DEPARTMENT OF THE ARMY PAMPHLET 27-100-44

Military Law Review Vol. 44

HEADQUARTERS, DEPARTMENT OF THE ARMY

APRIL 1969

DA PAMPHLET 27-100-44 MILITARY LAW REVIEW—1969

PREFACE

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This Review may be cited as 44 Mil. L. Rev. (number of page) (1969) (DA Pam 27–100–44, 1 April 1969).

For sale by the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, Price: $.75 (single copy). Subscription price: $2.50 a year; $.75 additional for foreign mailing.

PAMPHLET
No. 27-100-44

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., 5 *April 1969*

MILITARY LAW REVIEW—VOL. 44

Articles:

Comments:

ELECTRONIC DATA PROCESSING AND THE JUDGE ADVOCATE*

By Major Robert N. Johnson**

This article is concerned with a new type of research tool—computer oriented automatic data processing systems—available to judge advocates. The article briefly describes the history of the Army's utilization of computers. It explains, in layman's language, the processes of information storage and programming. Perhaps most importantly, it explains the use of computer records as evidence in court-martial proceedings and outlines the steps to be taken in laying the proper foundation for the admissibility of such records.

I. INTRODUCTION

Citizens of the United States function in the most highly computerized environment in the world. The United States Army has achieved greater sophistication in computer technology than any participating member of this community. More than five hundred data processing installations are operated by the Army, with over fourteen thousand pieces of automatic data processing equipment at these installations. These installations operate at a total cost in excess of one hundred eighty million dollars.[1] These resources are used to fulfill the Army's general goal as stated in U. S. Army Objectives, Chief of Staff Memorandum 64–169, 29 April 1964:

> The development, installation, and maintenance of Army information and data systems which are coordinated, standardized where feasible, and which meet the essential needs for information and data at all levels of command and in all functional areas, under all conditions from peace to general war.

The tactical role of automatic data processing as a tool of the commander will expedite the execution of the commander's decision by

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*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Sixteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] U.S. Army A.G. School Memo No. 35–1, Administration of ADPS (Dec. 1965).

rapidly processing large quantities of information and presenting it in summarized form. Automatic data processing can be a tool of both the command and staff element. The ADP systems will assist G1 in processing daily manning reports, replacement and loss estimates, prisoner of war records and reports, and graves registration. ADP can be of particular use to G2 in the preparation of collection plans and orders, assimilation of information from various collection agencies, analyzing chemical, biological, and radiological effects and enemy electronic warfare activities, acquisition of targets, and the dissemination of intelligence. ADP would aid G3 in the performance of operational analysis and preparation of plans and orders. G4 would be aided by the application of ADP in supply control, stock management, inventory control, logistical estimate of the situation, transportation and service requirements and plans, evacuation and hospitalization. G5 would be aided in the compilation of information on displaced persons and the employment records of indigenous personnel.

Many automatic data processing systems are in existence and are being planned for the Army's future use.[2] Therefore, in order to function efficiently in this highly complex society, whether advising the commander or representing the individual soldier, it is imperative that military lawyers objectively face the unique aspects of this highly developed and complex technology called electronic data processing.

Accordingly, the objective of this study is to establish the impact upon judge advocate activities in the field resulting from the Army's adoption of automatic data processing systems, and to determine the present and future utilizations of ADPS by the Judge Advocate General's Corps. Before examination of either of these objectives, a summary of Army plans for ADPS applications is appropriate. Section II accomplishes this purpose by a brief examination of two organizations at Headquarters, Department of the Army, level with data processing responsibility, the U.S. Army Information and Data Systems Command and the Data Support Command. This summary is concluded by a look at tactical automatic data processing through review of a plan known as Automatic Data Systems Within the Army in the Field.

In order that military law remain abreast of these developments and able to respond to the needs of the command in these fields, it is essential that the judge advocate be knowledgeable of the basic concepts of automatic data processing. Section III presents a capsule

[2] The author has reservations concerning the economic feasibility of the unlimited use of ADPS. However, such discussion is beyond the scope of this article.

version of the basic principles of electronic data processing systems. The field of automatic data processing may be conveniently divided into punched card data processing systems and electronic data processing systems. Punched card data processing systems include all data processing devices other than computer systems, while electronic data processing systems utilize computers. No attempt is made in this article to discuss punched card data processing, except as it relates to the input function of an electronic data processing system.

In order to present basic computer concepts, the characteristics of a particular computer will be discussed. However, this in no way indicates the author's preference for that model; it just happens to be the model with which the author is most familiar. Any reader already knowledgeable in the concepts of electronic data processing will quickly discover the liberties taken by the author in describing particular characteristics of the computer discussed. This is necessary for the illustration of general principles for the benefit of those not computer oriented.

Section IV discusses the first objective of this article: the impact upon judge advocate activities in the field resulting from the Army's adoption of automatic data processing systems. Contained therein is a discussion of the elimination of hard-copy-type personnel records in the field Army, and a general analysis of substantive areas of the military law affected by the Army's adoption of ADPS. Consideration is given to admitting "translations" of output from electronic data processing systems into evidence under the business records rule, or the official documents exception to the hearsay rule; and also to the applicability of the best evidence rule.

In Section V some of the present and future utilizations of ADPS by the Judge Advocate General's Corps are suggested and discussed. Included in this section is a discussion of an almost unknown and unused system of electronic data retrieval presently available to judge advocates in the field. In Section VI the author presents his conclusions and recommendations.

II. ARMY UTILIZATION OF AND PLANS FOR ADPS APPLICATIONS

A. *HEADQUARTERS, DEPARTMENT OF THE ARMY*

1. *AIDSCOM.*

To derive maximum benefit from the numerous related efforts in the field of automatic data processing, in 1963 the Chief of Staff established the Office of the Special Assistant to the Chief of Staff

for Army Information and Data Systems with the mission to serve as coordinator on the Army staff for overall development of all Army information and data systems.[3] His mission includes specific responsibility for development and implementation of plans, policies, and guidance for the Army's data processing systems.[4] On 8 April 1965, the U.S. Army Information and Data Systems Command (AIDSCOM)[5] was established to assist the Special Assistant, Army Information and Data Systems, in the accomplishment of its mision.[6]

2. *Data Support Command.*

The present Army Statistical and Accounting System, the outgrowth of a need for data of a statistical nature for management purposes, collects and analyzes material, thus providing a basis for future planning.[7] The basic source document of this data transmission system is still the unit morning report.[8] Since the development of the Army Statistical and Accounting System in 1940, the Data Processing Units within the U.S. Army Data Support Command, which comprise the Army Statistical and Accounting System, have converted from punched card equipment to electronic data processing systems as the means by which they are able to furnish statistical and accounting services to Headquarters, Department of the Army, and to commanders and staff officers throughout the country.[9]

The Adjutant General's responsibilities of manpower and personnel management in the field of data processing are carried out by the U.S. Army Data Support Command, which is a Class II activity of The Adjutant General's Office.[10] Prior to the organization of AIDSCOM, the responsibility to provide automatic data processing support, except for personnel systems, and to evaluate and select automatic data processing equipment for Army-wide use, was performed by the Data Command.[11]

Data Processing Units, which are the sub-units of the world-wide Army Statistical and Accounting System, are located at the head-

[3] U.S. Army A.G. School Memo No. 35–1, Administration of ADPS (Dec. 1965).
[4] *Id.*
[5] *Id.*
[6] Department of the Army policies governing the acquisition and use of ADPS were set forth in changes 2 and 3 to former Army Reg. No. 1–251, which encouraged the use of ADP equipment whenever more effective operations and greater economy could be achieved. This regulation was superseded by Army Reg. No. 18–1 (14 Feb. 1966).
[7] U.S. Army A.G. School Memo No. 35–3, The Army Statistical and Accounting System (Feb. 1965).
[8] *Id.*
[9] *Id.*
[10] U.S. Army A.G. School Memo No. 35–4, U.S. Army Data Support Command (Dec. 1965).
[11] *Id.*

quarters of each major Army command.[12] Data is transmitted from Data Processing Units in the field through an electronic data transmission system, called AUTODIN, to the Data Command.[13] The AUTODIN system is operated by the Defense Communications Agency.[14] One of the principal automated systems for which the data command is responsible provides the Judge Advocate General's Corps with various Army-wide statistics pertaining to actions taken by commanders pursuant to article 15.[15]

B. *TACTICAL AUTOMATIC DATA PROCESSING*

In 1965, a proposal for adopting automatic data processing techniques in the field army, known as the Command Control Information System, 1970 (CCIS–70),[16] was superseded by a plan known as Automatic Data Systems Within the Army in the Field (ADSAF). One of the three major systems of ADSAF, which might be of interest to judge advocates, is "personnel and logistics." [17] The U.S. Army Combat Developments Command, Adjutant General's Agency, is actively engaged in the personnel part of this system. Preliminary studies of the Agency indicate that the goal of the system is to eliminate or greatly reduce all record keeping in the field army heretofore accomplished manually and to substitute electronic data processing means for manual record maintenance.[18]

III. BASIC ELECTRONIC DATA PROCESSING CONCEPTS

A. *ESSENTIAL ELEMENTS OF ELECTRONIC DATA PROCESSING SYSTEMS*

1. *General.*

The design of any electronic data processing system evolves from the three basic considerations involved in all data processing regardless of the equipment used or the type of information to be processed: (1) the source data entering the system called input, (2) the processing of the source data within the processing unit, and (3) the final result or output from the system.[19]

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*; UNIFORM CODE OF MILITARY JUSTICE art. 15 [hereafter referred to as the Code and cited as UCMJ].
[16] U.S. Army A.G. School Memo No. 35–5, Tactical ADP (Dec. 1965).
[17] *Id.*
[18] *Id.*
[19] INTRODUCTION TO IBM DATA PROCESSING SYSTEMS 12 (I.B.M. 1960) [hereafter cited as INTRODUCTION].

Any electronic data processing system ordinarily consists of an combination of units which fall into one of three categories: input, storage and processing, and output devices. The key element of this system is the processing unit, a high speed electronic computer [20] (fig. 1).

2. *Input.*

In order to process data, a data processing system must have the ability to receive this data. Various input units are used to enter data into the system. Punched cards and magnetic tape are the two most common types of input to any electronic data processing system.[21]

The basic source document in a data processing system is the punched card. All data must be first placed into punched cards in order to be used in the system (fig. 2). If magnetic tape is desired as input, punched card data must be converted to tape records. The card is divided into 80 vertical columns numbered from left to right, each of which may contain a single character of information, such as a letter of the alphabet or a digit.[22]

The card is also sub-divided into 12 horizontal rows from top to bottom, called punching zones.[23] A character of information is represented by a single zone punch or a combination of zone punches within one of the 80 vertical columns.[24] Therefore, the maximum number of characters of information that can be contained in a single punched card would be 80.

A card reader device can transfer information from the punched cards into the central processing unit at a maximum rate of 800 cards

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[20] *Id.* at 5.

[21] Electronic Computer Programming Institute Text P-1, I.B.M. Data Processing and Computer Programming 1 (1964) [hereafter cited as *Programming.* P-1].

[22] Electronic Computer Programming Institute Text I, I.B.M. Data Processing and Computer Programming 3 (1964) [hereafter cited as *Programming* I].

[23] *Id.*

[24] The 12 zone is the topmost punching position and is followed from top to bottom by the 11 zone, then 0–9 zones in that order. The 12, 11, and 0 zones are referred to as alphabetic zones, while the 0–9 zones are called the numeric zones. Note the dual function of the 0 zone. Digits 0–9 are represented by a single zone punch in a card column. The particular zone punched corresponds to the digit that is to be represented. Letters of the alphabet are represented by a combination of two zone punches in a single card column. The first nine letters of the alphabet are in a single group, A–I, and given the numeric value of 1 to 9 respectively. The letters J–R form a second group of characters and are given the value of 1 to 9 respectively. The last 8 letters of the alphabet are in the third group and are assigned the numeric value 2 to 8 respectively. The alphabetic 12 zone is assigned to the first group of nine letters of the alphabet; the alphabetic 11 zone is assigned to the second group of nine; and the alphabetic 0 zone is assigned to the last group of eight. Therefore, a letter of the alphabet is represented in a single vertical column of a punched card by a combination of 2 punches; the first is a punch in the alphabetic zone assigned to its group, and the second is a punch in the numeric zone corresponding to its assigned value of 1 to 9 within its particular group. *Programming* I. 3–6.

Figure 1

per minute.[25] Although the punched card is the basic source document in an electronic data processing system, information is often transferred from the source document to magnetic tape as magnetized spots prior to entry into the central processing unit. This magnetic tape then becomes the principal input medium to the computer system, as a tape unit offers entry of data into the computer system at a speed of approximately 340,000 characters per second,[26] or an entry rate approximately 340 times faster than input by a card reader.

The recording of information on magnetic tape for entry into the computer system is accomplished by the movement of the magnetic tape across a read-write head within a tape unit which magnetizes spots in a vertical column similar to that of a punched card.[27] This recording procedure is similar to the recording process by a tape recorder. The recording can be retained forever, or the information is automatically erased when another recording on the same tape is accomplished. Most information to be entered into an electronic data processing system is transferred either to the central processing unit through a card reader device in the form of a punched card, or from the punched card into magnetic tape format and entered into the central processing unit through a tape unit (fig. 3).

3. *Storage in the Central Processing Unit.*

Information must enter the central processing unit after its exit from one of the input units; it is this component which actually processes the data. All the circuitry for interpreting the programmer's instructions to the system, performing data operations and arithmetic functions, making logical decisions, and directing all units of the electronic data processing system is contained in the central processing unit.[28]

In addition to the circuitry necessary for processing the data, the central processing unit contains an area called "storage."[29] The punched card could be described as a storage element; it could store one character for each card column. The punched card contains eighty positions of storage. Storage in the central processing unit contains

[25] *Programming* P–1 at 1.
[26] INTRODUCTION at 26.
[27] *Id.*
[28] *Programming* P–1 at 4.
[29] *Id.*

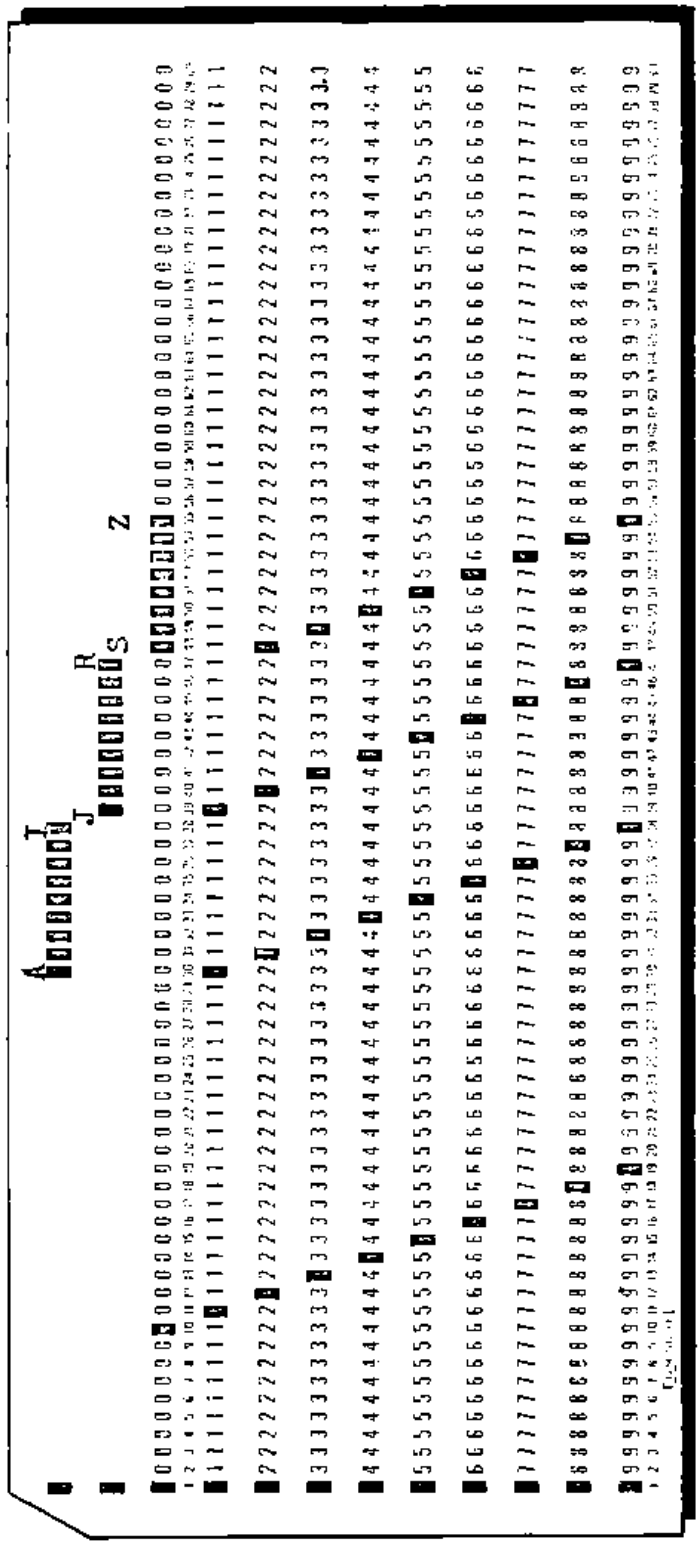

Figure 2

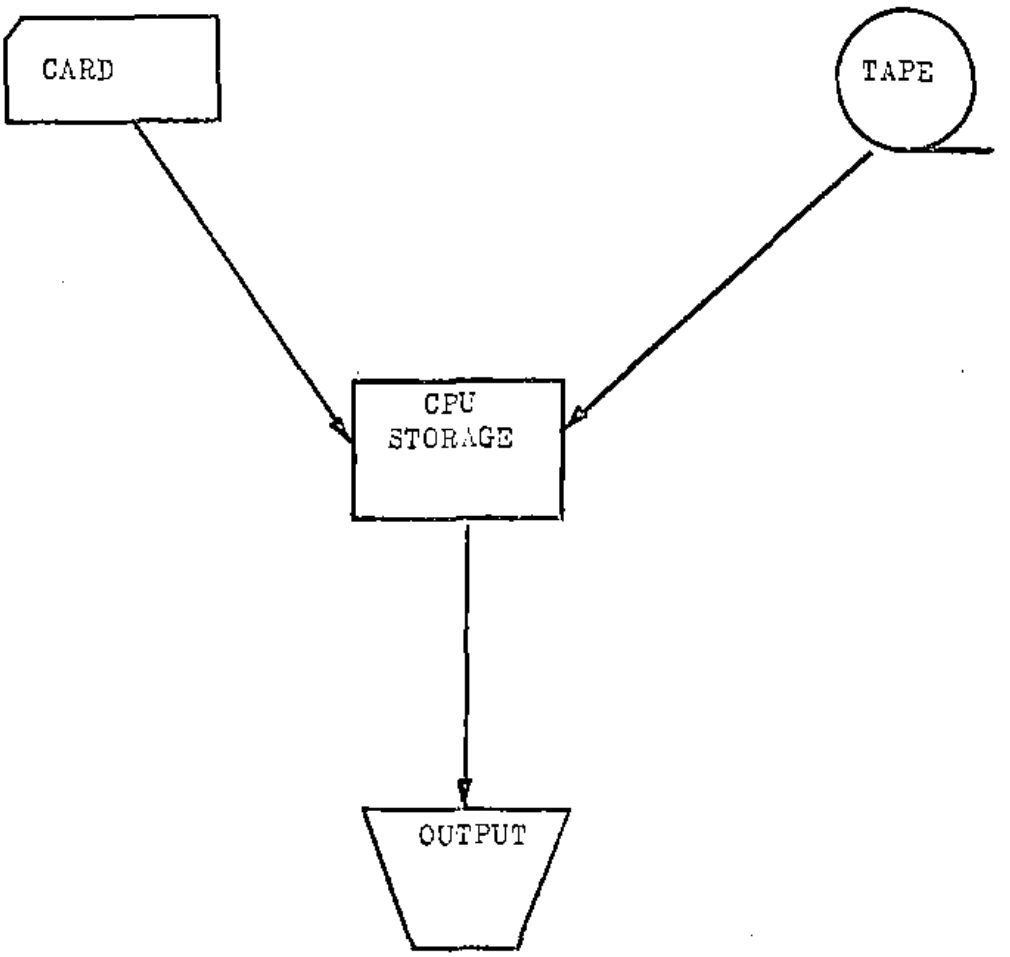

Figure 3

thousands of positions of storage. The number of positions of storage contained in any computer system is dependent upon the manufacturer of the computer in question and the model of that particular manufacturer.

Every position of storage can contain only a single character of information and, like each column in the card, is referred to by an "address." [30] The last column in the card is addressed as column 80. Consequently, the 80th position of storage would be referred to by the address 80, assuming the first position of storage is addressed as position 1. Within a single storage location in the central processing unit, a digit or letter of the alphabet is represented by the magnetizing of a unique combination of tiny rings of ferromagnetic material in a manner similar to the representation of data in a punched card by a combination of punches in a particular column.[31]

[30] *Id.* at 10.
[31] *Id.* at 11.

The procedure the data processing system follows to accomplish a given function is determined by a series of instructions to the computer, called a "program," and written by a "Programmer." In order for the system to execute the instructions written by the programmer and thereby accomplish its mission, the instructions and the data to be operated upon must be stored in the central processing unit by one of the input devices.

4. *Output*

After the input data is stored within the central processing unit and assorted according to the execution of the programmer's instructions, the final product, or "output," exits the system through one of the three basic output elements: (1) punched card output, (2) magnetic tape output, or (3) printed output[32] (fig. 4).

If the card punch device is used as the output element, information can exit the system at a maximum rate of approximately 250

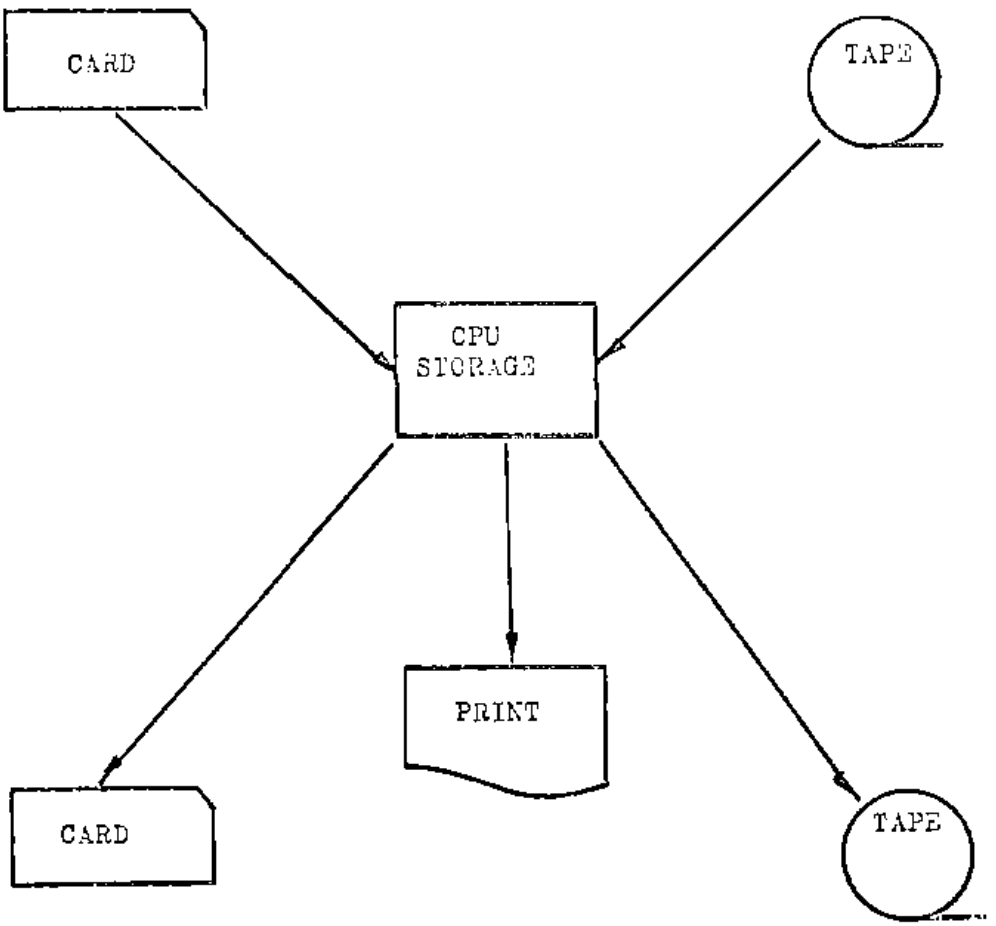

Figure 4

[32] *Id.* at 4.

cards per minute.[33] The tape device, as noted previously, provides a maximum rate in excess of three hundred times faster.[34] Printed output can be obtained at a maximum rate of 1200 lines per minute.

B. *PROGRAMMING*

A programmer, when assigned a problem, is provided with the type and format of his input data. His specifications will also include the type and format of the desired output. His job is then to write a program of detailed instructions which will cause the central processing unit, upon receipt of the raw input data, to convert such data to the desired output.

1. *Analysis of the Problem.*

The programmer's logical and orderly approach to the problem requires that he understand completely what is required by the program. He is never to make assumptions.

In order to illustrate programming techniques, let us follow a simple problem to its conclusion. A programmer's supervisor states that the type of input for a particular program will be a punched card containing four items of information: (1) salesman's name; (2) sales; (3) returns; (4) commission percentage. The output required must be a printed report containing name and the amount of commission based on sales.

The immediate problem facing the programmer is whether to calculate the salesman's commission on the basis of gross sales or net sales, which would be the amount of his sales minus the merchandise returned The programmer must seek clarification from the supervisor as he is forbidden to make an assumption in his analysis of the problem. In this hypothetical case, the supervisor states that the salesman's commission is to be based on net sales.

2. *Block Diagramming.*

The next step for the programmer in the orderly and efficient solution of this problem is to translate the sequence in which the instructions are to be executed in a graphic manner into a logic diagram called a "block diagram." This documentation allows the programmer to insure that his instructions will be in sequence and none will be omitted. A secondary purpose of the block diagram is to allow any programmer to grasp its logic long after it is written (fig. 5).

Information cannot be processed until it has been read into storage. Therefore, the first step in the block diagram provides for this. The

[33] Compare with the input rate of 800 cards per minute. The mechanical operation of punching a hole in a card is considerably slower than sensing holes already punched.

[34] *Programming* P-1 at 4.

Figure 5

four fields of information contained in the input punched card are read into storage in the central processing unit and available for processing. The next step is to perform the necessary calculation which will result in net pay. The third step performs the necessary calculation which results in the salesman's earned commission. The desired result is now in storage, but the specifications require us to provide an output instruction to print the answer. All the necessary requirements have been met and the block diagram indicates we have reached the end of our job.

3. *Coding the Instructions.*

After the block diagram has been satisfactorily completed, the next step is the coding of the instructions in a computer language, which follows a unique set of grammatical rules. The instructions are written in sequence as they appear in the block diagram, usually coded one instruction per block.

Before coding our hypothetical problem in our hypothetical computer language, it is imperative that we know the exact columns of the input card in which the various fields of information are located. Assume that the supervisor states that the input is in the format described in figure 6. First, the programmer must know the instruction format and the language of the particular computer. The instructional format of most computers requires at least two items: (1) an operation code which states the function to be performed, and (2) the storage location, or "address," of the data to be operated upon.

Let us assume that our computer language consists of the operation codes and their function as presented in figure 7. Before the programmer writes the instructions in the sequence in which they appear in the block diagram, he must identify the location of the data from the input card after it is read into storage. A look at the function of the read instruction indicates that when a punched card is read, the information therefrom is placed in the corresponding locations in storage.

The first step in determining the location of such data is to equate the fields of information with their unit's position in storage, in order that the computer may know where the information is placed:

```
NAME ---------- EQU ---------- POSITION 20
SALES --------- EQU ---------- POSITION 35
RETURNS ------- EQU ---------- POSITION 55
%  ------------ EQU ---------- POSITION 80
```

After equating the fields of information in the punched card to the storage location of their unit's position, the instructions are coded sequentially as illustrated in figure 8.

When the individual instructions which make up a program are coded, they are punched into cards and are loaded into storage. When the last instruction is placed into storage, the central processing unit begins to execute the instructions and produces the desired output. The programmer's job is complete. An average program might contain from one hundred to one thousand instructions.

Although computers are often described as machines that can "think," anyone familiar with the basic concepts of electronic data processing must agree that this is, of course, not true. The problem must be analyzed, reduced to a block diagram, and coded into proper instructions by the programmer. Like other machines, computers are

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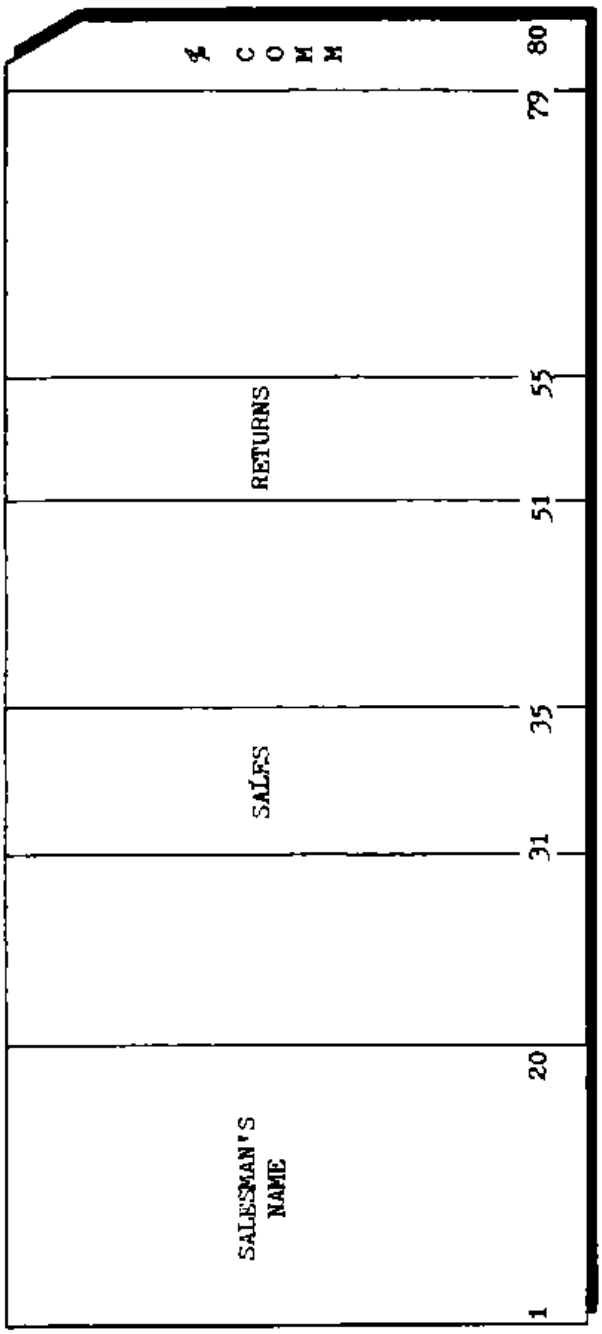

Figure 6

OPERATION CODE	FUNCTION
EQU	TO EQUATE A NAME WITH UNITS POSITION OF NUMBER IN STORAGE
MULT	MULTIPLY TWO NUMBERS
READ	READ A CARD INTO STORAGE POSITIONS 1-80
PRINT	PRINT A LINE OF INFORMATION FROM STORAGE ONTO PRINTER
SUB	SUBTRACT TWO NUMBERS
HALT	END OF PROGRAM, HALT

Figure 7.

```
NAME      EQU     POSITION 20

SALES     EQU     POSITION 35

RETURNS   EQU     POSITION 55

%         EQU     POSITION 80

          READ

          SUB     RETURNS, SALES

          MULT    NET SALES, %

          PRINT

          HALT
```

Figure 8

dependent upon people for their operation and control. They are, however, able to handle tremendous amounts of data at lightning speeds. The manner in which such data is handled depends upon the ingenuity of the men who command them.

IV. IMPACT UPON JUDGE ADVOCATE ACTIVITIES IN THE FIELD RESULTING FROM THE ARMY'S USE OF ADPS

A. *AREAS OF IMPACT*

There are numerous judge advocate activities that will feel the impact resulting from the Army's adoption of automatic data processing systems. However, only those areas that have a direct impact upon the activities of the judge advocate in the field are explored. The discussion is further limited to judge advocate courtroom activities. It is recognized that the fields of tort law, procurement, military affairs, and even international law will possibly be affected by this new technology. The problems presented in all areas of military legal practice as a result of the Army's use of ADP will prove to be similar, and the solutions will be analogous to those discussed in reference to military justice activities.

Detailed discussions of substantive law principles have been purposely avoided. It is assumed that the military lawyer has the basic knowledge in the areas under discussion. Accordingly, only those portions of the law as affected by the adoption of ADPS are discussed.

B. *ELIMINATION OF HARD-COPY-TYPE PERSONNEL RECORDS*

44 U.S.C. § 396(a) (1964) provides the statutory basis for the creation of most records, as it places upon the head of each federal agency the responsibility to create and preserve records with the information necessary to protect the rights of the Government and persons affected by the agency's activities. In the absence of a statute, however, such reports and records would probably be kept anyway.

Assuming, however, that this statutory language is the basis for the creation of records, it becomes important to determine if the Army's proposed elimination of hard-copy-type personnel records, and the substitution of information in the form of impulses on magnetic tape, qualifies as a record in light of current laws, thus allowing the elemination of paper records.

Within its comprehensive definition of a record, 44 U.S.C. § 366 (1964) includes any documentary materials, regardless of physical form or characteristics. All government agencies are controlled in clas-

sifying items as records, as the definition of a record is statutory in origin.[35] The definition of records set out above is broad enough to include information contained on magnetic tape, thus obviating the need to retain hard-copy source documents.

C. *RULES OF EVIDENCE*

The admissibility of output from ADPS in court-martial proceedings is an important legal issue. As the admissibility of records under the usual rules of evidence is not based solely on the statutory qualification of a document as a record, it is important to determine if the rules of evidence require retention of source documents solely for possible use in legal proceedings.

1. *Admissibility of Computer Records Without Regard to Manual Provisions.*

a. Admissibility of Computer Records as a Class. In *N.L.R.B. v. Pacific Intermountain Express Co.*,[36] the court accepted the graphic records of a tachometer as evidence of the driving speed of a motor truck. The weight to be accorded the evidence was left for the determination of the fact-finding body. The graphic representation of information in magnetic bit form in a data processing system is analogous to the graphic record of a tachometer. Hence, there should be no barrier to admitting computer records as a class.

An IBM punched card containing undecipherable machine accounting symbols was held to be inadmissible as a U.S. Department of Agriculture form in *Sunset Motor Line, Inc. v. Lu-Tex Packing Co., Inc.*[37] The record was inadmissible because it was not certified as required by the Federal Rules of Civil Procedure. If the necessary official certification had been present, the punched cards should have been admissible.

b. Admissibility Under the Business Entries Rule. New types of records in computer systems can satisfy the underlying test of trustworthiness required by the business entry rule, if made at the time of the act or event, or within a reasonable time thereafter. There is no doubt that a magnetic tape record, made in the regular course of business, and satisfying the test of trustworthiness, qualifies as a business entry.

However, both the original entry in punched card form and the magnetic tape record are unintelligible in their recorded form as

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[35] COMBAT DEVELOPMENTS STUDY, *Legal Implications of Projected Automation of Personnel & Administration and Logistics Operations in Support of the Army in the Field, 1970*, p. 6 (United States Army Combat Developments Command 1966) [hereafter cited as *Legal Implications*].

[36] 228 F.2d 170 (8th Cir. 1955), *cert. denied*, 351 U.S. 952 (1956).

[37] 256 F.2d 495 (5th Cir. 1958).

punched holes or magnetic impulses. Before the record can be offered in evidence it must be translated into an understandable written document. Any electronic data processing system can mechanically produce such printed output without error if a correct program is provided by a programmer.

In *Transport Indemnity Company* v. *Seib*,[38] the Supreme Court of Nebraska upheld the admission of business records prepared by electronic data processing equipment and stored on tape. The exhibit offered in evidence was a translation of the magnetic tape record in the form of a computer print-out. *No distinction was made between the record and its translation.* This decision was based on a detailed explanation of electronic data processing procedures to the court. The method and system employed were demonstrated in detail along with the internal checks and proofs of the system. The law's requirement that trustworthiness be demonstrated was satisfied by a demonstration of the reliability of the output.

It is suggested that business entries in the form of computer print-outs meet the criteria for admissibility as evidence in courts-martial as they already enjoy judicial acceptance. The acceptance of computer print-outs is the only practical solution to the problem presented by this technical achievement.

Printing devices in electronic data processing systems are nothing more than translators of a mechanized nature; analogy should be made to precedents concerning interpreters or translators of foreign languages.

c. Best Evidence Rule. The use of computer records as evidence should not be prohibited by the rule requiring the offeror of written evidence to produce the original document unless it is not available through no fault of his own. Although a magnetic tape qualifies as a record, the best evidence rule should not require the offering of the tape record which is not a writing in the usual sense. The offering of the machine-printed translation should be the vehicle for making the contents of the tape a matter of record, provided assurances are present that all the recorded data have been reproduced. Following the analogy to translation, all print-outs would be duplicate originals.

d. Official Records. In order to classify a tape record as an official record, it must be a written recording of a certain fact or event, made by a person in the performance of an official duty, imposed upon him by law, regulation, or custom, to record such fact or event and to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the matter recorded.[39] The tape record would

[38] 178 Neb. 253, 132 N.W.2d 871 (1965).

[39] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, ¶ 144*b*.

be within the official records exception to the hearsay rule upon presentation to the court of evidence of the trustworthiness of the recorded information. A proper foundation must be established by a detailed explanation of electronic data processing procedures and demonstration of the reliability of computer output. This suggested procedure is based on the assumption that regulations would be promulgated, which, if followed as prescribed, would by their very nature insure the trustworthiness and accuracy of the recorded information.[40]

However, as an exception to the best evidence rule, only an exact copy of the original is admissible in evidence as an official record. The authentication necessary for such copies must contain the custodian's statement that the authenticated instrument is a true copy of the original. Production of an exact copy would produce a magnetic tape record unintelligible to the reader. As in the business entries exception to the hearsay rule, a translation of the magnetic impulses to a printed output format is necessary to produce an understandable record. Even if this exception to the best evidence rule contemplates a document understandable in its original form, the analogy to translation is pertinent. It is this translation which is needed by the court.

The only reported case in this area, *Transport Indemnity Company* v. *Seib*, dealt with the business records, rather than official records. The rationale of this decision, however, seems to admit translations of official records in magnetic tape form. The court made no distinction between the tape record and its translation. As the primary distinction between these two exceptions to the hearsay rule is that the official records exception is concerned with the authentication of copies of records, as opposed to the record itself, it seems appropriate to consider an authenticated translation as a copy.

2. *Manual for Courts-Martial, United States, 1969.*

The foregoing cases and discussion concerning the admissibility of computer records provides the basis for the present provisions in the *Manual for Courts-Martial, United States, 1969*, which eliminate the problems in admissibility found in most jurisdictions. Two methods of compliance with the best evidence rule are provided:[41] first, by the testimony of a person sufficiently familiar with that particular system, who is able to translate the writing accurately; or second, by a machine translation which must be authenticated by the testimony of a witness knowledgeable of the particular system. In either case, the proof of the contents of the writing requires the testimony of a witness with some expertise in the field of data processing and the particular machine used.

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[40] *Legal Implications* at 17.

[41] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, ¶ 143*a*(2)(a).

An accurate written translation of an official record will constitute a copy or extract copy.[42] This is true whether the translation is made by machine or by a person. The attesting certificate of the custodian of the record, or his deputy or assistant, certifies that the writing to which the certificate refers is an accurate translation.[43]

Therefore, a certified translation of an official record created by an electronic data processing system is admissible as an exception to the best evidence rule. In this instance, the testimony of a person sufficiently familiar with the machine used, who can translate the machine record in court or authenticate in court an already existing translation of the record, is unnecessary. This requirement must be met, however, in the case of certified copies of machine records other than official records or banking entries.

V. PRESENT AND FUTURE POSSIBLE UTILIZATIONS OF ADPS BY THE JUDGE ADVOCATE GENERAL'S CORPS

A. *GENERAL*

The second objective of this article is to determine the present and future possible utilizations of automatic data processing systems by the Judge Advocate General's Corps by an explanation of the areas wherein the judge advocate could utilize ADPS for his benefit. Singular emphasis is given in this section only to those uses of ADPS within the Corps that would directly benefit the judge advocate in the field. All possible utilizations of ADPS by the military lawyer fall into one of two categories: the maintenance of statistical information, and legal research.

B. *MAINTENANCE OF STATISTICAL INFORMATION*

The primary purpose of any non-scientific data processing system is to accumulate or total information by proper classification, and to provide this statistical information in an orderly and meaningful fashion. The ability of a high speed computer in an electronic data processing system to process voluminous amounts of data at a high rate of speed should be utilized by the judge advocate.

Statistical type data of interest to the commander and the judge advocate regarding nonjudicial punishments and inferior courts-martial could be compiled by computers presently available at most major installations or at a higher echelon of command. Statistical data as to the personal history of the accused, types of offenses, results of non-judicial punishments or trials, and sentences would provide the input to such a data processing system. The result would be a

[42] *Id.* at ¶ 143a(2)(c).
[43] *Id.* at ¶ 143b(2).

highly beneficial compilation and classification of this information which would prove useful to the judge advocate and commanders at all echelons of command.[44] Any report, such as the quarterly report as to the number of cases tried, desired by The Judge Advocate General or commanders in the field, could be produced as printed output.

All current reports in the field of claims could be prepared by the computer. All echelons of command could be provided current data concerning claims being processed by types, amounts claimed, claims paid by types, and total amount paid.

These are but two examples of areas of utilization of ADPS by the judge advocate. Any statistical data concerning the judge advocate's spheres of activity, and of interest to either the judge advocate or the commander, could be accumulated and classified by an electronic data processing system.

C. *LEGAL RESEARCH*

In 1960 at the Annual Meeting of the American Bar Association in Washington, D.C., the use of the computer as a tool of legal research was first demonstrated.[45] Statutes were the first field of law chosen for this demonstration.[46]

The Office of the Staff Judge Advocate, Air Force Accounting and Finance Center, began to explore the use of the computer as a tool for legal research in 1961.[47] The outgrowth of the proposals submitted by that office was an electronic data processing research service called LITE, Legal Information Thru Electronics.[48]

In the LITE System every word of the following source documents of possible interest to Army judge advocates is stored on magnetic tape:[49]

United States Code (1964 ed.).

All Published Decisions of the Comptroller General of the United States.

Manuscript (unpublished) Decisions of the Comptroller General from 1954.

Armed Services Procurement Regulations (ASPR).

Fiscal Year 1966 Appropriation Acts.

Fiscal Year 1967 Appropriation Acts.

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[44] The high cost of producing such output must be balanced with the need for the information.

[45] Horty, *Use of the Computer in Statutory Research and the Legislative Process*, A.B.A. HANDBOOK, COMPUTERS & THE LAW 48 (CCH 1966).

[46] *Id.*

[47] Davis, *The LITE System*, 8 AF JAG L. REV. (No. 6) 6 (Nov.–Dec. 1966) [hereafter cited as Davis].

[48] *Id.*

[49] I–1 LITE NEWSLETTER 1–2 (Jan. 1968) [hereafter cited as LITE].

International Law Agreements (unclassified).
Defense Contract Audit Manual.
Military Joint Travel Regulations.
Civilian Joint Travel Regulations.
DOD Directives and Instructions.
DOD Pay and Entitlements Manual.
Court of Military Appeals Decisions (CMR).
Board of Review Decisions (CMR).

All of the information contained therein is available for processing and retrieval.

The LITE System searches the entire text of a body of information or "data base" in accordance with the searcher's requirements.[50] By using the total text approach, the LITE System does not rely on abstract citations or condensed scope lines, thus eliminating the human judgment factor inherent in any manual abstracting technique.[51] In its search of an entire data base, the LITE System retrieves for the researcher's use all the material containing particular words and phrases considered relevant to the user's problem.

The research services of the fully operational LITE System may be utilized by any defense agency, branch of the armed forces, judge advocates, accounting and finance officers, and procurement personnel at no cost to the user, except for extraordinary searches.[52] Services will be on a cost reimbursement basis for users outside the Department of Defense.[53]

Maximum benefit of LITE's research service is attained when the user's manual research is unsuccessful, his time is limited, his library is incomplete, the subject matter of the user's inquiry is not indexed, or the user has a need for exhaustive research.[54]

Military attorneys interested in using the LITE System must first identify their problem and, second, indicate the data base or source documents to be searched.[55] The judge advocate's inquiry can then be forwarded to: Staff Judge Advocate, Air Force Accounting and Finance Center, 3800 York Street, Denver, Colorado 80205. That office will frame the search for the user, and the results will be reviewed for accuracy.[56] But this method of inquiry should be avoided, if possible, by the judge advocate who desires a search, for he is usually an

[50] *Id* at 1.
[51] Davis at 7.
[52] LITE at 3.
[53] *Id.*
[54] Dietemann, *Using LITE for Research Purposes*, 8 AF JAG L. REV. (No. 6) 11 (Nov.–Dec. 1966).
[55] *Id.* at 12.
[56] *Id.*

expert in the field of substantive law he wishes to research and can best frame his own inquiry.

A recent search of the LITE System by a member of the staff and faculty of The Judge Advocate General's School, U.S. Army, in which the inquiry was "must an Article 31 warning be given before a suspect may be asked to identify himself?" is a prime example of why the user should frame his own search. In this instance, the search was framed by LITE personnel. After the question was put to the computer in the form of key words by LITE personnel, the printed output provided the cases concerning the interrogator identifying himself, as well as the suspect having to identify himself. The user, who was more familiar with his problem and the substantive law involved, could have framed his search to limit the computer output to those cases in which the word "identify" applies only to the "accused."

Accordingly, the best method is for the user to frame the search himself. In order to do this, he must identify the key words and phrases and the interrelationships among them,[57] and then put these search concepts on search framing forms obtained from the Staff Judge Advocate, Air Force Accounting and Finance Center.[58] The information on these forms will actually be punched into cards and subsequently fed into the computer to produce the desired output.[59] The detailed mechanical techniques of user search framing are beyond the scope of this article. However, because of the potential of the LITE System and the importance of user search framing, the LITE search manual has been reproduced as an appendix to this article. The judge advocate user must master these mechanical techniques in order to obtain the most meaningful output.

The results of the LITE computer searches are printed in one of three formats as specified by the user.[60] The CITE format is a list of retrieved document citations with a note identifying the document's subject matter.[61] The KWIC, Key-Word-In-Context, format displays the use of the search words as they actually appear in the text.[62] The computer produces three lines of printed matter with the key word in the middle line.[63] The PRINT format prints the total text of each output document.[64]

In this section, only the LITE System has been discussed in the field of information retrieval. Many organizations are experimenting

[57] *Id.* at 13.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 14.
[61] *Id.*
[62] *Id.* at 15.
[63] *Id.*
[64] *Id.*

with various legal information retrieval systems with varied degrees of success. However, the LITE System is the most sophisticated legal information retrieval system in existence, and the only system presently available to judge advocates. Because of the advanced state of the LITE System and the extensive research and development by the Air Force in this area of information retrieval, common sense dictates that no new systems will appear on the military horizon in the near future. *Army judge advocates, by their continued use of the LITE* System, should contribute to its potential growth and perfection.

VI. RECOMMENDATIONS

As previously stated, the objective of this article has been twofold: first, to establish the impact upon judge advocate activities in the field resulting from the Army's adoption of automatic data processing systems; and, second, to determine the present and future possible utilizations of ADPS by the Judge Advocate General's Corps.

A. *CONCLUSIONS*

The search for this twofold objective has revealed the following salient points.

1. *Electronic Data Processing Systems Are Here To Stay.*

As long as Army commanders and their staff elements require greater volumes of current information to expedite the execution of their orders, automatic data processing systems will serve as a tool of both the command and staff elements. Development of the U.S. Army Information and Data Systems Command, and the Data Support Command, at Headquarters, Department of the Army level, and the proposed substitution of electronic data processing means for manual record maintenance at the tactical level, indicate that automatic data processing techniques will hereafter be utilized throughout the Army.

2. *Computers Are Not "Thinking" Machines.*

Because of an erroneous assumption that computers have the ability to "think," personnel often harbor a fear of displacement by these mechanical monsters. An analysis of section III reveals the absurdity of this conception. These devices are not thinking machines; their thinking ability is non-existent. Their function is to carry out complex operations, already solved by programmers who command these machines by stored instructions, at a rate faster than humans can perform. *An error of the programmer* in either the analysis of the problem, block diagram, or coding the instructions will produce erroneous output. A computer will perform erroneous instructions as fast and in as exact a manner as it does correct commands.

3. *Military Lawyers Must Become Knowledgeable in ADPS.*

Because of the impact upon judge advocate activities in the field resulting from the Army's adoption of ADPS, judge advocates must become knowledgeable concerning automatic data processing systems in order to remain abreast of developments in the legal field. This conclusion is required by the elimination of hard-copy-type personnel records and the effect of such action upon the admissibility of evidence in court-martial proceedings. In order properly to conduct the direct examination or cross-examination of expert computer witnesses, the lawyer must have some knowledge of these systems if he expects to have the translation of a computer record offered in evidence or to suppress such evidence.

4. *Computer Records Are Admissible As a Class.*

The cases in section IV.C., subdivision 1*a*, clearly indicate that computer data, and their authenticated translations, are accepted by the courts.

5. *Computer Records and Translations Admissible Under the Business Entry Rule.*

New types of records in computer systems and their translations, if otherwise qualified as a business entry, are admissible as evidence.

Prior to the adoption of the *Manual for Courts-Martial, United States, 1969*, which permits such records to be admitted as evidence in a court-martial proceeding, the judge advocate found judicial acceptance for the admissibility of computer translations as a business entry as noted above.

6. *Use of Computer Records Are Not Prohibited by Best Evidence Rule.*

The 1969 Manual provisions eliminate this problem; following the analogy to translation, all print-outs are duplicate originals.

7. *Computer Records Are Not Prohibited by Official Records Exception to Hearsay Rule.*

The rationale of *Transport Indemnity* seems to admit translations of official records in magnetic tape form.

8. *Computer Records Admissible As Evidence Under 1969 Manual.*

All problems concerning the admissibility of computer records and their translations ceased to exist upon adoption of the *Manual for Courts-Martial, United States, 1969*. A certified translation of an official record created by an electronic data processing system is admissible as an exception to the best evidence rule. In this instance, the testimony of a person sufficiently familiar with the machine used, who can translate the machine record in court or authenticate in court

an already existing translation of the record, is unnecessary. However, this requirement must be met in the case of otherwise admissible certified copies of machine records other than official records or banking entries.

9. *Judge Advocate Maintenance of Statistical Information.*

Any statistical data, of interest to either the judge advocate or the commander, concerning judge advocate activities, could be accumulated and classified by an electronic data processing system.

10. *Legal Information Thru Electronics Has Potential.*

Cost delays incident to the use of manual research methods can be reduced by the judge advocate's utilization of the speed and accuracy of the LITE System. The potential of the LITE System will never be fully realized unless there is an increased use of the system by Army judge advocates.

B. *RECOMMENDATIONS*

The military affairs opinions on file in the Military Affairs Division, Office of The Judge Advocate General, should be made available as a data base to the LITE System. These opinions would then be available for searches by judge advocates in the field.

LITE's research services should be advertised to the military lawyers in the field.

Instruction on basic computer concepts should be provided Basic Class students and instruction on data processing principles should become a permanent part of the Advanced Class curriculum at The Judge Advocate General's School, U.S. Army; such instruction should include techniques of framing LITE searches.

Consideration should be given to establishing, within the Corps, a small group of computer trained judge advocates with a view to the establishment of common data processing programs for use of the judge advocate in the field in the gathering of statistical information and rendering of required reports.

APPENDIX*

INTRODUCTION

The use of the LITE system for legal research requires no knowledge of computers. Anyone who has sufficient familiarity with the United States Code, the decisions of the Comptroller General, the Armed Services Procurement Regulation and other text bases which have been added to the files to be able to find relevant material by traditional means will be able to employ this system with a minimal amount of effort and instruction.

There is no magic in computer searching. A computer search will provide you with exactly the same thing which you would obtain by traditional research, that is, reference to legal documents which may be applicable to the solution of your problem.

The complete text of each section of the United States Code, the complete text of each published decision of the Comptroller General and the complete text of the Armed Services Procurement Regulations (ASPRs), constitute the body of legal information which may currently be searched by the LITE system. (You will be advised as new files are added to the system.) Each section of the Code, and each Comptroller General's Decision is regarded as a single document. In the ASPRs, a numbered paragraph is regarded as a document. All of these documents have been stored in the computer, and may be printed out in response to a search inquiry.

Using the legal documents which it has stored, the computer creates an internally stored index to all but the most common words which comprise the actual language of these documents. In this index, on which the search itself is performed, each non-common word or number which appears in the text is assigned a three-part number. This number identifies the document in which the word is used, the sentence within that document in which it appears, and the position it occupies within that sentence. Thus, the third word in the fourth sentence in document 846 would be assigned the number 846.4.3. Certain common words, such as "the", "and", "but" etc., are counted but not assigned numbers. (See page 55)

*LITE SEARCH MANUAL (Air Force Accounting and Finance Center)

How to select search words

All of the non-common words are then arranged alphabetically, and each of these words is followed by a precise reference to every place in the entire collection of documents where that word is used. The way to obtain documents applicable to your problem, then, is to specify the word or words which you think it should contain if it is to have any bearing on the question in which you are interested. Since it is your intention to extract from the entire collection of documents only those which have potential relevance to your question, words should be chosen and combined that are very likely to appear in relevant documents, and unlikely to appear in irrelevant ones.

If, for example, you had a problem relating to a warehouse, you might present the word WAREHOUSE to the computer and command it to print out every document which contains that word. The computer would go through the word index until it found warehouse and make a list of the document numbers of every document in which that word appeared. It would then go to the stored documents and print each one whose number appeared on the list it had made.

If you wished to make the search more exhaustive, you would include such additional words as warehouses, storeroom, storerooms, storage and the like. The computer will perform the same operation for each of these words, simply adding to its list of document numbers those which it finds beside each word you have specified.

If, on the other hand, your problem dealt only with warehouse charges, you might wish to make your search more restrictive. In this case, you would ask the computer to print only those documents which contained both warehouse and charges. The computer would list the document numbers for each of those words separately. It would then compare the two lists and retain only those document numbers which appeared on both of them. These documents would then be printed out.

In essence, the retrieval of relevant documents is determined by your selection of significant words, and the relationship between these words which you specify. The following pages will

explain and illustrate the proper procedure for selecting your word lists and organizing the relationships among them. It is designed to be studied in order of presentation, but with the hope that the description of each command will be sufficiently clear to satisfy a desire for quick reference after the use of the system is understood.

The or command

Once you have selected a list of words, enter the identifying label GROUP 1 in the first column of the search statement. On the same line, in the second column, enter the command OR. then enter in the third column on the same line the first word of your list.

GROUP 1	OR	OFFICER	

If your list consists of more than one word, that is, if you wish to include grammatical variations and synonyms, you may enlarge the contents of GROUP 1 by repeating the command OR in column 2 on each succeeding line and entering beside it an additional word in column 3.

GROUP 1	OR	OFFICER	
	OR	OFFICERS	
	OR	AGENT	
	OR	AGENTS	

The effect of this statement is to create a list of all the locations of each of these words, identify them by the label GROUP 1, and store them until another command has been given.

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For example, if your research problem was to find all the locations of words which express the concept of transportaion, your list may resemble the following:

GROUP 1	OR	TRANSPORT	
	OR	TRANSPORTING	
	OR	TRANSPORTED	
	OR	TRANSPORTATION	
	OR	MOVE	
	OR	MOVEMENT	
	OR	SHIP	
	OR	SHIPMENT	

The word + or — command

In many instances, the potential relevance of a document may be more strongly suggested by the occurrence therein of a specific phrase, or a set of words in very close proximity to one another. To identify the presence of such phrases or close configurations of words, the WORD — OR + command is used.

Specific Phrase

A specific phrase may be located by identifying one word of the phrase, called the base-word, and counting the exact number of words from that word to another word in the phrase. For example, the phrase disbursing officer would be located by identifying the

word OFFICER as the base-word and counting the number of words by which DISBURSING precedes (-) it. The instruction to the computer would be:

GROUP 1	OR	OFFICER	
	WORD - 1	DISBURSING	

The same phrase could be located by using the word DISBURSING as the base-word, and counting the number of words by which OFFICER follows (+) it.

GROUP 1	OR	DISBURSING	
	WORD + 1	OFFICER	

Note the following phrases and observe the way in which they are constructed:

DEPARTMENT OF DEFENSE

GROUP 1	OR	DEPARTMENT	
	WORD + 2	DEFENSE	

or

GROUP 1	OR	DEFENSE	
	WORD - 2	DEPARTMENT	

COURT OF MILITARY APPEALS

GROUP 1	OR	APPEALS	
	WORD -3	COURT	

or

GROUP 1	OR	COURT	
	WORD +3	APPEALS	

Note in the immediately preceding example, COURT OF MILITARY APPEALS, that all documents containing the phrase COURT -- -- APPEALS would be identified. Thus, the phrases Court of Tax Appeals or Court of Patent Appeals would also meet the specified relationship. To make the phrase more precise, any one of the following constructions could be used:

GROUP 1	OR	APPEALS	
	WORD -1	MILITARY	
	WORD -3	COURT	

or

GROUP 1	OR	MILITARY	
	WORD -1	APPEALS	
	WORD -2	COURT	

or

GROUP 1	OR	COURT	
	WORD +2	MILITARY	
	WORD +3	APPEALS	

The essential thing to remember is that the distance must always be measured from the base-word, the base-word having been prefaced by the OR command. As long as the base-word is constant, the WORD + or WORD - commands need not be arranged in any particular sequence.

When constructing phrases, always be sure to include "common words" in counting the distance from the base-word, even though they are not available for searching.

Synonymous Phrases

When two or more phrases could be used interchangeably, a search for all of them can be constructed as one group, that the distance which separates the limiting words from the base-word or base-words remains constant. For example, a list of the locations of the phrases disbursing officer and disbursing officers could be created and stored together by either of the following constructions:

GROUP 1	OR	OFFICER	
	OR	OFFICERS	
	WORD -1	DISBURSING	

or

GROUP 1	OR	DISBURSING	
	WORD +1	OFFICER	
	WORD -1	OFFICERS	

Similarly, the construction

GROUP 1	OR	OFFICER	
	OR	OFFICERS	
	WORD -1	DISBURSING	
	WORD -1	FINANCE	

would locate each of the following phrases: disbursing officer, disbursing officers, finance officer and finance officers.

Words in Close Proximity

If you believe that a set of words grouped closely together would very probably indicate the relevance of a document containing them, but you cannot be certain of the exact distance between them, the WORD – OR - command can be used to define a range of text. Consider the following expressions:

The officer responsible for the ...
The officer was responsible for the ...
The officer will be responsible for the ...
The officer will be held responsible for the ...

Each is a possible means of expressing the idea of an officer's accountability, but the distance between the significant words varies. All four can be located by the construction:

GROUP 1	OR	OFFICER	
	WORD +0–4	RESPONSIBLE	

which will find all the locations of OFFICER which are followed within one to four words by the word RESPONSIBLE.

The same results would be obtained by:

GROUP 1	OR	RESPONSIBLE	
	WORD -0-4	OFFICER	

which would seek all locations of RESPONSIBLE which are preceded within one to four words by OFFICER.

It is also possible to specify a range on *both* sides of a base-word by using + and - together. The instruction:

GROUP 1	OR	OFFICER	
	WORD -4-1	RESPONSIBLE	

would locate the phrase responsible officer as well as any of the other expressions.

Note that the range need not be the same for both sides of the base-word. Nor is it necessary to begin the range on one side at 0. The command WORD -3+10 would specify that a word be found at least 3 words, but not more than 10 words, following the base-word.

However, a range must be indicated by the use of two numbers (e.g., WORD -1+6, WORD -2-3, WORD -2-2). The use of one number alone specifies an exact distance from the base-word, *and no other*. No matter what range is specified, it is effective only on words within the same sentence.

Combining Phrases and Single Words in One Group

You will recall that a group is defined as a list of words which are roughly synonymous. You may also recall that a group is constructed for the computer by listing all of the words it contains in column 3, prefacing each of them by the command OR in column 2, and identifying the group by inserting the label

GROUP and its number in column 1 on the line containing the first word of the list, as in:

GROUP 1	OR	RECRUIT	
	OR	RECRUITS	
	OR	ENLISTEE	

In this illustration, it is assumed that each of the words is of similar value in identifying potentially relevant documents. Now assume that the phrase enlisted men has the same value. That is, for the purpose of your search, enlisted man is equivalent to recruit. In order to include the phrase enlisted man in this group, the following construction should be used:

GROUP 1	OR	ENLISTED	
	WORD -1	MAN	
	OR	RECRUIT	
	OR	RECRUITS	
	OR	ENLISTEE	

This is so because the WORD -1 command will cause the locations of the word man to be compared with the locations of every base-word which precedes it. Therefore, if the word recruit were to be inserted between enlisted and man, the computer would be seeking the locations of enlisted man and recruit man.

Keeping this in mind, examine the following constructions:

GROUP 1	OR	ENLISTED	
	WORD +1	MAN	
	WORD +1	MEN	
	OR	RECRUIT	
	OR	RECRUITS	

and

GROUP 1	OR	MAN	
	OR	MEN	
	WORD -1	ENLISTED	
	OR	RECRUIT	
	OR	RECRUITS	

Each of them would have the computer locate all occurrences of enlisted man, and enlisted men, and recruit, and recruits. All would be retained together as the contents of GROUP 1, and would be held pending further instructions.

Combining Groups

In the foregoing description of how to combine phrases and individual words in one group, you may have observed that if more than one phrase was to be included, each of the phrases contained a word common to all, e.g., medical care and surgical care; enlisted man and enlisted men. Now consider a situation in which synonymous phrases do not contain one word common to both, as in household goods and personal property. In order

to have the computer find both phrases and retain them as components of a single group, it is necessary to construct two groups and then combine them. Examine the following instruction:

GROUP 1	OR	HOUSEHOLD	
	WORD -1	GOODS	
GROUP 2	OR	PROPERTY	
	WORD -1	PERSONAL	
GROUP 3	OR		GROUP 1
	OR		GROUP 2

You will note that in GROUP 1, the computer has been told to find all occurrences of the phrase HOUSEHOLD GOODS. Similarly, GROUP 2 contains all occurrences of the phrase PERSONAL PROPERTY. The novelty is to be found in GROUP 3. This group has instructed the computer to take the contents of GROUP 1 (all occurrences of HOUSEHOLD GOODS) and add to it the contents of GROUP 2 (all occurrences of PERSONAL PROPERTY). From this point on in constructing the search statement, reference to GROUP 3 will include all occurrences of both phrases.

There are two essential rules which must be observed in constructing such a combination. The first is that the groups being combined must have been previously constructed. That is, the group numbers in column 1 must be consecutive, and no group label in column 1 may contain a group with a number higher than its own. To illustrate, GROUP 5 (in column 1) could combine the contents of GROUPS 1, 2, 3, and 4, but it could not include itself (GROUP 5) or any following GROUP (GROUPS 6, 7, etc.).

The second essential rule is that the previously constructed GROUPS must be entered in column 4. The presence of an entry in column 4 is a signal to the computer that it is to seek something which it has already created and stored, rather than something, i.e., a word, which is being presented to it for the first time.

A careful study of the following illustrations will provide additional familiarity with the proper form for combining groups.

GROUP 1	OR	SURGEON	
	WORD +1	GENERAL	
GROUP 2	OR	MEDICAL	
	WORD -1	OFFICER	
GROUP 3	OR	DOCTOR	
	OR	DOCTORS	
	WORD +2	MEDICINE	
GROUP 4	OR		GROUP 1
	OR		GROUP 2
	OR		GROUP 3

GROUP 4 now contains all occurrences of SURGEON GENERAL, MEDICAL OFFICER, DOCTOR OF MEDICINE and DOCTORS OF MEDICINE.

GROUP 1	OR	ALLOWANCE	
	WORD -1	MILEAGE	
	WORD -1	TRAVEL	
GROUP 2	OR	COST	
	WORD -2	TRAVELING	
	WORD -2	TRAVELLING	
GROUP 3	OR		GROUP 1
	OR		GROUP 2

GROUP 3 contains all occurrences of MILEAGE ALLOWANCE, TRAVEL ALLOWANCE, COST OF TRAVELING and COST OF TRAVELLING.

GROUP 1	OR	MATERIAL	
	WORD -1	UNSERVICEABLE	
GROUP 2	OR	SUPPLIES	
	WORD -0-5	SURPLUS	
	WORD -0-5	OBSOLETE	
GROUP 3	OR		GROUP 1
	OR		GROUP 2
	OR	DETERIORATED	
	OR	DETERIORATION	
	OR	OBSOLESCENT	
	OR	OBSOLESCENCE	

GROUP 3 above contains all occurrences of all the following: UNSERVICEABLE MATERIAL, SUPPLIES preceded within one

to five words by either SURPLUS or OBSOLETE, DETERIORATED, DETERIORATION, OBSOLESCENT, OBSOLESCENCE.

From this it will be seen that single words may be combined in the same group with previously established groups. The only requirement is that the rules respecting groups must be observed; they must be entered in column 4, and they must have been previously constructed.

The sentence command

The WORD + OR - command provides a means of identifying relevant documents by reason of the heightened meaning which a given word is likely to have if closely associated with another word or words. That is, the word court takes on more distinctive meaning if closely linked with the word appeals, and a virtually unique meaning when closely linked with both appeals and military.

Similarly, a word which expresses a fairly general kind of action will be expressive of a more particular action if associated in the same sentence with the actor or the thing acted upon. The appearance in a document of a word like pay, for example, would not by itself indicate which of a large number of possible situations that the document described. If, however, the word pay were used in the same sentence with travel, it would be quite likely that the sentence, and therefore the document which contains it, deals with compensation for expenses incurred in moving from one place to another. That sentence might describe an even more definite situation if it also contained the phrase disbursing officer.

By requiring that one word, or one of its synonyms, be found in the same sentence with another word, or one of its synonyms, it is possible to narrow the possible implications of each word, and thereby separate probably relevant documents from the total collection. This is accomplished by using the SENTENCE command.

Consider, for a moment, a problem dealing with reimbursement for meals. It suggests two ideas: food, and payment for it. You might very well assume that if both ideas were expressed in the same sentence, any document containing such a sentence would probably be applicable to the problem. The computer would identify these documents on the following instruction:

GROUP 1	OR	REIMBURSE	
	OR	REIMBURSED	
	OR	REIMBURSING	
	OR	REIMBURSEMENT	
	OR	PAY	
	OR	PAID	
	OR	etc.	
	SENTENCE	MEAL	
	SENTENCE	MEALS	
	SENTENCE	FOOD	
	SENTENCE	BREAKFAST	
	SENTENCE	LUNCH	
	SENTENCE	DINNER	

The effect of this instruction would be to locate all occurrences of the REIMBURSE words, and retain only those which appear in a sentence containing one of the MEAL words.

Exactly the same results would be obtained by this construction:

GROUP 1	OR	REIMBURSE	
	OR	REIMBURSED	
	OR	REIMBURSING	
	OR	etc.	
GROUP 2	OR	MEAL	
	OR	MEALS	
	OR	FOOD	
	OR	etc.	
GROUP 3	OR		GROUP 1
	SENTENCE		GROUP 2

Although the results are identical up to this point, the difference between the two constructions may be critical as you expand the search statement. To be specific, the contents of GROUP 1 in the first illustration are the same as those of GROUP 3 in the second. *However*, in the first illustration, the computer has discarded all the locations of the REIMBURSE words which did not meet the requirement of being in the same sentence with one of MEAL words. Whereas in the second illustration, *all* locations of REIMBURSE, etc., have been retained as GROUP 1, and *all* locations of MEAL, etc., have been retained as GROUP 2. Therefore, by using the second construction, the REIMBURSE

words continue to be available for combination with other lists of words, as do the MEAL words. Thus, the second construction would allow for the following expansion of the search statement:

GROUP 1	OR	REIMBURSE	
	OR	etc.	
GROUP 2	OR	MEAL	
	OR	etc.	
GROUP 3	OR		GROUP 1
	SENTENCE		GROUP 2
GROUP 4	OR	VOUCHER	
	SENTENCE		GROUP 2

Here, the contents of GROUPS 1, 2 and 3 are as before, and GROUP 4 has been added. It contains all locations of VOUCHER which occur in the same sentence with one of the MEAL words.

Words Within a Range of Sentences

Unlike the WORD – OR - command, the SENTENCE command can be used without parameters, i.e., without a – or -. But it can also be used with parameters, following the same rules which apply to the WORD + OR - command.

As with the WORD – OR - command, you must begin with a base-word or base-words. Distance is then measured from the sentence which contains the base-word. To illustrate,

GROUP 1	OR	CONTRACT	
	SENTENCE +2	NEGOTIATE	

would require that NEGOTIATE be found in the second sentence following a sentence in which CONTRACT appeared.

GROUP 1	OR	CONTRACT	
	SENTENCE –0–2	NEGOTIATE	

The above requires that NEGOTIATE be found in the same sentence with CONTRACT, or in either of the two following sentences.

The command SENTENCE -# would count the number of sentences preceding the sentence containing the base-word, and SENTENCE -#-# would specify a range of sentences preceding the one containing the base-word. Similarly, SENTENCE +#-# would encompass a range of sentences on both sides of the base-word sentence, as well as that sentence itself.

The SENTENCE – OR - command is designed for those occasions in which a meaningful combination of words would not necessarily be found in the same sentence, but whose clustering in a relatively narrow range of sentences would suggest a greater probability of relevance than their random scattering throughout the entire text of a document. Just as the WORD – OR - command is effective only on words within a sentence, the SENTENCE command is effective only on sentences within a document.

888-801 O—69——4

The document command

Exactly like the SENTENCE command in its operation is the DOCUMENT command. Its function, however, is to locate all the occurrences of one or more words which are found in the *same document* with another word or words. Thus, it encompasses a wider range of text than either the SENTENCE command or the WORD + OR - command.

Suppose you were interested in locating all references to the phrase active duty, but only to the extent that it specifically concerned Air Force personnel. The two concepts are not so intimately associated that they would necessarily be discussed in the narrow range of a few sentences. You would therefore wish to enlarge the sweep of your search so that it would be sure to identify every document in which both ACTIVE DUTY and AIR FORCE appeared. This could be done in the following manner:

GROUP 1	OR	ACTIVE	
	WORD -1	DUTY	
GROUP 2	OR	AIR	
	WORD	FORCE	
GROUP 3	OR		GROUP 1
	DOCUMENT		GROUP 2

Please observe that this particular instruction could not have been given in only one group, because it involves the use of two phrases which do not contain a word which is common to

both. Note, however, the following construction, which is an alternative means of obtaining the same result.

GROUP 1	OR	ACTIVE	
	WORD +1	DUTY	
GROUP 2	OR	AIR	
	WORD +1	FORCE	
	DOCUMENT		GROUP 1

Here, the phrase AIR FORCE would no longer be available for further combination independently of its use in the same document with ACTIVE DUTY. This latter phrase, however, continues to exist as the content of GROUP 1.

The DOCUMENT command can also be used with numerical parameters (DOCUMENT – OR -), but the utility of searching a range of documents is rather limited. The sequence in which the Comptroller General's Decisions have been stored by the computer is roughly chronological: there is no substantive relationship between any two decisions which are located side by side.

However, the United States Code has been stored in the same sequence in which it appears in the printed volumes. Section 1 of Title 1 will be followed by Section 2, which is followed by Section 3, and so forth. Therefore, the DOCUMENT – OR - command might be used in a search performed only on the Code. There is, for example, a section of the U.S. Code dealing with the proceeds of sales made by the Secretary of the Air Force in which the phrase Air Force does not appear (Title 10, Section 9629). That phrase does appear, however, in the document

preceding it (Section 9628) and the one immediately following it (Section 9651). Therefore, the construction

GROUP 1	OR	PROCEEDS	
	WORD +2	SALES	
GROUP 2	OR	AIR	
	WORD -1	FORCE	
	DOCUMENT		GROUP 1

would not locate this relevant section. But any one of the following instructions would have retrieved it.

GROUP 1	OR	PROCEEDS	
	WORD +2	SALES	
GROUP 2	OR	AIR	
	WORD -1	FORCE	
	DOCUMENT +1		GROUP 1

or

GROUP 1	OR	PROCEEDS	
	WORD +2	SALES	
GROUP 2	OR	AIR	
	WORD -1	FORCE	
	DOCUMENT -1		GROUP 1

or

GROUP 1	OR	PROCEEDS	
	WORD +2	SALES	
GROUP 2	OR	AIR	
	WORD +1	FORCE	
	DOCUMENT +1-1		GROUP 1

Thus, while it will usually be unnecessary to go beyond the confines of one document in constructing the relationship between words, phrases, or sentences which you believe will identify relevant documents, you should be aware of the fact that it is possible to do so, and may be fruitful in searching the U.S. Code, and, perhaps, the Armed Services Procurement Regulation.

The but not command

In all of the foregoing explanations and instructions, emphasis has been placed on the selection of words and phrases whose presence in a document, either alone or in relationship to other words and phrases, would indicate the probable relevance of that document to the problem at hand. Now let us look at the selection of words and phrases from the opposite point of view.

Assume that the presence of the word OFFICER in a document would signify the probable relevance of the document, but that if it were part of the phrase WARRANT OFFICER or PETTY OFFICER, it would not convey the meaning you had in mind.

You would then want your search to include all occurrences of the word OFFICER, *but not* those which were coupled with WARRANT or PETTY. Such a requirement can be built into your search statement by means of the BUT NOT command. It would be accomplished by the following construction:

GROUP 1	OR	OFFICER	
	BUT NOT		
	WORD -1	WARRANT	
	WORD -1	PETTY	

The effect of this instruction would be to locate all occurrences of OFFICER, compare them with the occurrences of WARRANT and PETTY, and *discard* all the occurrences of OFFICER which were immediately preceded by WARRANT or PETTY. The same instruction *without* the BUT NOT command would have precisely the opposite effect, that is, all occurrences of OFFICER which were *not* immediately preceded by WARRANT or PETTY would be discarded.

As this illustration shows, the BUT NOT command is one which is used in conjunction with another command, and serves to reverse the effect of that command, that is, it discards, rather than retains, the specified combination. An examination of the following instructions will reveal its use with the SENTENCE and DOCUMENT command.

GROUP 1	OR	PAY	
	BUT NOT		
	SENTENCE	RETIRED	
	SENTENCE	RETIREMENT	

Here, GROUP 1 contains all occurrences of PAY which are *not* found in the same sentence with RETIRED or RETIREMENT.

GROUP 1	OR	RESERVE	
	BUT NOT		
	DOCUMENT	NAVY	
	DOCUMENT	MARINE	

All occurrences of RESERVE which are not present in the same document with NAVY or MARINE comprise the contents of GROUP 1.

Please observe that the BUT NOT command is entered in column 2 of the search statement on the line immediately above the command whose effect it will reverse. Note also that the other three columns on the line containing BUT NOT are blank. These conventions must be followed whenever the BUT NOT command is used.

Rules for constructing and combining groups

Much has already been implied without being explicitly stated about the proper procedure for constructing and combining groups. This was done so that a concern about formal requirements would not detract from your understanding of the function of the various commands. Now that you have mastered the use of these commands, you can focus your attention on the logic of group construction.

As you already know, every search must begin with a GROUP label in column 1, an OR command in column 2, and a word in column 3. This initial instruction will cause the computer to compile a list of locations, or occurrences. Let us call this the base-list. Every subsequent instruction will either increase or decrease the contents of this list, depending on the command given. The OR command will always increase the base-list. All of the other commands will always decrease it.

To illustrate,

GROUP 1	OR	OFFICER	

creates a base-list of all the occurrences of OFFICER.

GROUP 1	OR	OFFICER	
	OR	OFFICERS	

adds to the base-list all occurrences of OFFICERS.

GROUP 1	OR	OFFICER	
	OR	OFFICERS	
	WORD -1	SUPPLY	

reduces the base-list to only those occurrences of OFFICER or OFFICERS which are immediately preceded by SUPPLY.

GROUP 1	OR	OFFICER	
	OR	OFFICERS	
	WORD -1	SUPPLY	
	OR	QUARTERMASTER	

first adds to the base-list all occurrences of OFFICERS, then subtracts from it all occurrences of OFFICER or OFFICERS which are not immediately preceded by SUPPLY, and adds to the remainder all the occurrences of QUARTERMASTER. GROUP 1, therefore, now contains supply officer, supply officers, and quartermaster.

If the command SENTENCE, with the word AMMUNITION were, added to the group, as in

GROUP 1	OR	OFFICER	
	OR	OFFICERS	
	WORD -1	SUPPLY	
	OR	QUARTERMASTER	
	SENTENCE	AMMUNITION	

the computer will save only those occurrences of supply officer, supply officers, or quartermaster which appear in the same sentence with ammunition.

The point is that each command affects what has gone before, enlarging a previously created list in the case of the OR command, and reducing it an all other cases within a single group. Thus, it should be apparent that any sequence of commands is permissible, provided it is understood that commands are carried out sequentially.

Examine the following construction carefully:

GROUP 1	OR	PERSONNEL	
	DOCUMENT	MILITARY	
	SENTENCE	CIVILIAN	
	WORD -3-3	PAID	

The computer will:

1. find all locations of PERSONNEL.
2. save only those locations of PERSONNEL which are found in the same document with MILITARY.
3. of the locations of PERSONNEL which are in a document with MILITARY, save only those locations of PERSONNEL which are found in the same sentence with CIVILIAN.

4. of the locations of PERSONNEL which are found in a document with MILITARY, and in the same sentence with CIVILIAN, save only those locations of PERSONNEL which are followed or preceded within 3 words by PAID.

Thus, the locations of PERSONNEL constitute the base-list, and each command which follows is carried out with reference to that base-list, or what remains of it after previous commands have been executed.

Bearing in mind the group construction which has just been described, examine this construction:

GROUP 1	OR	PERSONNEL	
	OR	EMPLOYEES	
	DOCUMENT	MILITARY	
	DOCUMENT	SERVICE	
	SENTENCE	CIVILIAN	
	SENTENCE	NON-MILITARY	
	WORD -3-3	PAID	

Here, the base-list consists of all occurrences of PERSONNEL and EMPLOYEES. Starting with this base-list, the computer will:

1. save only those locations of PERSONNEL and of EMPLOYEES which are found in the same document with MILITARY or SERVICE.

2. *of these* , save only the locations of PERSONNEL and of EMPLOYEES which are found in the same sentence with CIVILIAN or NON-MILITARY.

3. of those which remain, save only those locations of PERSONNEL and of EMPLOYEES which are followed or preceded within 3 words by PAID.

From these illustrations, we can extract the following rules:

1. o The OR command establishes a base-list.

2. o Each use of the OR command enlarges the list which has already been established.

3. o All commands other than the OR command reduce the contents of the base-list. However,

4. o Repetition of the same reducing command (WORD - OR - SENTENCE, DOCUMENT) adds to the occurrences of the word to which the command is first affixed, the occurrences of all other words preceded by the same command. For example,

GROUP 1	OR	PERSONNEL	
	SENTENCE	CIVILIAN	
	SENTENCE	NON-MILITARY	
	SENTENCE	PRIVATE	

will require that CIVILIAN *or* NON-MILITARY *or* PRIVATE be found in the same sentence with PERSONNEL.

These rules apply to the construction of groups whose content is limited to the use of words entered in column 3. When a group contains reference, in column 4, to a previously established GROUP, one exception to these rules must be noted. Rule 4, above, is *not* applicable.

Thus, whereas

GROUP 1	OR	PERSONNEL	
	SENTENCE	CIVILIAN	
	SENTENCE	NON-MILITARY	
	SENTENCE	PRIVATE	

would require that PERSONNEL be in the same sentence with CIVILIAN or NON-MILITARY or PRIVATE,

GROUP 5	OR		GROUP 1
	SENTENCE		GROUP 2
	SENTENCE		GROUP 3
	SENTENCE		GROUP 4

would require that a word from GROUP 1 be found in the same sentence with a word from GROUP 2 and a word from GROUP 3 and a word from GROUP 4.

The rule, then, is that whenever a GROUP is entered in column 4, any command, other than OR, entered on the next line will always reduce the list already created, whether or not that command is identical to the one immediately above it. Now it can safely be said that a single group can be composed (1) entirely of words, entered in column 3; (2) entirely of GROUPS, entered in column 4; or (3) both words and GROUPS, with words listed in column 3 and GROUPS in column 4. It is only necessary to remember that the command which follows a GROUP entered in column 4 will always reduce the previously established list, unless it is an OR command.

GROUP 1	OR	AIR	
	WORD +1	FORCE	
GROUP 2	OR	OFFICER	
	SENTENCE		GROUP 1
	SENTENCE	DUTY	

This construction requires that AIR FORCE be in the same sentence with OFFICER, and with DUTY.

It should also be observed that every change of parameters is equivalent to a change of command. Note the following:

GROUP 1	OR	DUTY	
	WORD -1	ACTIVE	
	WORD -4-4	YEARS	
	SENTENCE	SERVICE	
	SENTENCE +3-3	RETIREMENT	
	DOCUMENT	RESERVE	

On the command OR, all locations of DUTY are found. The WORD -1 command discards from this base-list all locations of DUTY which are not immediately preceded by ACTIVE. Of this reduced list, only those locations of DUTY are preserved which occur within 4 words of YEARS. The list is then further reduced to those locations of DUTY, preceded by ACTIVE and within 4 words of YEARS, which are in the same sentence with SERVICE. It is then required that these locations be within 3 sentences of RETIREMENT. Those locations of DUTY which, in sequence, have met each and every requirement, are finally preserved as the contents of GROUP 1 if they occur in the same document with RESERVE.

The BUT NOT Command in Group Construction

As we stated earlier, the BUT NOT command can be employed to reverse the effect of any of the reducing commands. It should now be said that the BUT NOT command will affect only the command which immediately follows it. Note the following:

GROUP 1	OR	OFFICER	
	BUT NOT		
	WORD -1	WARRANT	
	SENTENCE	DUTY	

Here, BUT NOT reverses the effect of the WORD -1 command. The subsequent SENTENCE command is *not* reversed.

GROUP 1	OR	OFFICER	
	BUT NOT		
	WORD -1	WARRANT	
	WORD -1	PETTY	
	SENTENCE	DUTY	

In this case, because the WORD -1 command is repeated, the BUT NOT command is effective on *both* words prefaced by the WORD -1 command, but has no effect on the SENTENCE command.

Remembering that a change of parameters is a change of command, in the following construction, the BUT NOT command would only be effective on the WORD -1 command.

GROUP 1	OR	OFFICER	
	BUT NOT		
	WORD -1	FORCE	
	WORD -2	AIR	

Consequently, the contents of GROUP 1 would be all locations of AIR -- OFFICER, in which the blank could be filled by any word but FORCE. In order to locate every occurrence of officer, except Air Force officer, the following instruction would be proper:

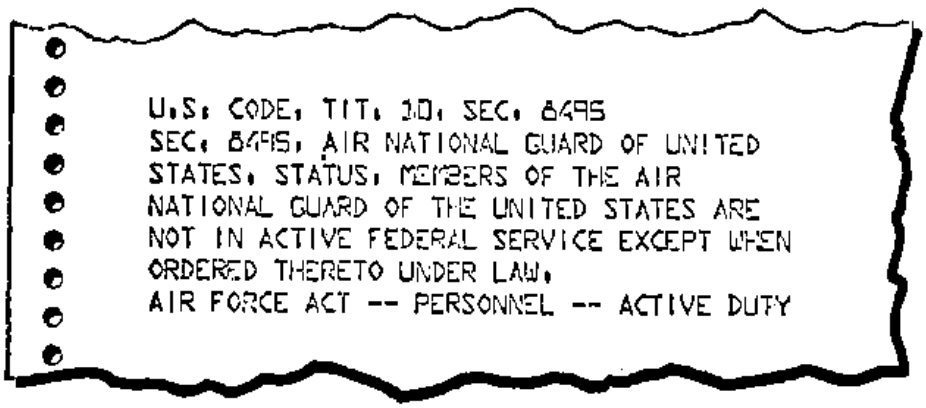
GROUP 1	OR	OFFICER	
	BUT NOT		
	WORD -1	FORCE	
	BUT NOT		
	WORD -2	AIR	

The output commands

All of the commands which have thus far been described will be employed by you in instructing the computer to select from the total collection those documents which have probable relevance to your problem. The following commands enable you to specify the form in which you wish to receive the documents which your search has identified.

The LITE system contains three printing options: PRINT, CITE, and KWIC. The PRINT command will instruct the computer to print out the *full text* of each document which your search has identified. This command should be used only if you do not have the basic source documents being searched available in your library.

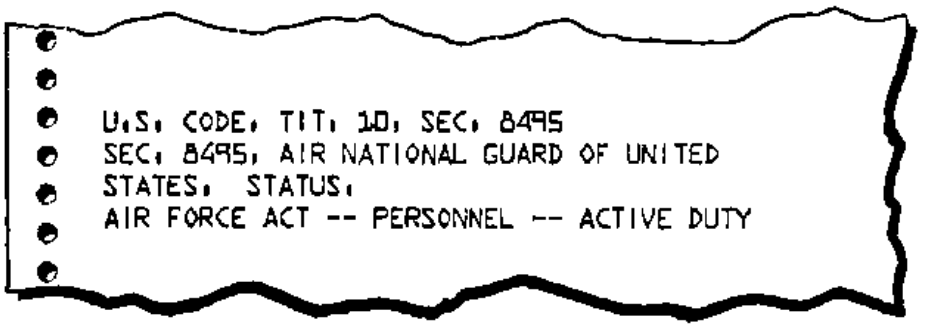
On the command PRINT, each responsive section of the U.S. Code will be printed in the following format:



The documents will be printed in sequential order, starting with Title 1.

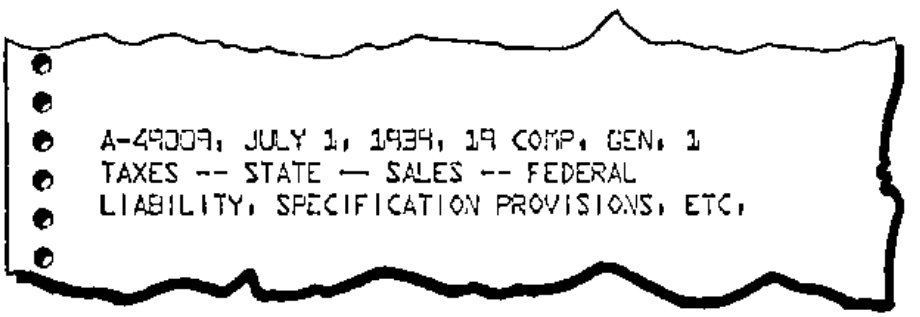
The CITE command will cause the computer to print the citation to each document which responded to your search request. Again because of the differences in format between the Unites States Code and the Comptroller General's Decisions, there is a slight difference in the use of this command on each body of material.

For the United States Code , the proper command is CITE 1, 2, 4, and it will cause the computer to print:



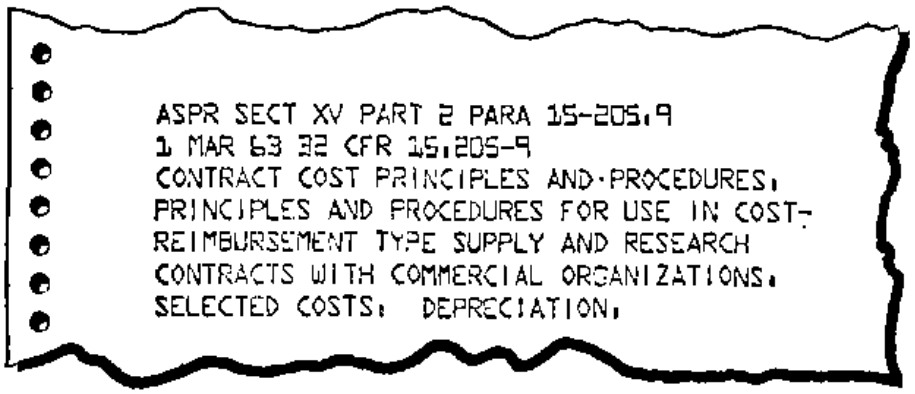
That is, it will print the citation, scope line, and classifying phrase of each responsive document from the Code.

For the Comptroller General's Decisions , the proper command is CITE 1, 2, and it will cause the computer to print:



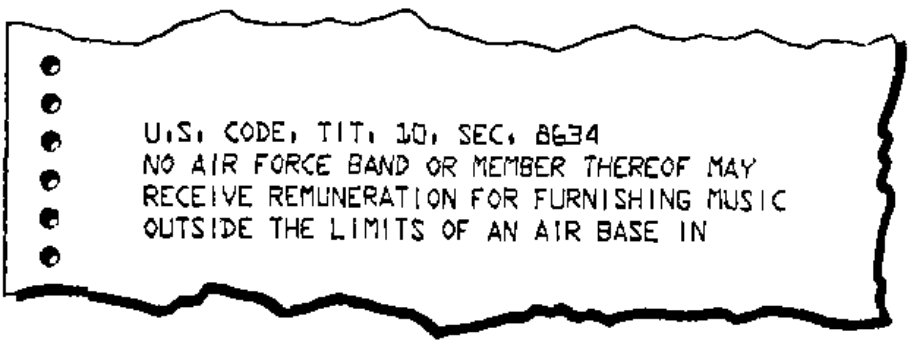
That is, it will print the citation and scope note of each responsive document from the Comptroller General's Decisions.

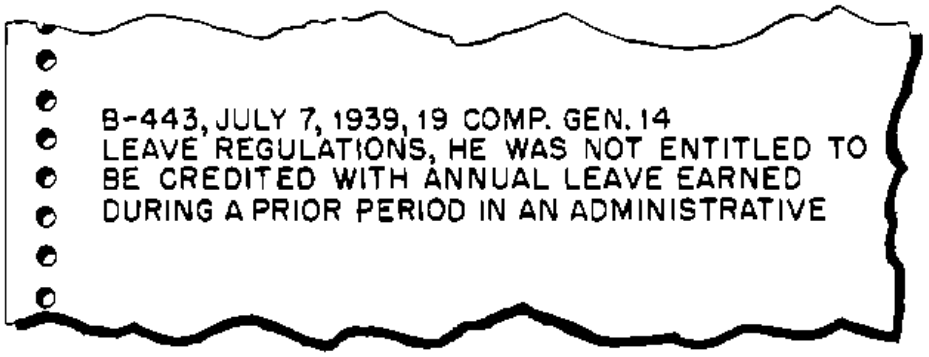
For the Armed Services Procurement Regulation (ASPR), the proper command is CITE 1, 2. It will cause the computer to print:



The citation and scope lines for the chapter, section and paragraph of the document are printed.

The KWIC command is the same for all bodies of material. It causes the computer to print the line of text which contains the word you have specified, the line immediately preceding it, the line immediately following it, and the citation of the document containing it. First some illustrations, and then a word of explanation.





The illustration from the United States Code depicts the output of a KWIC command in a search on the word REMUNERATION; that from the Comptroller General's decisions, a search on the word CREDITED. It is important to remember in using the KWIC command that the output of any search is determined by reference to the base-list. Therefore, had your search asked for all locations of the word CREDITED which appeared in the same document with PERMANENT, as in

GROUP 1	OR	CREDITED	
	DOCUMENT	PERMANENT	
OUTPUT	KWIC		GROUP 1

the base-list would contain locations of CREDITED. The DOCUMENT command would have discarded all locations of CREDITED which were not in the same document with PERMANENT. The KWIC command would then print every occurrence of CREDITED in the responsive documents, surrounded by its context, regardless of where in the document the word PERMANENT appeared. It would not print the word PERMANENT unless it happened to occur in the lines of the text immediately surrounding CREDITED.

Once you have decided on the type of output you wish to receive, the instructions to the computer can be given very simply. After you have completed the construction of your last GROUP, skip one line on your search statement and enter the word OUTPUT in column 1 on the next line. In column 2, enter the desired output command, and in column 4, the GROUP whose contents you wish to see.

OUTPUT	KWIC		GROUP 4

OUTPUT need not be limited to one GROUP, nor to one kind. That is, you may request an output on the contents of several GROUPS in whatever form you think will be most useful. All that is required is that you enter each GROUP you wish to see on a separate line in column 4, and the appropriate output command in column 2 on the same line. GROUPS need not be in sequential order.

The following illustrations demonstrate the use of OUTPUT commands for the source documents in the LITE data base.

UNITED STATES CODE

OUTPUT	KWIC		GROUP 4
	CITE 1, 2, 4		GROUP 2
	CITE 1, 2, 4		GROUP 1
	PRINT		GROUP 3
	KWIC		GROUP 5

COMPTROLLER GENERAL'S DECISIONS or the ASPR

OUTPUT	CITE 1, 2		GROUP 3
	KWIC		GROUP 7
	CITE 1, 2		GROUP 4

Your request that the search be performed on the ASPR, the United States Code, or the Comptroller General's Decisions, or any combination of data bases, is to be indicated in the boxes provided for the purpose on the search statement form.

Searching limited portions of data base

The LITE System has the capability to search only limited portions of any set of documents in the data base. For example, searches may be processed against only desired titles of the United States Code, against the Comptroller General's Decisions published since a specified date, or against specified sections, parts or paragraphs of the Armed Services Procurement Regulations. If you wish to so limit your search, please indicate the desired limitations when you transmit the search to LITE Headquarters.

Preparation of search statement

LITE computer searches should all be framed by entering search commands on Search Statement Forms. These forms should be executed and forwarded in duplicate to LITE Headquarters. Additional copies of these forms will be forwarded upon request. A sample form is included on page 56.

Conventions regarding word usage

- All words, to be entered in column 3, should be printed in block letters. The computer makes no distinction between capitals and small letters.

- All hyphenated words should be entered as such. They are regarded as one word by the computer, which can only match exactly what is presented to it with the exact words it has stored.

- Apostrophes are to be entered as dashes, since the computer does not recognize the apostrophe mark. Thus, officer's should be entered as OFFICER-S. However, if the apostrophe comes at the end of a word, do not enter it at all. Officers' should be entered as OFFICERS.

- No punctuation should be placed at the end of a word, since it will not match the words which have been stored. The word U.S. in text would appear in the word index as U.S and would not be identified if entered in a search statement with the final period. Punctuation characters *within* a word, however, are essential to the identification of that word.

- Words must be spelled correctly. Be sure to include varient spellings.

- In selecting words, give some consideration to the use of grammatical variations, synonyms and antonyms. ABILITY, for example, might suggest such other words as ABLE, CAPABILITY, and INABILITY. Final choice of which words to use is, of course, entirely up to you, but you should acquire the habit of considering the use of words from several points of view.

Check-list for completed search statements

Have you ...

o labeled each distinctive GROUP in column 1? Are these GROUPS numbered sequentially?

o entered in column 2 the command you wish to use? Does every line on which a word appears in column 3, or a GROUP in column 4, have a command in column 2?

o used the BUT NOT command? If so, are columns 1, 3, and 4 blank on the line on which it appears?

o entered any GROUPS in column 4? Have they been previously created and accurately labeled in column 1?

o entered any words in column 4, or GROUPS in column 3? If so, change them. Words *must* be entered in column 3, GROUPS in column 4.

o entered an OUTPUT command at the end of your search? If not, do so. A search without an OUTPUT command is completely unavailing.

o entered in column 4, with each OUTPUT command in column 2, the label of the GROUP whose content you wish to receive?

o indicated on the form which body of text you want searched? ASPRs? U.S. Code? Comptroller General's Decisions?

Common word list

UP	VOL	SUPP	EVERY	DEEMED	THERETO	OVERFLOW
DO	SEC	CORP	BEING	EITHER	THEREOF	
SO	ART	NEXT	WHERE	WITHIN	THROUGH	
IF	HAD	OVER	THESE	DURING	BETWEEN	
NO	BUT	EVEN	THOSE		WHETHER	
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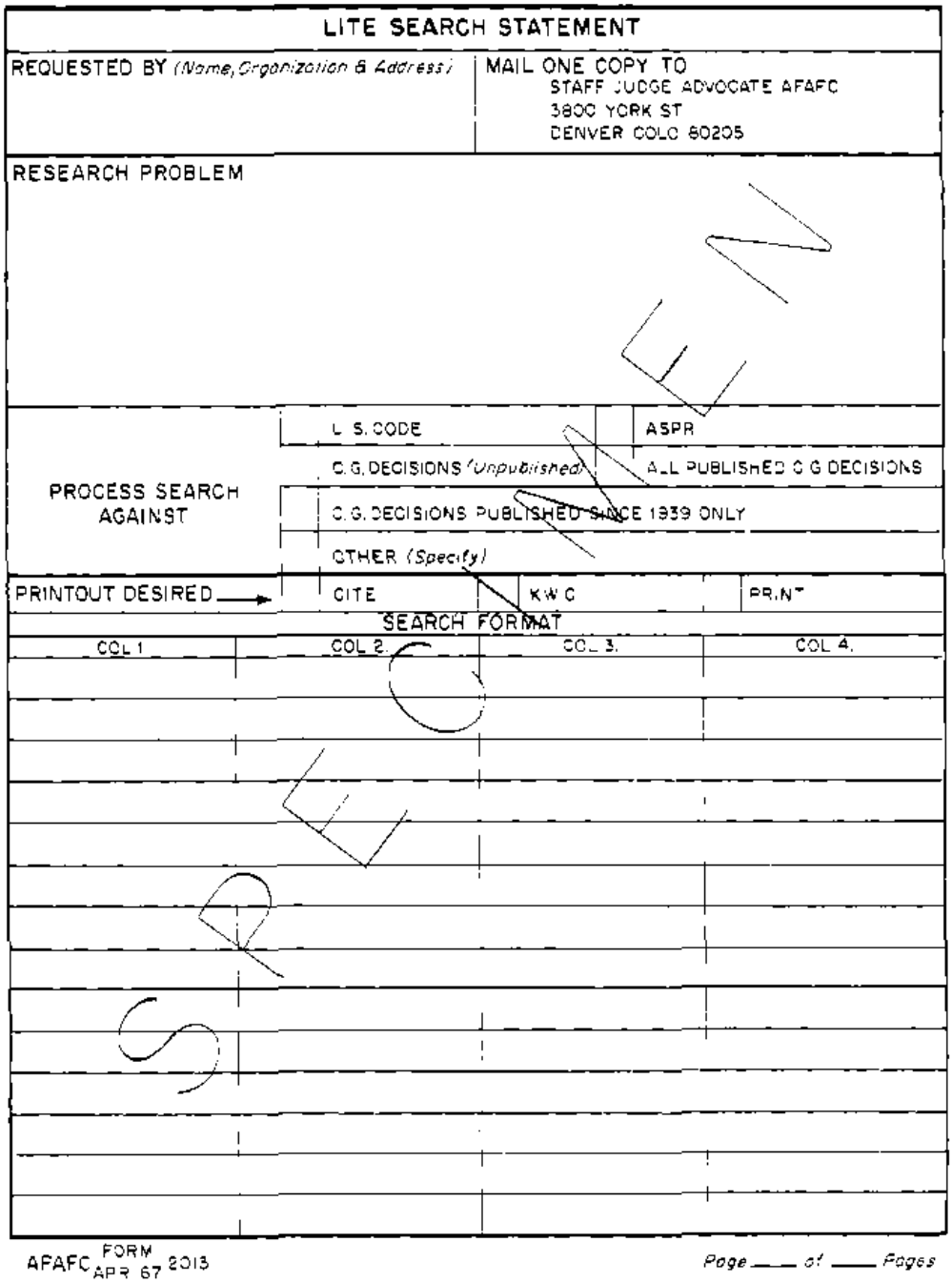

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THE NEW FRENCH CODE OF MILITARY JUSTICE*

By Major George C. Ryker**

This article is one of the few articles on the new French Code written in the English language. The salient points of the new code are discussed, with historical development. Suggestions are made where U.S. military justice can be improved in areas where the French have made headway.

I. INTRODUCTION

> The Military tribunals must be abolished, and will be. They are a survival of mediaeval prejudices. All citizens must be equal before the law. The danger of allowing one caste to consider itself separate from the rest of the nation and above common law was vividly exemplified in today's monstrous decision.[1]

Jean Jaures' prophetic statement has, almost eighty years later, nearly become a reality. On 1 January 1966, a new *French Code of Military Justice*[2] became effective creating broad, sweeping changes in military justice procedures and reflecting a significant step in the historical French trend toward uniting military justice and their civil law practices.

This work will neither detail French military justice procedures nor attempt a comparative analysis of the French and American military justice systems, as past articles relating to these subjects under prior French military justice codes exist which are generally appli-

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Sixteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Statement of Jean Jaures, socialist leader of France, uttered after the second court-martial of Captain Alfred Dreyfus at Rennes, France, 1889. *See* W. HARDING, DREYFUS: THE PRISONER OF DEVIL'S ISLAND 328–29 (1899).

[2] Law No. 65–542, 8 Jul. 1965, as amended by Law No. 66–1038, 30 Dec. 1966, CODE DE JUSTICE MILITAIRE, PETITS CODES DALLOZ (1967–1968) [hereafter called the French Code and cited as CJM].

cable to the new French Code.[3] Although it will be necessary to outline briefly some of the most important substantive and procedural differences between the administration of military justice in the United States and France, we shall be primarily concerned with the reasons underlying the enactment of the new French *Code de Justice Militaire*, its most significant changes and provisions, and the possible application of certain aspects of French military justice to our own military justice procedures.

II. THE FRENCH SYSTEM OF MILITARY JUSTICE

A. *HISTORICAL DEVELOPMENT*

Military justice in France, as in the United States, is rooted in antiquity. Although no military codes exist from the times of the Greeks or Romans, many present military offenses and punishments have filtered down from those periods without substantial modification.[4] The history of the early armies of Rome reflects that justice was administered by the *magistri militum*, especially by the legionary tribunes, either as sole judges or with the assistance of councils. The first European military laws were included in the Salic Code, originally promulgated by the chiefs of the Salians at the beginning of the fifth century. Later they were revised and matured by successive Frankish kings.

In 1347, under his Mandate of Mont-Didier, Phillip VI protected his men of arms by removing them from the jurisdiction of ordinary tribunals. The first *conseils de guerre* (councils of war) appeared with the ordinance of 1665, and the first French Code of Military Justice was enacted into law on 4 August 1857.[5] Under the 1857 Code, no civilian magistrate could interfere with the administration of military justice. The public furor which followed the Dreyfus Affair,[6] and severe criticism of certain *counseils de guerre* during World War I,

[3] For an excellent treatment of French military justice procedures under the old CODE DE JUSTICE MILITAIRE POUR L'ARMEE DE TERRE, law of 9 Mar. 1928, see Kock, *An Introduction to Military Justice in France*, 25 MIL. L. REV. 119 (1964). For comparative studies, see Rheinstein, *Comparative Military Justice*, 15 FED. B. J. 276 (1955), and Gaynor, *The French Code of Military Justice: A Comparison with the Uniform Code of Military Justice*, 22 GEO. WASH. L. REV. 318 (1954).

[4] W. WINTHROP, MILITARY LAW AND PRECEDENTS 17 (2d ed. 1895).

[5] Lafarge and Claviere, *Commentaire*, RECUEIL DALLOZ SIREY 1966, LEGISLATION, p. 29 [hereafter cited as Lafarge and Claviere].

[6] Captain Alfred Dreyfus was arrested in October 1894 for allegedly passing classified information to German officials. The main evidence against him, a letter called the *bordereau*, was forged by one of his superiors. At a closed court-martial in December 1894, a secret dossier was smuggled to the court which resulted in his conviction and subsequent confinement on Devil's Island. Revision proceedings in 1899 reaffirmed his conviction. The proceedings were fraught with deceit, forgery and anti-semitism. Dreyfus was finally exonerated in 1906 and restored to duty. *See* G. PALEOLOGUE, AN INTIMATE JOURNAL OF THE DREYFUS CASE (1957).

led to the law of 1928 [7] concerning only France's land armies. This Code represented a first step in bringing military and civilian forms of justice together by placing a civilian magistrate as president of military courts in time of peace. In 1934, the French Air Force was placed under the jurisdiction of the *Code de Justice Militaire pour l'Armee de Terre.*[8] Thereafter, in 1939, a separate code was enacted for the French Navy.[9]

The promulgation of the new French Code represents more than a mere combination of the separate codes then in effect for the Army and Navy. It was the purpose of the revision to enact legislation applicable to all three services, adapted to the realities of modern times, resembling common law procedures yet conserving the specific characteristics of military law.[10] Whether this comprehensive task was ultimately achieved forms the heart of this article.

B. *FUNDAMENTAL DIFFERENCES BETWEEN THE FRENCH AND AMERICAN SYSTEMS OF MILITARY JUSTICE*

In order to discuss the more important provisions of the new French Code, it is helpful to detail the most significant aspects of the administration of military justice in France, as distinguished from our own procedures.

The administration of military justice in France approaches, to a great extent, French civil criminal procedure. To the American observer, French criminal trials lack two of what we regard as cornerstones of our common-law system—trial by jury and the adversary concept. Basic to the civil law procedure is the proposition that a competent, well-trained, impartial judge should decide both law and facts. Rules of evidence, unless they have become a part of substantive law, should be suppressed. A competent judge knows what is relevant and the practicing lawyers realize this. Less technicality and more realism is the goal.

Moreover, the American method of almost total reliance on oral testimony and cross-examination is not utilized in most civil law countries. Written evidence is the basis of French criminal procedure. This evidence may be obtained by military or civil law enforcement authori-

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[7] Code de Justice Militaire pour l'Armee de Terre, Law of 9 Mar. 1928; Dalloz Recueil Periodique 1928, 4.193 [hereafter cited as CJMAT].

[8] Code de Justice Militaire pour l'Armee de l'Air, Law of 2 Jul. 1934; Dalloz, Recueil Periodique 1936, 4.214.

[9] Code de Justice Militaire pour l'Armee de Mer, Law of 13 Jan. 1938; Dalloz, Recueil Periodique 1940, 4.322.

[10] P. Doll, Analyse et Commentaire du Code de Justice Militaire 25 (1966) [hereafter cited as Doll].

ties or the *juge d'instruction*[11] prior to trial, and usually without the effective assistance of a lawyer. It is felt that written statements secured from an accused shortly after a crime without coloration added by an interview with his lawyer leads more frequently to the truth. In court it is the judge, sometimes with the assistance of counsel in framing the questions, who examines the witness, usually only concerning matters needing to be clarified stemming from the written declarations of the witness.

Thus, an impartial and thorough investigation by the police and the *juge d'instruction* containing *proces verbaux*, or written statements, by witnesses and possibly the accused, forms the *dossier* which is transmitted to the trial judges before the actual trial. In an appropriate case, the *dossier* may also include the report of an examination or inquiry by experts. When a technical question is presented during the preliminary investigation, either the *juge d'instruction*, the government prosecutor, the accused or a civil party may request an examination of the matter by experts. The experts, selected from a list maintained by the court for that purpose, may be granted broad powers to examine and investigate, but they may not interrogate the accused. Their report is, of course, subject to comment by the parties and may be attacked or reinforced by the appointment of other expert witnesses.

The essential facts of the case are, therefore, generally clear before trial. Careful study of the *dossier* and a few incisive questions propounded by the judges to the most essential witnesses usually takes the place of hours or days of pitched battle in the American courtroom. In sum, the civil law emphasis is upon careful scrutiny of pre-

[11] The *juge d'instruction* is the pretrial examining magistrate and constitutes an extremely important link in the French judicial system. He conducts a preliminary investigation of the case (*instruction preparatoire*) for which there is no exact counterpart in the United States. The *instruction preparatoire* serves both as a screening procedure roughly similar to the function of a grand jury under Anglo-American law and as preliminary preparation for trial, usually conducted by the prosecuting attorney. The *juge d'instruction* conducts an inquisitorial investigation and is required to seek out the evidence of the alleged crime himself, including interrogation of the accused and essential witnesses. Although an accused is effectively guaranteed certain rights at this stage of the proceedings, the *instruction preparatoire* usually constitutes a more detailed continuation of the prior investigation initiated by the police. In order to conduct his investigation, the *juge d'instruction* is vested with broad powers with respect to receiving testimony, inspecting the scene of the alleged crime, conducting searches and seizures, and issuing certain warrants. He may further order the accused into pretrial confinement in serious cases. The jurisdiction of the *juge d'instruction* with regard to non-military cases is generally set forth in articles 79–84 of the French Code of Penal Procedure (CODE DE PROCEDURE PENALE) [hereafter called the Penal Code and cited as CPP]. His authority with respect to military proceedings is contained in articles 122–51, CJM, and will subsequently be examined in greater detail.

trial investigations by well qualified, independent members of the judiciary.

With regard to the matter of appeal, French law is also fundamentally different. Their concept of an appeal usually consists of a trial *de novo* as a matter of right, a second chance given to the loser before judges of a higher grade concerning both the law and facts.[12] In contrast with our own system of appeal, under French law the government prosecutor enjoys a limited right to appeal unfavorable judgments or inadequate sentences announced by the trial court. This factor often has a direct bearing upon whether a person convicted of a crime should exercise his right to appeal, for the judgment of the appellate court may encompass more severe consequences if the prosecutor files a cross-appeal. Further appellate review by the Court of Cassation (*Cour de Cassation*) in both civil and military judicial proceedings is designed to assure that lower courts do not stray from the law set forth in codes and other legislative acts and to secure uniformity of the law throughout the area where it is applicable. The highest French judicial tribunal is said to judge decisions, not cases. If it determines that a law has been violated or incorrectly applied, or that a court has exceeded its authority, the Court of Cassation usually remands the case to a new court for decision. Thereafter, if the court to which the case is remanded (*cour de renvoi*) does not follow the Court of Cassation, the case may once again be remanded to another court which is bound to enter a decision in conformity to that of the Court of Cassation.[13]

C. *PROCEDURAL ASPECTS OF FRENCH MILITARY JUSTICE*

1. *Nature and Composition of Military Courts.*

Ultimate control of military justice in France is vested in the highest civilian tribunal, the *Cour de Cassation*.[14] The judicial powers exercised by the military are vested in the *Ministre des Armees* (roughly equivalent to our Secretary of Defense) and are delegated therefrom to specific field commanders.[15] By decree the *Ministre des Armees* fixes the number of military judicial districts (*Tribunaux Permanent des Forces Armees*), their location, the territorial extent of their juris-

[12] For an excellent discussion of the strengths and weaknesses of both the civil and common law systems with specific reference to France and the United States, see Pugh, *Cross-Observations on the Administration of Civil Justice in the United States and France*, 19 U. MIAMI L. REV. 345 (1965).

[13] For a more detailed examination of the French system of appeal and review, see Kock, *The Machinery of Law Administration in France*, 108 U. PENN. L. REV. 366 (1960).

[14] CJM art. 1.

[15] CJM art. 2.

diction and the number of trial courts within each judicial district.[16]

Although we will be primarily concerned with the operation of military judicial districts within France during peacetime, one should note that the French Code provides for the establishment of military tribunals (*Tribunaux Militaires aux Armees*), more streamlined versions of permanent military judicial district courts, outside the territorial confines of the Republic of France and in French territories during either peacetime or wartime. Only during time of war may military tribunals be legally established within France.[17]

The military tribunals are bound by the same general procedural rules as the permanent judicial district courts, but their composition is somewhat changed.[18] Moreover, provost tribunals may be authorized in certain overseas areas and within France when necessary in time of war to deal with minor misdemeanors.[19] In addition, a special high permanent court is provided for the trial of general or flag officers and members of the Military Justice Corps.[20]

The permanent judicial district courts are composed of five members—two civilian magistrates (the president of the court and an assistant) belonging to the Military Justice Corps and three military judges.[21] The military tribunals are also composed of five members, but the civilian assistant magistrate is replaced by a military judge and the military judges may be selected from the ranks of those wounded in action or combat troops, rather than regularly appointed military judges.[22] Formerly French military courts consisted of nine,

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[16] CJM art. 6. At the present time there are seven judicial districts within France itself, located in Paris, Lille, Rennes, Bordeaux, Metz, Lyon and Marseille. An additional district is located in Papeete (Tahiti). All of the judicial districts have three trial chambers except Paris, which has four, and Papeete, which consists of two. A district located within France itself may have judicial responsibility for some overseas areas in addition to a local geographical responsibility. For example, the jurisdiction located in Bordeaux supervises military justice in the territories of the Antilles and French Guiana (Decree No. 65-1156, 23 Dec. 1965, as amended by Decree No. 66-621, 17 Aug. 1966, CODE DE JUSTICE MILITAIRE, PETITS CODES DALLOZ 1967-1968).

[17] CJM art. 40.

[18] CJM art. 44.

[19] CJM arts. 457-73.

[20] CJM art. 5.

[21] CJM art. 7. Although termed military judges by the new Code, the *juges militaires* are officers and noncommissioned officers of a military service whose prime function is to guarantee the proper consideration of the military aspects of the case, including the seriousness of the alleged wrongdoing upon the military organization concerned and the military community in general. One commentator has equated their primary function as that of "technical counselors." DOLL 30. The military judges are nominated for judicial duty by the commander of the military judicial district concerned for a period of six months. Their selection to sit on a particular case depends upon the rank or grade of the accused and his seniority. CJM arts. 14-18.

[22] CJM art. 44.

seven, five or three judges, depending on the type of court being convened.[23]

2. *Pretrial Proceedings.*

As in our own procedure under the *Uniform Code of Military Justice*, the prerogative of initiating disciplinary proceedings is vested under French procedure in the commanding officer exercising the authority to convene military courts. The commander of the military judicial district receiving information concerning an alleged violation of military law or discipline must initially decide whether to deal with the matter administratively under his disciplinary authority set forth in article 375 of the French Code (a provision similar to nonjudicial punishment under article 15 of the *Uniform Code of Military Justice*), or refer the matter to the military judicial authorities for formal disciplinary action. Pursuant to his disciplinary authority the French military commander may impose punishment consisting of deprivation of liberty not to exceed sixty days. The exact scale of disciplinary punishments is set forth by decree.

In the event the military commander determines administrative disciplinary action is inappropriate he initiates formal disciplinary action by delivering to the government prosecutor (*commissaire du gouvernement*) an order to institute legal proceedings (*ordre de poursuite*). In addition to being the prosecutor, the *commissaire du gouvernement* is now firmly established as the legal advisor to the military commander.[24] He presently exercises the authority the military commander used to hold with regard to determining whether to initiate a formal pretrial investigation or to bring the accused directly before a military court.[25] Even the determination as to whether to order the accused into pretrial confinement now belongs to the government prosecutor. Under the new Code, once the military commander delivers the order to institute legal proceedings, he may not intervene in any subsequent judicial action. The military commander previously had the authority to appeal certain rulings, actions or orders of the pretrial investigating officer (*juge d'instruction*).

In the event a pretrial investigation (*instruction preparatoire*) is ordered, the file is transmitted to the examining magistrate (*juge d'instruction militaire*). One of the most important innovations in the new Code is the increase of authority granted the examining military magistrate. With some minor exceptions, he now exercises all the authority of his civilian counterpart.[26] Once given the authority to proceed, the

[23] CJMAT arts. 10, 156, 161.
[24] CJM art. 117.
[25] CJM art. 121.
[26] CJM art. 124.

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examining magistrate may now extend his investigation to include all related offenses and all persons who appear to be implicated.[27] On pain of voiding the entire proceedings, and at the outset of the investigation, the *juge d'instruction militaire* must advise the accused of his rights, including advice as to the nature of the accusation, the accused's right to remain silent and his right to counsel, either retained by or appointed for him.[28] All of the important procedural safeguards given a civilian under ordinary criminal procedures are now provided the military accused.[29]

The examining magistrate is empowered to issue a myriad of orders concerning the case.[30] The government prosecutor may appeal all orders issued by the examining magistrate and the accused is authorized to appeal certain orders specified in the Code.[31] Speedy and final appeal from these orders is directed to a new quasi-judicial body created by the 1966 Code, the *Chambre de Controle de l'Instruction*, which will later be examined in detail.

3. *Trial Procedure.*

After pretrial investigation or in the case of direct referrals to trial, the government prosecutor contacts the appropriate military commander exercising jurisdiction for an order convening the court.[32] The accused is, of course, always free to communicate with his attorney and is provided, free of charge, copies of the allegations against him, the written statements of all adverse witnesses, and the reports, if any, of expert witnesses.[33] A summons (*citation a comparaitre*) must be served on the accused at least three days prior to trial in peacetime.[34] The summons must again remind the accused regarding his right to counsel and further lists expected prosecution witnesses. The accused may at this time inform the prosecutor of the witnesses he desires to testify in behalf of the defense.[35]

With few exceptions, the conduct of the trial itself follows the procedures set forth in the Code of Penal Procedure.[36] Generally, the trials are public and the progress of the trial is controlled under the

[27] CJM art. 136.
[28] CJM arts. 127, 137–38; CPP arts. 114, 118.
[29] *See* DOLL 111. Article 137, CJM, makes direct reference to the applicable procedural safeguards contained in the CPP which must be observed upon pain of nullity.
[30] Among the most important of these orders are dismissal for lack of jurisdiction, a decision not to prosecute due to insufficient evidence of a crime, and release from pretrial confinement. *See* CJM arts. 143–44.
[31] CJM art. 147.
[32] CJM art. 184.
[33] CJM art. 188; CPP art. 276.
[34] CJM art. 259.
[35] CJM art. 257.
[36] CJM art. 189; CPP arts. 306–70, 463.

rather broad discretionary powers of the president of the court. The president may, in his discretion, direct the argument of counsel, call witnesses, request the production of documents and take other steps necessary to discover the truth.[37]

With respect to receiving testimony, the accused is usually heard first and is interrogated by the court concerning the *fait* (the act constituting the alleged offense). Though the accused is not clothed with a constitutional guarantee against compulsory self-incrimination, he may remain silent. However, his silence in this regard may result in an inference against him.[38] After questioning concerning the *fait*, an accused is asked whether or not he is guilty, whether there were aggravating circumstances, and whether extenuating or mitigating circumstances were present. Thereafter other witnesses summoned by the prosecution and defense give their testimony without interruption except by the president. When the witness has finished testifying he may be asked questions by the president, the government prosecutor and, with the president's approval, the other judges. Counsel for the accused may also request the president to ask certain questions of the witness.[39]

After the last witness is heard the government prosecutor submits argument. Then the defense sums up, with both the accused and his counsel having the right to argue. If the prosecutor replies, the defense has another opportunity to speak—this right to have the last word always belongs to the defense.[40]

The deliberations of the French military court are in secret; a majority of the judges must concur in any finding of guilty. In the event of a finding of guilty, the court then votes on whether there were extenuating or mitigating circumstances prior to adjudging a sentence by secret written ballot.[41]

The responsibility of ordering into execution the adjudged sentence is vested in the government prosecutor under the new Code. Except in death cases, the execution of the judgment is carried out twenty-four hours after the period for appeal has expired or the order rejecting an appeal has been received from the *Cour de Cassation*.[42] The punishment adjudged can, however, be suspended by the military commander who ordered the proceedings instituted.[43]

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[37] CJM art. 209.
[38] Gaynor, *supra* note 3, at 331.
[39] CPP arts. 309–12, 331–32.
[40] CPP art. 346.
[41] CJM arts. 223, 225–26, 229.
[42] CJM arts. 325–28.
[43] CJM art. 340.

4. *Appeal and Review.*

An appeal from the decision of a military court is not automatic, but must be filed by the accused or his counsel within five days after sentence was adjudged.[44]

The appellate process has been substantially revised under the 1966 Code. Instead of review by specially composed military courts of review,[45] appeal and review of military courts is now within the exclusive province of the *Cour de Cassation*, the highest civilian appellate court of France. The rules which now govern appeals from military courts are almost identifcal to those relating to civilian procedure.[46]

III. THE NEW FRENCH CODE

A. *THE NEED FOR LEGISLATION IN FRANCE*

The 474 articles now governing military justice for all French armed services replace 274 articles previously relating to the French Army, 276 articles heretofore applicable to the Navy, and the special legislation enacted in 1934 pertaining to their Air Forces. The prior codes were long, complex, confusing and not set forth in logical order. It was felt that the language used in the old codes needed simplification and clarification. Moreover, it was only reasonable to assume the administration of military justice would not escape the extensive judicial reforms vigorously instituted by the DeGaulle regime since its accession to power in 1958.[47]

The hostilities in Algeria led to increased jurisdiction on the part of French military courts. A great number of cases arose, many of which caused considerable public awareness of the antiquated, slow and overly complex hierarchy of existing military justice.[48]

Under new theories of criminology and penology, existing punishments had become outmoded. The desire to keep pace with the times and to include more civilian-type procedures and safeguards, while

[44] The delay for appeal is only one day in time of war. CJM art. 244.

[45] Under the prior code, appeals were directed to a special military chamber of the Court of Appeal (*Chambre des Mises en Accusation de la Cour d'Appel*) or in time of war to permanent military courts of review (*Tribunaux Militaires de Cassation Permanent*). CJMAT arts. 68, 126–55.

[46] *See* CJM arts. 243–52; CPP arts. 567–626.

[47] For some examples of recent French judicial reforms see Herzog, *Proof of Facts in French Civil Procedure: The Reforms of 1958 and 1960*, 10 AM. J. COMP. L. 169 (1961).

[48] Most notable of the military trials stemming from the operation of the Secret Army Organization in Algeria were those of Generals Raoul Salan and Edmond Jouhaud, the head and second in command, respectively, of the organization. Jouhaud was sentenced to death but Salan, with mitigating circumstances shown, received only life imprisonment. Thereafter General Jouhaud's sentence was commuted to life. N.Y. Times, May 23, 1962, at 1, 3.

increasing the speed of military justice, were the primary goals sought in the revision.

The reform was undertaken by the Minister of the Armies in close liaison with the Minister of Justice and the most eminent members of the Military Justice Corps. Under these conditions, and with the firm support of the chairmen of both French legislative assemblies, the deputies and senators adopted the proposed new legislation almost without discussion.[49] The result was the new Code, set forth in four chapters governing organization and jurisdiction, military penal procedures, offenses and punishments, and the last chapter dealing with provost tribunals.

B. *SIGNIFICANT ASPECTS OF THE NEW CODE*

1. *General.*

In order to effect the purposes of the new legislation, the emphasis was placed on incorporating to the maximum extent existing civil criminal procedures, interjecting more trained civilian judges into the stream of military jurisprudence and streamlining judicial bodies. The peacetime jurisdiction of military courts have also been somewhat circumscribed. Some legislation pertaining to military justice enacted subsequent to the 1928 Code has been incorporated into various sections of the new Code.

2. *Legal Professionalism Strengthened.*

In 1956 a law establishing a corps of military magistrates was enacted fusing together the trained judges of both the army and naval services.[50] The provisions of the 1956 legislation were incorporated throughout the 1966 Code. These civilian jurists, familiar with the procedures under military law, form the basis of the operation of present military justice at both the pretrial and trial levels. Both the government prosecutor and the military examining magistrate are members of the Military Judicial Corps. The powerful positions of president of permanent judicial district courts and principal assistant judge are now held by these magistrates. Even in time of war a civilian judge remains as president of a military tribunal in contrast with the prior practice of replacing the military magistrate with a senior military officer.

The new and exceedingly important *Chambre de Controle de l'Instruction* is also dominated by magistrates of the Military Judicial Corps. In peacetime the president of the chamber and his principal assistant, both military magistrates, form two-thirds of this three-

[49] Lafarge and Claviere 29.

[50] Colas, *Le Nouveau Code de Justice Militaire*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENALE COMPARE 909 (1965).

member body.[51] During wartime, the assistant is replaced by a military judge and the president may be a military magistrate of the mobilized reserve Military Judicial Corps.[52] The military magistrates are all appointed each year by the Minister of Justice and are absolutely independent of any control or influence by the military commander whom they serve.[53]

From the foregoing, when coupled with the fact that the entire course of military justice is now controlled and reviewed by the *Cour de Cassation*, composed of the most eminent civilian judges, it is apparent that French military justice will gain respect. The firm guiding hand of experienced, independent judges should tend to eliminate past criticism. Military authorities voiced no objection to this new judicial independence during the parliamentary debates concerning the proposed Code, and to this date their acceptance thereof has been favorable.[54]

3. *Authority of the Examining Magistrate and the Government Prosecutor Increased.*

Already touched on before, the tremendous increase in the power of the *commissaire du gouvernement* and the *juge d'instruction* should improve both the quality and the speed of pretrial proceedings. The examining magistrate and the government prosecutor under civilian procedures work in close cooperation with each other, and with their delegated authority form a most important link in the judicial chain. Their judicial powers in military cases have been increased importantly in the new Code. Although their civilian counterparts enjoyed the authority to direct the scope, nature and direction of the pretrial proceedings, the military *juge d'instruction and commissaire du gouvernement* lacked this power until promugation of the 1966 Code.

The prior necessity of having to return the case to the military commander whenever the examining magistrate discovered additional military suspects, or to modify or amend the charges, was time consuming and vested these decisions of a judicial nature in the legally untrained military commander. In addition, the elimination of the military commander's authority to interject an appeal to the orders rendered by the *juge d'instruction* buttresses the examining magistrate's authority and hastens the process of military justice. The examining magistrate is now as free as his civilian counterpart to issue orders concerning the case without first obtaining the signature of the government prosecutor

[51] CJM art. 50.
[52] CJM art. 52.
[53] DOLL 29.
[54] DOLL 25; Collet, *Le Nouveau Code de Justice Militaire*, 3 REVUE D'ETUDES ET D'INFORMATIONS DE LA GENDARMERIE NATIONALE (67th ed. 1966).

to validate the order as was the prior practice.[55] And finally in this regard, the new Code has eliminated a second degree of pretrial investigation. The old procedure required the *juge d'instruction* to submit the file with his recommendations to the Indicting Chamber of the Court of Appeal. This body, the *Chambre des mises en Accusation de la Cour d'Appel*, reviewed the pretrial investigation and, where appropriate, directed further investigation, referred the case to trial or dismissed the charges. These comprehensive powers are now vested in the *juge d'instruction*.

Like the *juge d'instruction*, the authority of the *commissaire du gouvernement* has been multiplied. Each judicial district has a government prosecutor who performs the functions of the *ministere public* in civilian jurisdictions. In addition to being head of the *parquet militaire*,[56] the government prosecutor is now the legal counselor to the military commander who exercises judicial powers.[57] The *commissaire du gouvernement* may also receive, by delegation from competent military authority, the power to direct the operations of the military judicial police during the investigation of an alleged offense.[58] Further increases in the scope of his powers include the ability to decide pretrial confinement matters, to determine whether the case will receive pretrial investigation or is to be transferred directly to a permanent judicial district court, and to insure the execution of sentences.[59] By statute it is the government prosecutor, not the military commander, who is charged with the responsibility of the administration of military justice and discipline.[60]

4. *Institution of the Chambre de Controle de l'Instruction.*

One of the significant innovations designed to increase the rapidity of military justice was the abolition of the Accusatory Chamber of the Court of Appeals and the creation, in its stead, of a Chamber for the Control of Pretrial Proceedings. The discussion of this new body

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[55] CJMAT art. 64.

[56] Comparable to our district attorney's office.

[57] CJM arts. 25, 117.

[58] CJM arts. 25, 84.

[59] CJM arts. 121, 328, 332.

[60] Article 25, CJM, provides for the following:

The government prosecutor performs before the permanent judicial district courts, by himself or by his assistants, the functions of the public minister.

He is, for the judicial matters within his jurisdiction, the counselor to the military authorities who exercise judicial powers.

He may receive by delegation from the authorities listed in the preceding sentence the authority to prescribe the operations of the military judicial police under the conditions set forth in article 84.

In his position as head of the *parquet*, the government prosecutor is charged with the administration of military justice and discipline.

goes hand-in-hand with the matters above concerning the increase of the authority of the examining magistrate.

As will be recalled, there are ordinarily three permanent judicial district courts in each military judicial district, each court having at least one examining magistrate assigned to it. For each judicial district, however, there is only one Chamber for the Control of Pretrial Proceedings. Superimposed above all the examining magistrates in a permanent judicial district, the *Chambre de Controle de l'Instruction* is charged with insuring the rapid march of military justice by monitoring the speed of pretrial investigations, ruling on the legality of orders of the *juge d'instruction*, and resolving conflicts between the government prosecutor and the examining magistrate. Although the composition of the Chamber for the Control of Pretrial Proceedings is identical to that of its predecessor (two civilian magistrates and a field-grade officer), its scope of authority is more limited. No longer is there a second stage of the pretrial investigation—the Chamber of Control normally enters into the pretrial proceedings only when there is an appeal from the orders of the examining magistrate by the accused or the government prosecutor. When a dispute exists concerning some action taken by the *juge d'instruction*, the Chamber of Control finally decides the matter and the investigation is immediately resumed. To avoid unreasonable delay, there may be no direct appeal from any decision of the Chamber of Control. In the event of a subsequent trial and conviction, however, the actions of the *Chambre de Controle de l'Instruction* may form the basis of an appeal to the *Cour de Cassation*.[61]

One may readily perceive the increase in the speed of pretrial proceedings this reform will provide. Since the second stage of pretrial investigation has been eliminated and it is no longer necessary for the indicating chamber to refer a case to trial, it is envisioned that the great majority of pretrial investigations will be effected without the intervention of the Chamber of Control. In the instances where the chamber is required to act, the provisions specifying for finality will eliminate time-consuming delays at the pretrial stage of the proceedings.

5. *Jurisdictional Matters.*

The concept of military jurisdiction in France under the new Code is of extreme importance. In line with the goal previously discussed of ensuring to the maximum extent the protections of civil procedure, military jurisdiction over offenders within the Republic of France during peacetime is limited. Without the territorial confines of France

[61] CJM art. 183.

and in time of war, martial law or national emergency the jurisdiction of the military is greatly expanded.

During peacetime the permanent judicial district courts exercise jurisdiction over members of the armed forces pursuant to three jurisdictional bases. They only have jurisdiction over members of the armed forces who commit purely *military offenses*,[62] and those military personnel who commit criminal offenses *within a military establishment* or *incident to military service*.[63] All cases involving other than the individuals or offenses indicated above are subject to the jurisdiction of civilian tribunals.

Outside the territorial confines of France, military tribunals have peacetime jurisdiction of offenses of every nature committed by servicemen, persons authorized to accompany the armed forces, civilian employees and dependents. Unless they are members of the armed forces, minors of 18 or less are not subject to the jurisdiction of military tribunals except where there is no other competent French tribunal available.[64]

During wartime or a period of national emergency all military courts wherever located exercise jurisdiction paralleling that of the military tribunals established overseas, supplemented by jurisdiction over any person committing treasonable acts or crimes against the security of the state.[65] The determination of "time of war" is apparently made by the President of the Republic of France pursuant to Article 16 of the French Constitution.[66] Martial law may be declared by the Council of Ministers in accordance with Article 36 of the Constitution, and a state of emergency is instituted by decree of the Council of

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[62] Title II, Book III, CJM, lists the military offenses recognized. Chapter 1 is concerned with the avoidance of military obligations such as failure to abide by enlistment or conscription laws, the several forms of desertion and unauthorized absences, encouraging or concealing deserters and malingering. Chapter 2 deals with offenses against honor or military duties. Listed therein are the offenses of capitulation, treason, military conspiracy, pillage, destruction of military property, misappropriation of military property or funds, uniform violations, offenses against the flag of the armed forces, and inciting acts against military duties or discipline. In Chapter 3 are set forth infractions against discipline. These offenses consist of insubordination (military revolt, rebellion, disobedience, illegal acts directed toward superiors, assault, insults, threats and refusal by a military commander to follow orders) and abuse of authority (illegal acts against subordinates, abuse of military requisitions and maintaining an illegal or repressive system of military justice). Chapter 4 concerns itself with military offenses in violation of standing or general orders including misbehavior before the enemy, offenses by and against sentinels or lookouts and improper hazarding of a vessel or airplane.

[63] CJM art. 56.

[64] CJM arts. 66–77.

[65] CJM arts. 72–74, 302.

[66] *See* E. GODFREY, THE GOVERNMENT OF FRANCE 41 (2d ed. 1963).

Ministers for a period not to exceed twelve days as specified by legislative enactment.[67]

This concept of expanding jurisdiction is designed to allow the maximum use of civil tribunals within France during normal conditions. Yet the new Code still provides a swift method for enforcing order and discipline among those in or connected with the armed forces when such stringent controls are necessary—outside the Republic or in time of war.

6. *War Crimes.*

Included for the first time in a French code of military justice are matters relating to the trial of war criminals by military courts. One of the most important new provisions relates to the treatment of a purported affirmative defense of obedience to military orders by one accused of a war crime. Another significant section deals with the military superior who either authorizes or tolerates the commission of war crimes by a subordinate.

Under the *Uniform Code of Military Justice* both general courts-martial and military commissions may try persons accused of offenses against the law of war.[68] Article 80 of the French Code announces such jurisdiction in more definitive terms. French military courts have jurisdiction over war criminals when the following elements are present:

a. The crime or infraction was committed after the opening of hostilities;

b. The crime was committed by a national enemy or an agent in the service thereof;

c. The offense was committed on the territory of the Republic, on territory submitted to the authority of France or in an operational war zone;

d. The crime was directed against a French national or one protected by France, a member of the military serving or having served under the French flag, or a stateless person or refugee of one of the territories listed above; and

e. The infraction, whether or not committed under the pretext of war, is not justified by the laws and customs of war.

Because of some uncertainty in the past concerning evidentiary and procedural rules to be followed in war crimes trials,[69] it was deemed advisable to include within the framework of the 1966 Code provisions

[67] DOLL 79–80.

[68] UNIFORM CODE OF MILITARY JUSTICE arts. 18, 21 [hereafter called the Code and cited as UCMJ].

[69] *Compare In re Yamashita*, 327 U.S. 1 (1964), *with* Geneva Convention Relative to the Treatment of Prisoners of War, arts. 85, 102, 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364

relating to some purported legal defenses to war crimes that were raised before the Nuremburg Tribunal. For these reasons the new Code has specifically provided that the laws, decrees or regulations emanating from enemy authorities, or orders or authorizations given by the enemy or authorities dependent or having been dependent thereon, may not be invoked as a defense to the charge, but may be considered only as matters in extenuation and mitigation.[70] Moreover, the Code has provided that when a subordinate has committed a crime proscribed by article 80, and his superiors have not participated in the perpetration of the war crime to the extent they can be charged as principals, such superiors may be considered as accomplices when such criminal conduct was organized or tolerated by them.[71] Although article 80 of the French Code does not list the infractions considered as crimes of war, reference to the applicable portions of the Penal Code[72] and to various legislation concerning the subject[73] provides one with detailed information as to the applicable offenses and punishments.

7. *Crimes Against the Security of the State.*

Prior to 1963, French military courts had exclusive jurisdiction to try any individual accused of a crime aimed against state security.[74] As a direct result of the Algerian crisis, a flood of legislation concerning state security, sometimes conflicting with existing provisions, was enacted limiting the scope of military jurisdiction in this regard.[75]

In January 1963, the National Assembly created the Court of State Security (*Cour de la Surete de l'Etat*) to deal with crimes and misdemeanors directed against state security in time of peace.[76] The specific crimes of which the Court of State Security takes cognizance are listed in article 698, *Code of Penal Procedure*.[77] Its jurisdiction extends to both civilians and military personnel, without regard to whether the alleged offenses were committed incident to military service. Moreover, since article 56 of the French Code is limited in its

[70] CJM art. 376. One may readily note from the terms used a reference to the government of Vichy France.

[71] CJM art. 81.

[72] CPP art. 698, ¶ *b*, *c*; DOLL 251, 252.

[73] Notably the Ordinance of 28 Aug. 1944, D.A. LEGISLATION 110, pertaining to crimes assimilated from interpretation of the Penal Code and the CODE DE JUSTICE MILITAIRE, and article 4 of the Law No. 48–1416, 15 Sep. 1948, D. LEGISLATION 320, providing for the exchange of normally privileged matter between an examining magistrate conducting an investigation concerning a war crime and allied nations who practice reciprocity.

[74] CJMAT art. 2.

[75] Lafarge and Claviere 32.

[76] Law No. 63–22, 15 Jan. 1963, CODE DE PROCEDURE PENALE, PETITS CODES DALLOZ (1967–1968).

[77] The law cited above which created the *Cour de la Surete de l'Etat* also established the proscribed offenses now embodied in the CPP.

application by article 698 of the *Code of Penal Procedure*, the Court of State Security has jurisdiction over certain military offenses if they relate to an individual or collective enterprise directed at substituting an illegal authority for the authority of the state. During time of war, however, the jurisdiction to investigate and judge these crimes is vested in the military authorities. The 1966 Code incorporates the essential provisions of the 1963 legislation.[75]

A unique provision in the new Code is that it is the government prosecutor who initiates criminal proceedings in state security matters during wartime. Under the old Code, this authority was vested in the military commanders. Unfortunately, two aspects concerning the jurisdiction over crimes against state security were not dealt with by the 1963 and 1966 legislation—the jurisdiction of the *Cour de la Surete de l'Etat* during time of war and the jurisdiction of military tribunals during a state of national emergency or martial law. Apparently the Court of State Security will continue to function during wartime, taking jurisdiction of those cases referred to it during peacetime, which do not directly affect the military, and certain crimes or misdemeanors not concerning the military authorities, committed by minors of 18 or under, where neither the co-principals nor accomplices are subject to the jurisdiction of military tribunals.

The concern about jurisdiction during martial law or a period of national emergency stemmed from the provisions of article 82 of the new Code as originally enacted, which indicated that the permanent judicial district courts might exercise jurisdiction under these conditions to the detriment of the Court of State Security. However, the Law of 30 December 1966,[76] which amended the Code just a year after its effective date, settled the dispute. It is now clear that the *Cour de la Surete de l'Etat* will continue to exercise its authority with regard to state security matters during a state of martial law or proclamation of national emergency.

8. *Appeal and Review.*

As has been indicated, one of the most important changes in the new Code was the decision to place in the Court of Cassation the exclusive authority to review the decisions of both the permanent judicial district courts and the military tribunals in both peacetime and time of war. This innovation will certainly quell the criticism of the 1928 Code directed at the procedure of allowing military appellate courts to review their own military cases during wartime.

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[75] *See* CJM arts. 302–03, pertaining to jurisdiction, and CJM arts. 304–23, concerning procedural rules to be followed by military authorities in state security cases during wartime.

[76] Law No. 66–1038, *supra* note 2.

The old practice in wartime evidenced a complex substructure of military appellate courts. The *Tribunaux Militaires de Cassation Permanents* reviewed the decisions of the permanent judicial district courts, and the *Tribunaux Militaires de Cassation* constituted the appellate authority above the military tribunals.[80] There were two main objections to the military courts of review. One was that the majority of the appellate judges were military officers and not judges by profession. The other was that there was no further appeal possible from the decision of a military appellate court. Another distasteful provision of the old Code, which has now been abolished, was the power granted the Council of Ministers or the commander of a beseiged area to suspend temporarily the right of appeal.[81]

Worthy of discussion at this point is the scope of appeal to the *Cour de Cassation.* Comparative studies have sometimes implied that a petition for review from French military courts directed to the *Cour de Cassation* may be based only upon alleged errors of law. There are actually three general categories of appeal to the *Cour de Cassation*—appeal in cassation, an appeal in the interest of the law, and demand for revision.

Appeals in cassation (*pourvoi en cassation*) constitute the majority of appeals. Factors such as lack of jurisdiction, insufficiency of evidence of guilt and failure to follow prescribed procedures may be attacked in this manner. When the appellate tribunal discovers an error committed below which invalidates the trial, it may take one of several courses of action. If the decision must be set aside due to lack of jurisdiction, the Court of Cassation may refer the case to a court of competent jurisdiction. When the decision is overturned for other reasons, the case is usually returned to another military jurisdiction for retrial, except when the basis for reversal was that the actions of the accused did not constitute a crime. Upon return (*renvoi*) of the case, the new court is bound by the decision of the *Cour de Cassation.* If it fails to so conform and another appeal is forthcoming on the same point of law, the case will again be returned, at which point the lower court will be directed to make its decision parallel to that of the higher court. Furthermore, the Court may set aside illegal, as distinguished from excessive, punishments.[82]

Appeal in the interest of the law describes that appellate procedure by which the *procureur general*, acting on formal order of the Minister of Justice, can question acts or judgments emanating from military jurisdictions which appear contrary to the law. Additionally, in the

[80] CJMAT art. 126.
[81] CJMAT art. 179.
[82] CJM arts. 249–50.

interest of the law, the *Cour de Cassation* may entertain an appeal from a military court when neither the accused nor the government prosecutor has filed an appeal within the required time.[53]

While appeals in cassation generally focus upon errors of law, the demand for revision is concerned with factual questions. Under certain specified conditions a judgment of a military court may be set aside without regard to a failure to file an appeal within the statutory time. Some examples of the use of a demand for revision are in homicide cases where evidence of the *corpus delecti* is insufficient, where another civil or military court has convicted another accused of the same crime and the convictions cannot otherwise be explained or resolved, where an essential witness has subsequently been convicted of material perjury, and where new evidence establishes the innocence of the accused.[54]

One may conclude that full appellate review of all military courts by the *Cour de Cassation* should guarantee to the individual tried nearly all the rights and privileges enjoyed under existing civilian procedures. The centralization of appellate review will further provide the beneficial attribute of equality in the application of the law by the various military courts and tribunals.

9. *Other Changes.*

Although the enactment of the Code wrought a myriad of changes in French military justice, the most important of which have already been mentioned, several other portions of the revision deserve brief comment. Inaugurated for the first time were the strict civilian procedural rules governing the conduct of judicial police with respect to the length of time a suspect may be held for investigation and questioning before either release or formal charges are required. Henceforth all persons under the jurisdiction of military courts will be afforded most of the guarantees of *la garde a vue* as set forth in the *Code of Penal Procedure*.[55]

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[53] CJM art. 252; CPP arts. 620–21.

[54] CJM arts. 253–55; CPP arts. 622–26.

[55] CJM arts. 101–09; CPP arts. 64–65. The term *la garde a vue* refers to detention of a suspect by judicial police and is not technically an arrest. A person found at the scene of a crime who is unable to satisfy the police of his identity or who may be able to furnish information about the crime may be detained for the purpose of watching him or obtaining more information. A person so detained must be released after 24 hours unless the *procureur* or, in a case involving military jurisdiction, the *commissaire du gouvernement*, authorizes an extension for another 24-hour period. During the detention the suspect must be given effective breaks or rest periods between questioning and a detailed written record must be made concerning all phases of the interrogation. *See* Vouin, *Police Detention and Arrest Privileges*, 51 J. CRIM. L. C. & P. S. 419 (1960); Patey, *Recent Reforms in French Criminal Law and Procedure*, 9 INT'L & COMP. L. Q. 383, 391 (1960).

The controversial procedure of trial *in absentia* has been abolished by the 1966 legislation. Along with this, the process of judgment by default has been substantially revised giving one placed in a default situation even more safeguards than are provided under existing civilian procedures.[86]

The nature of military offenses punishable by the French Code did not escape careful attention. An example may be found wherein the revisors deleted a previously proscribed offense of theft of military property, which could already be punished by reference to the Penal Code, and substituted therefor a provision punishing temporary misappropriation of military property, which was never the object of a definitive article under either military or civil penal codes. The same new provision [87] provides criminal sanctions for the negligent damage to or destruction of military property now thought necessary because of the increasingly more complex and costly machinery of war.[88]

In order to protect the integrity of military justice, the drafters provided severe penalties directed at any military commander who establishes or maintains an illegal or repressive system of military courts or tribunals.[89] Further significant changes were effected in the field of punishments. Equality of maximum punishments between the military services was achieved. The punishment of military degradation was abolished entirely, and dismissal substituted therefor.[90] The punishment of dismissal itself was changed to become an accessory penalty in all but a few serious offenses. Previously, as to officers and non-commissioned officers, dismissal from the military service was a

[86] CJM arts. 266–86; CPP arts. 487–94. Although a complex study in itself, the Code of Penal Procedure generally provides that an accused who does not appear in court at the time and place specified in a summons is in default and a judgment to that effect may be rendered. Notification of the default judgment may be made in person or by publication. A person so in default may contest the judgment within 10 days if he resides within metropolitan France and within one month if he is outside the territorial confines thereof. The new Code establishes a more liberal default procedure. When an accused does not appear as required in the summons (*citation a comparaitre*) the president of the military judicial district court must render a judicial order (*ordonnance presidentielle*) informing the accused he will be in default if he does not appear within 10 days (5 days in time of war). If he makes an appearance he is glevn another *citation a comparaitre* ordering him to present himself for trial at a subsequent date. Failure to abide by the *ordonnance presidentielle*, however, subjects the accused to a default judgment. Once in default the accused has 15 days in which to contest the default judgment and, importantly, this period does not begin to run until he is *personally served* with the default judgment.

[87] CJM art. 409.

[88] Lafarge and Claviere 33.

[89] CJM art. 444. Imprisonment for a period of 10 to 20 years is the punishment for a violation of this provision.

[90] Degradation consisted of publicly stripping the individual of all insignia of rank, grade and indicia of military status, much like the past Marine Corps practice of "drumming out" similarly condemned in the United States today.

mandatory penalty for many misdemeanors and felonies. Its imposition is now left largely to the discretion of the judges. However, the Senate failed in a bid to liberalize a provision requiring automatic loss of grade or rank in cases where the accused was sentenced to a punishment in excess of two months for certain specified offenses. Other important changes too numerous to detail, relating to suspension of sentence, conditional parole, recidivism and rehabilitation, all geared to the evolution of penal science, were incorporated throughout the new Code.[91]

C. *AN EVALUATION OF THE REVISION*

The enactment of the new *French Code of Military Justice* represents far more than a codification of prior legislation governing the three French military services. Throughout the new legislation exist material changes designed both to expedite military justice proceedings and align military justice procedures more closely to those found in the civilian courts.

Underlying most of the new provisions runs the trend toward greater professionalism and expertise in the administration of military justice in France. The 1966 Code has increased the number of military magistrates organic to military courts and subjected all military judicial proceedings to the review and control of the highest civilian appellate court of the land. Confidence in the Military Judicial Corps has been reflected in extending to the government prosecutor and the examining magistrate powerful judicial authority previously enjoyed only by their civilian equivalents. A speedy, authoritative forum for resolving pretrial disputes is displayed in the creation of the *Chambre de Control de l'Instruction* which is also charged with overseeing the timely progress of military justice proceedings. As we have seen, although the jurisdiction of military courts in France has been somewhat more severely limited during peacetime, the new *Code de Justice Militaire* embodies provisions designed to guarantee the rapid enforcement of discipline overseas and in time of war.

It might be argued that it is too soon to evaluate authoritatively the success of the revision. However, certain factors indicate that the proponents of the new Code have accomplished their goal of liberalizing and simplifying a heretofore overly complex system of military justice, while concurrently increasing individual guarantees under military law. Always of extreme importance in a civil law country, the commentaries of recognized legal authorities have been uniformly favorable.[92] Colonel Collet, the only member of the French armed forces to

[91] *See* CJM arts. 340–55.

[92] DOLL ; Lafarge and Claviere ; Colas, *supra* note 50.

write a comment on the new code, was similarly propitious.[93] Moreover, the dearth of legislation subsequent to the promulgation of the new Code reinforces the conclusion that the revision was a success. With the exception of the Law of 30 December 1966,[94] which clarified some latent ambiguities which existed in the new Code as originally enacted, the laws, decrees and orders pertaining to the Code promulgated since July of 1965 have been of minor significance and, indeed, anticipated due to the nature of the framework of the Code. At this time, at least, it must be concluded that the comprehensive revision undertaken is admirably suited to the needs of the French people and compatible with the requirements of the armed forces of France.

IV. POSSIBLE APPLICATION OF THE NEW FRENCH MILITARY JUSTICE PROCEDURES TO PROBLEMS IN AMERICAN MILITARY JUSTICE

Because of many fundamental differences between the two legal systems, common and civil law, it is obvious that French military justice procedures cannot, as a whole, offer a reasonable alternative to any possible inadequacies in our own system of military justice. Our own established concepts of trial by jury, a system of complex evidentiary rules and the adversary nature of judicial proceedings do not permit wholesale adoption of proceedings grounded so firmly in civil law. On the other hand, one should not reject legal ideas or procedures relating to the field of military justice merely because they are derived from a country whose judicial procedures are based on other than the common law as we know it. The aims of our two systems of military justice are the same—swift enforcement of military order and discipline while guaranteeing to the accused the maximum legal protections reasonably available under the circumstances.

Given the foregoing, is it not reasonable to assume there might be some practices or procedures applicable to our own system derived from a major military justice revision effected by the best military-legal minds of another Western country? The purpose of the following is to discuss the possible application to American military justice of some of the major changes created by the new *Code de Justice Militaire*. Although it would be possible to propose broad, far-reaching revisions, altering existing military justice concepts, based upon this study of the present French procedures, the author prefers to offer as an example one general recommendation, aimed at improving our present system of military justice without drastically altering an already healthy, essentially sound and workable framework.

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[93] Collet, *supra* note 54.

[94] Law No. 66–1038, *supra* note 2.

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Such a recommendation might well be addressed to the adequacy of our procedures governing pretrial investigations. Consideration of the increase in the scope of judicial power granted the military *juge d'instruction* under the new *Code de Justice Militaire* reflects the concept that an impartial, legally-trained investigator vested with necessary authority will perform this important task competently and efficiently. Our existing pretrial investigation procedures exhibit room for improvement in this regard.

In an appropriate case, and in every case referred to trial by general court-martial, a court-martial convening authority appoints an officer to conduct an investigation pursuant to article 32, *Uniform Code of Military Justice*, pertaining to charges which have been preferred against an individual. Although the applicable paragraph in the Manual for Courts-Martial [95] indicates the investigator should be a mature officer, preferably an officer of the grade of major or lieutenant commander or higher, or one with legal training or experience, actual practice demonstrates that junior officers not infrequently must be utilized in this regard. Many more senior investigating officers have had little or no prior experience in conducting article 32 investigations.[96] It is the author's experience that judge advocates rarely perform this vital pretrial function. Under ordinary circumstances either the staff judge advocate or a subordinate must guide the inexperienced article 32 investigator through a mass of statements, investigations and documents in order to impress upon him the legal significance and relevance of certain expected testimony and evidence. Counsel present at hearings convened during the investigation often assert legal objections to proffered evidence, posing additional problems. After terminating the investigation the pretrial investigator is often requested to re-open it due to the omission of an essential fact or element. Even after completing the task, the inexperienced officer must frequently seek legal advice before he can prepare his recommendations. If his investigation reveals additional charges against the accused, or indicates the possibility of co-principals or accomplices, he can do no more than note such in his report. Such information often results in yet another investigation, usually by a second officer. In sum, for the legally untrained or for the inexperienced officer the duty of conducting a complicated article 32 investigation is extremely difficult, bountiful in responsibility, but lacking in authority.

What assistance in this regard might we derive from an analysis of the changes in the French Code pertaining to the examining

[95] Manual for Courts-Martial, United States, 1951, ¶34 [hereafter called the Manual].

[96] *See generally* Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1 (1961).

magistrate? The word "magistrate" suggests the first possibility—that judge advocates conduct these proceedings which are becoming increasingly more important and complex as new judicial and constitutional safeguards are applied to the military. A reasonable assumption can be made that a judge advocate should be able to pinpoint the evidence and witnesses pertinent to the inquiry more effectively, obtain more relevant testimony, cope with knotty legal questions raised during the investigation, and conclude the investigation more quickly, to the benefit of both the accused and the government.

Concomitant with placing the burden of conducting pretrial investigations upon judge advocates, there should be a corresponding increase in the investigating officer's authority. As we have seen with the French counterpart of the article 32 investigating officer, the case is now transmitted to him *in rem* instead of *in personam*. The *juge d'instruction* may extend his investigation to all related offenses and to all persons implicated during the course of the proceedings. He is further empowered to increase or decrease the severity of the charge. If the evidence so indicates, the examining magistrate may institute new charges against the accused and, subject to objection by the *commissaire du gouvernement*, dismiss allegations not supported by the investigation. The French judicial authorities expect that by vesting these important pretrial powers in the trained magistrate, and without requiring him to refer these matters back to military authorities each time such an issue is raised, both the quality and speed of pretrial investigations will be vastly improved.

Would it not be more efficient to apply these general principles to our military justice procedures? Neither legislation nor executive order would be required to appoint judge advocates or legal officers as investigating officers. Legislation would be required, however, to invest in them the authority to render their use in this regard really worthwhile.

To pattern their authority upon that of the *juge d'instruction* under the new French Code would, in the author's opinion, be a step worthy of serious consideration. The resulting professional report of investigation, including properly drafted charges and properly charged offenses, could markedly reduce pretrial delays. This report, moreover, could conceivably form the basis for the commander's ultimate decision with respect to the disposition of the charges, requiring only an indorsement by the staff judge advocate reflecting his advice with respect to the investigating officer's recommendations. It is suggested that the enactment of legislation, granting the judge advocate who is appointed pretrial investigating officer substantial pretrial powers to deal with the matter under investigation *in rem*, patterned after the authority vested in the *juge d'instruction* as set forth in the 1966

French Code, would tend to place legal professionalism in a stage of judicial proceedings heretofore ignored and where it is sorely needed.

While in France the constant process toward fusing military justice with civilian procedures has been given emphasis by their recent legislation, this same basic trend exists in the United States. In our own country the enactment of the *Uniform Code of Military Justice* in 1951 was the product of similar sentiment. Since 1951, gradual yet steady inroads have been made upon traditional military justice doctrines and procedures by judicial decision. As the constitutional and procedural guarantees enjoyed by civilians become more and more a part of modern military justice, it is likely that existing military justice procedures may prove more awkward in peacetime, and even clumsy in a greater than limited war situation. For these reasons it would be appropriate to subject our own military justice procedures to critical scrutiny with a view toward simplifying present practices and anticipating future difficulties. Analysis of the new French Code of Military Justice indicates that substantial room for improvement may lie in the field of pretrial investigations conducted in accordance with article 32, UCMJ. The adaptability of the French Code to the stresses of war highlights a possible latent defect in our own procedures. To provide in advance for the streamlining of the administration of military justice during an emergency would be prudent, and the benefits derived from such foresight could redound to all who are concerned with the fair and efficient enforcement of military discipline.

COMMENTS

UNITED STATES EUROPEAN COMMAND: A GIANT CLIENT*

I. INTRODUCTION

A. *THE GIANT CLIENT*

From the north cape of Norway to the eastern boundaries of Turkey, from Morocco on the west to Libya on the southern Mediterranean coast, America's military interests in Europe and part of Africa are in the hands of the United States European Command, USEUCOM. Over half a million Americans—military, civilian employees, and dependents—are stationed in the countries[1] that make up EUCOM's geographical area of responsibility, nearly twice the size of the United States. They administer about one-fourth of the total U.S. worldwide military assistance effort. Consequently, its economic impact is vast; the dollar value of offshore procurement in the area exceeded a quarter billion in fiscal year 1968. Far and away the greatest portion of United States' foreign military sales are executed through the MAAG's and Missions of EUCOM.

America's military commitment is similarly impressive. The Commander in Chief, European Command, known as CINCEUR, exercises operational control under the Joint Chiefs of Staff (JCS) over the three powerful service component commands, U.S. Army Europe (USAREUR), U.S. Air Forces Europe (USAFE), and U.S. Navy Europe (USNAVEUR), which include the Seventh U.S. Army, the Berlin Command, Southern European Task Force, the Sixth Fleet, and the 3d, 16th, and 17th Air Forces.

The giant client, USEUCOM, generates legal business that keeps more than 300 U.S. lawyers, military and civilian, fully occupied in

*The opinions and conclusions presented are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] U.S. troops on Military Assistance Advisory Groups (MAAG's) or missions are stationed in the following 16 countries: Belgium, Denmark, France, Germany, Greece, Italy, Libya, Luxembourg, Morocco, Netherlands, Norway, Portugal, Spain, Tunisia, Turkey, and the United Kingdom. In addition, EUCOM has responsibility for coordinating U.S. military activities in all other countries in Europe.

Europe with the full gamut of legal problems. The vast majority of these lawyers are at work with the component service commands, USAREUR,[2] USAFE,[3] and USNAVEUR,[4] but it is the purpose of this paper to discuss the functioning of one of the smallest of all the EUCOM legal offices, the office of its own Legal Adviser, and to examine the role of the EUCOM Legal Adviser vis-a-vis various commands, embassies, organizations, and other authorities which affect the activities of the European Command.

B. *EUCOM'S ORIGINS*

To assess the Legal Adviser's position, it is helpful to get a good look at EUCOM itself.

EUCOM, one of the seven [5] unified [6] United States commands [7] op-

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[2] At any one time the Army has about 140 judge advocate officers and 29 DA civilian lawyers in Europe under USAREUR.

[3] USAFE lists about 116 judge advocate officers and 10 DAF civilian lawyers.

[4] The Navy rosters show 27 uniformed lawyers and 3 civilian attorneys in Europe.

[5] The seven unified commands are: Alaskan Command, Atlantic Command, Continental Air Defense Command, European Command, Pacific Command, Southern Command, and STRIKE Command. The Strategic Air Command is the only specified command. For an excellent summary of the specified command's legal situation, see Burke, *SAC: The "Specified" Command*, 10 AF JAG L. REV. (No. 1) 4 (Jan.–Feb. 1968).

[6] *See* JOINT CHIEFS OF STAFF PUBLICATION No. 2 (JCS Pub. 2), ¶ 30221 (Nov. 1959), *Definition of a Unified Command:* "A unified command is a command with a broad continuing mission, under a single commander and composed of significant assigned components of two or more Services, and which is established and so designated by the President, through the Secretary of Defense with the advice and assistance of the Joint Chiefs of Staff or, when so authorized by the Joint Chiefs of Staff, by a commander of an existing unified command established by the President."

[7] 10 U.S.C. § 124 (1964) provides: "*Combatant commands: establishment; composition; functions; administration and support.* (a) With the advice and assistance of the Joint Chiefs of Staff, the President, through the Secretary of Defense, shall—(1) establish unified combatant commands or specified combatant commands to perform military missions; and (2) shall prescribe the force structure of those commands. (b) The military departments shall assign forces to combatant commands established under this section to perform the missions of those commands. A force so assigned is under the full operational command of the commander of the command to which it is assigned. It may be transferred from the command to which it is assigned only by authority of the Secretary and under procedures prescribed by the Secretary with the approval of the President. A force not so assigned remains, for all purposes, in the military department concerned. (c) Combatant commands established under this section are responsible to the President and to the Secretary for such military missions as may be assigned to them by the Secretary with the approval of the President. (d) Subject to the authority, direction, and control of the Secretary, each military department is responsible for the administration of forces assigned by the department to combatant commands established under this section. The Secretary shall assign the responsibility for the support of forces assigned to those commands to one or more of the military departments."

erating directly under the Joint Chiefs of Staff,[8] is unique in that it is primarily concerned in the support of the U.S. commitment to NATO. It was activated, initially with headquarters in the I.G. Farben Building, Frankfurt, Germany, on 1 August 1952, as a result of (1) the North Atlantic Treaty of 4 April 1949;[9] (2) the decision of the North Atlantic Council of 18–19 December 1950 that the President of the United States should nominate a Supreme Commander for the then unformed NATO military organization; (3) the appointment of General Dwight D. Eisenhower as Supreme Allied Commander, Europe (SACEUR); (4) establishment of the international headquarters, Supreme Headquarters Allied Powers Europe (SHAPE); and (5) a series of follow-on studies initiated by then Secretary of Defense Robert Lovett to clarify the position of the U.S. Forces in Europe, particularly relative to NATO, and to provide these forces with a central authority in Europe for coordinating joint military interests.[10]

General Mathew B. Ridgway, SACEUR in 1952, became the first U.S. Commander in Chief, Europe (CINCEUR), combining both the SHAPE and U.S. command functions in the same individual.[11] To exercise his U.S. responsibilities on a day-to-day basis, SACEUR/CINCEUR delegated most of his U.S. Forces duties by a charter paper to the Deputy Commander in Chief, Europe (DCINCEUR), the first one being General Thomas T. Handy, U.S. Army.[12]

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[8] 10 U.S.C. § 141(d)(3) (1964) provides: "Subject to the authority and direction of the President and Secretary of Defense, the Joint Chiefs of Staff shall—. . . . (3) establish unified commands in strategic areas." This language is initially found in the National Security Act of 26 Jul. 1947, ch. 343, § 211(b)(3), 61 Stat. 505, with the following words added: ". . . [W]hen such unified commands are in the interest of national security. . . ." The amendments to the National Security Act, 10 Aug. 1949, ch. 412, § 211(b)(3), 63 Stat. 582, deleted these words, and the present U.S. Code text is found again stated in the Defense Reorganization Act of 6 Aug. 1958. Pub. L. No. 85–599, 72 Stat. 518.

[9] Signed at Washington, D.C., 4 Apr. 1949; entered into force for the U.S. on 24 Aug. 1949, 63 Stat. 2241, T.I.A.S. 1964. The Protocol on the Accession of Greece and Turkey was entered into at London, 17 Oct. 1951, and entered into force for the U.S. on 15 Feb. 1952, 3 U.S.T. 43, T.I.A.S. 2390. The Protocol on the Accession of the Federal Republic of Germany was entered into at Paris, 23 Oct. 1954, and entered into force for the U.S. on 5 May 1955, 6 U.S.T. 5707, T.I.A.S. 3428.

[10] JCS Pub 2 ¶ 30223 (Nov. 1959) provides that "The authority which establishes a unified command shall determine the force structure, designate a commander, assign or have assigned to him forces and his mission, define his general geographic area of responsibility or his function, and may designate a second-in-command."

[11] The first USCINCEUR was General Mathew B. Ridgway, 1 Aug. 1952 to 10 Jul. 1953, followed by General Alfred M. Gruenther, 11 Jul. 1953 to 19 Nov. 1956; General Lauris Norstad, 20 Nov. 1956 to 31 Dec. 1962; General Lyman L. Lemnitzer, 1 Jan. 1963 to date.

[12] Deputy Commanders in Chief, Europe (DCINCEUR) have been: General Thomas T. Handy, USA, 1 Aug. 1952 to 31 Mar. 1954; General Orval R. Cook,

In May 1954, Headquarters, EUCOM, moved from Germany to Camp des Loges, by the community of St. Germain-en-Laye, near Paris and close to the SHAPE headquarters at Rocquencourt, France, where it remained until the relocation of both SHAPE and U.S. Forces from France in 1966–1967. Once again many miles apart, SACEUR/CINCEUR and his international staff are now located near Casteau, Belgium, while DCINCEUR and the USEUCOM staff are at Stuttgart, Germany. A daily round-trip air courier facilitates contact between the two headquarters.

C. *EUCOM'S MISSION AND FUNCTIONS*

The missions of CINCEUR [15] include the following:

1. Maintain the security of the U.S. European Command and protect the U.S., its possessions, and bases against attack or hostile incursion.

2. Support SACEUR and honor the U.S. commitment to NATO.[16]

USAF, 1 Apr. 1954 to 31 May 1956; General George H. Decker, USA, 1 Jun. 1956 to 31 May 1957; General Williston B. Palmer, USA, 1 Jun 1957 to 30 Sep. 1959; General Charles D. Palmer, USA, 1 Oct. 1959 to 28 Feb. 1962; General Earle G. Wheeler, USA, 1 Mar. 1962 to 30 Sep. 1962; General John P. McConnell, USAF, 1 Oct. 1962 to 31 Jul. 1964; General Jacob E. Smart, USAF, 1 Aug. 1964 to 31 Jul. 1966; General David A. Burchinal, USAF, 1 Aug. 1966 to date.

[15] JCS PUB. 2 ¶ 30226, sets out the following responsibilities for Unified Commanders:

"a. Maintain the security of his command and protect the United States, its possessions, and bases against attack and hostile incursions.

"b. Carry out assigned missions, tasks, and responsibilities.

"c. Assign tasks to, and direct coordination among his subordinate commands to insure unity of effort in the accomplishment of his assigned missions.

"d. Communicate directly with:

(1) The Chiefs of Services on uni-Service matters as he deems appropriate.

(2) The Joint Chiefs of Staff on other matters to include the preparation of strategic and logistic plans, strategic and operational direction of his assigned forces, conduct of combat operations and any other necessary function of command required to accomplish his mission.

(3) The Secretary of Defense, in accordance with applicable directives.

(4) The subordinate elements, including the development organizations, of the Defense Agency and/or the Military Department directly supporting the development and acquisition of his command and control system . . . as authorized by the Director of the Defense Agency or Secretary of the Military Department concerned. . . .

"e. Keep the Joint Chiefs of Staff promptly advised as to significant events and incidents which occur in his functional or geographic area of responsibility, particularly those incidents which could create national or international repercussions. . . ."

[16] Two excellent commentaries on the U.S. commitment to NATO appear in the Department of State Bulletin: Rostow, *Europe and the United States—The Partnership of Necessity*, 58 DEP'T STATE BULL. 680, and Cleveland, *How To Make Peace With the Russians*, *id.* at 687. Undersecretary Rostow points out that the U.S. forces make up about 24 percent of NATO's armies in Europe and discusses in some detail the establishment of force levels. Ambassador Cleveland, who is

3. Exercise operational command[15] over assigned forces through the service component commanders. Insure that assigned forces are organized, trained, and equipped for the conduct of sustained combat operations.

4. Administer the military aspects of the Mutual Security Program.[16]

5. Plan and utilize military resources available to reinforce and support political, economic, and psychological programs for the achievement of national security interests.

6. Evacuate and assist in the evacuation of U.S. non-combatants and certain non-U.S. persons abroad.

7. Support other unified and specified commands, U.S. and other national and international agencies and commands.

8. Secure unity of effort in such missions as may be assigned to CINCEUR for his geographical area of responsibility.[17]

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the U.S. Permanent Representative on the NATO Council and Chief of the U.S. Mission to NATO (US NATO), describes the NATO defense system and makes mention, among other things, of the redeployment, of a small part of the NATO-committed Army and Air Forces to bases in the United States, while still keeping them committed to NATO and able to move rapidly to Europe in an emergency.

[15] Dep't of Defense Directive No. 5100.1 (31 Dec. 1958) and JCS PUB. 2, ¶ 30227 (Nov. 1959), authorize a Unified Commander to exercise operational command. This term is further defined in JCS PUB. 2, ¶ 30201 (Nov. 1959), to incorporate those functions involving composition of the forces, assignment of tasks, designation of objectives, and the authoritative direction necessary to accomplish the mission. Operational command should be exercised by the use of assigned normal organization units through their responsible commanders. Operational command does not include such matters as administration, discipline, internal organization, and unit training, except when a subordinate commander requests assistance. ¶ 30202 elaborates on the exercise of operational command by outlining that a Unified Commander is authorized to: (1) plan for, deploy, direct, control, and coordinate the actions of assigned forces in conformity with the concept that operational command normally will be exercised through the service component commanders; (2) conduct joint training exercises; (3) exercise directive authority within his command in the field of logistics, to insure effectiveness and economy of operation, prevent or eliminate unnecessary duplication of facilities and overlapping of functions among the service components of a command; (4) establish such personnel policies as required to insure uniform standards of military conduct; (5) exercise directive authority over all elements of his command, in accordance with policies and procedures established by higher authority, in relationships with foreign governments, including the armed forces thereof, and other agenices of the U.S. Government; (6) establish plans, policies, and overall requirements for the intelligence activities of his command; (7) review the recommendations bearing on the budget from the component commanders to their parent military departments to verify that the recommendations are in agreement with his plans and policies; (8) participate in the development and acquisition of his command and control system and direct the system's operation.

[16] Dep't of Defense Directive Nos. 5132.3 (8 Jul. 1963), 5410.17 (15 Jan. 1965).

[17] JCS PUB. 2, ¶ 30222, provides that when either or both of the following criteria apply generally to a situation, a unified command normally is required to secure the necessary unity of effort: (a) a broad continuing mission exists requiring execution by significant forces of two or more services, and necessitat-

9. Implement the public affairs policies of the Department of Defense.[18]

10. Coordinate international Cooperative Logistics Program.[19]

D. *THE CATALYTIC AGENCY*

Although almost one-third of a million U.S. military personnel are assigned to elements of the European Command, actually the Headquarters consists of only about 700 military personnel, divided among the services at a fixed ratio of 37½ percent Army, 37½ percent Air Force, and the remaining 25 percent Navy and Marine Corps personnel. Positions as chiefs of staff offices and directorates are assigned to particular services to maintain this balance.[20]

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ing a single strategic direction; (b) any combination of the following when significant forces of two or more services are involved: (1) a large-scale operation requiring positive control of tactical execution by a large and complex force; (2) a large geographic area requiring positive single responsibility for effective coordination of the operations therein; (3) necessity for common utilization of limited logistic means.

[18] See Dep't of Defense Directive No. 5105.35 (7 May 1965): "The Commanders of Unified and Specified Commands are responsible to the Secretary of Defense for public information and community relations. Unified and Specified Commands will be responsible for public affairs matters pertaining to assigned forces within their geographic areas of responsibility." *See also* Dep't of Defense Directive Nos. 5410.18 (9 Feb. 1968), 5122.5 (10 Jul. 1961), vesting the Unified Commander with certain responsibilities to the Secretary of Defense for Community Relations.

[19] Other missions include: responsibility for developing agreements respecting defense communications field agencies (DOD Directive 5105.19 (18 Sep. 1967)), direction of mapping, charting, and geodesy (DOD Directive 5105.27 (21 Nov. 1962)); assignment of single service claims responsibility when necessary to implement contingency plans (DOD Directive 5515.8 (28 Jul. 1967)); appointment of responsible commanders for status of forces matters (DOD Directive 5525.1 (20 Jan. 1966)); insuring coordination in local labor matters (DOD Directive 1400.10 (8 Jun. 1956)); acting on requests for theater clearances (DOD Directive 5000.7 (14 Jun. 1960)); certain responsibilities in matters of international logistics (DOD Directive 5100.27 (27 Apr. 1962)); foreign disaster relief operations (DOD Directive 5100.46 (15 Oct. 1964)); nuclear accident information planning (DOD Directive 5230.16 (8 Aug. 1967)); responsibilities with respect to contributions by foreign governments for administrative operating expenses of military assistance programs (DOD Directive 2110.31 (10 Apr. 1967)); reporting, screening, and disposing of redistributable military assistance program property (DOD Directive 4160.20 (20 Dec. 1967)); and continuity of operations policies and planning (DOD Directive 3020.26 (25 Aug. 1967)). *See also* Exec. Order No. 10608, ¶ 3 (5 May 1955), 3 C.F.R. 1954–1958 Comp., p. 249. 22 U.S.C. § 901 (1964), vesting military responsibilities, duties, and functions of the United States in all of Germany in "The United States Military Commander having area responsibility in Germany, . . ." to wit: CINCEUR.

[20] JCS PUB. 2, ¶ 30224, provides that the commander of a Unified Command shall have a joint staff with appropriate members in key positions of responsibility from each service having component forces under his command. The joint staff shall be reasonably balanced with regard to the composition of the forces and the character of the operations, so as to insure an understanding by the commander of the tactics, techniques, capabilities, needs, and limitations of each component of his forces.

USEUCOM is the keystone of the U.S. military presence in Europe. It is organized to coordinate U.S. efforts among the component commands, to conduct or supervise activities in the U.S. military interface with the international military headquarters of SHAPE and its major subordinate commands, to relate the U.S. military with U.S. diplomatic activities through contact with the many American embassies and ambassadors in Europe, including our representatives to the several international organizations headquartered there, to act as a quick and ready conduit to and from Secretary of Defense and the JCS, and in short to serve as a vital nerve center for the United States abroad.

The variety of roles of EUCOM, its importance in U.S.-European relations, both military and civilian, and the breadth of its resources provide stimulating activities for its staff agencies. It is in this context that we now examine one of these, its Legal Adviser.

II. THE LEGAL ADVISER

A. *ORIGIN*

The first legal office in EUCOM was established on 29 June 1954,[21] with the appointment of a civilian General Counsel, Mr. Leonard J. Ganse, GS–15. Following several years of study this office was replaced [22] on 1 December 1959 with the Office of the Legal Adviser, Joint Table of Distribution (JTD) spaces being allocated for the position to be held by one Army colonel, JAGC,[23] with an Air Force lieutenant colonel deputy and, later, a GS–15 civilian attorney assistant.

The initial order [24] establishing the Office of the European Command Legal Adviser (ECLA) assigned the following mission: to provide legal advice to the Commander in Chief and his staff on matters pertaining to military justice, foreign criminal jurisdiction, and United States and international law, and to maintain legal liaison with headquarters of component commands, Military Assistance Advisory Groups and Missions, and other United States and foreign agencies.

B. *MISSION AND FUNCTIONS OF THE LEGAL ADVISER*

Over the years the missions and functions statement has been changed and broadened, become more detailed and imaginative, until,

[21] The EUCOM General Counsel in later years brought an action in the Court of Claims, reviewing, among other matters, the origins of the position. *See* Ganse v. United States, 376 F.2d 900 (Ct. Cl. 1967).

[22] USEUCOM General Order 101, 1 Oct. 1959, effective 30 Nov. 1959.

[23] Legal Advisers to USEUCOM have been Colonel Howard S. Levie, JAGC, 1 Dec. 1959 to 22 Jun. 1961; Brigadier General (then Colonel) Lewis F. Shull, USA, 23 Jun. 1961 to 24 Jul. 1963; Colonel James K. Gaynor, JAGC, 25 Jul. 1963 to 13 Aug. 1966; and Colonel George S. Prugh, JAGC, 14 Aug. 1966 to date.

[24] USEUCOM General Order 102, 1 Oct. 1959, effective 1 Dec. 1959.

as matters presently stand, the functional responsibility of the Legal Advisor composes an impressively lengthy list.[25] Just a few of these

[25] The following are the functions of the Legal Adviser:

a. Provide legal guidance and assistance to CINCEUR and his staff.

b. Provide legal guidance and assistance to U.S. Elements at SHAPE and subordinate international headquarters, as required.

c. Provide technical liaison with legal agencies of US NATO, foreign countries, SHAPE, and subordinate international headquarters.

d. Formulate and review plans for contingencies and operations, insuring appropriate legal planning to include military justice, claims, PW, refugees, and legal aspects of civil affairs.

e. Act as contact point for General Counsel, Department of Defense.

f. Review NATO Status of Forces Agreement (SOFA) and initiate recommendations for action, insuring compliance, interpretation, a new understanding, or other action, as may be necessary.

g. Review the legal practices under the NATO SOFA and other international agreements, to insure U.S. requirements are adequately met and rights are preserved.

h. Initiate request to Secretary of Defense for the vesting of general court-martial jurisdiction in the Unified Command, when appropriate.

i. Advise CINCEUR and DCINCEUR in matters relating to military justice within the command, to the extent essential to the performance of the EUCOM mission.

j. Formulate policies and provide guidance for administrative handling of disciplinary matters within the EUCOM headquarters and MAAG's and missions.

k. Formulate, review, and monitor administrative and legal procedures connected with the exercise of foreign criminal jurisdiction, and in this connection serve as contact point with component commands, JCS, and DOD. See Dep't of Defense Directive No. 5525.1 (20 Jan. 1966).

l. Provide counsel and assistance in foreign military base rights negotiations and agreements to CINCEUR, the staff, and component commands, and to JCS, DOD General Counsel, State Department and Embassies concerned.

m. Provide counsel in residual value negotiations.

n. Provide counsel for legal aspects of civil affairs planning.

o. Plan and formulate proposals and guidance for use and assist in negotiation of international agreements.

p. Monitor international agreements and furnish assistance and information in that regard to the staff and to U.S. military and diplomatic representatives.

q. Review the Country Law Studies to insure accuracy, currency, and compliance with DOD directives.

r. Review and monitor EUCOM Country Regulations for legal sufficiency.

s. Provide counsel and serve as reviewing authority and office of record for matters relating to standards of conduct.

t. Formulate plans and policies and provide guidance for the administrative handling of claims matters within the headquarters, MAAG's and Missions, and elsewhere as necessary.

u. Review claims operations for compliance with directives and policies, but only insofar as necessary to the performance of the EUCOM mission.

v. Formulate, draft, and coordinate the tax portions of the EUCOM Supplement to the ASPR.

w. Take action on reports and correspondence received from contracting officers and components regarding host country tax changes that impact on U.S. forces.

x. Perform limited legal assistance for commander, staff, and headquarters personnel.

y. Sponsor, plan for, and participate in EUCOM Inter-Service Legal Committee.

z. Monitor and, at direction of DOD General Counsel, negotiate performing.

are: (1) review activities under NATO Forces Agreement (SOFA)[26] and other international agreements;[27] (2) obtain GCM jurisdiction for CINCEUR, if required;[28] (3) monitor agreement collection called for in DOD Directive 5530.2;[29] (4) review the country law studies;[30] (5) review EUCOM country regulations;[31] (6) provide counsel for matters relating to standards of conduct;[32] and (7) responsible for the tax portions of the EUCOM Supplement to the ASPR.[33]

C. *VARIED DUTY*

Duty in the Office of the Legal Adviser is anything but dull. Small and typically understaffed, with only three lawyers and two full-time clerks, the office is thrust into the widest possible variety of tasks, involving frequent and lengthy trips away from Stuttgart. A sample day for the Legal Adviser himself would read something like this:

0800–0925: Read message traffic; call NAVEUR Legal Officer about printing of report of Inter-Service Legal Committee; call Office of Chief of Staff, SHAPE, about contracting arrangements being negotiated in Belgium.

0930–1000: Staff Council meeting—report on yesterday's visit to AmEmb Bonn and Sending State meeting, followed by a few "chores"

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aa. Provide and maintain professional law library for the headquarters and a repository for international agreements.

[26] Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces, signed at London 19 Jan. 1951, entering into force for the U.S. on 23 Aug. 1953, 4 U.S.T. 1792, T.I.A.S. 2846.

[27] These include the Agreement to supplement the agreement of 19 Jun. 1951 between the parties to the North Atlantic Treaty regarding the status of their forces with respect to foreign forces stationed in the Federal Republic of Germany, with protocol of signature, signed at Bonn on 3 Aug. 1959, entering into force for the U.S. on 1 Jul. 1963, 14 U.S.T. 531, T.I.A.S. 5351. Signatories include the United States, United Kingdom, France, Belgium, Netherlands, Canada, and the Federal Republic of Germany.

[28] The most comprehensive background work on the activity of a staff judge advocate for a unified command operating a general court-martial jurisdiction is West, *Observations on the Operations of the Unified Command Legal Office*, 3 MIL. L. REV. 1 (1959). Another excellent article is Stevens and Farfaglia, *Court-Martial Jurisdiction in a Unified Command*, 10 A.F. JAG L. REV. (No. 3) 37 (May-June 1968). See UNIFORM CODE OF MILITARY JUSTICE art. 22*a*(7); Manual for Courts-Martial, United States, 1951, ¶¶ 5(2), 13.

[29] With the active assistance of the component commands, a consolidated index of international agreements involving EUCOM or its elements is being compiled. Roughly 900 such agreements have been identified.

[30] See Dep't of Defense Directive No. 5525.1 ¶IV(D) (20 Jan. 1966).

[31] See EUCOM Directive 30–12.

[32] Dep't of Defense Directive No. 5500.7 (8 Aug. 1967).

[33] Armed Services Procurement Reg. (ASPR) § 1.104(b), provides that USEUCOM will prepare a EUCOM ASPR Supplement and give tax and intergovernmental agreement information. ASPR § 1.609–2 also charges USCINCEUR with the responsibility for establishing and maintaining a list of offshore suppliers from whom bids and proposals will not be solicited and contracts not awarded. The EUCOM Legal Adviser participates in these actions.

and corridor arguments with the "Friendly J–5" an Air Force Major General who is also a lawyer and who delights in using the judge advocate in great portions of the J–5 work, Plans and Policy.

1000–1200: Prepare current analysis for J–5 and C/S concerning negotiations for U.S.-Turkey Bilateral Agreement.

1300–1315: Call to Legal Adviser, MAAG Spain, to discuss details of updating Country Law Study.

1315–1430: Research for DOD General Counsel on whether U.S. is entitled to exemption on Italian tax levied on school bus contract. Prepare message to components for in-put of information.

1430–1530: Attend command briefing for U.S. Ambassador to a Scandinavian country, where problem of a few U.S. military deserters might be raised.

1530–1600: Discuss with Headquarters Commandant the preparation for a new directive on internal discipline and military justice procedures.

1600–1610: Conversation with Deputy J–3 about contract changes for new Command Center building. Encounter the Friendly J–5 on the sidewalk outside his building—more chores, a few more arguments.

1610–1700: Drafting legal annex for J–5 contingency plan in Mediterranean.

1700–on: Reading incoming technical material, correspondence, USCMA advance sheets, JA Legal Service, etc.

D. *POLICY ROLE*

The Legal Adviser is a regular member of the USEUCOM Staff Council and attends the daily staff meetings and all major briefings. He is involved in many policy matters from the very outset and has both an opportunity and a duty to contribute his ideas, not only as to the law of the matter but the policy itself. In a headquarters of this type, the questions presented to the Legal Adviser are usually less of a straight "legal-illegal" issue but are more frequently concerned with assisting in the adaptation of a policy to fit identified legal limitations. There is thus an opportunity to shape the direction in which the policy should go, especially in the developing relationships with the international headquarters and with national military organizations with host countries.

The tasks of the Legal Adviser, USEUCOM, demand that he disregard a few of his views as an Army lawyer in order to fulfill his role as a joint staff officer. As one old hand at joint staff work has said in an informal memorandum to the writer:

> [A] good joint staffer doesn't have to forget for a minute his service affiliation. What he must avoid on joint duty is adherence or espousal of a service position just because it's the position of his service. To

> me the strength of a good joint staff is from the blending of stalwart, smart officers of the four services each injecting his own expertise into a problem . . . avoiding sheer addiction to dogma, but making sure that the valid service knowledge he possesses is injected into every problem.[34]

Army regulations do not necessarily apply to the issues presented to him nor do they help him, and so he must become familiar with the workings of the regulations of the other service, while one eye is cocked to previously issued EUCOM statements and directives. In this latter category are the directives for which the Legal Adviser is primarily responsible and which he may revise as necessary and proper.[35]

This illustrates the latitude the EUCOM staff may have, for, after considering the limits authorized by existing DOD directives and evaluating the differences existent among the service directives, the Legal Adviser may recommend to CINCEUR the most favorable or desirable path, eschewing a particular rule of one service. If he wishes, and this is generally done, the Legal Adviser circulates his draft directive not only among the EUCOM staff agencies having an interest, but also among his counterparts in the component commands, USAREUR, USAFE, and USNAVEUR. If the matter is of particular importance to the lawyers in Europe it may even be the subject of special consideration by the Inter-Service Legal Committee. Frequently, the staffing among the components brings forth new ideas and new differences, which must ultimately be resolved by CINCEUR, who will normally act on the recommendation of the Legal Adviser, USEUCOM.

The foregoing also illustrates the latitude available to the Legal Adviser in choosing a path influenced primarily by policy, but within established legal limits. The "law" available to the Legal Adviser of USEUCOM is more adaptable and fluid than that which circumscribes a staff judge advocate within a single service. Whereas the Legal Adviser of the unified command frequently finds latitude in the interstices of the several service regulations, the staff judge advocate cannot usually deviate from his service regulations. DOD directives are general in terms and broader than the more detailed implementing directives of the services. Furthermore, within the services major commands generally issue their own implementing directives, so that a

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[34] Comment by Major General Russell Dougherty, USAF, Director of J–5, EUCOM, former USAF Judge Advocate, 25 Sep. 1968.

[35] Staff Memo 45–1, Discipline of HQ USEUCOM Personnel; EUCOM Directive 5–13, USEUCOM Repository of Agreements with Foreign Governments; EUCOM Directive 45–1, Tort Claims—Component Command Responsibilities; EUCOM Directive 45–2, Inter-Service Legal Committee; EUCOM Directive 45–3, Foreign Criminal Jurisdiction Over U.S. Personnel; EUCOM Directive 45–4, Service of Process of British Courts Upon U.S. Military Personnel; EUCOM Directive 45–5, Military Justice—Disciplinary Jurisdiction Over MAAG and Mission Personnel; EUCOM Directive 45–6, Claims Procedures for MAAG's.

field staff judge advocate at base, post, division, or corps level is confronted with carefully defined limits. A unified command is seldom cognizant of such directives, let alone bound by them.

Of course, there are some directives of subordinate commands that do affect the work of the Legal Adviser. In Europe there are a few so-called tri-service directives issued by the three component commanders as common solutions to common problems. There is no established guidelines as to what goes into tri-service directives and what is left to the individual component command, but the rule of reason, common interest, ability to achieve consensus, and absence of preemptive directive from USEUCOM or higher authority provide sufficient guidance. Even in the tri-service directives, however, USEUCOM has a hand and usually coordinates or specifically approves the publication. Illustrative of the dynamics of this interchange is the important foreign criminal jurisdiction tri-service directive,[36] which was initially drafted by USAREUR's International Affairs Division, Office of the Judge Advocate, reworked by USEUCOM's Legal Adviser, discussed by the Inter-Service Legal Committee, staffed throughout the component commands for further study, re-drafted by EUCOM, re-staffed to the component commands again, and then sent to USAREUR for final editing and publication.

Because of the absence of many clear legal boundaries and the lack of historical depth of binding precedents, the Legal Adviser has somewhat more of a problem in finding the dividing line between policy and law questions. As a practical matter, however, this results, as mentioned above, in the Legal Adviser's having the opportunity to inject his policy judgment. Similarly, he also has a broad latitude in inventing or improvising solutions. This, in turn, suggests that the desirable qualifications for the Legal Adviser might be slightly different than that of other, more orthodox, staff judge advocate positions.

Rarely is a staff action presented to the Legal Adviser for legal opinion alone or for analysis of a "mere" legal question. The results of any policy decision may depend on many factors. These factors are considered by attempting a projection of what would be the ultimate legal impacts if the offered policy were adopted.

The thrust of any legal analysis is often in at least two directions: (a) what legal constraints bear on the suggested policy, and (b) what legal consequences necessarily follow in the event of adoption of the policy?

Obviously there is an impulse to seek interpretations of the law that promote the mission of the command, and it is in this regard that

[36] USAREUR Reg. 550–50/CINCUSNAVEURINST 5820.8F/USAFE Reg. 110–1, 20 Aug. 1968. *Exercise of Foreign Criminal Jurisdiction Over U.S. Personnel.*

the Legal Adviser is frequently in a position to make the law he has to apply. This suggests that there is a third question for the Legal Adviser to ask himself: how may legal principles be employed to assist the command in achieving its policy goals? In other words, how can the "law" help to accomplish the command's mission?

When a variety of interpretations is possible, and this seems remarkably frequent in the atmosphere of international affairs, the Legal Adviser has the duty to assess the relative weights of each and to pronounce in favor of the heaviest, or strongest, as he sees it. This affords an opportunity for choice.

This is not to imply, however, that the Legal Adviser is unfettered. There are many issues which need not be sent to him by component headquarters or upon which he can act only when he is permitted to do so through the authority of his commander. Delegations of authority by CINCEUR to component commanders affect the role of the Legal Adviser by transferring to the components matters where their legal officers will act, rather than the EUCOM Legal Adviser. There are also many issues in which the law is clear, or where custom is so well established as to be unshakable, or where higher authority has spoken on the issue and foreclosed further selection of positions. But the scope that is not foreclosed remains substantial enough to provide a very real challenge.

The relative importance of an issue depends a great deal upon the basic attitude of the Legal Adviser toward the law. His previous orientation and experience will naturally tend to make him more sensitive to some substantive legal areas than others. If he desires to influence the law in one direction, he has the opportunity to do so. The Legal Adviser's personal predelictions may thus well become of prime importance in the manner of handling at least some aspects of the law dealing with interrelationships of U.S. military headquarters and of various nations' military forces.

E. *DESIRED QUALIFICATIONS*

One of the foremost requirements for the EUCOM Legal Adviser is a thorough knowledge of the policy factors affecting the problems with which he deals. This, of course, means a sound grounding in general military-political subjects, political, military, and legal issues circulating in his geographical area of responsibility, international law and affairs, and the state of development of international organizations, particularly NATO and its components. Other important prerequisites are a sense of responsibility in the field of international relations *and* a predeliction for hard work and long hours.

Hopefully the person charged with the duties of Legal Adviser will have keen judgment, an ability to discern courses of action, and to

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weigh advantages and disadvantages in each, a quick sense of priorities, the ability to determine relative importance of issues and actions. In addition, he should have the ability to persuade, exercise patience, act diplomatically and tactfully, and function under heavy personal pressure.

The EUCOM Legal Adviser need not, however, be a specialist in any particular field of law, and in fact a "generalist" probably has some advantage because of the varied nature of matters brought to his door. If there is any specialty with more emphasis than others it is in the field of international and comparative law, for more of the day-to-day work falls in that category than in any other; knowledge of the civil law system is particularly valuable in this regard. Skill in foreign languages, especially French or German, is a non-legal specialty that is also a great asset and will bring manifold returns to the language-qualified Legal Adviser. Moreover, knowledge of European geography, culture, mores, customs, history, and philosophy is worthwhile.

Professional competence, political sense, and military knowledge are, of course, the most important qualifications for the position. To insure that the incumbent has the necessary professional background, a prerequisite for assignment as Legal Adviser, USEUCOM, is graduation from one of the service war colleges. In general, the experience of a staff judge advocate with varied and gradually more responsible positions and complete military schooling should qualify him for the Legal Adviser's position.

In addition, the Legal Adviser should be able to avoid single-track orientation, prejudices for or against a particular service, and blind obedience to precedent. A good grasp of office management and administration is also essential. In a major headquarters such as EUCOM there is little supervision given to the internal actions of a directorate or staff office, the chief being thus left pretty much to his own devices in these areas. Woe to the officer who ignores his security administration or neglects his files and records! The volume of highly classified papers and complicated problems arriving daily in this office demands adequate accounting, and in such a small office as this one, with but two administrative persons to do all of the typing, filing, and accounting for three active lawyers, it is mandatory that the system be simple, complete, and well known to all in the office. Day-to-day filing is done under two broad categories: national, in which the file is by country and then by subject: and general, in which a category is assigned with subcategories by subject. A third major file consists of the collection of international agreements.

Within the headquarters most business is done by memoranda to the CINC, DCINC, and C/S, and disposition forms (DF's) to other staff

offices and directories. Outside of the headquarters the electronic message is the basic method of doing business, and accordingly the morning and afternoon message pouches regularly assume monumental proportions.

A review of the work of the Legal Adviser demonstrates the need for the various qualifications mentioned above. For example, about 90 percent of his time is spent with nonlawyers, of which about 20 percent is spent with top-ranking operational, plans, or policy people (command group, J–4, J–5 staffers). About 40 percent is spent with staff technicians (Comptroller, Surgeon, J–1, Hq Commandant, Military Assistance Directorate, Public Affairs Officer, J–6, J–2, SJS). About 5 percent is spent with the political adviser (POLAD), and the other 25 percent is spent with MAAG's, Embassy people, representatives of SHAPE, AFCENT (Allied Forces, Central Europe), component commands, and liaison and foreign representatives. The remaining 10 percent of his time is spent with lawyers and covers consultations with both EUCOM counsel and legal officers of component commands, US NATO, those MAAG's having "house counsel," and the Embassy lawyer at Bonn.

III. RELATIONSHIPS

A. *LEGAL ADVISER WITH THE EUCOM COMMAND AND STAFF*

Now the "house counsel" is employed in any organization depends in large measure on the attitudes of the executive leadership. Fortunately for the EUCOM Legal Adviser the command group favors full utilization of the legal staff in all legally connected command actions and studies. It is left to the Legal Adviser to determine whether a legal issue or factor exists or may be involved. This, of course, results in the Legal Adviser's being drawn into many matters which do not develop into action for him, and it also requires his participation in many briefings, conferences, and studies in which his actual contribution is minimal. The educational and interest value, however, of such a process insures his almost total involvement in the work of the headquarters. He is given full opportunity to judge for himself where he thinks the lawyer can make a contribution. The regular daily staff council sessions provide a vehicle for a hasty review of necessary intelligence and operational activities, and his presence in that council makes it possible for the Legal Adviser to invite the attention of the highest staff officers of the command to legal items of special importance.

The distance that separates CINCEUR from his American staff prevents the frequent contact of the Legal Adviser with his com-

mander; but since it is EUCOM's legal involvement that primarily concerns him, the Legal Adviser's main avenue for the command relationship, policy direction, and general guidance is to the DCINCEUR and the EUCOM command element. A EUCOM liaison officer and the U.S. national military representative (USNMR) at SHAPE act as conduits to CINCEUR. Periodic flights, messages, and calls to the Belgium site suffice for the accomplishment of CINCEUR's immediate legal business.

The Legal Adviser deals directly with the DCINCEUR (four star, Air Force), the Chief of Staff (Vice Admiral) and the Deputy Chief of Staff (Army Major General), keeping all three fully informed of his activities. His efficiency report is prepared by the Chief of Staff and indorsed by the DCINC.

A great portion of the Legal Adviser's staff work is performed as a coordinator, contributor, or committee member under the staff leadership of one of the large directorates, most often J–4 (Logistics) and J–5 (Plans and Policies). He also acts as counsel for the MAAG's and missions in EUCOM, making visits to each at least once every two years and maintaining a substantial telephone and letter exchange with them. Being assigned certain key roles in the keeping of records of agreements and providing technical guidance in international negotiations assures the Legal Adviser a place of particular importance and utility to the staff in a function that arises in EUCOM with frequency.

Since the Legal Adviser enjoys a status equal to that of a Director, he is authorized to initiate and "sign off" on messages and command correspondence in his own name, although prudence dictates that matters other than routine are coordinated in advance with the command group. All EUCOM Legal Advisers have desired that their office be regarded as a staff agency capable of contributing to the solution of many problems, and not simply as a group of technicians who act in what is a narrow "legal" field. In a staff as large and preoccupied as is EUCOM's, however, it would not be difficult for the Legal Adviser to diminish the scope of his activities. Determination of that scope is primarily with the incumbent; if he draws it narrowly few will argue with him, but many will thereafter ignore his office. The goal, however, is active partnership in the entire process with those making policy decisions.

It would be difficult to characterize briefly the work of the EUCOM Legal Adviser. While actual legal decisions are relatively rare, general legal opinions and comments are frequent. A certain amount of the work is operational, including under this heading the collection of agreements, furnishing legal assistance, acting on the few EUCOM disciplinary or criminal matters or related inquiries or investigations,

on call participation with the battle staff in emergencies, and formulating the legal portions of war and contingency plans. Some of the effort is in directive writing and a heavy proportion of it is in meetings, discussions, negotiations, briefings, or preparations for these.

A rather unique and one of the most pleasant of the Legal Adviser's duties is the close contact with many senior civilian and military figures. At Headquarters USEUCOM the Deputy Commander in Chief and the other senior officers, generals and admirals, entertain substantially every important U.S. official visitor to the forces in Europe and every American Ambassador in the countries within the EUCOM area. This opportunity to see, hear, and carry on discussions with the people who are actively engaged in making major decisions affecting the United States is highly valued. There is, of course, the corresponding opportunity to demonstrate to these key officials the value of the military lawyer to the staff.

EUCOM publishes a series of directives, known as ED's, covering a wide variety of matters. ED 30–12 requires the promulgation of country regulations pertaining to personal property, local currency, motor vehicles and related subjects for U.S. personnel in USCINCEUR's area of responsibility.[37] The several directives containing these country regulations have been largely influenced by the Legal Adviser, who uses his frequent visits to the MAAG's and missions in the field as opportunities to check on the accuracy and currency of these directives. In addition to these country regulations, the Legal Adviser has an active interest in those directives, the legal aspects of which are prepared by legal officers of the component commands under his supervision. Summarizing the position of the Legal Adviser with the EUCOM staff, the words of H. Merillat, describing a different kind of legal adviser, are applicable: ". . . [C]ounsel, advocate, judge, keeper of the official conscience, apologist for official action, guardian of a tradition, innovator, scholar, and operator." [38]

B. *LEGAL ADVISER WITH LEGAL OFFICERS OF COMPONENT COMMANDS*

One of the most sensitive and yet critical aspects of the EUCOM Legal Adviser's task is his relationship with counterpart legal officers in the component commands. Often senior to him in rank, having direct access to their service departments at home, and exercising a greater degree of control over the legal assets of commands subordinate to the

[37] EUCOM Country Regulations are enforceable as to all service personnel passing through the area. See Army Reg. No. 550–10, 10 Oct. 1966; Air Force Reg. No. 30–3, 9 Mar. 1965; OPNAVINST 5710.21, 21 Sep. 1965.

[38] H. MERILLAT, LEGAL ADVISORS AND INTERNATIONAL ORGANIZATIONS vii (Oceana ed. 1966).

ones they serve, the component command legal officers are indispensable to the accomplishment of the tasks of the EUCOM Legal Adviser. Furthermore their contributions cannot be ordered, coerced, or demanded along technical channels but must come through mutual understanding of the mission of all elements of the U.S. military presence in Europe and their consequent willing, enthusiastic cooperation in the common effort.

In no real sense is the EUCOM Legal Adviser a competitor of his counterparts at the component commands, for they have physical assets to accomplish tasks far beyond the capability of the small EUCOM staff. The Legal Adviser does, however, have certain advantages which make him useful to the component command legal offices and also make it possible for him to obtain the benefits of their services and contributions. Ready access to the senior American commander in Europe, ease of communications, wide sources of information, interests unlimited by particular geographical boundaries or service, and availability of the collateral avenue of approach to Washington through the JCS equip the Legal Adviser with tools useful not only to himself but also to the component command legal officers. To this should be added the valuable Inter-Service Legal Committee, which serves as forum, anvil on which policies are hammered and made fit for adoption, avenue for professional consultation, and common voice for military lawyers in Europe.

There is, of course, a continual need to consult one another, characteristic of most professional people. The opinions, rationale, and suggestions of component command legal officers are the foundation of substantially all of the work of the EUCOM Legal Adviser, and without them his value to the command would be sorely circumscribed.

Not all of the necessary in-put need come from component commands, however. Throughout EUCOM, CINCEUR has designated Contact Officers for each country where U.S. MAAG's or missions exist.[35] These officers are usually the MAAG chiefs, located at the seat of government of the host country and having ready access to the host military authorities and the American Embassy. The Contact Officers are ideally suited to serve as CINCEUR's eyes and ears, to detect problems requiring in-country coordination among the various U.S. military commands, and to sense possible administrative difficulties with host authorities. CINCEUR's Contact Officers provide a multi-service channel of information from the scene of activity direct to Stuttgart, paralleling that which runs from the in-country U.S. unit to its major command and ultimately to the component commands through single

[35] EUCOM Directive 55–2, 13 Jun. 1967 (as amended), *USCINCEUR Contact Officer*.

service channels. The services of the Contact Officers are available to the EUCOM Legal Adviser and are frequently used. Indirectly the component command legal offices, by reason of their association with the Legal Adviser, also benefit from the CINCEUR Contact Officers' activities.

Guidelines exist to mark out areas of interest among the unified command, its component commands, and the respective staffs. Two key documents are DOD Directive 5100.1, 31 Dec. 1958, Functions of the Department of Defense and Major Components, and JCS Pub 2, UNAAF. The DOD Directive prescribes the chain of command for operational matters as running from the President and Secretary of Defense through the JCS to the commander of the Unified Command, who is responsible to the President for the accomplishment of his military mission. The unified commander has full operational authority over the forces assigned to him.[40] The chain of command for purposes other than operational, however, runs from the President and the Secretary of Defense to the Secretaries of the Military Departments and then to their commanders in the field.[41] JCS Pub 2 describes disciplin-

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[40] JCS Pub. 2, ¶30205, however, emphasizes that sound command organization should provide for centralized direction, decentralized execution, and common doctrine. ¶30215 provides that the command of a Unified Command will be exercised as follows, or as directed by the Secretary of Defense:

(a) through the service component commanders.

(b) establishing a subordinate unified command.

(c) establishing a uni-service force reporting directly to the command of a unified command.

(d) establishing a joint task force.

(e) attaching elements of one force to another force.

(f) directly to specific operational forces which, due to the mission assigned and the urgency of the situation, must remain immediately responsive to the commander.

[41] The legislative history of the Defense Reorganization Act of 1958, *supra* note (PL 85–599) is found in U.S. Code Cong. & Ad. News, 85th Cong., 2d Sess. 3272 (1958). The following explanation of the congressional intent appears at 3275.

"*Role of military departments.*

"The military departments still would furnish the forces that would make up unified commands and the military departments would control operations in other than unified and specified commands. The bill uses the word 'combatant' to modify the unified or specified commands authorized to be established. This usage is intended to prevent the training, logistical, and administrative functions of the military services from being organized into unified commands.

"Subject to the superior authority of the Secretary of Defense, each military department would continue to be responsible for the administration of its forces assigned to unified commands. In those cases where the forces from one service assigned to a unified or specified command were so small that it would be inefficient for their administration to be handled by their own military department, the bill provides authority for the Secretary of Defense to assign responsibility for the administration of these forces to another military department.

"The responsibility for the support of forces assigned to unified or specified commands could be vested in one or more of the military departments by the

ing and administrative matters as being generally under the component commands, and this essentially removes these subjects from the scope of work for the EUCOM staff.[42] In the legal field this makes unnecessary EUCOM Legal Adviser's interest in such matters as courts-martial, claims, and military affairs,[43] except as they affect directly the EUCOM headquarters and its personnel.[44] Responsibility for and interest in command readiness and the coordination of component commands when the subject matter affects the EUCOM mission provide the rationale for the occasional EUCOM staff interest in these areas of the law.

Within these rather general boundaries, the service lawyers of the several and scattered commands and offices in Europe have carved out, over the years, a workable and balanced division of effort. EUCOM is kept informed of disciplinary actions, in general reports, in serious incident reports, and in trial observers and confinement reports. Matters affecting only one service are usually omitted from EUCOM interest. Where two or more services are involved, especially where differences in solution are apparent, or when U.S. relations with a foreign country are concerned, EUCOM has an interest. If practicable, responsibility is delegated to one component for handling a specific problem, *e.g.*, negotiation or construction of an agreement. Where NATO practices are involved, or it appears that a solution in one area may set undesired precendents in another, it is at EUCOM where such an assessment and proper adjustments can most readily be made. And, finally, the committee device, with full component participation, is frequently used to develop acceptable solutions. Thus it is in the legal

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Secretary of Defense. This procedure is followed for the unified commands in existence today and this provision contemplates a continuation of the current practice."

DOD Directive 5100.3 assigns responsibility for the support of HQ USEUCOM to the Department of the Army, effective 15 September 1958.

[42] It is well known that the administration and discipline of the armed forces are primarily uni-service responsibilities (JCS PUB. 2, ¶ 30401). The commander of a unified command exercises only such control over the administration and discipline of the component elements of his command as is essential to the performance of his mission. Each component commander is responsible for the internal administration of his command.

[43] Rules and regulations are also for the most part uni-service matters (JCS PUB. 2, ¶ 30407).

[44] Disciplinary matters in USEUCOM are rare, as might be expected in major headquarters. *Staff Memo* 45–1, supra note 35, however, provides for the procedures to be used if a disciplinary action must be taken. Reports of incidents requiring such action are channeled through the service element commander and, if appropriate, to the senior service officer assigned to the headquarters. If action under the UCMJ is called for, the matter is referred through service component command channels. CINCUSNAVEUR retains jurisdiction over Navy personnel; CINCUSAREUR has delegated jurisdiction for Army personnel to CG, Communications Zone, Europe (COMZEUR); and CINCUSAFE has delegated jurisdiction to CG, 17th Air Force.

area, as well as others, that EUCOM serves as a catalytic agent, a nerve center, and coordinator, dependent upon and yet serving its components in a dynamic interchange that constantly moves in both directions between the legal staffs of EUCOM and its component commands.

C. *LEGAL ADVISER WITH OTHERS*

1. *JCS and DOD.*

As mentioned above, command and control of unified commands is maintained by the Secretary of Defense through the Joint Chiefs of Staff. JCS does not have a military law office but receives its legal advice from the General Counsel, Office of the Secretary of Defense, and from the service Judge Advocates General. (There was, however, a lawyer recently assigned to the staff of the J–5, and used extensively in European policy matters.)

There are thus two routes for actions to take, one through service channels (component command to military department and service Judge Advocate General) and the other through the unified command to JCS, SEC DEF, and General Counsel, OSD. Each route has its own advantages and disadvantages, but used together they can be mutually reinforcing and especially effective.

The Legal Adviser at EUCOM has direct access to the General Counsel, OSD, and a more or less regular exchange of correspondence passes between the two. The Legal Adviser is in a position to serve as the General Counsel's on-the-scene representative, contact-point, and coordinator of field service views. Hence, the General Counsel can respond quickly to field requests for guidance and opinions needed by all commands in the field.

In addition to the General Counsel, the Assistant Secretary of Defense (ASD) for International Security Affairs (ISA) involves the Legal Adviser, albeit indirectly, into much activity. This is especially true in the negotiation of international agreements, base rights agreements, and the like. EUCOM's position between ASD/ISA and the military elements of the country team, EUCOM's close relationship with the Chief of the U.S. Diplomatic Mission, and EUCOM's access to component commander's views, give it a unique opportunity to synthesize, coordinate, consolidate, and develop negotiating positions. The EUCOM Legal Adviser is deeply involved in this process.

2. *U.S. Embassies.*

Most American Embassies do not have a legal adviser, and this fact gives the far-flung service lawyers an additional service opportunity. In Greece, Turkey, and Spain, to mention only three examples, the military lawyers handling legal matters for the MAAG's and in-

country U.S. military personnel also assist the Embassies, especially in negotiations involving U.S. military-host country relations. Through the MAAG's the EUCOM Legal Adviser, then, has quick access to the Embassy, and the interested Embassy officials have reciprocal access to the military law stream.

Embassy communications route to the Secretary of State and, in joint State-Defense matters, to the Secretary of Defense. It is evident that, with the Embassies working in conjunction with EUCOM, there are also two routes to the State-Defense position, one through EUCOM to the JCS to SEC DEF and the other that the Embassy takes. The two routes can and generally are made mutually reinforcing by the close EUCOM/Embassy-Country Team connection. Consequently, when the Legal Adviser makes his regular visits to the MAAG's, these include base-touching with the Embassy, occasionally with the Ambassador, and always with the Political–Military Officer on the Embassy staff.

3. *NATO and US NATO.*

The U.S. is represented at NATO by an ambassador and his supporting delegation know as "US NATO."[45] In this delegation is a lawyer assigned from the staff of the General Counsel, OSD. While the EUCOM Legal Adviser does not have frequent contact with the US NATO Legal Adviser there are some matters that occasionally arise to link the two together. The U.S. Mission at NATO sometimes requests information which can be delivered through direct EUCOM-US NATO contact or through the formal communications chains to JCS-DOD-State/Defense.

NATO's major military command is SHAPE, commanded by SACEUR. SHAPE's staff is international,[46] and its Legal Adviser is a Belgian civilian, following the earlier example of SHAPE in France that the host country supplies the Legal Adviser to international headquarters stationed there. CINCEUR looks to the EUCOM Legal Adviser on matters involving U.S. law, but as SACEUR he refers SHAPE's legal questions to the SHAPE Legal Adviser. There is contact between the Legal Advisers of EUCOM and SHAPE, the former assisting the latter on call, the latter on request furnishing information regarding SHAPE legal matters of interest to EUCOM. This relationship has become of greater importance with the reloca-

[45] For the status of such persons, see Agreement on the Status of the North Atlantic Treaty Organization, national representatives, and the international staff, signed at Ottawa on 20 Sep. 1951, entering into force for the U.S. on 18 May 1954, 5 U.S.T. 1087, T.I.A.S. 2992.

[46] Protocol on the status of international military headquarters, signed at Paris on 28 Aug. 1952, entering into force for the U.S. on 10 Apr. 1954, 5 U.S.T. 870, T.I.A.S. 2978.

tion of SHAPE to Belgium, since the Government of Belgium has entered into a stationing agreement with the international headquarters [47] and has regarded the national elements supporting SHAPE in Belgium as being under that agreement. This concept, known as the "SHAPE Umbrella," results in applying to national support elements the interpretations made by the Legal Adviser of SHAPE and the Belgian authorities. Consequently, the EUCOM Legal Adviser values greatly the friendly contact and cooperative exchange of information with his SHAPE counterpart.

A similar pattern exists with regard to AFCENT, SHAPE's next subordinate command in the central region of Europe. AFCENT, with headquarters at Brunssum, The Netherlands, has a Dutch Legal Adviser. As SHAPE's delegee, AFCENT negotiated an international headquarters stationing agreement with the Government of The Netherlands.[48] There is, however, a major difference for U.S. personnel stationed with AFCENT, as distinguished from those stationed with SHAPE. In Belgium, no implementing agreement fills in the gap of the NATO SOFA for troops stationed there, but in The Netherlands the long-standing U.S.-Netherlands "Soesterberg" Agreement [49] provides coverage in addition to that afforded by AFCENT's stationing agreement. Cooperation between the Legal Advisers of AFCENT and EUCOM, along with the in-country U.S. military lawyers, facilitates the work of the respective commands.

4. *NATO Partners.*

There is little direct contact with military legal advisers of NATO partners, except in Germany, where there is a Sending State Meeting periodically to bring together representatives, usually including legal representatives, of all six of the nations having troops stationed in the Federal Republic of Germany. What one NATO partner does, as a matter of practice or interpretation of the NATO SOFA, has a habit of influencing others, so there has developed an active interest in identifying the so-called "NATO Practices." It is too early to assess the value of "NATO Practices" in persuading partners to accept consensus as the acceptable standard or "Common law of SOFA," but nothing has succeeded as well as consensus in recent negotiations.

There is no common meeting ground for the military legal advisers in Europe or NATO. The closest to this is the private organization, strongly supported by several of the larger European nations, known as the International Society of Military Penal Law and the Law of

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[47] Belgium-SHAPE Stationing Agreement, 12 May 1967.

[48] Netherlands/AFCENT Customs Clearance Agreement, 1 Jul. 1968.

[49] Netherlands-U.S. Agreement Relating to the Stationing of U.S. Armed Forces in the Netherlands, with annex, 13 Aug. 1954, 6 U.S.T. 103, T.I.A.S. 3174.

War. The Society brings together military law people from all over the world, although it is primarily Europe oriented and supported. It is a useful vehicle for communication and is so used by the EUCOM Legal Adviser and many other U.S. military lawyers in Europe.

IV. PROBLEMS

Above all else the EUCOM Legal Adviser struggles against overcommitment. With his limited resources he must avoid this pitfall to which he is propelled by enthusiasm, training, dedication, and even habit. This is most difficult in this active headquarters. Careful identification of matters requiring his action, as distinguished from matters best handled by the comparatively well staffed component command legal offices, is equally difficult—and a constant problem.

This leads to the second most critical area, bringing into tandem, when necessary, the full U.S. legal team in Europe. The technical difficulties of any centralizing of foreign affairs legal advisory functions in one headquarters are insurmountable—there are too many voices to be heard, ideas to be considered, views to be advanced. Component command legal offices are essential to perform these functions.

V. THE FUTURE

As the unified command continues to establish its place in the defense machinery, more and more its presence becomes significant and its utility proven. As pressures develop for economy, there is a tendency to look to the one central headquarters that can act for all. As pressures develop for rapid response, there is a tendency to look to the one place that will react most promptly. As the staff of a unified command improves in efficiency it gains acceptance and adherents. With improved communications, moreover, there follows a greater capability to act and react from centralized commands, and with this goes increased responsibility. This, then, points to greater use, wider scope of action, and even more effective utilization of unified commands in the future, as testified to by the many officers who are "graduating" from unified command staffs each year, most with an appreciation for the potential of the joint staff approach to problems.

The Legal Adviser is an integral part of this process. As his utility increases and the value of his keystone position becomes apparent, the greater becomes the importance of the post to overall defense goals and the better his opportunity to bring law immediately and effectively to bear on the problems and policy issues that affect the entire force. The investment of legal talent at the unified command level brings returns commensurate with that investment.

There is increasing consciousness that what happens in one country affects U.S. interests in others. There is also a slowly developing

common law for forces abroad, a sort of consensus in the administration of the Status of Forces Agreement. As a corollary to this, however, the erosion of a principle in one area tends to yield to conformity in another. To participate in and control both sides of this process a central monitor, with sufficient means and authority to initiate prompt action, is necessary. As time passes, the unified command emerges more clearly as a suitable agency for this task, and its Legal Adviser is in a critical position to fill this vital role.

GEORGE S. PRUGH, JR.*

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COURT-MARTIAL JURISDICTION OVER WEEKEND RESERVISTS?*

The *Uniform Code of Military Justice*, article 2(3), provides jurisdictional authority over persons who are "members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter." [1] A recently published opinion of The Judge Advocate General,[2] concerning administrative reductions in grade for enlisted reservists *not* on active duty, however, reaffirmed the inapplicability of this article to such actions.

The circumstances under which court-martial jurisdiction may be exercised over "inactive duty" reservists (who frequently perform training duty in various forms of weekend assemblies or drills) are not clearly set forth in pertinent directives or instructions. In the opinion of The Judge Advocate General, *supra*, it was asserted that the mentioned jurisdictional grant was not intended to extend court-martial jurisdiction to personnel on inactive duty training, "unless the use of dangerous or expensive equipment was contemplated . . ." [3] under training performed pursuant to voluntary acceptance of written orders specifically providing for jurisdiction under the Code.

Use of imprecise terms, such as "dangerous" or "expensive" equipment, may suggest that determination of specific requisites for implementing the statutory basis for court-martial jurisdiction rests with the commander who would issue the orders for voluntary acceptance by the inactive duty reservists concerned. In such a setting, it is possible that a reserve unit commander might presume to exercise his discretion concerning the degree of danger or expense (relating to the equipment to be used) which would meet the standard suggested in the opinion. Obviously, the purported exercise of jurisdiction, however conscientiously motivated, could not make valid any actions which are beyond the scope of the congressional grant.

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*The opinions and conclusions presented are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] UNIFORM CODE OF MILITARY JUSTICE art. 2(3) [hereafter called the Code and cited as UCMJ].

[2] JAGA 1967/4322, 20 Sept. 1967, *as digested in* 68-8 JALS 17.

[3] *Id.*

This problem necessitates the availability of a staff judge advocate, or other legal advisor, to furnish definitive advice. In this connection, it is not unusual for reserve unit commanders to inquire whether reservists are subject to the Code for disciplinary purposes when attending weekend assemblies or other forms of inactive duty training. Routine disposition of such inquiries by reference only to the text of article 2(3) of the Code could lead to surprising results, depending on the ingenuity and imagination of the particular commander. By reason of the technical nature of the subject matter, however, a commander's efforts to implement article 2(3) would be closely coordinated with the appropriate legal officer. Such liaison should effectively abort any questionable exercise of court-martial jurisdiction.

Since the problem of the weekend reservist, vis-a-vis court-martial jurisdiction, has not been treated extensively in easily accessible manuals or similar instructional guides, a brief review of some of the available precedents and legislative history of the Code provision may prove helpful to those who may confront such problems and—even more significantly—to help preserve the congressional purpose of the statute.

Apparently the present Code provision has incurred close scrutiny of civil courts on only one occasion,[4] where, strangely enough, it was relied upon by a marine on *active* duty to support a petition for a writ of habeas corpus for release from military custody. The marine had previously enlisted in the Ready Reserve and after failing to perform the required number of reserve drills was ordered to active duty training under the applicable statutory obligation.[5] He was taken into military custody when he failed to appear for duty as directed. Over the petitioner's insistence that he could not be so apprehended because he did not voluntarily accept his orders as provided in article 2(3) of the Code,[6] the court held that the subsection did not apply to reservists called to active duty training, citing legislative history to show that the clause was intended for "inactive reservists who merely attended short periodic drills or training, participated in week-end flights or who handled dangerous or expensive equipment."[7]

A 1953 opinion of The Judge Advocate General of the Air Force[8] offered considerable advice regarding the scope of this Code provision as well as suggestions for pertinent administrative procedures. That opinion, which also relied on relevant legislative history, reflects the view that "UCMJ, art 2(3), is intended to cover Reserve personnel

[4] La Piata *ex rel.* Fisher, 174 F. Supp. 884 (E.D. Mich. 1959).
[5] 10 U.S.C. § 270(b) (1964).
[6] La Piata *ex rel.* Fisher, 174 F. Supp. at 886.
[7] *Id.*
[8] Op. JAGAF 1953/9, 2 Dig. Ops. 163 (1953).

who are performing inactive duty training involving the use of aircraft or other expensive heavy equipment." [9] Hence, "it is not intended to make Reserve personnel subject to the Code when they are attending meetings or lectures, or taking correspondence courses or training of similar character. . . ." [10]

In proper cases, according to the opinion, voluntary acceptance of written orders pursuant to article 2(3) should be shown by the reservist's signature on a copy thereof, attesting that he has read the orders and understands that he is subject to the Code, and depositing such copy with the training commander.[11] The opinion advises, further, that separate orders should be issued for each period of inactive duty training intended to be covered by article 2(3), and that such orders should spell out the voluntary nature of the training and specify the period of training, thereby designating both the duty and the times when military control and jurisdiction under the Code will commence and terminate.[12]

A 1966 opinion of The Judge Advocate General of the Army [13] reiterates the application of article 2(3) only under circumstances "when dangerous or expensive equipment is used, such as on week-end flight training . . ." based on congressional hearings prior to the adoption of the Code. In a more recent discussion,[14] an Air Force writer asserts much the same view, that article 2(3) was intended to cover only reservists handling "expensive" equipment, or more specifically "aircraft," and notes that flight orders routinely contain a clause implementing the jurisdiction of the Code.

With respect to termination of jurisdiction, the 1953 Air Force opinion also indicates that court-martial jurisdiction ceases upon termination of the status covered by the orders, "unless prior to [such termination] . . . jurisdiction has attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, filing of charges or other similar action . . . ." [15] In addition, the opinion notes that amenability of reservists to court-martial jurisdiction may be saved by the provisions of article 3*a* of the Code.[16] The significance

[9] *Id.*
[10] *Id.*
[11] *Id.*; 2 DIG. OPS. at 164.
[12] *Id.*
[13] JAGJ 1966/5771, 4 Nov. 1966.
[14] Murray, *Court-Martial Jurisdiction Over Reservists*, 10 A. F. JAG L. REV. (No. 4) 10 (Jul.–Aug. 1968).
[15] 2 DIG. OPS. at 164; *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 11*d*; *but see* United States v. Schuering, 16 U.S.C.M.A. 324, 36 C.M.R. 480 (1966).
[16] *Id.* Subject to the limitations of time under UCMJ art. 43, art. 3*a* provides for jurisdiction over "any person charged with having committed, while . . . subject to this Code, an offense against this code, punishable by confinement of five years or more . . ." which could not otherwise be tried by civil courts.

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of "attached" jurisdiction (prior to termination of duty status) by reason of actions commenced with a view to trial may be enhanced by the appearance of new language in the *Manual for Courts-Martial, United States, 1969:* "[I]f jurisdiction has attached by the commencement of action before the effective terminal date of self-executing orders, a person may be held for trial by court-martial beyond that terminal date." [17]

The problems under the language of the current Manual and article 2(3) of the Code are illustrated in *United States* v. *Schuering*.[18] In 1965 a Marine Corps reservist, while at a drill under orders specifying he was subject to the Code, was confronted with evidence that he stole two government micrometers. He admitted the larceny. Charges subsequently were served upon him at a time other than on a drill day and he appeared (also on a non-drill day) before a special court-martial under specific orders issued pursuant to an administrative training directive. After conviction, and approval by the convening authority, a board of review agreed with the convening authority that jurisdiction had attached at the time he was confronted with the facts of the missing equipment and simultaneously admitted his involvement. However, the Court of Military Appeals determined that there had been no action legally sufficient to attach court-martial jurisdiction when he was on training duty pursuant to orders specifying such jurisdiction. The Court stressed that no restraint had been placed on the accused and that the orders bringing him before the court-martial were legally inadequate to confer jurisdiction on the military tribunal.

This case is especially significant in its effect on the scope of article 2(3). Responding to accused's contention that the military's right to prosecute under the circumstances terminated at the end of the drill period during which the offense was committed, the Court emphasized that the basic elements of military jurisdiction require that the accused be subject to military law *at the time of the offense* and *at the time of the trial*.[19] In such vein, the Court disavowed any "long accepted understanding that termination of a drill period bars prosecution in a later drill period for an offense committed earlier." [20] Accordingly, the Court stated:

> [I]t is appropriate to apply the general rule that a court-martial may try an accused for an offense committed when he was subject to military law, if he is also subject to such law at the time of trial, notwithstanding there was an interval of time between the offense and the trial when he

[17] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, ¶ 11*d*; the language in this new section seems to relax the degree of "attachment" necessary to effect jurisdiction in the original instance.

[18] 16 U.S.C.M.A. 324, 36 C.M.R. 480 (1966).

[19] *Id.* at 327, 36 C.M.R. at 483.

[20] *Id.* at 328, 36 C.M.R. at 484.

> was not amenable to military law. . . . We hold, therefore, that in each period of training duty the accused is liable to trial by court-martial for an offense committed by him when subject to military law. . . .[21]

Therefore, whereas the Court denied jurisdiction and reversed the case on the ground that the original actions were legally insufficient to confer military jurisdiction over Schuering, the general rule was established that jurisdiction may be continued from one period of inactive training to another if jurisdiction is in fact obtained during the original period.[22]

Within the broad perimeters of jurisdiction under article 2(3), there remain for consideration the particular circumstances under which such jurisdiction is appropriately exercised. It is in this area that the legislative history of the article (which appeared in its present form for the first time in the Code) [23] is a prime source of guidance concerning the basic purpose of the provision.

A 1958 opinion of The Judge Advocate General [24] succinctly summarizes the congressional viewpoints:

> In adopting Article 2(3) . . . Congress intended that court-martial jurisdiction should not extend to personnel on inactive duty training for short periods of time unless orders relating to such personnel specifically provided that they were subject to the Code and the written orders were voluntarily accepted. The Congressional hearings . . . are replete with indications that this subsection was to be utilized only when dangerous or expensive equipment is used, such as upon week-end flight training or cruises [citations omitted]. In addition, the hearings reveal that the Army indicated to the Congress that it would rarely, if ever, utilize this subsection. . . .

For example, the Senate Report states pertinently:

> Subdivision 3, article 2, was objected to by Reserve associations on the ground that it would be used to subject Reserves to the code when they are engaged in all types of inactive duty training. . . .[25]

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[21] *Id.*

[22] *Id.* It is also significant that the Court did not cite the use of dangerous or expensive equipment as a necessary basis for such jurisdiction; see OP. JAGAF, *supra* note 8. Note that Judge Ferguson, though concurring in *Schuering's* result (because of lack of evidence of proper action to attach jurisdiction, coupled with a purported effort to impose jurisdiction by legally ineffectual orders), declined to join in a pronouncement of "extraordinary exercise of military judicial authority" without the closest examination when "it becomes needful." *Id.* at 331, 36 C.M.R. at 487.

[23] An earlier form applicable only to the Navy appeared in Act of 25 Jun. 1938, ch. 690, § 301, 52 Stat. 1180.

[24] JAG 1958/3016, 6 May 1958. Congressional hearings and reports referred to and quoted therein are conveniently compiled in *Index and Legislative History, Uniform Code of Military Justice* (U.S. Gov. Printing Office 1950).

[25] S. Rep. No. 486, 81st Cong., 1st Sess. 4-5 (emphasis added).

Subsequently, in the Report it is stated:

> Paragraph (3) . . . makes the code applicable to a person on inactive duty training, but only if he has voluntarily undertaken the training after notice that he will be subject to the code. This paragraph is intended to afford control over persons on inactive duty training *involving the use of dangerous or expensive equipment*—such as week-end flight training.[26]

During the House hearings,[27] a representative of the Department of Defense stated:

> We specifically did not intend and did not want to impose court-martial jurisdiction over Reserves on inactive duty when they are just taking correspondence courses or coming to meetings or wearing their uniforms. . . . As far as the Army [also the Air Force] is concerned this is an extension of jurisdiction; as far as the Navy is concerned it is a dilution of present jurisdiction.[28]

It is therefore reasonably clear that jurisdiction under article 2(3) was not intended to embrace reservists participating in routine assemblies, drills, meetings, etc., or when undertaking correspondence courses. The congressional concept clearly limited jurisdiction to circumstances involving the use of dangerous or expensive equipment as normally would be required for flight training or cruises. The precise limits to which such jurisdiction can be extended legitimately may require, in particular circumstances, advance legal advice from the respective military departments, subject ultimately to review under the Code.[29] The policy inherent in the enactment of article 2(3) reflects an extreme congressional concern that jurisdiction not be extended over "inactive duty" reservists beyond that which reasonably can be justified by the use of dangerous or expensive equipment.

The limited jurisdiction available under article 2(3) therefore should prompt reserve commanders, when confronted with disciplinary matters clearly not within the intended scope of the article, to consider administrative measures, including reprimands, reductions in

[26] *Id.* at 8 (emphasis added).
[27] H.R. REP. No. 2498, 81st Cong., 1st Sess. 859–64 (1949).
[28] Remarks of Mr. Larkin, *id.* at 860, 863.
[29] It is again noted that the jurisdictional prerequisites of UCMJ art. 2(3), pertaining to the nature of the training, as reflected by the legislative history herein set forth, were not cited by the Court of Military Appeals in *Schuering*, *supra* note 15, but appear to have been assumed or disregarded as not required by the law as enacted. Subsequently, the limited application of art. 2(3), in the light of legislative history (previously deemed pertinent in La Plata *ex rel.* Fisher, 174 F. Supp. 884 (E.D. Mich. 1959)), was reasserted in JAGA 1967/4322, *supra* note 2.

grade,[30] call to active duty when applicable, as well as the various elimination procedures.[31] In addition, offenses of a civil nature may be referred for disposition by the appropriate civil authorities.

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[30] *E.g.*, Army Reg. No. 140–158, paras. 11, 12 (10 Mar. 1966).

[31] Insurance against possible misapplication of UCMJ art. 2(3) could be provided by technical instructions issued through the offices of the respective Judge Advocates General.

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U.S. GOVERNMENT PRINTING OFFICE: 1969 O—338-831