams to have complete authority to bind the activity commander whom they represent,[38] it does not necessarily follow that the union negotiating team has full authority to bind the union local. There is considerable precedent that negotiating without sufficient authority to bind one's principal may constitute a failure to negotiate in good faith,[39] but the ground rules should specify to what extent the union local and management are bound by the agreement reached between the negotiating teams. If the ground rules, either expressly or impliedly, recognize that persons outside the union negotiating team may withdraw or modify the chief spokesperson's

agreement, then the union has arguably negotiated in good faith because management knowingly recognized the limited authority of the union team.[40] Management may therefore want to insist that the ground rules provide that any agreement reached at the table is irrevocable except by mutual agreement, and is binding on all union officers and members at large, as well as the activity commander. This safeguard is particularly necessary if the union local president is not the chief spokesperson of the union team, or if the union purports to require ratification by its membership. The union's agreement to a rule of irrevocability, without having delegated complete authority to its team, would be deceptive and might well constitute bad faith negotiations.

9. *Mechanics of agreement.* The customary means of expressing agreement is the placement of the chief spokesperson's initials by each item agreed upon. Withdrawal of an agreement reached in this manner would, in most instances, be an unfair labor practice.[41] To ensure proper understanding, the ground rules should provide that the initialing of an item is binding on all members of the negotiating team, including the chief spokesperson, and the principals they represent. Withdrawal of agreement may be permitted upon mutual consent, and editorial changes in grammar, spelling and citations should also be permitted. To provide an incentive for the completion of negotiations, items agreed upon should not become effective until the entire agreement has been executed.[42] In no event should terms such as "tentative agreement" or "agreement subject to approval" be used.[43] The rules should make it clear that "approval" by the activity commander, the agency head's designee and the appropriate union official is merely a ministerial act.[44] The "ministerial act" is legally significant only as "execution" for purposes of Section 15, Executive Order 11491, *as amended.* Refusal to "execute" an agreement already expressed by the chief spokesperson's initials may be equivalent to an improper withdrawal of agreement by management.[45] The ground rules should also note that, while the agreement is subject to regulatory review by higher headquarters after its execution, the finality of the agreement is not affected except for those provisions which violate applicable law, Civil Service Commission or agency regulations, or Executive Order 11491, *as amended.*

10. *Amendments.* Management may want to consider a "mutual reopener" clause, stating that amendments or supplements to the ground rules may be negotiated only upon mutual consent. Such a clause would prevent the union from attempting to negotiate changes in the ground rules in the midst of negotiations on substantive matters. Management, of course, would be similarly restricted. Renegotiation of amendments to the ground rules would be compulsory if changes in law, regulations, or Executive Order 11491, *as amended,* necessitated changes in the ground rules. In any event, if the ground rules are attached to a basic collective bargaining agreement which contains a "mutual reopener" clause, that clause would also control amendments of the ground rules.

11. *Post-agreement procedures.* The ground rules should specify at what point the basic agreement is "executed" for purposes of Section 15, Executive Order 11491, *as amended.* Since the agency has only forty-five days after the agreement's "execution" to complete its review for compliance with law and regulations, or "post-audit review", there should be no additional formalities to delay dispatch to higher headquarters. The rules might therefore specify that the last ministerial act at the local level—usually the signatures of the union president and activity commander—will constitute formal execution of the agreement.[46] The rules should further indicate that executed agreements will not be implemented in whole, or at least in part, until the "post audit review" is completed and a reasonable period (not to exceed a specified time) has expired. The short hiatus between execution and implementation will enable management to make any required changes resulting from the "post-audit review", print the contract, distribute copies to supervisors, conduct training classes and initiate any other changes that may be required by the new contract.

Appended to this article are proposed ground rules that were drafted jointly by a labor counselor and a labor-management relations

specialist. The rules reflect most of the considerations listed above, but should be modified or expanded to meet local conditions. Certain provisions may be overly restrictive, too complicated or unnecessary. What experience has shown to be necessary in one negotiation may be "legalistic" in another, interfering with the "bargaining process." Some critics may argue that long and complicated ground rules are needed only when management seeks to hide behind them out of fear to negotiate. In some instances this may be a valid criticism. In other circumstances, however, past bargaining history and the personalities involved may warrant comprehensive protection for both parties. One of the goals of labor-management relations is "problem-solving" through good faith bargaining. Ground rules should not get in the way of the bargaining process, but are intended to facilitate and expedite successful negotiations. The appended ground rules are offered as a guide; the final negotiated agreement may vary considerably.[47]

In drafting the ground rules or "memorandum of understanding", management officials should bear in mind that contract negotiations are intended to benefit both sides. Although arms length negotiation frequently has many characteristics of an adversary proceeding, the object of labor-management relations under Executive Order 11491, *as amended*, is harmony, cooperation, and mutual respect.[48] Consequently, the ground rules by which management and labor negotiate their all-important collective bargaining agreement should not be one-sided or unsconcionable. Bargaining at an initial disadvantage will make one party appear unfair and will alienate the handicapped negotiators as they realize their predicament.[49] It follows that the primary goal of management in drafting and negotiating ground rules should not simply be the assurance of its own protection, but also the assurance of orderly, harmonious and fair conditions for collective bargaining.

Footnotes

1. Ground rules are also known as "memoranda of understanding" or "prenegotiation agreements." *See* "Collective Bargaining Under E.O. 11491," Government Employee Relations Report Reference File 61:351, 358 (29 September 1975) [hereinafter cited as GERR RF].
2. Exec. Order No. 11491, 3 C.F.R. 861 (1966–1970 Comp.), 29 October 1969, *as amended by* Exec. Order No. 11616, 3 C.F.R. 202 (1971 Comp.), 26 August 1971, *and* Exec. Order No. 11636, 3 C.F.R. 321 (1974 Comp.), 17 December 1971, *and* Exec. Order No. 11838, 40 Fed. Reg. 5744, 6 February 1975, § 11a [hereinafter cited as E.O. 11491].
3. *See generally*, U.S. Dep't of the Army, Civilian Personnel Pamphlet No. 70, Labor Negotiations at the Local Level, May 1971, §§ 41, 43 [hereinafter cited as CPP No. 70]. "Ordinarily, articles in an agreement whose purpose is to secure union and management cooperation to achieve what are essentially management's goals will be initiated by management at the beginning of a particular labor-management relationship." *Id.* at § 41. *See also*, U.S. Dep't of the Army Pamphlet 27-21 (Ch 1). MILITARY ADMINISTRATIVE LAW HANDBOOK (7 March 1975), para. 4.11c [hereinafter cited as ADMIN. LAW HANDBOOK].
4. For the relationship of team members to one another, *see* GERR RF 61:351–354; CPP No. 70, §§ 15, 16; and ADMIN. LAW HANDBOOK, para. 4.11c. *See also*, LEGAL GUIDE TO NEGOTIATION OF AGREEMENTS ON LABOR-MANAGEMENT RELATIONS IN THE DEPARTMENT OF THE ARMY FOR LABOR COUNSELORS, Labor and Civilian Personnel Law Office, OTJAG, 1 Aug 1975, p. 12 [Hereinafter cited as LABOR COUNSELOR GUIDE] which provides that "[t]he primary responsibility in each instance to conduct negotiations for management lies with the CPO [Civilian Personnel Officer]. The function of the labor counselor who participates in the negotiation is to provide legal support to the CPO, when requested." Civilian Personnel Regulation 700 (Ch 21), Personnel Relations and Services, Chapter 711.A, Labor Relations, 18 March 1975, para. 1–5b [hereinafter cited as CPR 700 (Ch 21) 711.A] further provides that "[e]ach commander will designate the civilian personnel officer as the principal contact point for conducting business with unions since such dealings will be concerned for the most part with personnel policies and working conditions." Para. 1–5c notes that "[t]he Installation Labor Counselor, a qualified attorney designated by the activity, is available to provide advice and assistance to the civilian personnel officer on matters such as union contacts involving attorneys, third party proceedings, grievance resolutions, arbitration representation, *legal advice to negotiation committees*, contract interpretation, management training (including instructor assistance) and review of labor relations policies and procedures." (emphasis added). *See also* 593 GERR A–9 (1975) where one observer of the "labor counselor program" noted, "Whether the labor counselors will also serve as members of management negotiating teams is a matter to be determined on a case-by-basis. It appears that in most instances agreement on the substance of clauses will be the province of non-lawyer negotiators for both sides, with the counselors coming in after substantive agreement is reached to help draft

the actual contract language." In some instances the labor counselor might actually be on the management negotiating team, especially where a union attorney is present. Labor counselors should review all proposals from both sides prior to agreement by management.

5. For a discussion of the requirements for an effective team, *see* CPP No. 70, §§ 33, 34.
6. Dep't of Defense Directive 1426.1 (9 October 1974), para. VH. [hereinafter cited as DOD Directive 1426.1] requires that the chief spokesperson have training in negotiations. If management is fortunate enough to have other members of its team who are experienced negotiators or draftsmen, they too should be included in the initial drafting process.
7. *See* CPP No. 70, § 8; GERR RF 61:351, 353. Just as "intra-management bargaining" leads to uniformity during substantive negotiations, unanimity of opinion is important when negotiating ground rules.
8. E.O. 11491, §§ 19a(6) and 19(6) provide that management and the union, respectively, "shall not refuse to consult, confer, or negotiate with an agency as required by this order." Section 11a provides, "[a]n agency and a labor organization . . . shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions. . . ." *See Joint Technical Communications Office (Tri-Tac), Dep't of Defense, Fort Monmouth, New Jersey*, A/SLMR No. 396, 31 May 1971 [Hherinafter cited as GERR] in which management withdrew from an agreement contrary to the ground rules, and thereby violated E.O. 11491, § 19a(6). But not every breach of ground rules constitutes an unfair labor practice. *See Seattle Regional Office, Small Business Administration, Seattle, Washington*, A/SLMR No. 423, 26 August 1974 [hereinafter cited as A/SLMR 423], reported in 576 GERR A-8 (1974), wherein management legally withdrew agreement after initialling several items. The Administrative Law Judge (ALJ) noted that "[n]ot every breach of agreement constitutes a violation of the Order." The Assistant Secretary for Labor-Management Relations (A/SLMR) ruled this was not an unfair labor practice. In *Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California*, A/SLMR No. 435, 30 September 1974 [hereinafter cited as A/SLMR No. 435], *reversed*, FLRC No. 74A-77 (8 August 1974), the union refused to follow a procedural agreement which would have deprived it of a substantive legal right. Such refusal was not an unfair labor practice. *Id.* Management's subsequent refusal to negotiate and withdrawal from the conference room was a "technical" violation of section 19a(6) with *"de minimus"* effect. In reversing the A/SLMR, the Federal Labor Relations Council (FLRC) held,

> [t]he Council feels strongly that in appropriate factual situations . . . brief interruptions of negotiations with a *de minimus* effect should not warrant the finding of a violation. Rather, an isolated incident which results in such a brief interruption should be examined in the context of the totality of the respondent's bargaining conduct for a determination as to whether it would effectuate the purposes of the Order to find a violation when no further benefit would accrue from that finding and the resultant remedial order.

In *Dugway (Utah) Proving Ground and NFFE Local 1239* (case 61–2235), 24 February 1975, reported in 601 GERR C–3 (1975), an ALJ found that management could legally withdraw from a memorandum of understanding (of a substantive nature) because it was never incorporated into the basic collective bargaining agreement, was not approved by the agency head, and did not have a specified duration. The memorandum, however, did not cover procedural ground rules but was a "written recording or memorialization of a practice or condition of employment" of a substantive nature. In contrast, there is no requirement that ground rules be incorporated into a contract, be approved by higher authority, or have a specified duration. In any event, ground rules often are incorporated as an appendix to the contract, thereby subjecting them to approval by the agency head's designee along with the basic contract, and do have a duration clause. Nevertheless, the ALJ's findings and recommendation do hold that written memoranda of understanding are not always binding.

9. *See* CPR 700 (ch 21) 711.A, para. 1–10d which provides, in part, that "[the next higher command] will provide advice and assistance to local management as needed before and during the negotiation process, including on-site visits and necessary coordination with higher echelons where warranted." While ground rules agreed upon at the local level do not require approval of higher headquarters, the next highest command often monitors labor relations within its jurisdiction. If the ground rules are later attached to the final contract, which is then reviewed by the major command, presumably the ground rules would also be reviewed. E.O. 11491, § 15 and DOD Directive 1426.1, Encl 2, para. B.2.b(7) provide that agreements between an agency and a labor organization are subject to the approval of the agency head or his representative. CPR 700 (Ch 21) 711.A, para. 1–10f provide that in the Department of the Army (DA) the activity commander may approve agreements. The agreement must then be reviewed for compliance with laws, regulations, agency policies, and E.O. 11491 by the next higher headquarters. *See* DOD Directive 1426.1, Encl 2, para. 1–10g.
10. *See* "Bargaining Outline for Management," GERR RF 61:301. Management draftsmen should anticipate that other ground rules already in existence which are more favorable to labor might result in "whipsawing."
11. *See* GERR RF 61:351, 354, 357–58.
12. See generally CPP No. 70, § 46 for the various tactical responses to union proposals. Selection of management strategy must necessarily vary with the circumstances.
13. If, however, the parties have previously negotiated another set of ground rules, the terms of those rules might govern negotiation of new ground rules. This is particularly likely if the old rules were attached to the

collective bargaining agreement and that agreement is still in effect. Failure to agree on ground rules might result in intervention by the Federal Mediation and Conciliation Service and the conduct of substantive negotiations without any ground rules. *See, e.g.*, 619 GERR A–1 (1975).

14. It is crucial that management not be "tricky or subtle" when drafting and presenting its ground rules. *See* notes 48 and 49, *infra*, and accompanying text. The unwary or over-eager negotiator or draftsman would inadvertently give such an impression if the union is relatively unconcerned with the issues covered by management's proposed rules. Moreover, if the ground rules contain an illegal clause or would serve to deprive the union of a substantive right, they may be unenforceable. *See, e.g.*, A/SLMR No. 435 (reversed by FLRC on other grounds), note 8 *supra*.
15. If both parties have successfully used a set of ground rules in previous negotiations, the union may assert that a local precedent has been set and should be followed in the negotiations at hand. In that event, the burden will be on management to show why new ground rules are necessary. Documenting past instances and future possibilities of confusion, misunderstanding, and mutual inconvenience may help demonstrate the need for new procedures. Changes in law, regulations, policies or E.O. 11491 may also illustrate the need for revised ground rules.
16. Usually the president of the union local will have the authority to bind the union he represents and the negotiating team he appoints. False representations of authority by the union official who signs the ground rules or his subsequent disavowal of that authority would probably be an unfair labor practice in violation of E.O. 11491, § 19b (6).
17. This is particularly so if the chief spokesperson or his alternate is changed or new members of the negotiating team are added, or both. *See* the report and recommendations of the ALJ in *Office of Federal Highway Projects, FHA/DOT and NFFE Local 1348*, 23 May 1975, reported in 588 GERR A-5 (1975) and 614 GERR C-3 (1975), in which management was permitted to withdraw its chief spokesperson because no meetings were scheduled and management continued a dialogue with the union. If meetings had been scheduled, or a new member were added and redesignated the chief spokesperson, the change could be an unfair labor practice in violation of sections 19a(6) or 19b(6). *See also* Civil Service Comm'n Office of Labor-Management Relations, *OLMR Info-Guide*, No. 75–28 (8 July 1975) at pp. 1–2 [hereinafter cited as *OLMR Info-Guide* (date)].
18. E.O. 11491 does not require a written agreement on ground rules, the obligation is merely to bargain in good faith. If both parties, in good faith, supplement the written agreement with an oral understanding, the requirements of the order are satisfied. For clarity and evidentiary purposes, written terms are always best.
19. CPP No. 70, § 29.
20. *Id.* at § 11. *See also* CPP No. 70, § 22 concerning the wording of labor agreements. *But see* Labor Counselor Guide at pp. 19, 20. A Department of Health, Education and Welfare (HEW) official has noted, with regard to substantive contract proposals, that

> [a] major source of grievances during the term of the agreement will be ambiguity in language. In order to keep interpretation of agreement language by an arbitrator to a minimum, every effort should be made to ensure that each statement is clear, concise, and direct. While some have argued that in order to get over a hurdle in bargaining it may be helpful to agree on purposely ambiguous language, the immediate problem solved by such a tactic will generally be greatly outweighed by the long term problems created in administering the agreement. GERR RF 61:351, 361–62.

Ground rules, however, are less likely to be interpreted by arbitrators, and flexibility may be necessary to reach any agreement at all. If ground rules are too long or complicated, union officials may be reluctant to agree to their use. The education and experience of negotiators in formulating their proposed ground rules are relevant considerations in this regard.

21. For mutual convenience, the situs of negotiations is normally on the installation or activity where the bargaining unit is located.
22. E.O. 11491, § 11a requires only that labor and management will meet at "reasonable times." *See generally* CPP No. 70, §§ 23–26; Labor Counselor Guide at p. 13, GERR RF 61:351, 359. Dilatory tactics by either party may be an unfair labor practice. *See ANG Bureau, State of Vermont*, A/SLMR No. 397, 20 June 1974 [hereinafter cited as A/SLMR No. 397]; *AAFES, Keesler Consolidated Exchange*, A/SLMR No. 144, 28 March 1972 [hereinafter cited as A/SLMR No. 144]. Similarly, failure to press for negotiations could be a waiver of the right to later successfully file an unfair labor practice charge for refusal to negotiate. *See* A/SLMR No. 144.
23. Alternates who attend negotiations after their commencement or on an intermittent basis should never be chief spokesperson. *See* GERR RF 61:351, 353. From management's standpoint, it is desireable to limit the number of team members to the minimum necessary, usually four or five. Union representation should normally not exceed the number of management representatives. *See* E.O. 11491, § 20.
24. *See generally* CPP No. 70, §§ 33, 37. *See also* note 17 *supra*.
25. *See* GERR RF 61:351, caucuses should normally not exceed thirty minutes.
26. *Id.* at 61:361.
27. *See generally* E.O. 11491, preamble; CPP No. 70, § 4; Labor Counselor Guide at pp. 14–15.
28. E.O. 11491, § 20. *See generally Philadelphia Metal Trades Council and Philadelphia Naval Shipyard*, FLRC No. 72A–16 (3 April 1973).
29. *See generally* Report and Recommendation of the Federal Labor Relations Council on the Amendment of Executive Order 11491, *as amended*, "Labor Management Relations in the Federal Service, para. V.3.,

FEDERAL PERSONNEL MANUAL, Supp. 711-1 (Inst. 9) [hereinafter cited as FLRC Report].

30. *See OLMR Info-Guide* 75-8 (27 March 1975), p. 35.
31. *See generally* CPP No. 70, §§ 28, 29; LABOR COUNCIL GUIDE at p. 13; GERR RF 61:351, 362. *See also* A/SLMR No. 435, note 8 *supra*, and A/SLMR No. 144, note 22 *supra*, for a discussion of some of the pitfalls in discussing proposals. The handling of proposed "mid-contract changes" might be better prescribed by different rules embodied in the basic agreement. Management may not wish to be bound to strict time periods and procedures in effecting foreseeable changes that require relatively quick implementation. The ground rules might therefore govern all negotiations during the life of the basic agreement "except where otherwise provided." *See* notes 34 and 37 *infra*.
32. The Federal Service Impasse Panel (FSIP) defines "impasse" as "that point in the negotiation of a labor agreement at which the parties are unable to reach full agreement, notwithstanding their having made earnest efforts to reach agreement by direct negotiations *and by the use of mediation or other voluntary arrangements for settlement*" (emphasis added). *See* 5 C.F.R. 2470.2(a) (3). Similarly, the rules of the Federal Mediation and Conciliation Service (FMCS) indicate that its services will be proferred only when there is a "dispute" and does not use the word "impasse." *See* 29 C.F.R. 1425.2(a). DOD Directive 1426.1, Encl 3, para. C, implies that an impasse (for DOD purposes, at least) may occur before FMCS assistance is requested. The parties could, however, reach their own definition of "impasse" which would not include or require mediation or other settlement arrangements. Mediation would still be required by DOD Directive 1426.1 and FSIP rules before the FSIP would intervene in what it conceives to be an "impasse". But the parties' own definition might permit implementation of management proposals after their conception of "impasse" and before FMCS intervened. The Civil Service Commission has indicated (unofficially) that:

> the parties could agree to conduct good faith negotiations, with a management right to implement in case of impasse and no use of the impasse resolution machinery during the life of the agreement or until the anniversary date of the agreement or activation of a reopener clause, etc. If the Union felt the management action violated the agreement, it could, of course, utilize the negotiated grievance procedure. *OLMR Info-Guide* 75-8 (27 March 1975), p. 18.

33. *See* E.O. 11491, § 11a. *See OLMR Info-Guide* 75-8 (27 March 1975), pp. 13-15 for a discussion of how to resolve "compelling need" disputes. The FLRC has issued proposed criteria for determining the existence of compelling need to become effective in December 1975. *See* 606 GERR F-5 (1975).
34. *See generally* CPP No. 70, §§ 48-51. *See also* E.O. 11491, §§ 16-17; DOD Directive 1426.1, Encl 3, para. C; 5 C.F.R. 2470 *et seq.* (1975 Comp.). In *San Antonio Air Logistics Center, Kelly Air Force Base*, A/SLMR No. 540, 30 July 1975, it was noted that "it is well established that if the parties reach an impasse following good faith negotiations, an employer may unilaterally impose changes in working conditions which do not exceed the offers or proposals made in the prior negotiations." If more than one proposal is being negotiated, however, all must be agreed upon or must be the object of an impasse before any one proposal can be implemented. The recommendation of the ALJ implied, in dictum, that management is required to give notice of its implementation, although this may not be "good law". *See OLMR Info-Guide* 75-46 (28 August 1975), pp. 3-4. A properly drafted clause, if agreed upon, could permit implementation before all negotiations are completed or without additional notice. *See* note 31 *supra*, and note 37 *infra*.
35. *See* CPP No. 70, §§ 23, 38. LABOR COUNSELOR GUIDE at pp. 13-14; GERR RF 61:351, 358. Care should be taken to comply with Army Reg. No. 360-5 (27 September 1967) when releasing material to the public. Management should not agree to jointly release information until the Public Information Officer (PIO) has agreed to its release.
36. Exec. Order 11838, 40 Fed. Reg. 5744, 6 February 1975 broadened negotiations considerably. *See* FLRC Report, note 29 *supra*.
37. *See* GERR RF 61:351, 358 where an HEW official expresses the view that ground rules are desirable only in initial negotiations. Care should be taken not to obligate management in the ground rules to negotiate anything other than the basic collective bargaining agreement. Management may want the substantive agreement to include a "zipper" clause limiting its obligation to negotiate. Specifically, management might hope to limit its obligation with regard to "mid-contract changes" to "consultation" rather than "negotiation." To avoid the problem, the ground rules might cover the negotiation of the basic collective bargaining agreement and "other matters appropriate for negotiation." Whatever is "appropriate" may then be determined in substantive negotiations. *See* notes 31 and 34 *supra*. *See also* GERR RF 61:351, 366 for a suggested "zipper clause".
38. *See* DOD Directive 1426.1, para. V.A. 2 and Encl 2, para. B. 2b(1). CPP No. 70, § 34 is outdated in this respect.
39. In A/SLMR No. 144, note 22 *supra*, the A/SLMR did not find a violation of E.O. 11491, § 19b(6) only because there was no evidence that the union denied authority to its chief negotiator for consummating an agreement. Similarly, the Assistant Secretary in A/SLMR No. 397, note 22 *supra*, found no section 19a(6) violation because of insufficient evidence, although it implied that the Order required sufficient authority for a chief negotiator to bind its principal. In *USDA Agricultural Research Service and NFFE Local* 1552, A/SLMR No. 519, 30 May 1975, reported in 583 GERR A-1 (1974) and 617 GERR A-7 (1975), the ALJ noted in his report and recommendation to the A/SLMR that there is a presumption in E.O. 11491 that each party's chief spokes-

person has authority to "seal a bargain." Similarly, in A/SLMR No. 396, note 8 *supra*, the ALJ noted in his report, "if [management] may renege on the agreed upon terms on the ground that [management's chief negotiator] did not have final authority, one must conclude the employer never bargained in good faith *ab initio* . . . . For to permit an agent to conduct negotiations with the express, as well as implied, understanding that he has authority to negotiate an agreement dictates that any agreement reached by the negotiators be accepted by the employer." *See also* GERR RF 61:351, 353; and *Department of Agriculture, Peoria, Illinois*, A/SLMR No. 519, 30 May 1975.

40. *See* A/SLMR No. 423, note 8 *supra*. In that case the ground rules specified that initialing agreed-upon items "did not preclude the parties from considering or revising the agreed upon item until a final agreement was reached." While agreement was withdrawn for reasons other than disapproval by outside authority, the A/SLMR apparently felt that the "tentative approval" clause did permit management to withdraw its agreement without negotiating in bad faith.
41. *See* A/SLMR No. 396, note 8 *supra*. *But see* A/SLMR No. 423, note 8 *supra*, where management's withdrawal of agreement was permitted because the agreed-upon item conflicted with E.O. 11491 and the FEDERAL PERSONNEL MANUAL and was therefore nonnegotiable. Agreement on another item was withdrawn because management anticipated, in good faith, a policy change by the agency making the agreement illegal.
42. *See* LABOR COUNSELOR GUIDE at p. 14.
43. *See, e.g.*, A/SLMR No. 423, note 8 *supra*, and *OLMR Info-Guide* 75-28 (8 July 1975), p. 2. *Cf.* GERR RF 61:351, 361.
44. *See also International Federation of Federal Police and Pearl Harbor Naval Station, Hawaii*, A/SLMR No. 504, 28 April 1975, reported in 605 GERR A-7 (1975), where the A/SLMR noted that "a binding negotiated agreement may be executed with signatures made in abbreviated form, as by the use of initials, and such an agreement may be reproduced after a less formal document has been approved by the authorized representative of the parties. . . . [T]he affixing of the parties' signatures . . . constituted merely formal executions of the previously agreed upon documents."
45. *See Headquarters, U.S. Army Aviation Systems Command*, FLRC No. 72A-30 (25 July 1973) and A/SLMR No. 396, note 8 *supra*. ADMIN. LAW HANDBOOK, para. 4.11c notes, "It is crucial for the negotiation team to keep the commander informed of all progress that is made with respect to negotiations and to get his authority to make agreements on specific issues. It is only when the commander is informed that the negotiations progress since he has ultimate authority on whether or not to accept the final agreement." *See also* GERR RF 61:351. In view of A/SLMR No. 396, the legality of this option is questionable.
46. E.O. 11491, § 15. *See generally OLMR Info-Guide* 75-8 (27 March 1975), p. 28, which notes, "[a]s a result of this change, not only will negotiators have to exercise greater care and agencies act more expeditiously in their review process, but management should seek to have the ground rules specify what makes the 'clock start running.' " What constitutes the last ministerial act to be performed at the local level depends largely on the authority of the negotiating teams and from whom it is derived.
47. These ground rules were adopted with minor changes and were used successfully in one recent contract negotiation. They were drafted to counter several procedural problems faced by local management in past negotiations, one of which even resulted in an unfair labor practice complaint filed by management. This past history of procedural misunderstanding led management to prepare an unusually comprehensive "code" of negotiation procedures. In other circumstances many of these provisions could, and possibly should, be omitted or modified.
48. *See generally* E.O. 11491, preamble; CPP No. 70, § 4.
49. *See* CPP No. 70, §§ 5, 11. "The side that is tricked in a collective bargaining situation will rarely bargain on a relaxed and friendly basis. The result in either case will be to make the other side so suspicious and cautious that negotiations on a man-to-man, plain speaking basis will be replaced by legalistic, protocol-ridden procedures which will lessen rather than increase true understanding and cooperation." *Id.* at § 11.

APPENDIX

MEMORANDUM OF UNDERSTANDING FOR NEGOTIATION OF A COLLECTIVE BARGAINING AGREEMENT AND OTHER MATTERS APPROPRIATE FOR NEGOTIATION

This memorandum of understanding is entered into by the US Army Training Center and Fort Blank (USATCENFB), Texas, hereinafter referred to as the EMPLOYER, and Local 28, Government Employees Federation of America (GEFA), hereinafter referred to as the UNION.

IT IS AGREED that all negotiators desig-

nated by the parties will be governed by the following rules during the conduct of all negotiations between the parties (except where otherwise provided) from the effective date of this Memorandum of Understanding until the termination of the basic collective bargaining agreement to which this Memorandum of Understanding is or will be attached as an appendix:

RULE 1. It shall be the mutual responsibility of the EMPLOYER and the UNION to negotiate pursuant to Executive Order 11491, as amended, in good faith with the objective of reaching agreement by diligent and serious exchange of information and views, and by avoiding unnecessarily protracted negotiations. It is mutually agreed that both parties will show respect for all persons participating in the negotiations and will conduct negotiations in a dignified manner.

RULE 2. The period designated for negotiation of a basic collective bargaining agreement is *30 December 1975* and thereafter until completed. Negotiation sessions will normally be held at the Civilian Personnel Office, Building 2021. All other negotiations during the life of the basic collective bargaining agreement, including renegotiation of the basic agreement, will be conducted at mutually agreed upon dates and places. In all instances negotiating sessions will normally be conducted from 1230 to 1600 hours each scheduled workday, or until the parties agree that an impasse has been reached which makes further negotiation fruitless until the impasse has been resolved in accordance with RULE 15. Should a day scheduled for negotiations fall on a holiday, the next session will be held on the following workday. Any change in an agreed upon schedule for the reconvening and adjournment of negotiating sessions will be by mutual agreement. Caucuses can be called by either side on a unilateral basis not to exceed 20 minutes in any one hour. The party in caucus may retire from the negotiating room. Requests for recesses may be proposed by either party, and will normally be honored by the other party.

RULE 3. The negotiating team for each party shall not exceed five principal members and five alternate members. An alternate member may participate in a particular negotiation session only when a principal member is unable to attend. At least 24 hours prior to initial negotiation of either the basic collective bargaining agreement or any other matter to be negotiated during the life of this Memorandum the parties will designate by formal correspondence the principal and alternate members of their negotiation teams and which members will act as Chief Spokesperson and alternate spokesperson. If at any time the Chief Spokesperson is unable to be present an alternate spokesperson designated by him as the Acting Chief Spokesperson will assume the duties and powers of the Chief Spokesperson. If the Acting Chief is unable to attend a session, he will designate another alternate spokesperson as Acting Chief Spokesperson with full duties and powers. When the original Chief Spokesperson returns to the negotiation sessions he will resume his duties and powers as Chief Spokesperson. It is not necessary for the entire negotiation team of either party to be present throughout negotiations or particular sessions, so long as the Chief Spokesperson or an acting Chief Spokesperson is present. Formal correspondence will be required to effect a change in previously designated members, both principal and alternate, or the chief spokesman or alternate spokesmen of either the EMPLOYER or the UNION at least 24 hours prior to initial negotiations. Changes in membership of negotiating teams made after the commencement of negotiations will not be permitted without the consent of both parties, except that previously designated alternates may replace a principal member who is unable to attend. The composition of teams negotiating matters other than the basic collective bargaining agreement may differ from that of the team which negotiated the basic collective bargaining agreement or other matters previously negotiated. The Chairmanship of the negotiation sessions will be rotated between the two parties with the first session being chaired by the EMPLOYER.

RULE 4. The first 40 hours of negotiation sessions governed by this Memorandum, the purpose of which is the negotiation of a basic col-

lective bargaining agreement, or other matters required to be negotiated, will be official duty time for union negotiators who are Federal employees and who are present and participating in such negotiation sessions. Any unused portion of the first 40 hours official time remaining at the termination of the basic collective bargaining agreement may not be added to the official time alloted for any subsequent negotiations.

RULE 5. Joint subcommittees, working committees and fact-finding committees may be established by mutual consent of the parties. The Chief Spokesperson (or Acting Chiefs) of the parties, by mutual agreement, will decide the scope, authority and operations of all joint, sub, working and fact-finding committees.

RULE 6. Negotiations will be conducted by the Chief Spokesperson (or Acting Chief Spokesperson). Other members of the negotiating teams of the two parties in attendance at the negotiation sessions will address the group only when requested to do so by their party's Chief Spokesperson (or Acting Chief) or at their request after recognition by the Chairman. This does not preclude the other members from conferring privately in such a manner that the negotiations are not disrupted, or from passing notes to their Chief Spokesperson (or Acting Chief Spokesperson).

RULE 7. The word "proposal", as used in this memorandum, means a suggested item offered for inclusion in the basic collective bargaining agreement, or as an amendment/supplement thereto. Such proposals must be in writing and will be submitted by each party at least 14 calendar days prior to the day negotiations start. Late proposals may be discussed or negotiated if such discussion or negotiation is mutually acceptable to both sides. An agenda will be prepared on the first day of negotiations to negotiate only those proposals which were submitted in accordance with this provision. In computing the 14 day time period under this provision the day of delivery of proposals and the first day of negotiations will not be included. Proposals on new items submitted during negotiations not presented in accordance with the foregoing may be discussed or negotiated if such discussion or negotiation is mutually acceptable by both parties. Either party, when submitting new proposals after the commencement of negotiations will do so at least one working day in advance of any discussion of them and will provide sufficient information to give the other party an opportunity to familiarize itself with the subject matter so that the proposal may be fully developed, if negotiation is agreed upon, when it is reached on the agenda.

RULE 8. The work "counterproposal", as used in this memorandum, is a suggested item which varies the terms or the form of a proposal of the other party but does not raise subject matters not substantially contained in the original proposal. Counterproposals may be submitted at any time after the original proposal has been submitted by the other party. The other party will not be required to discuss the counterproposal until 24 hours after its submission.

RULE 9. Any proposals/counterproposals concerning the obligation of the parties with respect to "mid-contract changes", as defined in the basic collective bargaining agreement, and the procedures to be followed in meeting any such obligation will be governed by this Memorandum but will not be considered proposals to amend, supplement, or replace this Memorandum.

RULE 10. Both parties when formulating proposals or counterproposals shall consider that the scope of negotiations will extend to personnel policies and practices and working conditions in accordance with Sections 11 and 12 of Executive Order 11491, as amended. If the UNION makes a proposal/counterproposal which the EMPLOYER believes is nonnegotiable, the proposal/counterproposal may be tabled in accordance with RULE 15 until the negotiability dispute is settled under applicable law and regulations.

RULE 11. Extracts of EO 11491, as amended, which are required to be included in the agreement will be copies verbatim from the Order. Proposals/counterproposals which merely re-

peat, or reword, laws and regulations will not normally be included in the agreement unless the parties agree on their need for ease of understanding and improvement of communications between management and the members of the bargaining unit. Individual or group grievances will not be presented for adjudication during negotiating sessions.

RULE 12. Either party, upon request, is entitled to an oral explanation from the other party as to the meaning and proposed operation of a specific provision of a proposal/counterproposal submitted by the other party.

RULE 13. The Chief Spokespersons (and their Acting Chief Spokespersons) have full authority to bind the EMPLOYER and the UNION, respectively. When agreement on a proposal/counterproposal has been reached, the agreed upon item shall be written out and initialed by the Chief Spokesperson (or Acting Chief Spokesperson) of both parties. It is understood by both parties that the agreement is subject to review for regulatory compliance by Headquarters, US Army Training and Doctrine Command after the agreement is signed by the Commanding General, USATCENFB and the President, Local 28, GEFA. Once a proposal/counterproposal has been agreed upon and initialed by the Chief Spokesperson (or Acting Chief Spokesperson) of both parties neither party may propose changes in that item except in accordance with RULE 14 of this Memorandum of Understanding. Once the Chief Spokesperson (or Acting Chief Spokesperson) of a team initials an item, that party, all members of the team, and their alternates are bound by his agreement to that item. Agreements reached on individual items will not become effective until the entire agreement has been executed.

RULE 14. After agreement on all proposals/counterproposals has been reached and all items have been initialed by the Chief Spokesperson (or Acting Chiefs) both parties will meet for the sole purpose of correcting any misspellings, improper or awkward grammar, and inaccurate regulatory citations and/or cross references to provisions of the agreement. If agreement cannot be reached on the need or propriety of such changes, the finality of the item already agreed upon and initialed will not be affected. Any changes made as a result of this meeting will not affect the substantive content or meaning of the corrected item but are intended only to clarify and improve the appearance of the agreement. This will be accomplished before the President, Local 28, GEFA and the Commanding General, US Army Training Center and Fort Blank, execute the agreement.

RULE 15. Tabling of a particular proposal/counterproposal for negotiation at a later negotiation session may be done by either party when additional time is desired for consideration of the issue in question. Tabling of a particular proposal/counterproposal does not constitute an impasse on the item. Negotiation on tabled proposals/counterproposals will normally be renewed when remaining proposals/counterproposals have been agreed to or tabled.

RULE 16. It is mutually agreed that an impasse occurs only after both parties have exchanged and considered the respective proposals and counterproposals in good faith and, despite such honest and diligent efforts, the two parties cannot (before intervention by third parties) reach agreement on the proposals/counterproposals being negotiated. The EMPLOYER may implement without further notice its proposals/counterproposals after such an impasse in negotiations has been reached and before resorting to mediation. The procedures outlined in Executive Order 11491, as amended, DOD directives, and DA regulations will apply in the resolution of all impasses.

RULE 17. The basic collective bargaining agreement and amendments/supplements thereto will be deemed to be "executed" for purposes of this Memorandum and Section 15, Executive Order 11491, as amended, when the Commanding General, USATCENFB and the President, Local 28, GEFA have signed their names to the final copy of the Agreement. A collective bargaining agreement and any amendments/supplements thereto which have been executed will not be implemented until:

a. The required regulatory compliance review by HQ, TRADOC, has been received locally and any required changes resulting therefrom have been made and approved by HQ, TRADOC; and

b. A reasonable period of time (not to exceed 60 days) has expired since receipt of the final regulatory approval by HQ, TRADOC, for the purpose of reproducing the contract, distributing copies to supervisors, conducting training/implementation classes, and effecting changes required by the contract.

RULE 18. The EMPLOYER will make available to the respective negotiation teams applicable policies and regulations of the Department of the Army, personnel policies and procedures issued by the Civilian Personnel Officer, US Army Training Center and Fort Blank and other documents such as Executive Orders and regulations which become pertinent to discussions that arise. The EMPLOYER will also arrange to have typed those articles which have been agreed to by the parties. To keep employees and management informed on the status of negotiations, the parties may prepare a brief, joint release whenever it is mutually agreed that significant progress has been achieved. The releases shall be distributed by the EMPLOYER as Bulletin Board Notices or whatever is deemed more appropriate by the EMPLOYER. Neither party shall post, distribute, or otherwise release other material or information concerning the negotiations before negotiations are completed. This does not preclude internal consultations within either the UNION or the EMPLOYER.

RULE 19. This Memorandum of Understanding will become effective upon the signatures of the Chief Spokesperson of the negotiation team of the EMPLOYER and the President of the UNION and will be attached as an appendix to the basic collective bargaining agreement. This Memorandum is binding on both parties and their present and future officers and representatives from its effective date to the termination of the basic collective bargaining agreement to which it is or will be attached. Proposals to amend, supplement, or replace this Memorandum may be negotiated upon the mutual consent of both parties, except where otherwise provided in this memorandum. In the event of a conflict between provisions of this Memorandum and provisions of the basic collective bargaining agreement to which it is or will be attached, the basic agreement will be controlling.

APPROVED:

Local 28, GEFA

Date _____

APPROVED:

USATCENFB

Date _____

Article 138 Revisited

By: Robert Gerwig, Attorney-Advisor, US Army Forces Command, Fort McPherson, Georgia

Introduction.

Rarely subjected to close scrutiny in critical analyses of the Uniform Code of Military Justice is a section which has weathered a long history characterized most notably by extended dormancy—until comparatively recently. Article 138—"Complaints of Wrongs," one of several nonpunitive sections included among the Code's "Miscellaneous Provisions"—provides an extraordinary remedy for a serviceman who believes he has been "wronged" by his commander.[1] Every complaint cognizable thereunder must be forwarded to the Secretary of the military department for ultimate disposition.

Attention is drawn to the Article because of its recent return to vigor, a development attributable to a combination of factors including, among others, (1) its "discovery" by the courts

as a prerequisite of judicial review; and (2) its implementation in 1971 by regulations long overdue. Also, dissident elements in the later stages of the Vietnam War were attracted to its apparent potential for circumventing customarily impenetrable command barriers. Resurgence of Article 138 warrants reexamination of its unique complaint procedure, which on occasion seemed fated to ignominious demise because of disuse.

The early history of Article 138 can be summarized briefly here because details of its evolution are available elsewhere. Among contemporary authors, Abraham Nemrow considered the Article's beginning in some depth,[2] tracing its genealogy back to the military code of King James II promulgated in 1688, relying in part on earlier research by Winthrop [3] and De Hart.[4]

British ancestry and early American adaptation furnish a reasonable explanation for the Article's placement within the court-martial oriented Uniform Code. For example, the British formulation required the superior commander, upon complaint of a soldier that he had been wronged by an officer, to summon a regimental court-martial as a forum to resolve the grievance. Another aspect of the British procedure (respecting complaints by officers) closely presaged its modern counterpart by providing for examination into the complaint by the appropriate general.

In due course, the soldier/officer complaint statutes emerged in the Massachusetts and American Articles of War of 1775 (Art. 12–13; XIII-XIV), followed by the American Articles of War of 1776 (Art. 1–2, Sec. XI). In 1789, the latter were expressly recognized by the First Congress and made applicable to the existing Army.[5] Thereafter they were reenacted in 1806 (Art. 34–35) and 1874 (Art. 29–30) and in 1920 they were consolidated into a single provision (Art. 121) which, with some modification, was reenacted in 1948.[6]

The current article 138, a product of the Uniform Code of Military Justice, as enacted 5 May 1950, was incorporated in Title 10, as a result of the 1956 general recodification of military statutes, to provide as follows:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.[7]

With respect to complaints by officers, early writers construed the British procedure as a means for the "settlement of professional disputes." [8] Winthrop defined the term "wronged" as used in the American article pertaining to officers to include "any and all injuries grievance done or caused by a superior to an inferior officer in his military capacity or relation, and that are . . . properly susceptible of being remedied without a resort to a trial by court-martial"; and further, "that the wrongs contemplated are mainly denials of rights or just privileges, or other arbitrary proceedings in contravention of military usage." [9]

Whatever their purpose and whether they applied to soldiers or officers, Winthrop (whose classic treatise was first published in 1886) concluded that the provisions were "antiquated" and of "slight significance." Winthrop's view was echoed in 1916 by Brigadier General Enoch H. Crowder, then The Judge Advocate General of the Army, when he testified before a Congressional subcommittee concerning a proposed reenactment of the Article:

> "This is an unused Article, and I presume a strong argument could be made that it had been repealed by nonuse. There is I think no demand for it in the service, and I can recall but one . . . investigation under it in my 39 years of service . . . I do not know why this article is reinstated, unless somebody thinks it is good preachment to have on the statute books." [10]

Nevertheless, Nemrow suggested that the Congress had intended to perpetuate a formal grievance procedure (even if infrequently employed) to protect military subordinates from *possible* abuse by commanders, and therefore contended that the "procedure which has clung so tenaciously to military law must be understood by military administrators." [11]

Early Administration.

Some administrative interpretations of the early complaint procedure may serve to place its current counterpart in clearer focus. For example, the procedure could not be invoked in matters beyond the power of the (regimental) commander to redress; therefore redress was not available to a complainant against an officer no longer in service.[12] Early strict construction precluded consideration of a complaint against a *post* commander if he were not also the complainant's (regimental) commander.[13] Regarding an officer's complaint that restriction (awaiting trial on charges punishable by mandatory dismissal) to his quarters, messhall, and area within a radium of a quarter-mile of his quarters for exercise denied him social intercourse with his brother officers, the issues of restriction limits was a matter within the discretion of the authority exercising disciplinary control in the case,[14] though in an analogous proceeding the discretion was regarded as vested in an officer superior to a "local commanding officer." [15] The complaint mechanism was calculated to afford redress for a grievance perpetrated by a commander personal to the complainant.[16] Moreover, the Article as amended, contemplated redress for wrongs sustained by a member on *active* duty.[17]

General Crowder's assertion that there was no demand for the "unused Article" remained substantially unchallenged until a curious administrative development in the late 1950's recalled the provision from what Nemrow described (in the unpublished version of his thesis) at its "somnolent status." [18] For a period from May 1955 until June 1956, Army regulations governing administrative reduction of enlisted personnel for inefficiency provided that personnel so reduced would be advised in writing of their right to submit, within 10 days, a complaint under Article 138. Predictably, the new regulations popularized resort to the almost forgotten statutory complaint mechanism. The new focus on Article 138 also spotlighted the disconcerting fact that specific procedures to administer the statute had never been promulgated. As a result, reduction appeals were subjected to more-or-less ad hoc handling in disparate efforts to comply with the statutory requirements. The flurry of paperwork ended when the reduction regulations were revised to delete reference to the Article 138 remedy.[19]

The reduction appeals episode generated an interesting distinction pertaining to the effect of relief granted under Art. 138 when compared with appeals from nonjudicial reductions under Article 15. Thus a soldier appealing reduction under Article 15 could be restored to his former grade with effect given thereto retroactive to the date of his reduction. Under Article 138, however, redress of the administrative reduction was limited to restoration of grade for pay purposes effective only from the date the restoration action was taken, according to the Comptroller General.[20]

Other early determinations reflected the view that complaints could be resolved under the statute based on an investigation informal in nature.[21] Within the Army, it was reasonably clear that the Article 138 remedy was not intended for use by reservists who were neither on active duty nor subject to court-martial jurisdiction.[22] The concept of placing responsibility for resolving complaints upon an officer exercising general court-martial jurisdiction over the respondent—*i.e.*, the officer complained against—seemed to make it clear that, in any event, the latter must be subject to court-martial jurisdiction to enable the complaint to reach a competent authority for disposition in accordance with the Article. The failure of the Article expressly to except reservists from its reach apparently led at least some federal appellate courts to regard the remedy available to reservists not on active duty and therefore constituted an administrative prerequisite to judicial review.[23]

Nemrow recalled [24] a state court's reliance on

an earlier form (*i.e.*, Article 121) of Article 138 in dismissing a civil suit by a former national guardsman against the state's adjutant general. That article (applicable under the state law), the court declared, prescribed "the measure and mode of redress to which an officer was entitled for wrong done him by his commanding officer."

Nemrow's survey indicated that the Article's effectiveness was hampered by nonuse. Reluctance to employ the Article was ascribed to the availability of other less cumbersome and adequate procedures—*e.g.*, filing complaints with an inspector general or submitting informal appeals to superior commanders—as well as to the absence of specific regulations under which the Article could be uniformly administered. Ultimately, he concluded that the Congressional enactment was a valuable right which could be enhanced by appropriate regulations.[25] Despite the plea of Nemrow and others for implementation of the Article, procedural regulations did not appear until 1971.[26]

Under the Regulations

The new regulations directed The Judge Advocate General to take final action on Article 138 complaints as the designee of the Secretary of the Army. Previously, no single staff agency had been charged with the responsibility for review and final disposition of complaints under the Article. For example, complaints submitted to the Office of The Judge Advocate for comment indicated that cases were acted upon by The Inspector General, The Provost Marshal General, and by The Adjutant General, among others, during the preregulation era. Within the Office of The Judge Advocate General, responsibility for review was assigned the Administrative Law Division.[27]

Early guidance from that Division indicated that inquiries conducted by the general court-martial authority into a complaint should identify and develop the factors which influence the commander/respondent's decision, if allegations of abuse of discretion were to be properly considered. Further, it was suggested that morale and discipline within a command would be strengthened, "if redress were to be granted locally and quickly rather than at a later date on behalf of the Secretary of the Army." [28]

The latter opinion also considered problems arising from complaints against the commander of an activity located as a tenant on a major installation. Under such circumstances, if redress extended to matters beyond the command jurisdiction of the installation commander, the complaint should be forwarded to the Office of The Judge Advocate General, and recommendation as to redress forwarded to the officer to whom the tenant commander is responsible. Final disposition of such cases would be deferred by the Office of The Judge Advocate General until information was received as to redress granted.[29]

Under the regulations (as amended in 1972 and 1973) [30] the complainant's commander for purposes of redress was identified as that active duty officer empowered to impose nonjudicial punishment under Article 15, plus any superior active duty commissioned officer in the complainant's chain of command (to include the officer exercising general court-martial jurisdiction over the complainant). Availability of Article 138 redress was limited to members on active duty, and the earlier policy encouraging resolution of legitimate complaints at the lowest command level was retained. On the other hand, respondent commanders were not empowered to restrict the submission of complaints under Article 138 but were required to forward all complaints to the officer exercising general court-martial jurisdiction for disposition, subject to final action at the Department level.

Subject to waiver by the general court-martial authority for good cause shown, complaints are required to be submitted within 90 days of discovery of the alleged wrong, upon a showing by the complainant that a written request for redress was refused by his commander. The regulations confer no right upon the complainant to "participate in subsequent action on his complaint," though he may be requested to submit information in clarification or explanation of his submitted allegation.

Significantly, the 1973 revision of the regulations authorized the general court-martial authority (upon advice of his Staff Judge Advo-

cate) to return without action a complaint not directed to a proper commander, or unaccompanied by proof of denial by a competent commander of a written request for redress. In addition, the general court-martial authority may advise the complainant of other channels under existing law or regulations through which he may seek to accomplish the desired relief, or when appropriate, that the matter has already been placed in such channels. In either case, such referral constitutes "proper measures" contemplated by Article 138 and should be reported to The Judge Advocate General as in other Article 138 proceedings. The other "channels" for appeals "include but are not limited to—"

"(1) Actions taken pursuant to the UNIFORM CODE OF MILITARY JUSTICE, the MANUAL FOR COURTS-MARTIAL, or military criminal law regulations which are subject to resolution either by—

(a) Application to the appropriate commander, such as in cases of confinement;

(b) Pretrial motion to the convening authority or military judge; or

(c) Other administrative or judicial action;

(2) Nonjudicial punishment imposed pursuant to Article 15, UNIFORM CODE OF MILITARY JUSTICE;

(3) Appeal from officer evaluation reports or enlisted efficiency reports;

(4) Appeal from certain administrative reductions in enlisted grade;

(5) Appeal from findings of pecuniary liability;

(6) Withdrawal of flying status;

(7) Officer elimination actions; and

(8) Appeal from administrative reprimands which are directed to be filed in an official military personnel file.

The foregoing provision may serve as a partial response to a body of prior judicial precedents recognizing (as a prerequisite to judicial review) the right to appeal via Article 138 various command determinations, and in particular those impinging on pre-trial confinement, made pursuant to the UCMJ, or pursuant to established military procedures.[31]

The regulations further provide that the forwarding correspondence, in all cases, will (1) reflect that action on the complaint was personally taken by the officer exercising general court-martial jurisdiction over the respondent and (2) be signed by that commander.

Relatively few opinions of The Judge Advocate General relating to the Article 138 process delineated under the implementing regulations have been released generally. From these a few have been selected for notation.

For example, an early opinion eliminated chaplains from consideration as proper respondents under the Article and its supporting regulatory provisions.[32] Similarly, an opinion (which returned the file of a complaint for proper handling where procedural requirements had not been met) indicated that the complaint, which was submitted to the Army Chief of Staff probably was not cognizable, since that officer was not the complainant's commander.[33]

A somewhat novel application of Article 138 procedure occurred when a complaint was filed against a service school commandant alleging due process wrongs committed by a faculty board. Upon review, it was found that procedural deficiencies in the board proceedings justified the complaint, and the commandant was directed to convene a new board.[34] Another opinion declared that if a complaint is inquired into informally, either by the officer exercising general court-martial jurisdiction or by an officer of his command senior to the respondent on his behalf, the file should so indicate. Furthermore, the regulations require that the GCM authority personally make the decision whether redress be granted or denied and that evidence of that action should be included in the file.[35]

Remedial action pursuant to Article 138 requires as a prerequisite an action which results in a detriment to the member; the purpose is to redress a wrong personal to the complainant. Thus an abstract complaint aimed at a com-

mander's directive unsupported by proof that the directive was or would be applied to the complainant was not cognizable under the Article.[36]

Where a complaint against the type of discharge issued (an undesirable discharge awarded in response to soldier's request for discharge for the good of the service, on condition that he be given honorable or general discharge) was properly filed while complainant was on active duty, the complaint was found to have "procedural viability" after the complainant's separation from the service. It was determined that although the *issuance* of the discharge was valid and irrevocable, its characterization was erroneous, based on proof supporting the allegation made under Article 138.[37]

Under ancient precursors of Article 138 (including the early American Articles of War), a petitioner for redress was vulnerable to disciplinary action should he fail to substantiate the alleged wrong. However, modern usage prohibits punishment of the complainant in the event he fails to provide supportive evidence for invoking Article 138.[38]

Finally, it appears that acts involving judgment and discretion (as in the application of standard elimination regulations) ordinarily will not give rise to an actionable wrong within the meaning of Article 138.[39]

Judicial Review.

Before examining some traditional problems of judicial review in its familiar technical sense, reference will be made to some recent observations which may serve to delineate the dimensions of Article 138 as viewed by the judiciary.

For example, Article 138 has been judicially recognized as conferring a right of redress "essential in any organization which is inevitably hierarchal and hence particularly subject to those prejudices or arbitrary decisions which are part of man's psychological fabric." [40]

In another vein, the United States Court of Military Appeals has said:

> The right to seek redress of wrongs is an integral part of the complex of rights granted by the Congress to those subject to military law. Those to whom an application for relief under the provisions of this Article is submitted may not lightly regard the right it confers, nor dispose of such application in a perfunctory manner. Its provisions should not be construed by those charged with the administration of military justice, at any level, in a manner calculated to lead anyone to believe that the right of redress of wrongs is of minor importance and one which may be disregarded entirely or perfunctorily complied with.[41]

That court further indicated that merely sending through Article 138 channels a copy of a petition for habeas corpus at the same time that the petition was dispatched to the court itself did not constitute a bona fide pursuit of Article 138 relief so as to reflect, for purposes of judicial review, the exhaustion of a prerequisite administrative remedy.

In another instance a federal district judge declined to consider as a basis for judicial review an alleged improper adjudication under Article 138 where the proof showed that the complaint asserted wrongs suffered by individuals other than the complainant as opposed to "direct harm" to himself.[42]

On the other hand, the Eighth Circuit of the U.S. Court of Appeals sustained the right of a complainant who properly filed his Article 138 complaint while on active duty to have his complaint fully considered and determined even though he was discharged before his complaint was resolved, where the Army's error led to his nonmilitary status.[43]

A recent law review note [44] gives Article 138 additional exposure which, together with other recent interest, may further rescue the Article from threatened obscurity. The note, in its entirety undertakes (once again) to examine the responsibility of the judiciary vis-a-vis the functions of the military in the context of a constitutional government system. Of particular interest is the note's analysis of Article 138 as a forum to resolve constitutional claims and its utility as an administrative prerequisite to judicial review in such cases.

The casenote deals with the problems of David Cortright, a military bandsman at Fort Hamilton whose antiwar sentiments prompted the Army to transfer him to a post in Texas.[45] Alleging that the transfer abridged his first amendment rights, Cortright initially filed a complaint under Article 138, which failed to persuade military authorities senior to the respondent/commander that the transfer was for a purpose other than to improve military efficiency in the best interests of the band and the Army. His subsequent suit for mandamus relief to cancel the transfer convinced a federal district judge that the transfer illegally suppressed free speech and that the Article 138 was inadequate. Ultimately, the Court of Appeals for the Second Circuit decided that the circumstances did not warrant judicial intervention.[46]

The note contends that the Article 138 proceedings in Cortright's case clearly did not meet minimum procedural safeguards—*i.e.*, fair hearing, at which there is appraisal of adverse information, opportunity to rebut such information, ability to present one's own position, and a decision with reasonable basis in fact. While the suggested safeguards appear facially reasonable, the Article 138 complaint process is in no sense to be compared for example, with a show-cause action instituted by the military. It is a complaint filed at the option of the aggrieved individual, who necessarily assumes the burden of convincing the military reviewing official that a wrong was committed by his commanding officer.[47]

Objections offered by the note, buttressed by supporting views of the district judge concurred in by a judge of the Second Circuit (who dissented from the majority holding of the Court of Appeals [48]) specify that a "formal" investigation of the complaint was not made by the Army and that the Army's ultimate conclusion was not supported by substantial evidence.

The alleged inadequacies, according to the commentary, manifested lack of procedural due process, which made the proceeding "arbitrary and capricious." With regard to the legal sufficiency of the Article 138 proceedings, the Second Circuit essentially applied the *Orloff* rationale [49] that "judges are not given the task of running the Army," declaring "we do not sit as a super-Judge Advocate General to review determinations under that Article [138]."

The note asserts that the nature of the Article 138 investigation—*i.e.*, formal or informal—significantly affects the extent to which a court should review the military proceeding. The commentators argue that if judicial review is to be limited (in deference to Army administrative determinations), minimum due process standards must be observed. However, they question whether an Article 138 proceeding even "formal" in nature is a sufficient remedy to limit the scope of review by a federal court, as in *Cortright*. They concede the presence of "normal day-to-day" grievances which require expeditious resolution with which "the judiciary would have little reason to become entangled." On the other hand, "more serious grievances, such as racial discrimination or denial of first amendment rights . . . (as in *Cortright*) might require more formal procedural safeguards." By applying such safeguards (except where expressly shown to be impracticable for military exigencies), the note contends, "the military could regulate the sphere in which it is most able to make judgments—personal decisions and operations—while the courts could supervise the sphere in which they are most knowledgeable—due process and observance of constitutional requirements."

The note also considered the reasonableness of the factual findings and their effect on the scope of review [50] especially in the light of the Second Circuit's disagreement with the trial judge's view that the record "did not support the investigation's conclusory finding that the transfers were made for military efficiency; he saw a clear attempt to stifle protected dissent." Regardless of the note editors' views as to the particular findings, their emphasis on the need for a record which reflects specific and detailed findings as a basis for the ultimate conclusion merits attention. The more detailed the basis for a military determination pursuant to Article 138 proceedings, the greater the likelihood of its acceptance as reasonable by a judge considering the extent of judicial review warranted by the circumstances of the litigation before him.

At the risk of pedantry, the lesson for judge advocates is crystal clear: If the legal ground already won by judicial recognition of Article 138 as an effective administrative prerequisite to judicial review is to be held against continuing charges of "arbitrariness and capriciousness," the judge advocate must ensure that the Article 138 record is sufficiently detailed to show without question or cavil the factual base as well as the rationale for the ultimate military decision. In the context of Article 138 administration, the most likely place of that sufficiency to be demonstrated is the level of the officer exercising general court-martial jurisdiction over the respondent/commander.[51] For it is at that stage of the administrative process that a decision to sustain the action complained of must be substantiated by reference to a legal basis adequate to persuade a reviewing judge that it is indeed not his task to "run the Army"—at least in the case before him—and that the determination, viewed in its military context, meets judicial notions of fairness to the complainant.

Legislative Proposal.

Effort has been made in recent years to introduce legislation assertedly "to protect the constitutional rights of those subject to the military justice system." [52] Included in suggested revision of the Code is a proposal which would provide:

"S. 938. Art. 138. Complaints of wrongs.

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction *Judge Advocate General of the armed force of which the officer against whom it is made is a member. The Judge Advocate General* shall examine into the complaint and *is authorized to* take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."[53]

The provision would require any superior commissioned officer receiving a complaint submitted under the article to forward that complaint to The Judge Advocate General, thereby eliminating any statutory referral to an officer exercising immediate general court-martial jurisdiction over the respondent.

By excluding a statutory role for the officer exercising immediate general court-martial authority, the Article would, for the first time in its history, require examination of the complaint in the first instance (after initial denial of redress by a commanding officer) at the level of the Department head. The procedure appears to be wholly at odds with the principle of effecting redress at the lowest (and therefore the earliest) possible level. Moreover, it does not seem to give due consideration to the administrative impact such requirement would have upon The Judge Advocate General and his staff. In the light of the Article's lengthy history and provision for consideration of complaints by specified intermediate commanders, it is difficult to perceive a supposed constitutional benefit from language which would preclude effective redress below the Department level.

Conclusion.

Article 138 is deeply rooted in military law. Although its complaint procedure has been marked by inattention for substantial periods of time, it appears the ancient remedy is still a viable avenue of redress.[54] Its resurgence is attributable primarily to recent appearance of implementing regulations and some tentative identification by the civil judiciary of the Article as an acceptable administrative prerequisite to judicial review.

Proper administration of the Article, to include adequate investigation of complaints and disclosure of governing facts and rationale for pertinent decisions, should serve to minimize intervention by the civil courts into internal military affairs. In fact, if the judiciary as a whole can be persuaded to regard Article 138 proceed-

ings with approval, it even may be anticipated that at least some potential military litigants will resort to Article 138 rather than seek redress through civil court actions.

And while the "rediscovered" Article provides a positive mechanism for correcting abuse of command authority to the injury of individuals, its rigid requirement for final disposition of complaints at the Department level also serves as a constant monitor to remind all commanders that an indiscretion resulting in direct harm to a subordinate may cause the dereliction to be reviewed all the way to the top—a deterrent of no mean degree.

Footnotes

1. 10 U.S.C. 938.
2. Nemrow, "Complaints of Wrong Under Article 138, Uniform Code of Military Justice," a 1957 thesis presented to The Judge Advocate General's School, U.S. Army, an abbreviated version of which appears in 2 MIL. L. REV. 43 (1958). And *see* Tompkins, Article 138: A Resurrection, 27 JAG J. 463 (Spring 1974), and Greene, "Article 138: Fact or Fiction?" (thesis presented to The Judge Advocate General's School, United States Army, April 1974).
3. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920 reprint).
4. Winthrop, MILITARY LAW (1862).
5. Act of 29 September 1789, ch. XXV, Sec. 4, 1 Stat. 96.
6. The 1948 revision provided for initial disposition of the complaint by the officer exercising general court-martial jurisdiction (instead of by the general commanding where the respondent is located), a concept retained by the present Article 138.
7. 10 U.S.C. 938.
8. Winthrop, *supra* note 3 at 600, citing Clode and Hough.
9. Winthrop, *supra* note 3 at 600.
10. Nemrow unpublished thesis, *supra* note 2 at 2–3.
11. Nemrow, *supra* note 2 at 47.
12. XXV, 332, April 1874, Digest of Opinions of the Judge Advocates General of the Army (1901) [hereinafter DIG. OPS.], @ 19. (Roman numerals cited refer to folios, Arabic numerals to press books, according to the records of the Office of The Judge Advocate General.)
13. LV, 365, March 1888, DIG. OPS., 18.
14. JAG-250.451, 28 Sept. 1928, DIG. OPS. (1912–30), 611. (File No. refers to War Dept. decimal file system generally employed 1917–1942).
15. C.M. 199315 (1932), DIG. OPS. (1912–40), 400.
16. Winthrop, *supra* note 3 @ 602, and JAGJ 1953/1011, 29 Jan. 1953, 3 DIG OPS. (1953–54) 756.
17. Nemrow, *supra* note 2, @ 55, citing JAGA 1955/2382, 21 March 1955; also see, more recently, JAGA 1970/4619, 5 October 1970, 70–17 JALS 7.
18. Nemrow, unpublished thesis, *supra* note 2 @ 1.
19. Uncertainty over proper processing of Article 138 reduction complaints is reflected by the author's copy of a letter from the Department of the Army, 23 January 1959, to a general court-martial authority indicating that "Decision on such complaints rests with the officer exercising General Court-Martial jurisdiction," and that such actions were reviewed at the Department level "only with respect to procedural correctness."
20. B–128487, 22 August 1956, 36 Comp. Gen. 137; 6 DIG. OPS. (1956–57), 365.
21. JAGA 1956/6505, 12 September 1956, 6 DIG. OPS. (1956–57), 452; JAGA 1967/3422, 3 February 1967, 67–19 JALS 18.
22. Newrow, *supra* note 2 @ 55, citing JAGA 1955/2382, 21 March 1955.
23. Smith v. Resor, 406 F.2d 141 (2 Cir. 1969), Raderman v. Kaine, 411 F.2d 1102 (2 Cir. 1969), and Schatten v. U.S., 419 F.2d 187 (6 Cir. 1969). *Contra:* Rasmussen v. Seamans, 432 F.2d 346 (10 Cir. 1970) (indicating Article inapplicable to National Guard personnel not in federal service). These cases were decided before the issuance of AR 27–14, see *infra* note 26, which expressly restricts the right to apply for redress under the Article to members on active duty. Nevertheless, the remedy was recently judicially regarded as applicable to a reservist ordered to active duty, though he did not comply with the order, seeking instead habeas corpus relief, which was denied, in part, for failure to exhaust the Art. 138 remedy. Herrick v. Cushman, 379 F.Suppl. 1143 (E.D.N.C. 1974). And the article was considered "an important and effective means of administrative review" in Casey v. Schlesinger, 382 F.Supp. 1218 (N.D.Okla, 1974), in which a writ of habeas corpus seeking relief from order to active duty was denied petitioner/reservist for failure to pursue the Art. 138 remedy.
24. Nemrow, *supra* note 2 @ 52, *citing* Wright v. White, 166 Ore. 136, 110 P.2d 948 (1941), in turn, *citing* the British precedent of Dawkins v. Paulet, 5 LRQB 94, 35 LQJB53.
25. Nemrow, *supra* note 2 at 95.
26. Army Reg No. 27–14, 13 May 1971.
27. JAGA 1971/5034, "Processing of Complaints Under Article 138, UCMJ," THE ARMY LAWYER, October 1971, at 13. TJAG makes final disposition as designee of the Secretary of the Army, under AR 27–14. This is an example of an exercise of discretion by the Secretary through the issuance of regulations establishing standards whose application to particular cases may be regarded as essentially ministerial. *See* US Dep't of Army Pamphlet 27–21 (1973) at p. 1–4. For those concerned with the validity of the Secretarial designation, it does not seem unreasonable for the Congress to have contemplated that someone other than the Secretary himself might consider the equities of a complaint over, *e.g.*, a commander's denial to a soldier of a pass or similar privilege. Lest the suggested rationale be regarded as revolutionary, refuge may be taken in the legislative history of Article 138, which reflects that the 1956

codification substituted the word "Secretary" for "Department" (a term used in the statute since 1916) for "accuracy" and out of a sense of reality that the Department *"as an entity could not act upon the complaint"* (emphasis added). *See* "Historical and Revision Notes" following 10 U.S.C. 938.

28. *Id.* at 14.
29. *Id.*
30. Army Reg. No. 27-14, 15 February 1972, 10 December 1973; and *see* Malinosky, "Changes in Processing Article 138 Complaints," THE ARMY LAWYER, February 1974 at 9.
31. *E.g.*, Levy v. Dillon, 286 F.Supp. 593 (Kan. 1968); Smith v. Resor, 406 F.2d 141 (2 Cir. 1969); United States ex rel Berry v. Commanding General, 411 F.2d 833 (5 Cir. 1969); Cortright v. Resor, 447 F.2d 245 (2 Cir. 1971), *cert denied*, 405 U.S. 965 (1972); McGaw v. Farrow, 472 F.2d 952 (4 Cir. 1972); and Catlow v. Cooksey, 21 USCMA 106, 44 CMR 160 (1971). Despite effort to encourage potential Article 138 complainants to use other established avenues for relief, the Article remains rather broad, so that even petty allegations still may be entertained thereunder unless a specific other "channel" is established therefor. Possible complainants may be diverted to Inspector General channels, for example, if they are persuaded that relief can be accomplished more quickly thereby than by a remedy leading to the Department level for final disposition in the event redress is not gained at a lower echelon.
32. DAJA-AL 1971/5567, 22 December 1971, THE ARMY LAWYER, March 1972 at 23.
33. DAJA-AL 1972/3643, 18 February 1972 (involving complaint over action by Chief, Sp Per Br, OP, addressed to the Army Chief of Staff).
34. DAJA-AL 1972/4228, 13 June 1972, THE ARMY LAWYER, October 1972, at 26.
35. DAJA-AL 1973/3662, 28 February 1973 (unpublished), and DAJA-AL 1974/5319, 12 Nov 1974, 75-4 JALS 31 (DA Pam 27-75-4).
36. DAJA-AL 1973/3622, 8 March 1973, THE ARMY LAWYER, May 1973 at 24.
37. DAJA-AL 1973/4503 29 August 1973, THE ARMY LAWYER, October 1973 at 35; THE ARMY LAWYER, April 1974 at 12.
38. DAJA-AL 1974/3431, 25 February 1974, THE ARMY LAWYER, May 1974 at 22; and THE ARMY LAWYER, July 1974 at 20.
39. DAJA-AL 1973/5191, 28 December 1973, THE ARMY LAWYER, May 1974 at 23. Since this paper was drafted, other subjects have been considered in published opinion-digests: (a) The AR requirement that complaints be addressed "through channels" contemplates submission through the normal chain of command, DAJA-AL 1974/4927, 18 Sept 74, 75-3 JALS 22 (DA Pam 27-75-3), and (b) complaint may be mooted if complainant, in collateral proceeding, was offered opportunity to accomplish objective sought under Article 138, DAJA-AL 1974/63(s), 21 Aug 1974, 75-3 JALS 23 (DA Pam 27-75-3). Received still later, due to publication delays, were additional subjects consolidated in "Recent Disposition of Article 138 Complaints": (a) personal appearance before TJAG; (b) premature referral to ABCMR; (c) resolution after complainant became civilian; (d) complaint resolved under Article 15; (e) alleged wrongdoer not complainant's commander; (f) complaint resolved under AR 600-37; and (g) delay in processing complaint. THE ARMY LAWYER, February 1975 at 22.
40. Smith v. Resor, 406 F.2d 141, 147 (2 Cir. 1969).
41. Tuttle v. Commanding Officer, 21 USCMA 229, 45 CMR 3 (1972).
42. Turner v. Callaway, 371 F.Supp. 188 (D.C. 1974), 190.
43. Colson v. Bradley, 477 F.2d 639 (8 Cir. 1973).
44. Note, *Judicial Review and Military Discipline—Cortright v. Resor: The Case of the Boys in the Band*, 72 COLUM. L. REV. 1048, 1065-1076 (October 1972).
45. Certain other members of the band were transferred under similar circumstances in Vietnam and Korea.
46. Cortright v. Resor, 447 F.2d 245 (2 Cir. 1971), *rev'g* 325 F.Supp, 797 (E.D.N.Y. 1971), *cert. denied sub nom.*, Cortright v. Froehlke, 405 U.S. 965 (1972).
47. Turner v. Callaway, 371 F. Supp. 188 (D.C. 1974), and Army Reg. No. 27-14, (10 December 1973) para. 3.
48. The Second Circuit panel majority holding did not assert that a civilian court could not interfere with a transfer order or prescribe other relief necessary to prevent abridgment of a soldier's first amendment rights but stated that judicial intervention "must await a stronger showing than Cortright's." Cortright, *supra* note 46 at 255.
49. Orloff v. Willoughby, 345 U.S. 83 (1953); Parker v. Levy, 417 U.S. ___ (1974), 41 L Ed 2d 439, 451. More recently, a district judge states, "There is no statutory authority for a civilian court review of these [Article 138] proceedings, and they are expressly excluded from Administrative Procedure Act" (citing that Act's exclusion of "courts-martial and military commissions"). Moore v. Schlesinger, 384 F. Supp. 163 (Colo. 1974) (dismissing action for declaratory judgment, including consideration of a denial under Article 138 matters raised in the civil suit).
50. Note, *supra* note 44 at 1070-1076.
51. Although the decision of the GCM authority is reviewed in the Office of the Judge Advocate General, a decision upholding the GCM authority's action normally is expressed in summary style.
52. *See e.g.*, S. 987, 92d Cong., 1st Sess., 22 February 1973; S.1127, 92d Cong., 1st Sess., introduced March 8, 1971; S.4191, 91st Cong., 2d Sess., introduced August 6, 1970—all by Sen. Bayh—and H.R. 579, 92d Cong., 1st Sess., introduced Jan. 22, 1971, by Congressman Bennett.
53. Words proposed to be deleted from the existing provision have been lined out while proposed new language is italicized.
54. Subsequent to the preparation of this paper, a report to the October 1974 JAG Conference at Charlottesville reflected the handling of 118 complaints by the Army during FY 1974, of which 21 (17.8%) resulted in some form

of corrective action. The corrective actions were directed as follows: By the respondent/commander, 4; the general court-martial authority, 10; The Judge Advocate General, 7. "Administrative Law Report," THE ARMY LAYWER, November 1974, at 18. The volume of complaints forwarded to TJAG for review apparently increased about threefold in the past several years. For example, only 37 complaints were forwarded in 1971, as against 106 in 1973, see "TJAG's Annual Report'," THE ARMY LAWYER, August 1974, at 5.

Reserve Affairs Items

ON-SITE TECHNICAL TRAINING SCHEDULE.

The Reserve Component Technical Training (On-Site) Program schedule for the second half of the academic year 1975–76 which includes the date, time and site, is set forth below. Also provided is a list of the local action officers and the training site location for each session.

The program is designed to place a greater emphasis on New Developments in Military Law and provide the following instruction:

Military Criminal Law—3 hours
Administrative and Civil Law—3 hours
Procurement Law—1 hour
International Law—1 hour

(Both Procurement and International Law instructors will be prepared to give additional instruction if functional JAGSO teams are present at the session and desire such instruction.)

Reserve Component officers who do not receive notification of the on-site program through their unit of assignment are encouraged to contact the action officer to confirm the date, time and location of the scheduled training, as unavoidable changes may occur. As with previous training, coordination should be initiated with units other than JAGSO to provide maximum opportunity for interested JAG Corps officers to take advantage of this training. In addition, all active Army JAG Corps officers assigned to posts, camps and stations located near the scheduled training site are encouraged to attend the sessions.

Questions regarding the program should be directed to the appropriate action officer. Problems encountered by active Army officers or unit commanders should be directed to Captain Rob Walker Freer in the Office of the Assistant Commandant for Reserve Affairs, The Judge Advocate General's School, Charlottesville, Virginia 22901 or telephone (804) 293-6121.

Reserve Component Technical Training (On-Site) Schedule

City	*Date & Times*	*Subject*	*Action Officer Phone*	*Training Site Location*
1. Miami	17 Jan 76 0800–1700	Criminal Law Administrative Law Procurement * International Law	LTC Alden N. Drucker 305-538-1401	5601 San Amaro Drive Coral Gables, FL
Orlando	18 Jan 76 0800–1700	Criminal Law Administrative Law Procurement *International Law	LTC Theodore H. Van Deventer 305-656-1753	Taft USAR Center
2. Houston	31 Jan 76 0800–1700	Criminal Law Administrative Law *Procurement International Law	MAJ Donald M. Bishop 713-224-9811	Annex Building

City	*Date & Times*	*Subject*	*Action Officer Phone*	*Training Site Location*
Dallas/Ft. Worth	1 Feb 76 0800–1700	Criminal Law Administrative Law *Procurement International Law	MAJ Virgil A. Lowrie 817-387-3831	Muchert Reserve Center
3. Minneapolis	7 Feb 76 0800–1700	Criminal Law Administrative Law *Procurement International Law	MAJ Robert M. Frazee 612-338-066	Building 501 Fort Snelling
Madison	8 Feb 76 0800–1700	Criminal Law Administrative Law Procurement *International Law	MAJ Richard Z. Kabaker 608-262-2441	Madison AFR Armory
4. Denver	28 Feb 76 0800–1700	Criminal Law Administrative Law *Procurement International Law	LTC Bernard H. Thorn 303-573-7600	I-332 Fitzsimons General Hospital
Salt Lake City	29 Feb 76 0800–1700	Criminal Law Administrative Law Procurement International Law	MAJ G. Gail Weggeland 801-524-5796	Building #107 Fort Douglas, Utah
5. Seattle	6 Mar 76 0800–1700	Criminal Law Administrative Law *Procurement International Law	MAJ John P. Cook 206-624-7990	Harvey Hall Ft. Lawton
Honolulu	7 Mar 76 0800–1700	Criminal Law Administrative Law Procurement International Law	COL Donald C. Machado 808-86-2681	Bruyeres Quadrangle
6. Austin	20 Mar 76 0800–1700	Criminal Law Administrative Law Procurement *International Law	MAJ Charles W. Richards 512-451-8261	USAR Center
San Antonio	21 Mar 76 0800–1700	Criminal Law Administrative Law *Procurement International Law	MAJ Richard G. Weil 512-735-9261	2010 Harry Wurzback USAR Center
7. Philadelphia	3 Apr 76 0800–1700	Criminal Law Administrative Law Procurement International Law	CPT Joseph Berarducci 215-568-7666	Philadelphia Memorial AFRC
8. Jackson	8 May 76 0800–1700	Criminal Law Administrative Law Procurement International Law	LTC Edward L. Cates 601-948-2333	U.S. Army Reserve Training Center
Memphis	9 May 76 0800–1700	Criminal Law Administrative Law *Procurement International Law	MAJ Robert G. Drewry 901-526-0542	Marine Hospital

* Additional instruction will be provided for the specialized teams.

CLE News

1. State Mandatory CLE Rules.

The Continuing Legal Education department of this publication consists mainly of a calendar of courses conducted at the school or elsewhere which we think should capture your interest. We intend, too, to use it as a vehicle for informing you of developments in continuing legal education. These days, those developments seem most often to relate to the adoption of mandatory CLE rules by various States. This month there are several such developments to report.

The Minnesota Board of Continuing Legal Education has advised the School that its courses are approved for CLE credit in that State. Minnesota lawyers attending courses here can receive one hour's credit for each *sixty* minutes of instruction attended at The Judge Advocate General's School. To obtain this credit, Minnesota lawyers should complete and submit Minnesota's Form No. 3 to the State board.

The Judge Advocates Association board of directors adopted, on 8 November 1975, two resolutions pertaining to mandatory CLE requirements. One takes the position that, rather than exempting judge advocates as a class from State CLE rules, it should be made possible for them to comply by attending out-of-state courses. The second resolution advocates courses conducted under auspices of a Judge Advocate General, include correspondence courses and videotape programs. Both resolutions had been drafted by the Joint Committee of Government Attorneys on Recertification Requirements and earlier approved by the national council of the Federal Bar Association. Both the JAA and FBA are making their views known to states in which CLE requirements are under consideration.

2. MANDATORY CONTINUING LEGAL EDUCATION SURVEY.

This compilation, dated 24 September 1975, was made available by the American Bar Association at the National Conference on Continuing Legal Education in Chicago during the period of 10–12 November 1975.

States responding:	ALL, (including the District of Columbia).
States which have mandated continuing legal education:	2, (Iowa and Minnesota).
States in which the state supreme court is considering proposed rules:	2, (New Mexico and Wisconsin).
States in which plans have been drafted and are under review by the state bar associations:	5, (California, Idaho, Kansas, Maryland, Washington).
States in which the subject is being studied by bar association boards or committees:	26, (Alaska, Arizona, Colorado, Connecticut, Georgia, Illinois, Indiana, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Wyoming).
States in which no study or action is currently contemplated:	16, (Alabama, Arkansas, Delaware, District of Columbia, Florida, Hawaii, Kentucky, Louisiana, Maine, Mississippi, New Jersey, New York, Ohio, Oklahoma, Tennessee, West Virginia).

3. ABA NATIONAL CONFERENCE ON CONTINUING LEGAL EDUCATION.

The National Conference on Continuing Legal Education was held in Chicago, Illinois, November 10-12, 1975, sponsored by the American Bar Association. One hundred fifty three participants attended from 36 states. Approximately 31% were professional continuing legal education administrators, 30% private practitioners, 32% deans and professors of law, 3% judges and 4% military and government officials. This statement was approved at the final session of the Conference.

This was the fourth major conference on the subject of continuing legal education. The previous ones were held at Arden House in 1958 and 1963 and in Chicago in 1968.

Conference participants addressed the following matters, having received a book prior to the Conference which included an essay on each topic:

The relationship between effective delivery of legal services and continuing legal education. Mandatory continuing legal education and other means for improving the quality of legal services were discussed.
Legal specialization. The value of including continuing legal education among the requirements for achieving and maintaining specialty designation was discussed.
New teaching techniques. New educational technologies and the role of skills training were discussed.
National minimum standards. The utility and feasibility of national standards for continuing legal education were explored.
The economics of continuing legal education. Various means of ensuring sufficient financing to meet the needs for experimentation, innovation, growth, and the maintenance of quality were discussed.

The Conference reached the following conclusions:

1. *The Public Interest in Continuing Legal Education.*

The public interest in the delivery of quality legal services requires that effective continuing legal education and training be available to all lawyers at reasonable and convenient places, times and costs.

2. *Continuing Legal Education and Quality Legal Services.*

Participants discussed the innovative programs now adopted in Iowa and Minnesota that undertake to enhance the performance of lawyers and judges by requiring regular participation in a prescribed number of hours of continuing legal education. A majority of the conference participants are of the view that the case for mandatory programs is not sufficiently persuasive to support a recommendation that all states now adopt them. We believe that there are unanswered questions concerning the specific relationship between required programs of continuing legal education and the quality of legal service.

We urge the organized bar in each state to study closely the results of the mandatory programs now being initiated as well as other means by which the quality of legal services available to all can be improved. In addition to mandatory continuing legal education, conference participants were made aware of a number of additional possibilities that may serve this end: various forms of specialization arrangements for providing potential clients with additional information about lawyers and legal services; increased inducements (including improved programs) for voluntary participation in continuing legal education, perhaps combined with appropriate recognition of that participation for the benefit of potential clients; peer review, self-assessment programs and prescribed remedial educational programs for lawyers found deficient; expanded use of disciplinary procedures; and intensified efforts to improve the quality and coverage of continuing legal education courses and materials relating to the legal problems faced by middle and low income persons.

3. *Specialization and Continuing Legal Education.*

We are aware of the various plans now being discussed to enable American lawyers to hold themselves out as specialists in numerous fields. Specialization plans with differing characteris-

tics have already been adopted in California, Florida, New Mexico and Texas. These developments may lead to additional demands that continuing legal education organizations provide advanced programs for practitioners who are or wish to be certified, recognized or identified in one or more specialized fields of law. Mandatory continuing legal education may be an appropriate response to specialist recognition. However, we believe that qualifying standards in such plans should place more emphasis on experience and periodic testing of specialists' proficiency than on mandatory continuing legal education.

4. *New Technology and Continuing Legal Education.*

New technology presents both challenges and opportunities to continuing legal education. Videotaped or televised instruction has been successfully employed by a number of continuing legal education programs, particularly when used in conjunction with live commentary and interchanges between student and teacher. Computerized instructional programs, enabling the student and teacher to interact through the medium of the computer, are currently in development. Video and computer technology require significant capital investment although they also offer the prospect of eventual low per-pupil cost. Such investments will strain the resources of continuing legal education as presently organized. To the extent that materials can be developed for adaptation and use in many different states, these problems will be ameliorated. Although these technologies hold promise, their widespread use will require increased consumer familiarization with their operation and effectiveness. In utilizing such new technologies, the institutions of continuing legal education should call upon all resources available to the profession including the law schools. It is especially important that early programming using these new technologies be carefully monitored and that experience with these methods in other fields of education be brought to bear on their design and utilization in continuing legal education.

5. *National Standards for Continuing Legal Education.*

We recommend that national standards for continuing legal education be promulgated. The standards would offer guidance to those responsible for continuing legal education and assist in the administration of programs involving mandatory attendance. The standards should be promulgated by an independent national commission. The standards recently adopted by the Association of Continuing Legal Education Administrators serve as an initial study draft for this group. The standards finally promulgated by the proposed commission should provide for approval on both an institutional or a course-by-course basis. The standards should be administered by an entity that itself does not conduct programs in continuing legal education. The urgency that attends the creation of such a body will depend on the proliferation of mandatory continuing legal education programs. We do not attach a high priority to a formal system of accreditation absent wide-spread adoption of mandatory programs.

6. *Financial Support of Continuing Legal Education.*

Continuing legal education has been largely financed by tuition and fees charged those who attend programs or purchase materials. Although in the foreseeable future these sources will continue to defray the bulk of the expenses incurred by continuing legal education programs, the need to create high quality materials and programs, particularly those employing the newer educational technologies, places special financial strains on continuing legal education institutions. In the interest of ensuring that the institutions will be able to respond to these needs, the bar should give financial and other assistance to continuing legal education.

4. TJAGSA Courses (Active Duty Personnel).

December 8–11: 2d Military Administrative Law Developments Course (5F-F25).

January 5–16: 6th Procurement Attorneys' Advanced Course (5F–F11).

January 12–15: 3d Environmental Law Course (5F–F27).

January 19–23: 4th Military Lawyer's Assistant Course (Criminal Law) (512–71D20/50).

January 19–23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512–71D20/50).

January 26–30: 23d Senior Officer Legal Orientation Course (5F–F1).

March 8–19: 65th Procurement Attorneys' Course (5F–F10).

April 5–9: 24th Senior Officer Legal Orientation Course (5F–F1).

April 26–May 7: 66th Procurement Attorneys' Course (5F–F10).

May 10–14: 6th Staff Judge Advocate Orientation Course (5F–F52).

May 17–20: 1st Civil Rights Course (5F–F24).

May 24–28: 13th Federal Labor Relations Course (5F–F22).

June 7–11: 26th Senior Officer Legal Orientation Course (5F–F22).

June 28–July 2: 2d Criminal Trial Advocacy Course (5F–F32).

July 12–16: 25th Senior Officer Legal Orientation Course (5F–F1).

July 19–August 6: 15th Military Judge Course (5F–F33).

August 9–13: 3d Management for Military Lawyers Course (5F–F251).

5. TJAGSA Courses (Reserve Component Personnel).

January 5–16: 6th Procurement Attorneys' Advanced Course (5F–F11).

January 19–23: 4th Military Lawyer's Assistant Course (Criminal Law) (512–71D20/50).

January 19–23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512–71D20/50).

March 8–19: 65th Procurement Attorneys' Course (5F–F10).

April 26–May 7: 66th Procurement Attorneys' Course (5F–F10).

June 21–July 2: 1st Military Justice II Course (5F–F31).

June 21–July 2: 1st Military Administrative Law Course (5F–F20).

July 11–24: USA Reserve School BOAC (Procurement Law and International Law, Phase VI Resident/Nonresident Instruction).

6. Selected Civilian-Sponsored CLE Programs (This Quarter).

DECEMBER

1–2: ALI-ABA Program, "Tax Court Practice Today," Frenchman's Reef Holiday Inn, St. Thomas, V.I.

1–2: ALI/ABA Program, Federal Bankruptcy Procedure Under the New Bankruptcy Rules, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

1–3: ABA Criminal Justice Section, Court Administrators' Conference, Reno, NV.

1–3: American Academy of Judicial Education Program, Evidence I: Hearsay Hazards and a Cross-Examination, Center of Adult Education, University of Maryland University College, College Park, MD.

1–5: ABA Center for Administrative Justice, Trial Techniques in Administrative Proceedings, Washington, DC.

1–5: Federal Publications Inc, Government Contract Program, Civilian Agency Procurement, Quality Inn/Pentagon City, Washington, DC.

3: Philadelphia Bar Association, Annual Meeting, Bellevue Stratford Hotel, Philadelphia, PA.

3–4: ALI-ABA Program, International Arbitration, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

3–4: ALI-ABA Program, Federal Criminal Procedure, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

3–5: Oklahoma Bar Association, Annual Meeting, Oklahoma City, OK.

3–5: State Bar of Georgia, Midyear Meeting, Atlanta, GA.

3–5: Iowa State Bar Association, Midyear Meeting, Des Moines, IA.

3–5: Federal Publications Inc, Government Contract Program, Subcontracting, Sahara Tahoe, Lake Tahoe, NV.

4–5: FBA-BNA Briefing Conference on Postal Developments, Stouffer's National Inn, Arlington, VA.

4–5: PLI Program, "Public Interest" Litigation, Hyatt on Union Square, San Francisco, CA.

4–6: American Law Institute Program, "Restatement of the Law, Second, Judgments—Advisers," The Westbury, New York, NY.

4–6: American Academy of Judicial Education Program, Criminal Law I: Search and Seizure, Center of Adult Education, University of Maryland University College, College Park, MD.

5: San Diego County Bar Association, Annual Meeting, San Diego, CA.

5–6: ALI-ABA Program, Practice Under the New Federal Rules of Evidence, Frenchman's Reef Holiday Inn, St. Thomas, V.I.

5–6: PLI Program, Medical Ethics and Legal Liability, Americana of Bal Harbour Hotel, Miami, FL.

7: ABA Section of General Practice, Committee on Military Law, Meeting of Vice Chairmen, Washington, D.C.

7–10: National College of District Attorneys Course, Law Office Management Seminar, Houston, TX.

8–12: Federal Publications Inc, Government Contract Program, Masters Institute in Government Contracting, Williamsburg, VA.

9–13: National College of District Attorneys Course, Organized Crime Seminar, Portland, OR.

10: American Foreign Law Association, Fall Luncheon Meeting, "What Admiralty Law Can a Non-Admiralty Lawyer Use Advantageously?" The Lawyer's Club, 115 Broadway, New York, NY.

10–12: Federal Publications Inc, Government Contract Program, Government Contract Costs, Hospitality House, Williamsburg, Va.

15–17: Federal Publications Inc, Government Contract Program, Changes in Government Contracts, Quality Inn/Pentagon City, Washington, DC.

16–18: Federal Publications Inc, Government Contract Program, Government Architect/Engineer Contracting, Statler Hilton Hotel, Washington, DC.

18–19: Federal Publications Inc, Government Contract Program, Cost Estimating for Government Contracts, International Inn, Washington, DC.

18–19: Federal Publications Inc, Government Contract Program, Management Techniques for Construction Subcontractors, Quality Inn/Pentagon City, Washington, DC.

JANUARY

4–11: National Institute for Trial Advocacy, Southeast Regional Session, Part Two, University of North Carolina, Chapel Hill, NC.

6–8: US Civil Service Commission CLE Program, Paralegal Training Seminar, Washington, DC.

7–9: Federal Publications Inc, Government Contract Program, Changes in Government Contracts, Holiday Inn/Golden Gateway, San Francisco, CA.

10–17: National Institute for Trial Advocacy, Northeast Regional Session, Part Two, Cornell Law School, Ithaca, NY.

11–14: National College of District Attorneys Course, Welfare Fraud Seminar, Broadmoor Hotel, Colorado Springs, CO.

14: American Foreign Law Association, Fall Luncheon Meeting, "Current Developments in Argentine Commercial Law as They Concern American Attorneys," The Lawyer's Club, 115 Broadway, New York, NY.

15–16: Federal Publications Inc, Government Contract Program, Cost Estimating for Government Contracts, Sheraton Chateau LeMoyne, New Orleans, LA.

16–17: ABA National Conference of Lawyers and CPA's, meeting, Arizona Biltmore, Pheonix, AZ.

16–18: Virginia Bar Association, Annual Meeting, Conference Center, Williamsburg, VA.

19–20: University of Santa Clara School of Law, Federal Publications Inc, "Renegotiation of Government Contracts," Plaza Room, Tropicana Hotel, Las Vegas, NV. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc, 1725 K Street NW, Washington, DC 20006, Phone 202-337-8200.

20–22: US Civil Service Commission CLE Program, Environmental Law Seminar, Washington, DC.

22–23: ABA Litigation Section, national institute on "Proof of Damages," Fairmont Hotel, San Francisco, CA.

22–24: ALI-ABA Program, Modern Real Estate, Transactions, Los Angeles, CA.

25–29: National College of District Attorneys Course, Advanced Organized Crime Study Group, New Orleans, LA.

25–30: American Academy of Judicial Education Program, Problems in the Conduct of a Jury Trial, University of Miami, Coral Gables, FL.

FEBRUARY

3–5: US Civil Service Commission CLE Program, Institute for New Government Attorneys, Washington, DC.

5–7: ALI-ABA Program, Environmental Law, Fairmont Hotel, San Francisco, CA.

6–8: ABA Section of Taxation, Midyear Meeting, Houston Oaks Hotel, Houston, TX.

8–11: American Academy of Judicial Education Program, Criminal Law III: Effective Assistance of Counsel, Right to Counsel, Double Jeopardy, Speedy and Public Trial, Insanity Defense and Competency to Stand Trial, Arizona State University, Tempe, AZ.

8–11: National College of District Attorneys Course, Major Fraud/White Collar Crime Seminar, Los Angeles, CA.

11–14: American Academy of Judicial Education Program, Evidence III: Relevancy, Authentication, and Judicial Notice, Arizona State University, Tempe, AZ.

12–17: ABA Midyear Meeting, Philadelphia, PA.

13–15: National Association of Women Lawyers, Midyear Meeting, Philadelphia, PA.

13–15: National Organization of Bar Counsel, Meeting, Philadelphia, PA.

19–20: ABA Section of International Law, National Institute on "Current Legal Aspects of Doing Business in the Middle East," The Mayflower, Washington, DC.

22–27: American Academy of Judicial Education Program, Trial Judges Writing Program, Unversity Inn, Coral Gables, FL.

23–24: ABA Center for Administrative Justice, Application for the Administrative Procedure Act, Meeting, Washington, DC.

24–25: US Civil Service Commission CLE Program, Application of the APA to Administrative Proceedings, Washington, DC.

25–28: National College of District Attorneys Course, Pretrial Problems Seminar, Houston, TX.

February 29–March 5: National College of District Attorneys Course, Prosecutor's Office Administrator Course, Houston, TX.

Litigation Notes

From: Litigation Division, OTJAG

1. State Workmen's Compensation Law Provides Immunity to United States. In a novel problem under the Federal Tort Claims Act, the United States Court of Appeals, Fifth Circuit, ruled in *Roeltfs, et al. v. United States, et al.*, No. 72–3475 (decided 16 September 1974 and reissued as mandate on 30 October 1975 following the Supreme Court's denial of certiorari), ruled that when a contractor was obligated to maintain workmen's compensation by a contract

with the United States, the Government was entitled to the same immunity from suit as a private statutory employer.

Thus, in the areas of claims and tort liability litigation involving a Government contract, careful attention should be given to state workmen's compensation provisions. If the state statute provides the employer a defense from suit on the basis that workmen's compensation is an exclusive remedy, under the precedent of this case the Government may also be allowed immunity from suit under the Federal Tort Claims Act.

2. Waiver and Compromise of Medical Care Recovery Claims. Staff Judge Advocates and Recovery Judge Advocates are cautioned to refrain from making agreements with injured parties or their attorneys that exceed the delegated monetary authority of paragraph 5-16c, AR 27-40. Particular caution must be exercised in negotiations or discussions of cases involving a claim by the United States of $20,000.00 or more. *Only* the Department of Justice may waive or compromise a claim in excess of $20,000.00. When a request for waiver or compromise is based on undue hardship, the burden to establish such hardships is upon the injured party or his attorney. Pending changes to AR 27-40 will increase the monetary waiver and compromise authority available to Staff Judge Advocates and Recovery Judge Advocates.

Legal Assistance Items

By: Captain Mack Borgen, Administrative and Civil Law Division, TJAGSA

1. Items of Interest.

Legal Assistance Programs and Administration—Representative Under an Expanded Legal Assistance Program—Garnishment Proceedings. The extent to which a military Legal Assistance Officer in an Expanded Legal Assistance Program may represent clients in a garnishment proceeding is presently under consideration. In the interim, the Chief, Legal Assistance Office, OTJAG, advises that Legal Assistance Officers (LAO) should not represent servicemembers or their dependents in garnishment proceedings brought under title 42 U.S.C., section 659. This interim prohibition extends to any active participation in the litigation, but the LAO may provide general guidance regarding support obligations and enforcement procedures and remedies. [Ref: Chs. 1, 26, DA Pam 27-12].

Family Law—Privacy Act—Release of Home Addresses of Active Duty and Retired Service Members. In accordance with a recent opinion of The Judge Advocate General, the home address of an active duty or retired member may be released to persons contemplating filing actions under title 42 U.S.C., section 659 (1975) (Garnishment of Federal wages). It has been concluded that "under the provisions of the Freedom of Information Act (4 U.S.C. § 552a) and The Privacy Act of 1974 (5 U.S.C. § 552a) and their implementing regulations, there is no legal objection to compliance with such requests for disclosure" as the release of personal information under those circumstances would not constitute an "unwarranted" invasion of privacy. (See para. 3-2b, AR 340-21 and para. 2-12f, AR 340-17). DAJA-AL 1975/4965 (31 Oct 1975). [Ref: Ch. 26, DA Pam 27-12].

Property—United States Savings Bonds—Safekeeping. Pursuant to DOD Inst. 7300.6, "Safekeeping U.S. Savings Bonds," 23 September 1975, the military departments will accept U.S. savings bonds of active duty members for safekeeping. Each military department has an option to extend similar services to retired military members. Implementing instructions will be forthcoming. [Ref: Ch. 35, DA Pam 27-12].

Legal Assistance Programs and Administration—*Materials on State and Federal Taxation.* OTJAG will be procuring and distributing tax materials for use by Legal Assistance Officers. It is expected that the following publications will be distributed to all SJA Offices: *Internal Revenue Code and Regulations;* IRS Publication 448, "A Guide to Federal Estate and Gift Taxation," (Rev. Jan. 1975); IRS Publication 757, "U.S. Armed Forces Training

Income Tax Law—Course Book," (November 1975); 1975 Package X (2 Vols.), "Informational Copies of Federal Income Tax Forms;" NAVSO P-1983 (18th Ed.), 1976 *Armed Forces Federal Income Tax;* 1976 *All States Income Tax Guide;* 1976 *Prentice-Hall Tax Guide.* Unlike past years, the IRS will this year send free of charge a copy of Publication 17, *Your Federal Income Tax—1976 Ed.*, to any individual who requests it.

Also being distributed to Legal Assistance Offices is the 1976 Edition of AAA's *Digest of Motor Laws.* [Ref: Part 18, DA Pam 27-12].

Family Law—Garnishment—Civil Service Commission Responsibility for Executive Agency Implementation—Federal Court Jurisdiction in Wage Garnishment Proceedings. Title 42 U.S.C., section 659, provides for the garnishment of Federal wages as a means of collecting alimony payments and child support. In accordance with Executive Order No. 11,881, 3 C.F.R. ___, 40 Fed. Reg. 46291 (October 7, 1975) the Civil Service Commission, in consultation with the Justice Department, is responsible for promulgating regulations for the implementation of section 659 by all executive agencies. The Commission will establish general regulations, and, subsequently, each agency will issue specific, conforming rules.

The section is extremely brief, and a number of difficult legal questions can arise thereunder. The question of Federal court jurisdiction under section 659 already has led to inconsistent District Court rulings. The position of the Justice Department is that section 659 serves *only* as a waiver of Federal sovereign immunity. The Justice Department has argued that the section does not contemplate the use of Federal courts in domestic relations litigation except when support enforcement has been "certified" under section 660 by the Secretary of HEW. This position has been adopted by some District Courts. Contrariwise, it has been reported that some Federal judges have issued garnishment orders to Federal agencies so long as the support claim has been reduced to judgment in a State court order or decree. The Federal jurisdiction in those cases has been based upon title 28 U.S.C., section 1346(a)(2) ("The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any . . . civil action against the United States, not exceeding $10,000 in amount, founded . . . upon . . . any Act of Congress. . . ."). See "Federal Wage Garnishment: A Matter for the Federal Courts?," 1 FAM.L. RPTR 2853 (Oct. 28, 1975). [Ref: Ch. 26, DA Pam 27-12].

Social Security—Maximum Annual Earnings. The Social Security Administration recently announced that the maximum taxable annual earnings will be increased from $14,100 (1975) to $15,300 (1976). This will increase the maximum FICA tax payable by a wage earner from $824.85 (1975) to $895.05 (1976). The tax rate remains 5.85 percent. [Ref: Ch. 39, DA Pam 27-12].

Wills—Drafting of "Living Wills." As a result of the nationwide publicity given to the New Jersey case involving Karen Quinlan and the many legal, medical, and moral questions raised by the case, some clients recently have sought to have a "living will" clause or some other directory statement of their intentions regarding "extraordinary efforts or heroic medical acts" included in or attached to their wills. Such clauses are designed merely to define the person's desires concerning such measures in the event he suffers from a disease, illness, or injury from which there is no reasonable expectation of recovery. Although the legal effect, if any, of such a clause or statement is extremely questionable at this time, the client nevertheless may wish to have it included. Copies of one such "living will" and further information may be obtained from the Euthanasia Educational Council, 250 West 57th Street, New York, New York 10019. [Ref: Ch. 14, DA Pam 27-12].

2. Recent Legislation.

State Taxation of Military Income—Montana. Effective "for all taxable years after December 31, 1974" the active duty military income received by residents of Montana is exempt from state income taxation if said residents "entered into active duty from Montana." Sec. 84-4907.2, Repl. Vol. 5 (Part 3), Revised Codes of Montana, 1947. [Ref: Ch. 43, DA Pam 27-12].

3. Pending Legislation.

Estate Planning—Insurance — SGLA —VGLA — Conversion Rights. Since World War I, the government has provided low cost insurance for servicemembers and various types of insurance programs for retirees and veterans. Since 1965, the primary insurance for servicemembers has been Servicemen's Group Life Insurance (SGLI), title 38, U.S.C., section 765, *et seq.* The SGLA program was supplemented in 1974 by The Veteran's Insurance Act of 1974 which established a new program of post-separation insurance, Veteran's Group Life Insurance (VGLI), title 38, U.S.C. section 777 (1975). Pursuant to this legislation GSLI policies are "automatically" converted after separation to a five-year nonrenewable term policy.

At the end of the five-year VGLI term, the insured has a right to convert by written application to a commercial life policy, and such policy is to be "issured without medical examination" (38 U.S.C. 777(d)). This right of conversion to a commercial policy has been limited to "whole life" or "permanent" insurance, rather than term policies, but there has been increasing criticism of this limitation.

On November 12, 1975 the Senate Veteran's Affairs Committee held hearings on S. 1911, which, if enacted, would permit the servicemember to convert his government insurance to a commercial term policy after separation. The assumption of this bill, according to its sponsor, Senator Hartke, is that "the government's only concern should be that the individual has access to accurate, adequate, and relevant information on the cost of insurance available to him through those companies participating in the SGLI and VGLI conversion program." Although the legislation is opposed by the Veterans Administration, it is expected that the bill will be reported favorably by the committee. If so, a summary of the committee's report will be made in this column.

For a discussion of the SGLI and VGLI programs and of the other government insurance programs, see Chapter 10, DA Pamphlet 600–5, *Handbook on Retirement Services*, July 1975; DA Pamphlet 360–517, *Armed Forces Life Insurance Counselor's Guide*, May 1975; DOD Information Guidance Series (DIGS), "Life Insurance and the Service Family," Nos. 8A–13 (—"Service Benefits"), –14 (—"Life Insurance"), –15 (—"Estimating Survivor Income"). [Ref: Chs. 11, 13, DA Pam 27–12].

4. Articles and Publications of Interest.

Commercial Practices and Controls—Express and Implied Warranties —Magnuson-Moss Warranty Act. DOD Information Guidance Series (DIGS) No. 8E–6, "Consumer Protection—'Truth in Warranty' Law," November 1975. For a more detailed analysis of this legislation see the article by Mssrs. Wilkes and Jensen entitled "Protecting the Rights of the Reasonable Average Consumer—The Consumer Product Warranty Act of 1975" in Barrister magazine published by the Young Lawyers Section of the ABA. (Barrister, Fall 1975, at 25). See also, "Legal Assistance Items," THE ARMY LAWYER, April 1975, at 23. [Ref: Ch. 10, DA Pam 27–12].

Family Law—Divorce —Division of Military Retired Pay. Sage, "Military Retired Pay in Texas: A New Outlook," 7 ST. MARY'S L.J. 28 (1975). See also, "Legal Assistance Items," THE ARMY LAWYER, July 1975, at 34. [Ref: Ch. 37, DA Pam 27–12].

Family Law — Enforcement of Support — Garnishment. DOD Information Guidance Series (DIGS) No. 11–4, "Garnishment of Federal Pay," October 1975. [Ref: Ch. 26, DA Pam 27–12].

Retired Personnel — New Handbook on Retirement Services. Dept. of the Army Pamphlet 600–5, *Handbook on Retirement Services for Army Personnel and Their Families*, July 1975. Replacing the January 1969 publication, this new pamphlet is to be inserted as Chapter 38, DA Pam 27–12, *Legal Assistance Handbook.* The pamphlet covers many subjects relating to retired personnel and their families and with the extensive use of appendices the publication organizes a great amount of essential information for the LAO. [Ref: Ch. 38, DA Pam 27–12].

Survivor's Benefits — *Burial Rights of Deceased Military Personnel.* DOD Information Guidance Series (DIGS) No. 8A–21 (Rev. 1),

"Interments in National Cemeteries," October 1975. This publication briefly defines those persons eligible for burial in the National Cemeteries administered by the Veteran's Administration and Arlington National Cemetery which is under the jurisdiction of the Department of Army. The policies on space assignment, the allocation of costs, and other burial rights are described. [Ref: Ch. 16, DA Pam 27-12].

Judiciary Notes

From: U.S. Army Judiciary

Recurring Errors and Irregularities

1. *October 1975 Corrections by ACOMR of Initial Promulgating Orders:*

a. Failing to indicate after the Pleas and *before* the Findings paragraph that the military judge had dismissed a specification of the charge due to its multiplicity—2 cases.

b. Failing to set forth the correct date that the sentence was adjudged.

2. *SJA offices in the field should assure that the following matters are accomplished:*

a. Request for appellate defense counsel forms, completed and signed by the accused, should be forwarded with the record of trial to the office of the Clerk of Court.

b. If accused indicates he intends to retain civilian counsel on the Request for Counsel Form, the name and address of such counsel should be forwarded to the Clerk of the Court's office as soon as possible.

c. An errata or corrective sheet, indicating proposed changes by the military judge to errors in the records of trial, should be included in the original copy of the record. For uniformity, the errata sheet should be inserted in the record immediately following the page which contains the receipt of the accused for a copy of the record.

3. *SJA Reviews and Actions:*

SJA's are reminded that the rules enunciated in *United States v. Goode,* 23 USCMR 367, 50 CMR 1 (1975) (written review required by Articles 61 and 65(b) must be served upon counsel for accused), and in *United States v. Keller,* ___ USCMA ___, ___ CMR ___ (5 Sep 75) (convening authority must justify an action that differs from the recommendation of his SJA), are applicable to records of trial forwarded to The Judge Advocate General of the Army, HQDA (JAAJ-ED), for examination under the provisions of Article 69, UCMJ. Failure to comply with the mandates of those cases may require return of the record to the convening authority for appropriate corrective action per paragraph 95, MCM 1969 (Rev.).

4. *SJA Review—Policy on Forfeitures:*

Paragraph 3*b*, AR 190-36, provides, in part, that "any forfeiture imposed on an enlisted person that exceeds forfeitures of two-thirds of pay per month for 6 months should be remitted by the convening authority unless the sentence includes, and the convening authority approves, a bad conduct discharge or dishonorable discharge or confinement unsuspended for the period of such forfeitures." Recently, in the examination of general court-martial cases under Article 69, The Judge Advocate General of the Army was required to take corrective action in the following instances: although the approved confinement was for six months, the period of partial forfeitures exceeded six months; the portion of the forfeitures that exceeded forfeitures for six months was suspended rather than remitted. Such corrective action may not be necessary if the post-trial review reflects that the convening authority was advised of the policy set forth in AR 190-36. In this regard, *see* United States v. Bumgarner, 43 CMR 559 (ACMR 1970).

GCM Military Judges

There will be a need for several general court-martial judges in the summer of 1976. Interested Colonels and Lieutenant Colonels

should make their desires known to the Chief Trial Judge, HQDA (JAAJ-TJ), Nassif Building, Falls Church, Va. 22041, and the Chief, PP&TO, OTJAG.

JAG School Notes

1. Publications. Beginning with this issue, *The Army Lawyer* and the *Judge Advocate Legal Service* are under new leadership. Captain Paul F. Hill, the former editor, has left active service and returned to the practice of law in Tallahassee, Florida. The new editor is Captain Charles P. Goforth (J.D., University of Virginia 1975). At this writing, Captain Goforth is also a student in the 79th Basic Class. The Chief of the Doctrine and Literature Division is Major Victor G. McBride, and the Director of the Developments, Doctrine and Literature Department is Lieutenant Colonel Jack H. Williams. *The Army Lawyer* now has some additional competition, for, in October 1975, the "JAG Reporter" published by the Office of The Judge Advocate General of the Air Force, resumed publication in a monthly format. We have given the editors of that publication blanket permission to use material, both signed and unsigned, from *The Army Lawyer* from time to time. We shall also bring to our readership pertinent material which has appeared in the *Air Force JAG Reporter.*

2. Continuing Legal Education. The Commandant represented the School at the National Conference on Continuing Legal Education held at the University of Chicago and the American Bar Center in November. According to their final statement, a majority of the conferees were of the view "that the case for mandatory programs is not sufficiently persuasive to support a recommendation that all states now adopt them." The full text of the final statement of the conference appears in the Continuing Legal Education section of this issue.

3. Important dates—1976. Those who make a practice of marking future events on their calendars might like to take note of the following scheduled events. During the 99th annual meeting of the American Bar Association in Atlanta in August 1976, the Judge Advocates Association is scheduling its annual business meeting and dinner for Monday, 9 August 1976. Without there having been any proposal or approval regarding the 1976 JAG Conference or its scheduling, the School has nevertheless taken the precaution of reserving the banquet hall of the Boar's Head Inn for the night of 12 October 1976.

4. ITRO. In November 1975, a new and little known organization met at The Judge Advocate General's School. The group is known as the Interservice Training Review Organization (ITRO) Task Group for Judge Advocate Programs. The Task Group is comprised of the commandants of the three service Judge Advocate Schools and training representatives from the Judge Advocate Career Management offices of those three services and the Marine Corps. The mission of the group is to assess the commonality of courses now being conducted at the several schools and make recommendations to the Interservice Training Review Organization with regard to consolidating or collocating any courses found to have a high degree of commonality. The same body will meet at the Naval Justice School in December 1975 and at the Air Force JAG School in January 1976, with its initial report due on 30 January 1976.

5. Happenings in the New Building. The abundant facilities of the new Judge Advocate General's School building have enabled the School to accommodate the legal education programs of some other organizations. During the period 30 September–3 October, the School was the site of an Institute for Legal Counsels presented by the Legal Education Institute of the U.S. Civil Service Commission. In late October, the Army Materiel Command conducted an Environmental Law Seminar for its attorneys. In January 1976, besides conducting five courses of its own, the School will host a Military Appellate Judges' Conference, the plans for which are still being developed in conjunction with the U.S. Army Judiciary and the national College of the State Judiciary.

International Law Item

The International Society for Military Law and the Law of War.

The International Society for Military Law and the Law of War has recently appointed Captain James Burger of the International Law Division at TJAGSA as its Permanent Correspondent in the United States. Members are encouraged to pay their dues ($2.00 per year) and their subscription fees ($5.00 per year) by sending to Captain Burger checks made payable to the Society. The dues and fees will be deposited in a bank account at Charlottesville and will be forwarded in one check each April to the Society's account in Brussels. This will avoid any problems in currency exchange. While the dues and fees will be transferred only once each year, the Society will be notified quarterly of paid-up members and subscribers to the Review.

For those persons interested in becoming members, the Society is a private international organization registered at Strasbourg with approximately 1000 members from 38 countries. Many of the members are judge advocates since the Society's purpose is the study of comparative military law and of the law of war. *The Review* is published two times each year, and international congresses are supported by issues studied by the Society. Any questions can be addressed to Captain James Burger, Permanent Correspondent, International Society for Military Law and the Law of War, Post Office Box 1903, Charlottesville, Virginia 22903.

JAGC Personnel Section

From: PP&TO, OTJAG

1. BG Sneeden Retires.

It has been announced that BG Emory M. Sneeden will conclude his long and dinstinguished military career on 1 January 1976. Following his retirement he will accept appointment as Senior Legislative Assistant to Senator Strom Thurman of South Carolina.

BG Sneeden was commissioned as an infantry second lieutenant in September 1950, following a period of enlisted service with the 11th Airborne Division in the Far East. He served in the 82d Airborne Division, 8th Infantry Division and 24th Infantry Division (Korea) before his branch transfer to the Judge Advocate General's Corps in 1955. During his years of service with the Judge Advocate General's Corps, he has served with distinction in numerous key positions, including three years at the JAG School, Staff Judge Advocate, First Airborne (Vietnam), Staff Judge Advocate, U.S. Army, Japan, Chief, Personnel, Plans and Training, Executive Office of The Judge Advocate General, Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg and his current position as Chief Judge, U.S. Army Court of Military Review/ Chief, U.S. Army Legal Services Agency.

BG and Mrs. Sneeden and son, David, plan to make their permanent home in Columbia, South Carolina.

2. Orders requested as indicated.

Name	*From*	*To*
	MAJORS	
PEZELY, Martin	Europe	USA Retraining Bde, Ft Riley, Ks
	CAPTAINS	
BASHAM, Owen D	Canal Zone	USALSA, w/sta Canal Zone
CARLTON, Roy D	USAG, Fort Bragg, NC	USALSA, Falls Church, Va.

Name	*From*	*To*
CAULKING, John	USACIDC, Korea	USALSA, Falls Church, Va.
DENNY, Michael	Def Lang Institute Monterey, California	Europe
ECKER, Frank B	Watervliet Arsenal Watervliet, New York	Europe
GODWIN, Fitzhugh	OTJAG	USACIDC, Korea
HAINES, Lon C	USA Tng Center, Fort Dix, New Jersey	Korea
HEMMER, Paul C	USALSA, Falls Church, Va	MDW, Washington, D.C.
JACKSON, James	USALSA, Falls Church, Va.	OTJAG, Wash DC
JESELNIK, Anthony	Korea	Europe
LATCHAW, Ralph	101st Abn Division Fort Campbell, Ky.	Korea
LEE, Verndal C	9th Infantry Division Fort Lewis, Washington	Korea
MADDEN, John J	USACDEC, Ft Ord, Ca	Europe
MADDEN, Norine	USAG, Ft Ord, Ca	Europe
MEDARIS, Ronald	193d Inf Bde, Canal Zone	USA Admin Center, Ft Benjamin Harrison, Indiana
NEWELL, Robert	82d Abn Div, Ft Bragg, NC	USACC, Taiwan, APO San Francisco 96263
PARWULSKI, James	Def Language Institute Monterey, California	Japan
PRICE, Samuel S	USAG, Okinawa, APO SF 96331	USA QM Center, Ft Lee, Va.
SOLOW, Shelly	2d Inf Div, APO SF 96251	Presidio of San Francisco, CA
TROMEY, Thomas	32d Army Air Defense Cmd Europe	USA Armor Center, Ft Knox, Ky
WOLSKI, James K	Transportation Center, Fort Eustis, Va.	Korea
	WARRANT OFFICERS	
EGOZCUE, Joseph	1st HHC, Ft Bragg, NC	USA Transportation Center, Fort Eustis, Virginia
WADE, George E	USA Garrison, Ft Meade, Maryland	19th Support Group, Korea

3. Congratulations to the following officers who were promoted.

TO LTC, AUS
Gustave F. Jacobs
TO MAJ, AUS
Gary L. Anderson

4. JAG Corps RA Strength Approaches Authorized Level. The following messages were sent to the field and are reproduced for the benefit of all individual judge advocate officers:

a. Regular Army and Voluntary-Indefinite Selections for the Judge Advocate General's Corps

(1.) The Regular Army strength of the Judge Advocate General's Corps is approaching its authorized level and certain year groups are over-strength. In particular, year groups 1969 through 1973 are over-strength to the extent that few Regular Army applicants from those year groups can be selected for a Regular Army commission. In addition, year groups 1967 and 1968 are almost filled.

(2.) The JAGC Regular Army Selection Board will convene on 15 December 1975 and annually in May of each year thereafter to select the best qualified applicants for a Regular Army commission. In view of the overall Regular Army strength status of the Corps in general, and the over-strength year groups in particular, many fine officers who apply for a Regular Army commission can not be selected.

(3.) Those officers not selected for a Regular Army Commission will be considered for voluntary-indefinite status (USAR career officer on active duty) and, if selected for voluntary-indefinite, will be advised of the opportunity to apply for such status under the provisions of Army Regulation 135–215.

(4.) The JAGC Voluntary-Indefinite Board will also convene on 15 December 1975 and annually thereafter in May of each year to select the best qualified applicants for voluntary-indefinite status. In view of the current strength status of the Corps, many fine officers who apply for voluntary-indefinite status can not be selected.

(5.) Officers whose applications for either Regular Army or voluntary-indefinite status are received after the convening date of the Selection Board will be advised that their applications are being returned based upon late submission, but that they may be resubmitted prior to 15 April of the following year for consideration by the next Selection Board. Officers whose obligated period of service will be completed prior to the next Selection Board may request a short term extension under the provisions of AR 135–215 if they desire to be considered for Regular Army or voluntary-indefinite by the next Selection Board. In all such cases, the Personnel, Plans and Training Office will examine the record of each such officer and will advise those officers whose records are not competitive for selection for Regular Army or voluntary-indefinite that his record is not competitive.

(6.) All USAR officers on active duty in the Judge Advocate General's Corps should be advised of the foregoing and that only the best qualified will be selected for retention in the career force as either a Regular Army or voluntary-indefinite officer.

(7.) Special efficiency reports are not appropriate. Letters of indorsement should be brief and factual.

b. Reduction in Active Duty Obligation for Graduates of the Judge Advocate General's Excess Leave Program.

(1.) The active duty obligation for graduates of the Judge Advocate General's Excess Leave Program has been reduced to four years for ROTC scholarship officers and three years for all other graduates. The obligation begins on the date the officer enters the basic class, TJAGSA, or is admitted to the practice of law following graduation from law school, whichever occurs *first*. For officers who entered the advanced course, TJAGSA, immediately after graduation from law school, the three or four year active duty obligation began on the date the officer entered the advanced course or was admitted to the practice of law following graduation from law school, whichever occurred *first*.

(2.) The active duty obligation for graduates of the Funded Legal Education Program (AR 351–22) remains at six years.

c. Selections for The Judge Advocate General's Excess Leave Program.

(1) The Judge Advocate General has determined that no selections will be made for the Judge Advocate General's Excess Leave Program (AR 601–114) for law school classes commencing in fiscal year 7T (July-September 1976) and fiscal year 77 (October 1976–September 1977). This decision was necessitated by an overstrength in certain year groups in the Judge Advocate General's Corps.

(2) Applicants for the Judge Advocate General's Excess Leave Program who will have less than two years and more than six years of active federal service on 1 September 1976 will have their applications returned without action. Applicants for the Excess Leave Program who will have between 2–6 years of active federal service on 1 September 1976 will be considered for the Judge Advocate General's Funded Legal Education Program (AR 351–22) by a selection

board which will meet in February 1976 without further action on their part.

d. Graduate Schooling at Government Expense for Judge Advocate General's Corps Officers.

(1) A Selection Board will convene in January 1976 to select JAGC officers for Graduate Schooling at government expense for classes commencing in FY–7T (July–September 1976). The period of schooling will be for one year.

(2) Four quotas are tentatively available for Graduate Schooling during FY-7T. These four quotas are in the following disciplines: Criminal Law—1; Procurement Law—1; Administrative Law—1; and Environmental Law—1.

(3) Following completion of schooling, an immediate utilization tour of three years is required. Utilization tours are generally in the following locations: Criminal Law—Office of The Judge Advocate General, The Judge Advocate General's School, U.S. Army Legal Services Agency (Contact Appeals Division), Korea or Europe; Administrative Law—Office of The Judge Advocate General or The Judge Advocate General's School.

(4) JAGC officers with between 6–10 years of active duty may volunteer for Graduate Schooling at government expense. Written requests must be received in HQDA (DAJA-PT), Washington, DC, by 15 December 1975 to be eligible for consideration by the January 1976 Selection Board. The request must specify the discipline the officer wishes to study.

5. New Telecopier in Use in OTJAG. A newly installed Class "A" phone is now available in the Administrative Support Office, OTJAG, for use solely with the Xerox telecopier III. The new phone number is (Commercial) Area Code 202 679-4337 or AUTOVON 227-4337. The telecopier presently in use is a continuous feed, unattended answering machine capable of receiving a document of unlimited length. It will always be set to receive on a six minute per page speed. As the machine operates unattended, the caller will hear a "beep" which is the signal to begin transmission. The telecopier will be "ready to receive" 24 hours a day, seven days a week. A Facsimile Transmittal Header Sheet (DA Form 3918-R) must be used on all material to insure proper routing.

This system uses a Xerox telecopier III. Questions as to compatibility with other telecopiers should be referred to the Administrative Office, OTJAG, AUTOVON 225-2272.

Current Materials of Interest

Articles.

Comment, The Law of Homicide: Does It Require a Definition of Death?, 11 WAKE FOREST L. REV. 253 (June 1975).

Spong, The War Powers Resolution Revisited: Historic Accomplishment or Surrender?, 16 WM. & MARY L. REV. 823 (Summer 1975).

The Summer 1975 issue of the BAYLOR LAW REVIEW (Vol. 27) contains several noteworthy articles as part of its symposium on prepaid legal services: Politz, Prepaid Legal Services: The Public Interest, 27 BAYLOR L. REV. 405; Jones, Prepaid Legal Services and the Organized Bar, 27 BAYLOR L. REV. 405; Pugh, State Regulation of Prepaid Legal Services, 27 BAYLOR L. REV. 415; Richnow, Marketing Prepaid Legal Services to Meet the Consumer's Demand, 27 BAYLOR L. REV. 421; Smith, Reflections on the Ethical Development of Prepaid Legal Services, 27 BAYLOR L. REV. 427; Hendricks, Federal Income Tax Consequences of Group Legal Services Plans, 27 BAYLOR L. REV. 431; Comment, Commercial Insurance Plans on Prepaid Services, 27 BAYLOR L. REV. 511; Comment, Group Legal Services, The Ethical Evolution, 27 BAYLOR L. REV. 527; Comment, Prepaid Legal Services Plans—The Grasps of the Internal Revenue Code, 27 BAYLOR L. REV. 544; Comment, Legal Services Within Reach of the Average American: A Review of the Tunney Hearings, 27 BAYLOR L. REV. 603; Comment,

How Prepaid Legal Services Will Affect the Public, 27 BAYLOR L. REV. 621; and Comment, Prepaid Legal Services, Fee Schedules, and the Constitution: Possible Conflicts, 27 BAYLOR L. REV. 627.

Hulett, The Privacy and the Freedom of Information Act, 27 ADMINISTRATIVE L. REV. 275 (Summer 1975).

Rubinstein, Update: The Anatomy of a Bid Protest, 34 FED. B. J. 252 (Summer 1975).

Shlemon, The Service Contract Act—A Critical Review, 34 FED. B. J. 240 (Summer 1975).

Young, Thoughts on Practicing International Law, 3 SYRACUSE J. INT'L L. & COMMERCE 1 (Spring 1975).

Note, "The Applicability of Federal Common Law to Aviation Tort Litigation," 63 GEO. L.J. 1083 (May 1975).

Zadzilko, "Hospital Accident Reports: Admissibility and Privilege," 79 DICK. L. REV. 493 (Spring 1975).

Note, "Constitutional Law — Vagueness Doctrine — Police Departmental Regulation Proscribing 'Conduct Unbecoming an Officer, is Void for Vagueness. *Bence v. Breier*, 501 F.2d 1185 (7th Cir. 1974), cert. denied, 95 S. Ct. 804 (1975)," 53 TEXAS L. REV. 1298 (August 1975).

Note, "Criminal Law—Arrest Records—The FBI Has an Affirmative Duty To Take Reasonable Precautions to Ensure the Accuracy of the Information Contained in Its Criminal Files. *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir 1974)," 53 TEXAS L. REV. 1308 (August 1975).

Note, "Criminal Law—Contempt—Refusal to Rise in Federal Court Does Not Constitute Contempt of Court Under the Federal Contempt Statute. *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974)." 53 TEXAS L. REV. 1321 (August 1975).

The September 1975 issue of the CREIGHTON LAW REVIEW (Vol. 9) contains *the annual survey of Nebraska Law.* The areas of Nebraska law surveyed are: Administrative Law, Civil Procedure, Commercial Law, Constitutional Law, Criminal Law, Domestic Law, Environmental Law, Evidence, Insurance, Miscellaneous Legislation, Municipal Corporations, Property, Social Legislation, Taxation, Torts, Trade Regulations, Trusts and Succession, and Workmen's Compensation.

Angle, "Wisconsin's Fair Employment Act: Coverage, Procedures, Substance, Remedies," 1975 WISCONSIN L. REV. 696.

Salinger, "Constitutional Law—Equal Protection—One Year Residency Requirement for Divorce Is Constitutional—*Sosna v. Iowa*, 419 U.S.—, 95 S. Ct. 553 (1975)," WISCONSIN L. REV. 875.

Walker, "Witness' Use of Memoranda: Present Recollection Revived and Past Recollection Recorded," 6 CUMBERLAND L. REV. 471 (Fall 1975). Includes construction of the Alabama rules.

Ahern, "Torts—Comparative Negligence—Contributory Negligence Judicially Abrogated by California Supreme Court. *Nga Li v. Yellow Cab Co. of California*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)," 6 CUMBERLAND L. REV. 515 (Fall 1975). Includes Illinois, Florida, and Alabama positions.

Manual.

K. R. Redden & S. A. Saltzburg, *Federal Rules of Evidence Manual.* The authors are both Professors of Law at the University of Virginia. The *Manual* sells for $35 plus tax and will be supplemented annually. Contact: The Michie Company, Charlottesville, VA 22906.

Book.

Richard J. Bonnie & Charles H. Whitebread II, *The Marihuana Conviction.* (1974). The authors are both Professors of Law at the University of Virginia. Contact: The University Press of Virginia, Bemiss House, 210 Sprigg Lane, Charlottesville, Virginia, 22901.

AR Revision.

DA Circular 310-79, 9 October 1975, announces a major revision of AR 310-10, Military Orders, which will be distributed in December 1975, and become effective 1 July 1976. Under the new regulation, orders will no longer be is-

sued unless specifically authorized by AR 310–10. AR 310–10 will not authorize the issuance of orders for administrative proceedings, notwithstanding the reference to "orders" in paragraph 3a, AR 15–6. Pending revision of AR 15–6, after 30 June 1976, boards should be convened by means of a letter or Disposition Form (DA Form 2496) addressed to the President of the Board and over the command line of the convening authority. The DF should contain the same information presently appearing in the "order."

By Order of the Secretary of the Army:

FRED WEYAND
General, United States Army
Chief of Staff

Official:

PAUL T. SMITH
Major General, United States Army
The Adjutant General