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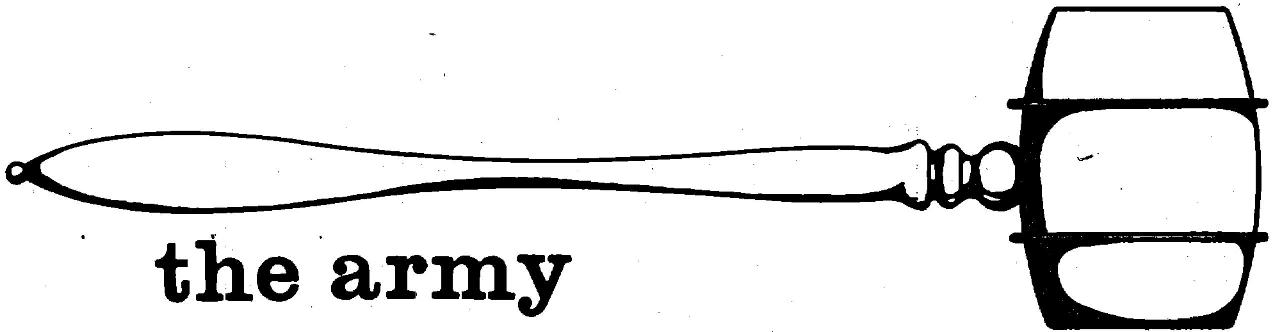

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Theory and Practice: Some Suggestions for the Law of War Trainer

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Q. Now I will ask you if, during those three periods of instruction and training, were you instructed by anybody in connection with the Geneva Conference?

A. Yes, sir, I was.

Q. What was—if you have a recollection—what was the extent and nature of that tutoring or training?

A. I know there was classes. I can't remember any of the classes. Nothing stands out in my mind as to what was covered in the classes, sir.

Q. Did you learn anything in those classes of what actually the Geneva Conference covers with respect to the rules of warfare?

A. Not in the laws and rules of warfare, sir.[1]

This quotation is from the testimony of First Lieutenant William Calley at his 1971 court-martial for the murder of unarmed South Vietnamese

[1] Record, at 3769, United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973). The record may be found in the Library of The Judge Advocate General's School.

civilians. Lieutenant Calley's testimony might well be echoed by many soldiers today. American soldiers presently are instructed in the law of war[2] soon after their entry on active duty.[3] Consequently, all soldiers, in theory at least, know that the law of war exists and that it regulates their conduct in combat. Yet, it is often misunderstood. It is all too often viewed as a one way street which leads only to victory for the enemy and to needless defeat or death for the American soldier.

How did such a misimpression arise and what can be done to correct it? How does one, particularly a judge advocate, make the law of war relevant and meaningful for the soldier of the 1980s? To provide an answer to these questions, and thereby offer training suggestions to the judge advocate, is the object of this paper. It is the judge advocate, in his or her role as the legal expert, who will most often be called upon to instruct soldiers in the law of war. Increasingly, the judge advocate will also be involved in the field training of soldiers.

The first step in any program of instruction is for the instructor to know the subject matter. But to be *effective* instructors in the law of war, they must have more than a simple knowledge of the "black letter" rules, they must also have a real appreciation of the military art. Judge advocates may well be unquestioned as to their knowledge of the rules in a class on criminal law, but when they begin to discuss "war," many soldiers automatically question their knowledge and expertise. When teaching the law of war, judge advocates are no different than infantry tactics instructors. Both, to be effective, must know not only the subject, but how the subject affects the soldier's ability to carry out the combat mission. Equally important, instructors must be aware of those factors which might influence the soldier's understanding of the instruction.

Today, perhaps the greatest influencing factor on a soldier's perception of the law of war is the

[2]The law of war includes treaty-made law as well as customary principles of international law. The principle treaties governing the law of war on land today are the Hague Convention IV of October 18, 1907 Respecting the Laws and Customs of War on Land, 36 Stat. 2777 (1910), T.S. No. 539 [hereinafter cited as Hague 1907]; and the four Geneva Conventions of 1949. These are the Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and Geneva Convention of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as GWS, GWS (Sea), GPW, and GC, respectively].

[3]U.S. Dep't of Army, Reg. No. 350-216, Training—The Geneva Conventions of 1949 and Hague Convention No. IV of 1907, para. 5a. (7 Mar. 1975) [hereinafter cited as AR 350-2-216].

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general misunderstanding of the role of law in Vietnam.[4] Possibly because of a few sensational incidents, most notably that at My Lai, soldiers often believe that, at best, only lip service was paid to the law of war in Vietnam. When this impression is reinforced by other soldiers—or worse, the officers above them—the law of war instructor is faced with a difficult task.

Coupled with this impression of the law of war in Vietnam is the general notion that the law of war is *ex post facto.* It is often viewed simply as "victor's justice," a law totally dependent on winning the war. This idea is most dramatically illustrated by the frequent questions from soldiers concerning the Nuremberg trials after World War II.[5] Soldiers have seen pictures of the German defendants at the trial and, generally, are aware of the fact that the German and Japanese leaders were punished for their violations of the law of war. They rarely understand that victory only made the trial possible. Victory did not make criminal acts which did not violate the law of war previously.[6]

A third influencing factor in a soldier's perception of the law of war may be the simple rigors of the training schedule. The time selected for law of war instruction is important. If the law of war instruction is presented late in the training day, the soldier may assume that it is less important than other instruction. This is particularly true if there is no reinforcement training to follow a formal lecture. The knowledge gained quickly fades as the soldier moves on to other training and duties. Judge advocates should, therefore, not only know "the law" and how it applies to the combat mission, but also have an appreciation of the conditioning factors which may influence the soldier's reception of the law of war instruction.

The Nature of the Law of War

Cicero wrote *"Inter Arma Silent Legis"*—in time of war, the laws are silent.[7] To many people this is an accurate statement even today. The law of war simple is not a part of our general legal understanding. The starting point, for the instructor as well as the student, is to understand the history and the nature of the law of war.

The law of war did not begin with the Nuremberg trials and World War II. Rules governing the conduct of warfare have existed for thousands of years and are found in virtually every civilization. This is not to say that the rules were as refined, or as detailed, as are those of today. However, the mere existence of some controls on warfare in early societies is often a revelation for today's soldiers. These early rules were primarily concerned with how a war might be initiated (*jus ad bellum*). Consequently, there were rules requiring a formal exchange of letters and demands before the initiation of hostilities.[8] In ancient China, wars could not be waged in the planting and harvesting seasons.[9] These early rules are today found in the body of law loosely called "conflict management." In this body of law are found the rules which limit a state's right to resort to force.

For instance, Hague Convention III of 1907 is concerned with the opening of hostilities. It provides in Article I that hostilities "must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."[10] Thus, we find these ancient rules embodied in a treaty currently in force. The motive behind this requirement for an ultimatum or a declaration of war is obviously to give the nations involved a

[4]For an excellent review of the role of judge advocates in Vietnam, *see generally* G. Prugh, Law at War, Vietnam 1964-1973 (1975).

[5]The Nuremberg trials most often mentioned are those of the German leaders. There were 22 defendants, 19 were convicted. The sentences ranged from 10 years imprisonment to death by hanging. The proceedings are reported in the 42 volume Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg (1947) [hereinafter cited as IMT].

[6]I am here concerned only with traditional war crimes. Some writers have criticized the Nuremberg trials as being *ex post facto* with regard to that portion of the indictment alleging the crime of waging an aggressive war. *See, e.g.*, E. Davidson, The Nuremberg Fallacy (1973).

[7]Cicero, *Pro Milone IV* xi. The translation is found in Black's Law Dictionary 948 (4th ed. 1968).

[8]The Egyptians had such rules as early as 200 B.C. *See* I. Friedman, The Law of War, A Documentary History 3 (1972) [hereinafter cited as Friedman].

[9]*Id.*

[10]36 Stat. 2259 (1910), T.S. No. 538.

chance to resolve the dispute peacefully. The same reasoning led to the inclusion of Article 33 in the United Nations Charter.[11] That article provides that a nation involved in a dispute with another state must seek a solution by "peaceful means" before resorting to force.

"But", says the skeptic, "these rules have been violated, just look at Pearl Harbor." The instructor must be prepared for such skepticism. Clearly, the rules on the initiation of hostilities have been violated, not only by the Japanese at Pearl Harbor, but by the German attack on Russia on June 22, 1941. However, the teaching point to be stressed is that though the rules were violated, the violations earned the universal condemnation of mankind as an act of treachery. Further, those Axis Leaders responsible for the attacks were tried for their crimes at Nuremberg[12] and Tokyo.[13] Today, the initiation of hostilities without a prior declaration of war would be an element of proof in a trial on a charge of waging an aggressive war and committing a crime against the peace.[14] Therefore, these centuries old rules still have vitality today.

But it is not the conflict management rules which most concern the American soldier. Those decisions are usually political, not military. Soldiers are most concerned with the rules governing their conduct once hostilities have commenced. The rules of hostilities (*jus in bello*) deal with how war is waged: what might be a lawful target and who may be a lawful combatant. Like the rules governing the initiation of hostilities, the sources of today's rules are thousands of years old. Soldiers may be aware of the rules for warfare found in the Bible.[15] Though these rules are often raised by soldiers as an example of the harshness of war, it should be remembered that these rules generally spared the noncombatants, primarily women and children. The protections extended to such noncombatants gradually evolved into a set of rules for the conduct of hostilities.[16] These rules, when viewed together, reveal the general principles that today form the groundwork for the law of war. An understanding of these general principles is important for all soldiers.

These general principles are today considered to be military necessity, proportionality, and unnecessary suffering. In essence, military necessity is the legal principle which "justifies those measures not forbidden by international law which are indispensible for the complete submission of the enemy as soon as possible."[17] The judge advocate or soldier should view this principle as a two prong test. First, is the action contemplated in violation of international law? Secondly, if the action is not in violation of international law, will it aid in securing the "complete submission" of the enemy? The doctrine of military necessity is a difficult one to teach to soldiers. The doctrine is often confused with the old German notion of *Kriegsraison*. That doctrine essentially held that if an action was necessary for military success it was permissible, laws to the contrary notwithstanding.[18] The problem with considering such a doctrine as a rule of law is that then there is no rule at all. One war crimes tribunal said such a doctrine would "eliminate all humanity and decency and all law from the conduct of war."[19] The soldier must understand that there are limits on what is permitted under the principle of military necessity. The rule is clear. The question of whether or not an action was militarily necessary will turn on the facts.

The second general principle is that of "unnecessary suffering." This principle normally invokes much less discussion than that of military necessity. This principle is currently embodied in Arti-

[11] 59 Stat. 1031; T.S. No. 993.

[12] IMT, *supra* note 5.

[13] An International Military Tribunal for the Far East was convened at Tokyo for the trial of the major Japanese war criminals. This tribunal tried 25 defendants, all were convicted. The sentences ranged from 20 years to death. The proceedings are reported in the Record of the International Military Tribunal for the Far East (1947).

[14] U.S. Dep't of Army, Pamphlet No. 27-161-2, II International Law 38 (1962) [hereinafter cited as DA Pam 27-161-2].

[15] *See, e.g.*, Deuteronomy 20:10-20; I Samuel 15:3.

[16] 1 Friedman, *supra* note 8, at 4.

[17] U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 3a (1956).

[18] DA Pam 27-161-2, *supra* note 14, at 10.

[19] United States v. Von Leeb, XI Trials of War Criminals 541 (1950).

cle 23(e) of the 1907 Hague Regulations. That article forbids the employment of "arms, projectiles, or material calculated to cause unnecessary suffering."[20] This principle is a corollary to that of military necessity. The key word is "calculated." The aim of combat is to cause the other side to suffer. Consequently, all suffering is not prohibited; only "unnecessary suffering" is forbidden. The instructor should stress that "unnecessary suffering" is not limited to the physical suffering of an individual, *i.e.* a more severe wound than necessary, but rather can extend to situations where any noncombatant is made to suffer unnecessarily. For example, destroying a dwelling house of no military significance might lead to unnecessary suffering on the part of the owner and, consequently, would be improper.

The third general principle, that of proportionality, is really simply a balancing test for the other two principles. Often soldiers object that to require that the soldier mentally perform a balancing test before acting in combat is simply unrealistic and points up the fanciful nature of the law of war. The instructor should point out that most combat actions will occur automatically and involve no violation of the law of war. The task of the soldier is to recognize those situations which do warrant special attention. If the soldier is aware of the history of the law of war and the general principles, he or she should have little difficulty in determining when the law of war might affect the mission.

The Rationale for the Law of War

The instructional task for the judge advocate, having been trained in the law, is not solely to state what the rules are, but to explain why the rules are as they are. That is, to explain that the rules have a rational basis. The judge advocate who fails to understand the rationale for the law of war cannot be an effective teacher or trainer. In short, the judge advocate has to be able to explain not only the "what," but also the "why" of the law of war.

There are several rationales which have been put forth for the law of war.[21] Each of the stated rationales for the law of war must be explained to the soldier in the overall framework of the military mission. Mere hortatory statements will not impress the soldier.

Most law of war instructors begin a discussion of the rationale for the law of war by pointing out that its violation rarely gains the violator a distinct military advantage. Having made this statement, the instructor then turns to an example. The example most often cited is that killing a prisoner of war may deprive the friendly forces of valuable intelligence.[22] While this is certainly a clear example of the teaching point, it may not be the best one for all potential audiences. The act of killing a prisoner of war is so clearly criminal,[23] that the teaching point intended, lack of military advantage, may be obscured in the mind of the audience. Examples for this teaching point should, therefore, be varied with the audience.

One example which might be used is the bombing of the abbey at Monte Cassino in Italy during World War II. The Hague Regulations prohibit the unnecessary destruction of cultural monuments and buildings.[24] To unnecessarily destroy such places not only means that the law has been violated but, perhaps more importantly, the structure might then be used by the enemy. In March 1944, General Mark Clark's Fifth Army was fighting its way up the Italian peninsula. At the urging of the British, who believed that the abbey was being used as an observation point, Clark permitted the destruction of Monte Cassino by air bombardment. Only after the abbey was battered by the bombing did the Germans occupy it as an observa-

[20]Hague 1907, *supra* note 2.

[21]The rationales herein presented are taken from those currently emphasized in the law of war instruction at The Judge Advocate General's School.

[22]*See* U.S. Dep't of Army, Subject Schedule 27-1, The Geneva Conventions of 1949 and the Hague Convention No. IV of 1907, 12 (29 Aug. 1975) [hereinafter cited as ASUBJSCH 27-1].

[23]Such an act would be a "grave breach" of the Geneva Conventions as well as murder under United States law. GPW, *supra* note 2, at art. 130.

[24]Hague 1907, *supra* note 2, at art. 27.

tion post. The bombing actually made it easier for the Germans to use and defend the abbey. The walls and roof having been made into rubble, the occupiers no longer had to fear ceilings and walls collapsing on them. General Clark later wrote: "Not only was the bombing of the abbey an unnecessary psychological mistake in the propaganda field, but it was a tactical military mistake of the first magnitude. It only made our job more difficult, more costly in terms of men, machines, and time."[25] This is a succinct example of a violation of the law of war actually causing a disadvantage to the force violating it.

This interplay between the law and the military effects of its violation must be understood by the judge advocate and the soldier. The judge advocate should search for examples, such as Monte Cassino, which convey to the soldier the idea that the law of war affects decisions made at all levels of command.

A second rationale for following the law of war is "self-interest." Simply put, "if we do it to them, they might do it to us." This rationale is almost self-explanatory and rarely is questioned in classes on the law of war. When examples are sought, the judge advocate might discuss the reluctance of either side to resort to gas warfare in World War II. The legal reason was that the 1925 Geneva Gas Protocol[26] prohibited its use; the practical reason was that the other side might have retaliated with similar, or worse, methods of warfare. When asked at the Nuremberg trials about the possibility of gas warfare, Albert Speer, the German Armaments Minister, testified that "[i]n military circles there was certainly no one in favor of gas warfare. All sensible Army people turned gas warfare down as being utterly insane since, in view of [the allies] superiority in the air, it would not be long before it would bring the most terrible catastrophe upon German cities"[27] In this testimony, the judge advocate finds a clear example of the fear of reciprocity at work.

Another rationale for complying with the law of war is the effect its violation has on foreign relations and world public opinion. This rationale should be especially stressed to audiences of officers and NCOs, those who make decisions. However, it should be understood by all soldiers. Violations are always publicized by the enemy. After the murders at My Lai, the Viet Cong immediately publicized the incident. In a translated radio broadcast the Viet Cong described the operation as follows:

> A sweep operation was conducted on 15 Mar 68 recently in SON TINH. Crazy American enemy used light machineguns and all kinds of weapons to kill our innocent civilian people in TINH KHE Village (SON MY (V)). Most of them were women, kids, there were some just born babies and pregnant women. They shot everything they saw, they killed all domestic animals, they burned all people's houses. There were 26 families killed completely—no survivors.
>
> The fierce devil Americans dropped down their priest covers to become barbarous, and cruel. [sic][28]

Such publicity hurts the image of the American soldier throughout the world.

Perhaps even more important is the potential loss of homefront support when violations of the law of war become known to the American people. Almost every soldier will have seen the picture of General Nguyen Ngoc Loan, the Chief of South Vietnam's National Police, summarily executing a suspected Viet Cong officer captured in the 1968 Tet offensive. That picture was promptly flashed around the world and into American homes via television. To many Americans that incident confirmed "the suspicion that this was a 'wrong war'

[25]This account of the bombing is taken from General Clark's recollection of the incident. The incident is often raised in law of war classes and, like the bombing of Dresden, merits considerable study by the judge advocate. M. Clark, Calculated Risk 312 (1950).

[26]The United States did not ratify the Protocol until 1975; 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65. However, President Roosevelt viewed gas warfare only as a retaliatory measure. *See generally* J. Spaight, Air Power and War Rights 193-96 (3d. ed. 1947).

[27]Testimony of Albert Speer, XVI IMT, *supra* note 5, at 527.

[28]*See* J. Goldstein, B. Marshall & J. Schwartz, The My Lai Massacre and its Cover-Up 298 (1976) [hereinafter cited as Cover-Up].

on the 'wrong side'."[29] In short, the American people, like those of other civilized nations, expect soldiers to comply with minimum standards of humanitarian conduct in warfare. There is a basic standard of morality which transcends national boundaries. Violation of that standard can affect a nation's ability to successfully wage a war.

Another rationale for following the law of war is that, by following it, the restoration of peace might be facilitated. If the law of war is being followed the enemy soldier or population is less likely to adopt a "fight to the death" attitude. In support of this rationale the instructor might consider the plight of the American prisoners of war in North Vietnam. The prisoners were a key factor in the peace negotiations. Peace became possible only when the North Vietnamese, at least colorably, began to treat their captives in accordance with the law of war.[30]

This list of rationales for the law of war is certainly not exhaustive. The key point for the instructor is to understand the rationale behind the law of war and how that rationale translates into the military mission. The instructor who fails to understand the rationale for the law of war and who is unable to provide examples from military history will be hopelessly mired in a swamp of difficult student questions with no acceptable answers.

The Requirement for Dissemination

Once the judge advocate knows the "black-letter" rules of the law of war and the general rationale for compliance, he or she is technically prepared to go forth and "disseminate" the law. The law of war, to be effective, must be understood by all soldiers, not simply lawyers and commanders. The drafters of the rules appreciated the necessity of making the rules known to the soldiers. Consequently, various treaties have had provisions dealing with dissemination.

A study of American attempts to formulate a law of war usually begins with Francis Lieber's General Order 100 of April 24, 1863.[31] In General Order 100, Lieber set out the rules of warfare for the Union Army in the War Between the States. While the order does not *per se* mention a requirement for dissemination, two factors indicate that its provisions were made known to the troops. First is the fact that it was issued as a General Order under the authority of the Secretary of War. Such general orders were normally posted for the information of all the troops. Secondly, the order was transmitted to the Confederate forces under a flag of truce.[32]

The First Red Cross Convention of August 22, 1864[33] provided, in Article VIII, that the execution of the Convention "shall be regulated by the commanders-in-chief of belligerent armies" Article IX provided that the parties to the Convention would communicate the text of the treaty to other states for accession.[34] Thus commanders were executing the convention internally, while states were disseminating the law externally to non-signatory states.

The Hague Convention on Land Warfare of July 29, 1899 required that the "High Contracting Parties" issue "instructions" to their "armed land forces."[35] The instructions were to be in conformity with the Convention. This provision was repeated in the Hague Convention IV of October 18,

[29] D. Oberdorfer, Tet! 170 (1971).

[30] *See* D. Forsythe, Humanitarian Politics 157 (1977).

[31] The order is reprinted in I Friedman, *supra* note 8, at 158-86.

[32] The Confederate response outlined its view of the law of war. G.O. 100 was strongly criticized by the Confederate Secretary of War as permitting violations of the law of war. A portion of the response read:

> Order No. 100 is a confused, unassorted, and undiscriminating compilation from the opinion of the publicists of the last two centuries, some of which are obsolete, others repudiated; and a military commander under this code may pursue a line of conduct in accordance with principles of justice, faith, and honor, or he may justify conduct correspondent with the warfare of the barbarous hordes who overran the Roman Empire, or who, in the Middle Ages, devastated the continent of Asia and menaced the civilization of Europe.

Series II, Vol. 6 Official Records of the Union and Confederate Armies 41 (Series II 1899).

[33] I Friedman, *supra* note 8, at 187-91.

[34] The U.S. became a party to the treaty in March, 1882. 22 Stat. 940 (1882).

[35] Article I, Hague II, 32 Stat. 1803 (1902). The treaty is reprinted in I Friedman, *supra* note 8, at 221-35.

1907.[36] The requirement to issue "instructions" probably refers to orders rather than formal teaching of the rules. However, the only way to insure that such "instructions" were in conformity with the treaty would have been to make its provisions known, at least to the commanders.

It is in the Geneva Convention of July 6, 1906, that the first clear reference to troop dissemination is found. Article XXVI provided: "The signatory governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large."[37] While the Hague treaties had referred to the requirement for commanders to issue instructions in conformity with the law of war, this treaty created an affirmative duty to "acquaint" all the troops with the law. Those soldiers who gained a special status under the convention were to receive special instruction. This difference in requirements may be explained by the different objects of the two treaties. The Hague Conventions were essentially concerned with the methods of warfare, that is, what weapons might be used and what targets might be attacked. The Geneva Conventions dealt with the victims of war, those who were wounded or sick. The decision as to which weapons to employ or targets to attack is, necessarily, a decision to be made by the commander. The initial treatment of the victims of that attack, however, is the responsibility of every soldier. The requirement that the convention be made "known to the people at large" is apparently an acknowledgement of the fact that warfare no longer was the sole province of uniformed forces. Entire nations participated in conflicts.

The Geneva Convention on the Sick and Wounded of July 27, 1929[38] repeated this obligation to disseminate the provisions of the convention to soldiers and the population. The companion treaty for prisoners of war did not have a similar provision. Article 84 did require, however, that the contents of the convention be posted in prisoner of war camps.[39]

The current treaty requirements for dissemination are found in the four Geneva Conventions of 1949.[40] Common to all four conventions is an article concerning dissemination. Article 47 of the first convention is typical and reads as follows:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

The second convention has a similar provision in Article 48.[42] It is important to note that the requirement for dissemination exists in peacetime as well as in wartime. There may not be time, after "the balloon goes up," to adequately train the troops as to their responsibilities under the law of war.

It should also be noted that the law of war is to be included in civil instruction "if possible." The words "if possible" were added, not because the delegates to the Conference thought that civilian instruction was less imperative than military instruction, but because, in federal systems, civilian education may not be a responsibility of the central government.[43]

Medical personnel and chaplains are specifically mentioned in the article. Such personnel gain a special status under the law of war and have special rights and duties. They must, therefore, know what their rights and duties are. One commentator wrote that because these persons "enjoy *rights* under the Convention, they ought to make a

[36] Hague 1907, *supra* note 2, at art. 1.

[37] 36 Stat. 2199.

[38] Art. XXVII; 47 Stat. 2074 (1932).

[39] 47 Stat. 2021 (1932).

[40] *See* note 2 *supra*.

[41] GWS, *supra* note 2.

[42] GWS (Sea), *supra* note 2.

[43] I. Pictet, Commentary, Geneva Convention (Land) 349 (1952).

special point of scrupulously observing the corresponding duties which the convention imposes on them."[44]

The Prisoner of War Convention has a dissemination provision in Article 127. However, an additional requirement exists in that article that "authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions."[45] Thus, the military police, who run the prisoner of war camps, must receive special instruction.

The fourth convention provides protection to civilians.[46] Article 144 deals with dissemination. Because civilians gain rights under the fourth convention the article states that the provisions of the convention should be included in the programs of civilian instruction "so that the principles thereof may become known to the entire population." Further, any persons who "assume responsibilities in respect of protected persons" must possess the text and be "specially instructed."

The problem of dissemination was again addressed in the 1977 Protocols to the Geneva Conventions.[47] Dissemination requirements are found in Article 83 of Protocol I and Article 19 of Protocol II. Article 83 repeats the obligation to disseminate the law of war in both peace and war. With regard to civilian education, the article now requires that states "encourage" the study of the conventions by the civilian population. This was again a recognition of the fact that in some federal systems the central government does not control civilian education.[48] Article 19 of Protocol II simply requires that its text "shall be disseminated as widely as possible."

Thus, the requirement to disseminate the law of war is clearly stated in the current treaties. The development of this requirement can be traced from an implied obligation derived from the method of publication, *e.g.* General Order 100, to a general obligation placed on the governments and commanders, *e.g.* Hague Conventions, to an express requirement that the study of the law of war be included in military instruction and, if possible, in civilian instruction, *i.e.* 1949 Geneva Conventions and 1977 Protocols.

Protocol I, in Article 87, also places an affirmative duty on commanders to insure that members of their command are "aware of their obligations under the Conventions and the Protocol."[49] Consequently, the requirement for training in the law of war is now one of the "black-letter" rules. A failure to adequately perform that training constitutes a violation of the law of war in itself. Further, such a failure might constitute a dereliction of duty and be punishable under the Uniform Code of Military Justice.[50] Having discussed the legal requirements for training in the law of war, we turn now to United States attempts at compliance with that requirement.

My Lai: Impetus for Change

The United States has always emphasized the need to comply with the law of war. Unfortunately, mere emphasis from the national command authorities is not always translated into action by the lower echelons of command. Various texts containing the rules have, from time to time, been published for the use of commanders and troops.[51] However, the catalyst for a complete review of Army training in the law of war was the incident at My Lai on 16 March 1968.

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[44] *Id.*

[45] GPW, *supra* note 2.

[46] GC, *supra* note 2.

[47] The Protocols are reprinted in U.S. Dep't of Army Pamphlet No. 27-1-1, Protocols to the Geneva Conventions of 12 August 1949 (1 Sep. 1979) [hereinafter cited as Protocols]. Protocol I deals with international conflicts. Protocol II deals with non-international conflicts. As of this date, the United States has not ratified the Protocols.

[48] VIII Official Records of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 393 (1977).

[49] Protocols, *supra* note 47.

[50] This is a point rarely made to commanders. A DOD study of the Protocols states "violations of this provision, once it goes into effect, could be deemed to be violations of Article 92, Uniform Code of Military Justice", 10 U.S.C. § 892 (1976). DOD Protocols Review Group, Review and Analysis 1-87-8 (1977).

[51] *See, e.g.*, U.S. Dep't of Army Field Manual No. 27-10, The Law of Land Warfare (July 1956).

The facts of the incident and the law involved have been the subject of much scholarly comment.[52] A brief review, however, is relevant as background for a discussion of the training involved before and after the incident.

Lieutenant Calley was an infantry platoon leader in Charlie Company, lst Battalion, 20th Infantry, 11th Light Infantry Brigade in Vietnam. On 15 March 1968, the company commander, Captain Ernest Medina, briefed the men on an upcoming mission. The company was to assault the village of My Lai the next day. The next morning Calley's platoon was airlifted to My Lai. Surprisingly, and contrary to intelligence briefings, there was no resistance. The platoon encountered only unarmed civilians.

After the village was secured, the civilians were brought to two collecting points. Shortly thereafter, Calley and other members of the platoon opened fire on these unarmed civilians. Many were killed while huddled in a ditch. Among those killed were old men, women, and children.

Flying as part of the helicopter support that day was Warrant Officer Hugh Thompson. Thompson landed his helicopter and demanded that the killing stop. Thompson later reported what he saw to his command. However, no formal investigation followed.

Charges of murder the Uniform Code of Military Justice[53] were later preferred against Leiutenant Calley and other members of the unit. After a lengthy trial, Calley was convicted and sentenced to life imprisonment.[54] No other member of the unit was convicted.

Thompson's report also generated charges concerning an alleged "cover-up" of the massacre. Colonel Oran Henderson, the brigade commander, was charged and acquitted for his part in the "cover-up."

To determine how the incident could have happened and how such incidents might be avoided in the future, the Secretary of the Army directed that Lieutenant General William R. Peers conduct an in-depth investigation. The Peers' investigation essentially dealt with the failure of the unit to properly investigate the incident, rather than the incident itself. Related to the failure to investigate was the failure of soldiers, other than Thompson, to report what had happened. The Peer's report of its investigation included a discussion of the law of war training of the unit.[55]

The Peers' group uncovered several factors which contributed to the massacre. One problem was the clarity of the orders given. There was no evidence that the Task Force commander, nor his subordinates, ordered the indiscriminate killing that occurred. However, the orders failed to make a clear distinction between combatants and noncombatants.[56] Commanders had been permissive in their attitude toward the soldiers handling of the Vietnamese. There was evidence of scattered incidents of mistreatment prior to the My Lai operation.[57]

Peers found that there was a general lack of training. The 11th Brigade underwent accelerated training prior to its deployment to Vietnam. After arrival in Vietnam, planned make-up training was never effectively carried out. The evidence indicated that the soldiers had received "only marginal training in several key areas. . . . These areas were (1) provisions of the Geneva Conventions, (2) handling and safeguarding of non-combatants, and (3) rules of engagement."[58] Additionally there was a lack of training with respect to the concept of "illegal orders" and the responsibility to report war crimes.[59] These findings along with recommendations, were submitted to the Secretary and Chief of Staff of the Army.

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[52]An excellent account for the judge advocate may be found in Cooper, *My Lai and Military Justice—To What Effect?*, 59 Mil. L. Rev. 99 (1973).

[53]Uniform Code of Military Justice art. 118, 10 U.S.C. 918 (1976).

[54]Calley's life sentence was subsequently reduced to time served.

[55]*See* Cover-Up, *supra* note 28, at 210-11.

[56]*Id.* at 193.

[57]*Id.* at 202.

[58]*Id.* at 204.

[59]*Id.* at 228.

The DOD Law of War Program

The Department of Defense response to the Peers Report is found in a directive entitled the "DOD Law of War Programs."[60] The directive states that it is the policy of the Department of Defense to insure that the law of war is observed, that a preventive law program is implemented, and that violations are reported.[61] The directive states that it is the general responsibility of all members of the U.S. Armed Forces to comply with the law of war in the conduct of military operations in armed conflicts, "however such conflicts are characterized."[62]

Specific responsibilities are assigned to the secretaries of the military departments. The secretaries shall "[p]rovide publication [sic] instructions, and training so that the principles and rules of the law of war will be known" to the service members.[63] The extent of the knowledge of the law of war shall be "commensurate with each individual's duties and responsibilities."[64]

Commanders of unified and specified commands must institute programs to prevent violations of the law of war.[65] All rules of engagement must "conform to the law of war."[66]

The Army's implementation of the directive is found in a regulation entitled "Training, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907."[67] The regulation's objective is to "provide guidance for training of U.S. Army personnel in the conventions."[68] Particularly mentioned are the soldier's rights and duties regarding enemy personnel and civilians, enemy property, and the American soldier's rights and duties if captured.[69] The regulation essentially provides for two types of training; these might be called "formal" and "informal." The formal training takes place in basic combat training and in the Army's branch schools. This formal training is basically done by a classroom lecture. The informal training arises out of the duty of each major army commander to insure that every soldier has a "practical working knowledge" of the law of war and that every soldier receive an orientation in the law and the pertinent rules of engagement within two weeks of arrival in a theatre of operations.[70]

The regulation states that the formal instruction is to be presented by a judge advocate or other legally trained person "together with officers with command exerience preferably in combat."[71] The formal training must emphasize the following seven points:

(1) The rights and obligations of U.S. Army personnel regarding the enemy, other personnel, and property.

(2) The rights and obligations of U.S. Army personnel if captured, detained, or retained.

(3) The requirements of customary and conventional law pertaining to captured, detained, or retained personnel, property, and civilians.

(4) Probable results of acts of violence against, and inhuman treatment of personnel.

(5) Illegal orders.

(6) Rules of engagement.

(7) War crimes reporting procedures.[72]

The soldier's knowledge of these points is to be commensurate with his or her duties.

The guidance with regard to the "practical working knowledge" requirement is much less specific. "Practical working knowledge" is not defined in the regulation. The law of war is, however, to be integrated into all "tactical training and related

[60]Dep't of Defense Directive No. 5100.77, The DOD Law of War Program (10 Jul. 1979).

[61]*Id.* at para. C.

[62]*Id.* at para. E.1.a.

[63]*Id.* at para. E.2.e.(1).

[64]*Id.*

[65]*Id.* at para. E.2.h.(1).

[66]*Id.* at para. E.2.h.(6).

[67]AR 350-216, *supra* note 3.

[68]*Id.* at para. 3.

[69]*Id.*.

[70]*Id.* at para. 6.

[71]*Id.* at para. 7.

[72]*Id.*

subjects where possible," be realistic within safety limitations, and be related to the training in the Code of Conduct[73] and the Uniform Code of Military Justice.[74]

A review of the regulation's requirements reveals a major weakness. The bifurcated system of training leads to breakdowns in its implementation. The formal instruction is being done. It is part of the soldier's formal military education. It is easily checked. The calibre of the instruction can be monitored by the commander and the staff judge advocate. But the soldier's actual understanding of the law of war, or lack thereof, is not so easily checked. The soldier's appreciation of his or her responsibilities under the law of war can only be realistically checked by followup training. Yet, the regulation offers no guidance on how to conduct any such training.

A further deficiency arises from the fact that the judge advocate is mentioned only in connection with the formal instruction. Thus, an impression is created that the judge advocate has no role in the training process beyond delivering a formal lecture. This often leads to the judge advocate delivering a "canned" lecture to a unit and then ceasing any further involvement in the training of that unit.

The Judge Advocate as Teacher

While training in the law of war is a "command responsibility,"[75] the actual formal instruction is usually presented by a judge advocate. In most staff judge advocate offices, the duty of presenting the instruction will fall to the officer who is usually the most junior and most recently out of the Basic Class at The Judge Advocate General's School. Teaching the law of war is normally an additional duty for the judge advocate.

Consider the problems that the judge advocate faces when given an order to "go teach the Geneva Conventions." The officer will have completed The Judge Advocate General's School's Basic Course and will have received nineteen hours of instruction in International Law. A portion of one hour of that instruction will have been devoted to the general requirement for instruction in the law of war. No specific guidance on "how to teach" is taught at The Judge Advocate General's School to the Basic Class. Further, as indicated above, the law of war is often viewed very skeptically by many soldiers.

But the judge advocate is not at a total disadvantage. He or she brings into the classroom a commission as an officer and a law degree, each of which can be translated into an image of expertise by the skillful instructor. In the Basic Class instruction, the nature, history and rationale of the law of war were covered. With some outside research, he or she should be able to present the "rules". With some further study of military history, he or she may be able to explain the rules in terms of actual or potential military operations.

Armed with the requisite knowledge to be disseminated to the troops, the instructor now turns to non-legal considerations relative to the mission. The instructor should ask the unit commander or operations officer the following questions before the instruction:

(1) Where will the instructions take place? Is the location appropriate? Is a sound system available if needed? If the class is to be given in a crowded theatre, even the strongest voice may need augmentation after an hour.

(2) How many soldiers will be in the audience? What are their duties? Are there many combat veterans in the audience?

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[73]The Code of Conduct is a moral code of responsibility designed to guide a soldier if captured. Exec. Order No. 10631 (1955).

[74]The Uniform Code of Military Justice requires that all servicemen be instructed as to its punitive provisions. U.C.M.J. art. 137; 10 U.S.C. 937 (1976).

[75]*See* AR 350-216, *supra* note 3, at para. 8.

[76]*See, e.g.*, U.S. Dep't of Army Training Film 21-4228, The Geneva Conventions and the Soldier (1971); U.S. Dep't of Army Training Film No. 21-4229, When the Enemy is My Prisoner (1971); U.S. Dep't of Army Training No. 21-4249, The Geneva Conventions and the Military Policeman (1971); U.S. Dep't of Army Training Film No. 21-4719, Geneva Conventions and the Medic (1975); U.S. Dep't of Army Training Film No. 21-4720, Geneva Conventions and the Civilian (1975); U.S. Dep't of Army Training Film No. 21-4550, Geneva Conventions and the Chaplain (1973); U.S. Dep't of Army Training Film No. 27-3616, Geneva Conventions and Counterinsurgency (1965).

(3) Is the unit one which requires special instruction (i.e. a military police or medical unit)?

(4) Is use of the various training films appropriate? How many of the soldiers have seen the films before?

(5) What uniform will the audience be wearing? What blocks of instruction or duties precede and follow the law of war instruction?

(6) Will the unit commander be there? If so when was the last time he received law of war instruction? Is he available to provide sound tactical input to answers to questions, if needed?

(7) Will other officers or NCOs be in the audience?

(8) Is the unit scheduled for an ARTEP (Army Readiness Training Evaluation Program) exercise? Are there any upcoming field exercises where knowledge of the law of war will be tested?

(9) Who is the co-instructor? Is he or she qualified?

(10) Perhaps most importantly, does the commander have any suggestions to make the instruction more relevant to the soldiers?

From the answers to these questions, the judge advocate will have learned something about the audience and how the staff of the unit perceives the law of war.

When the day to deliver the class arrives, the judge advocate should make a final review of the notes for the class and assure that any training aids are ready. One mistake often made and easily corrected is a simple mistake in choosing the uniform to be worn. The judge advocate should "look like a soldier." Especially if the audience is in the fatigue uniform, the instructor should be in fatigues. Proper attention should be given the boots or shoes. The uniform should be neat and pressed if appropriate. Haircuts are important, as is a "soldierly" bearing. In short, if the instructor looks like an officer and a soldier, the instruction is enhanced—the instruction itself takes on a more military character.

The Army has provided a ready-made lesson plan for the law of war instructor.[77] Following this plan will insure that the seven points required by regulation are covered. However, the lesson plan is a two-edged sword. Over-reliance on the script may result in the instructor appearing to read to the troops. If the instructor can, through tonal inflection, gestures, or otherwise, appear to be speaking extemporaneously, the instructor will then appear to be truly interested in the subject and not simply carrying out an unpleasant duty.

The regulation requires "team teaching" whenever possible. "Team teaching" means just that; it does not mean a debate between the lawyer and the officer. To avoid the appearance of such a debate, the judge advocate should coordinate with the other half of the "team" in advance. The co-instructor will normally be an officer from the unit to be trained. Consequently, officer will be familiar to the soldier and be a valuable aid in teaching the law of war. If, however, the co-instructor does not understand the law of war, he or she cannot provide the type of input needed to make the law of war relevant to the soldiers. In short, team teaching must be practiced to be effective.[78]

Another common problem is an overreliance on the training films. If properly employed, the current Army training films are a useful training aid. They are designated to maintain the interest of the soldier. Yet, the film can only serve as a general background for the instruction. Each film is designed for a specific type of audience. The judge advocate should be thoroughly familiar with each of the films. Such familiarity should alert the instructor to the questions which are likely to be raised in the soldier's mind.

The instructor must be prepared for questions. The law of war may raise many difficult issues for soldiers. Yet, sometimes soldiers are reluctant to ask questions. Should this appear to be a potential

[77] ASUBJSCH 27-1, *supra* note 22.

[78] An excellent article on team teaching is Nearine, *Teaming is Tops for Training*, Mil. Rev., July 1971, at 72.

problem, the instructor might "plant" a question by having one of the officers or NCOs ask it. Such "planted" questions have two advantages. First, the instructor is given the opportunity of responding to a question which he or she knows will be asked. Second, and perhaps more importantly, if the question comes from one of the senior personnel present, it indicates to other soldiers an interest on the part of the questioner in the law of war, as well as the relevance of the law of war for career soldiers.

The instructors duties are not over with the end of class. When the instructor returns to the office, he or she should reflect on the presentation in light of the following questions:

(1) Were there any questions which could not be answered? If so, where can the answer be found and how can it be communicated to the soldier who asked the question?

(2) Does the commander have any comments on the presentation? Any suggestions for the next class?

(3) Was the co-instructor, if any, well informed on the general nature of the law of war?

(4) If the Staff Judge Advocate had been there, would he be satisfied with the instruction?

(5) Finally, and most importantly, am "I" satisfied with the instruction?

The Judge Advocate as Trainer

The law of war responsibilities of the judge advocate do not end with the conclusion of the "platform" presentation. The instruction must be reinforced by subsequent training, that is, practical application of the principles to realistic combat simulations. While the judge advocate may be viewed as the expert on the law, he or she is often thought to know little or nothing about training exercises and requirements. With conscientious effort and a little study, the judge advocate can become an important member of the training team.

The judge advocate must convince the commander or the operations officer that he or she has a role to play in subsequent unit training. The first step is to make the offer of assistance. The requirement for formal instruction in the law of war is well known to commanders; the requirement that each soldier have a "practical working knowledge" of the law of war is not so well known. It is only through training exercises that a commander will be able to determine if each soldier has such a knowledge. As commanders become aware of the "practical working knowledge" requirement, the judge advocate should become a welcome addition to the training team.

Before being able to intelligently make suggestions on law of war training the judge advocate must understand the training process. Army training today is "performance oriented."[79] Performance oriented training is designed to insure that each soldier, whether acting individually or as part of a team, is able to perform the military mission in an acceptable manner. Performance oriented training has three elements. First, the task to be accomplished must be clearly understood. Second, the conditions under which that task is to be accomplished must be stated. Finally, the standard for acceptable performance must be determined. These elements—task, condition, and standard—are readily adaptable to most military training. Law of war training might involve a specific task such as safeguarding and evacuating prisoners of war. The conditions obviously would be those of combat and the standard would be to perform that mission, such as handling of prisoners of war, in accordance with the law.

Once the performance oriented objectives are determined, the trainer begins to plan and conduct the actual training. The Army currently uses a "3 step, backward planning process" to prepare and conduct training.[80] The first step is to determine the desired results of the training. Once the desired results are established, the trainer prepares to conduct the training and, finally, the training is actually performed. Applying the law of war to this process, we find that the result desired—practical working knowledge—is already determined. The preparation for conducting the train-

[79] U.S. Dep't of Army, Field Manual No. 21-6, How to Prepare and Conduct Military Training 4 (Nov. 1975).

[80] *Id.* at 8-26.

ing consists of developing various scenarios which raise law of war issues and which can be injected into the training exercise. The training will actually be conducted when these scenarios are placed into the "play" of the exercise.

There are several different types of training exercises. They may be as simple as a board game or as complex as a field training exercise.[81] Since law of war issues arise primarily in combat situations, the judge advocate should strive to have the law of war scenarios inserted into the training medium which most clearly reflects combat conditions—the field training exercise. The field training exercise is a two sided exercise, requiring control personnel to monitor the play. A good field training exercise should remedy shortcomings in previous training and indicate needed future training. The field exercise has been called the "most advanced form of combat training."[82] The law of war should be a part of every such exercise.

Potential problem scenarios are as varied as actual combat missions might be. The scenarios might vary depending on whether individual or unit performance is to be evaluated. The only standard for such scenarios is that they realistically reflect combat conditions. Before attempting to design such scenarios, the judge advocate should be familiar with the unit's field SOP and rules of engagement, as well as the basic play of the exercise. The judge advocate should also determine when the unit last had formal instruction in the law of war. These considerations will influence the design of the problem scenarios.

The judge advocate then has the task of proposing the selected law of war scenarios to the commander. This may require some creative thinking on the part of the judge advocate. One guideline is that the scenarios chosen should be relevant to the mission of the unit being trained. The field training must be "tailored" just as the formal training should be. Another guideline is that the scenarios must be "payable." They must not be dangerous, nor difficult to monitor.

An initial consideration should be to determine just how obvious the law of war input should be to the soldiers. Should the soldiers know that law of war training is being evaluated? Different responses may result if the soldier is alert to the possibility that the law of war is being specifically tested than if the law of war issues are submerged in the wider context of the combat exercise. Creating obvious law of war fact situations, *e.g.*, a rifle squad finds a wounded enemy soldier, may serve to reinforce specific formal instruction. The more subtle law of war issues *e.g.*, the same squad receives sniper fire from a protected building, may serve to evaluate the unit's general understanding of the law of war.

The first step for any trainer with the mission of developing such law of war scenarios should be the Army's *Selected Problems in the Law of War* circular.[83] Section I of this circular presents some general guidance on training techniques. Section II consists of factual scenarios raising law of war issues. Section III contains an index to help the trainer select material appropriate to the training objective. This is an invaluable guide for any soldier charged with the mission of developing law of war training.

After the scenarios are chosen, they must be introduced into the play of the exercise. The judge advocate should be part of the evaluation team as either an observer or an actual player.

For instance, the judge advocate might play the role of an enemy prisoner of war. The "PW" could then evaluate the capturing soldier's understanding of his responsibilities under the law of war. Many law of war issues might be raised by such a simple "capture." For instance, were any wounds treated;[84] was force used or threatened to secure

[81] A field exercise is defined as:

> A tactical exercise conducted under realistic combat conditions. It enables the unit to improve its teamwork and the tactical application of the various techniques involved in collective training. It is also used to test units to see if they can meet your training objectives. Engagement simulation adds measurably to the effectiveness of small unit field exercises.

Id. at 125.

[82] Loehe, *A Theory for Field Exercises*, Mil. Rev., Jan. 1975, at 11.

[83] U.S. Dep't of Army, Training Circular No. 27-10-1, Selected Problems in the Law of War (June 1979) [hereinafter cited as TC 27-10-1].

[84] GWS, *supra* note 2, at art. 12.

information;[85] was the "PW" removed from the front as soon as possible?[86] By playing such a role, the judge advocate should be able to personally monitor the unit's compliance with the law of war and determine any weak points in the formal instruction.

The expected responses of the captures would be varied by simply having the PW claim to be a member of a medical unit. The captive would then be able to determine if the soldiers appreciate the special status of medical personnel.[87] The problem of "civilians" in the battle area is one which raises many legal and tactical issues for the soldier. The role player might be found at the front in civilian clothes. The "civilian" then would be able to observe the soldiers' understanding and implementation of the rules governing the treatment of civilians.[88]

These are only a few suggested methods as to how one might test a soldier's basic knowledge of the law of war. Of course, the judge advocate does not have to "play a part;" he or she might simply observe the treatment of others. However, particularly if the judge advocate is unknown to the capturing soldiers, a more accurate picture of the unit's understanding of the law of war can be obtained by actually getting into the "trenches" with the soldiers.

One further point should be made. All too often, the judge advocate or commander tends to think only in terms of training in the Geneva Conventions to the exclusion of training in the Hague Conventions or customary international law. Especially in the areas of weapons and targeting problems, the trainer should be aware of the potential application of these sources of international law and, therefore, turn to those sources for scenarios.

At the conclusion of any training exercise the training team should reflect on the training and any deficiencies discerned from the exercise. In this "post-exercise analysis," the commander takes the information from all the controllers, couples it with personal observations and determines what to do next. Based on this analysis, the commander can determine whether remedial training is necessary. It is, therefore, very important that the observations and comments of the judge advocate be made known to the commander. Without comment from the expert, the commander may not be aware of training shortcomings which indicate a serious lack of understanding of the law of war on the part of the unit.

Once shortcomings are revealed, the commander may turn to less formal, and less expensive, training techniques. This informal training may consist of informal discussions with the troops or the display of posters and notices. Most training schedules include some time for the commander to use as seen fit. Such "commander's time" may be an excellent opportunity to have the judge advocate come in and comment on the law of war issues in the previous exercise.

At such a conference, the judge advocate should go over each law of war scenario in the exercise and be prepared to comment on the issues raised and the unit's recognition of and solution to the problems. This, in effect, becomes a "feedback" session. The troops can again ask general questions about the law of war as well as specific questions about the problems in the exercise. Having seen the effect that the law of war can have on a combat mission, the soldiers may now be better able to comprehend the rationale of the law of war.

These suggestions for training in the law of war could be easily implemented. To introduce the law of war into tactical training would require little, if any, increased expenditures. It requires only a recognition of the problems of law of war training and a desire to improve the soldier's understanding of the law. It is important to note that, as the judge advocate becomes involved with training, his or her own understanding of how the law of war works in combat should increase. This then should make the judge advocate a better "platform" instructor. In short, such involvement in field exercises trains, not only the soldier, but also the judge advocate.

[85] GPW, *supra* note 2, at art. 21.

[86] GPW, *supra* note 2, at art. 19.

[87] GWS, *supra* note 2, at arts. 24, 26, 28.

[88] GC, *supra* note 2, at art. 5.

Future Training

Currently, law of war training is normally limited to the formal lecture or practical field training. Other modes of training warrant some consideration by commanders and judge advocates. One such method that should be explored is the use of computer technology to teach the law of war. While this method might prove overly difficult or too expensive for mass troop instruction, it could easily be adapted for small groups of officers and NCOs. The computer could present law of war situations to the student, who would then have to respond quickly. As in combat, little time may be available to make the decision. Also as in combat, the student would have to "live by" the decision; the chain of events set in motion by the decision could not be reversed. Such a computerized program would provide a convenient mechanism for testing the student's knowledge of the law of war. It would also alert the judge advocate to those areas of the law which need reinforcement or more explanation.

One disadvantage in using computers to teach the law of war is that the rules apply to an infinite variety of facts. It would be difficult for any computer program to take into account all these potential variations. Of course, there may be no need to cover every possible situation. Those scenarios which are most likely to come up in combat should be sufficient to teach the general principles. Computers are used to teach tactics and logistics at the various service schools. A failure to consider that same technology for training in the law of war is a mistake.[89]

Another method of instruction that should be considered is the "war game." War games are not new. They have historically been used to teach tactics and the military art generally.[90] Yet they have not been used to teach the law of war. War games provide a means of gaining experience in decision making. They offer a means of instilling a competition factor into what otherwise might be a dull learning exercise.

One approach used at The Judge Advocate General's School is to divide the class into two groups representing the opposing forces of two warring countries.[91] Each student is assigned a role, *i.e.*, private, battalion commander, prisoner, etc. Instructors pose various scenarios to the students. Each scenario requires a quick answer by the student playing that role. To maintain the interest of the student, maps are used to show troop movements. To increase the competition factor, the responses are "graded" by an instructor using a one to five point scale. The action is kept fast moving by limiting the time for responses. At the conclusion of the exercise, the victorious force is announced.

The degree of interest shown in the "war" is surprising. Students who rarely participate in any meaningful way in formal classroom presentations often become the most vocal in espousing their "country's" view of the law. Presumably, this reaction is because no one wants to lose a war — even one fought only on paper.

It must be remembered, however, that games themselves do not teach. They can, however, aid the learning process.[92] The participants must have previously acquired some understanding of the subject to be "gamed." The war game then can be used as follow-up training after a formal lecture.

The use of such a war game is particularly appropriate for an "officer's call" or other commander's time. Officers and NCOs are rarely interested in sitting through a period of formal instruction in the law of war. Yet, the use of a war game might generate interest, particularly if the participants were allowed to perform in their actual military positions. The *Selected Problems* circular[93] might be checked for scenarios which could be used in the

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[89]Computers are being introduced into legal education. For one example of such a program see Hellawell, *CHOOSE: A Computer Program for Legal Planning and Analysis*, 19 Colum. J. Transnat'l L. 339 (1981).

[90]For an example of "war gaming" in Vietnam, *see* Webb, *War Gaming and Combat*, Mil. Rev., Apr. 1969, at 18.

[91]For a discussion of a similar exercise, *see* De Mulinen, *The Law of War and the Armed Forces*, Int'l Rev. Red Cross, Jan.-Feb. 1978, at 202.

[92]Games are being introduced into legal curricula. *See* Katsh, *Preventing Future Shock: Games and Legal Education*, 25 J. Leg. Ed. 484 (1973).

[93]TC 27-10-1, *supra* note 83.

game. The judge advocate who is asked to present a class to such a group would do well to consider using a war game format.

Conclusion

The combat considerations which confront the soldier today are infused with legal considerations. The incident at My Lai prompted a reappraisal of the Army's approach to the law of war. Much has been done; much remains to be done.

Article 82 of Protocol I provides:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.[94]

The obligation to advise commanders includes the responsibility for conducting training in the law of war as well as the review of operations plans.[95] In short, the judge advocate is, today more than ever, charged with insuring that all soldiers understand and comply with the law of war. A failure to properly train a unit or advise a commander may well result in criminal charges being preferred against the judge advocate.

This paper is not intended to be a panacea for all the ills that afflict training in the law of war. The law of war is a difficult subject to teach. For many years, it was not really taken seriously as part of the soldier's training. All too often, the judge advocate has viewed the responsibilities in this area as an unpleasant additional duty, to be completed as quickly as possible, so that he or she might return to the practice of "real law."[96] Hopefully, this article has presented a few pointers for the law of war instructor, which, with some polishing, will make the law of war more interesting to both instructor and soldier.

[94]Protocols, *supra* note 47.

[95]The obligations imposed by Article 82 are the subject of a recent article. That an expanded role for the judge advocate in war planning is on the horizon is undeniable. *See* Parks, *The Law of War Advisor*, 31 JAG J. 1 (1980).

[96]Williams, *The Army Lawyer as an International Law Instructor: Dissemination of the Conventions* (Mar. 1976) (unpublished thesis in The Judge Advocate General's School Library).

The Neutrality Doctrine in Federal Sector Labor Relations

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This article will examine the neutrality doctrine, central principle guiding management's conduct of labor relations in the federal civil service. Broadly stated, this doctrine requires that federal agency management officials and supervisors[1] avoid any statements or actions which would either encourage or discourage their employees from engaging in union activity or supporting a particular labor organization. Management's neutral stance is particularly important during union organizing campaigns and representation elections to ensure that employees feel free either to support or oppose a particular union.[2]

[1]The terms "management official" and "supervisor" are used as defined in the Civil Service Reform Act of 1978, 5 U.S.C. § 7103(a) (Supp. V 1981). For brevity, the terms "supervisor" and "management" are used throughout this article to represent both and refer to agency officials who exercise responsibilities in the areas of policy formulation or personnel administration, to include employee discipline and adjustment of grievances. The neutrality doctrine does not apply to nonsupervisory employees, who are free to express their views supporting or opposing labor organizations, even during a representation election. *Id.* at § 7102; (V 1981 Department of Justice, Immigration and Naturalization Serv., 9 FLRA No. 36 (1982).

[2]"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102 (Supp. V 1981). The election ballot always includes a "no union" alternative. *Id.* at § 7111(d). V 1981.

The neutrality doctrine appears straightforward in principle, but becomes a demanding standard to follow in practice. A supervisor's well-intentioned comment to an employee about the merits of unions or an agency's good faith effort to provide use of its facilities to a labor organization may become the basis for an unfair labor practice charge. The value of a thorough understanding of the neutrality doctrine is that it enables supervisors and their counsel to avoid such pitfalls, Accordingly, this article will examine the origins and development of the neutrality doctrine in the federal sector in order to formulate guidelines for federal supervisors to aid their effort to comply with the law.

Genesis of the Neutrality Doctrine

The neutrality doctrine originated under the unique regime for federal labor-management relations established in 1969 by President Nixon's Executive Order No. 11,491, Labor-Management Relations in the Federal Service[3] (the Order). Federal employees could join or refrain from joining labor organizations, obtain representation, and bargain collectively.[4] However, wages, hours, and benefits remained nonnegotiable, since established by law, and strikes were forbidden.[5]

Given the unavailability of these economic incentives and weapons to the federal employee unions, overt management hostility to unions and their members could have effectively frustrated the government's avowed policy to preserve the employees' freedom to choose whether to engage in union activity.[6] Thus, while a private employer's right to voice opposition to union representation of his employees is protected by the "free speech" provision of the Taft-Hartley Act,[7] no such provision was included in the Order. In contrast, agency heads were enjoined to "assure that employees . . . are apprised of their rights under this section and that no interference, restraint, coercion, or discrimination is practiced within [the] agency to encourage or discourage membership in a labor organization."[8] This injunction was reinforced by section 19 of the Order, which defined and prohibited unfair labor practices by both management and labor, to include any action which would "interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order." Section 19(a)(3) forbade management to "sponsor, control, or otherwise assist a labor organization," permitting only the provision of "customary and routine services and facilities," if also furnished "on an impartial basis to organizations having equivalent status." This provision was aimed at the spectre of "captive" or "company" unions controlled by the employer.[9] The Order thus established a significant difference between private and federal sector labor-management relations in that the government, as the employer, required neutrality of its management officials.[10]

Neutrality v. Free Speech: The Impact of the Federal Labor-Management Relations Statute

Title VII, Federal Service Labor-Management Relations[11] (the Statute), of the Civil Service Reform Act of 1978 replaced Executive Order 11,491 as the basic law governing federal labor-management relations.[12] It largely mirrors the substantive provisions of the Order, to include those on unfair

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[3]Oct. 29, 1969, 34 Fed. Reg. 17,605 (1969), *reprinted in* 5 U.S.C. § 7101, at 312-17 (Supp. V, 1981).

[4]The right of federal employees to join labor organizations and obtain representation was recognized in President Kennedy's Executive Order No. 10,988, 27 Fed. Reg. 551 (1962). Executive Order No. 11,491 preserved these rights and added the right to bargain collectively.

[5]Exec. Order No. 11,491, §§ 1(e)(1), and 19(b)(4).

[6]*See* note 2 *supra*.

[7] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c) (1976).

[8]Exec. Order No. 11,491, § 1(a).

[9]Department of the Air Force, Grissom Air Force Base, Peru, Ind., 1978 FLRC No. 77A-77, 6 FLRC 406.

[10]*See* Hampton, *Federal Labor-Management Relations: A Program in Evolution*, 21 Cath. U.L. Rev. 493, 501 (1972).

[11] 5 U.S.C. § 7101-35 (Supp. V 1981).

[12]The Act became effective on 11 January 1979.

labor practices.[13] A notable change is the inclusion of section 7116(e), a "free speech" provision, as follows:

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.[14]

The legislative history of this provision reveals that the Senate desired to grant supervisors some latitude in the expression of personal views, arguments, and opinions. Indeed, the Senate version of section 7116(e) was nearly as expansive as section 8(c) of the Taft-Hartley Act.[15] In contrast, the House bill had no comparable provision. The Conference Report[16] asserted that section 7116(e) as enacted was intended to codify decisions of the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR) under Executive Order 11,491, which also had no such provision. These decisions, while apparently distinguishing between election and nonelection situations,[17] cast a baleful eye on any nonneutral management opinion, and were quick to find a violation of section 19(a)(1) based on coercion.[18]

Ultimately, a variant of the Senate view as prevailed, based on the interpretation of section 7116(e) by Administrative Law Judge William B. Devaney in *Oklahoma City Air Logistics Center, Tinker Air Force Base.*[19] Judge Devaney read the word "which—" in the first sentence of section 7116(e) to modify only the phrase "the making of any statement," in which case the three enumerated categories in the section delimit "statement," but not "view, argument, opinion." Under this somewhat strained sentence construction, the three categories limit only statements made during an election; the expression of views, arguments, or opinions at other times is constrained only by the concluding requirements of section 7116(e) that they contain "no threat of reprisal or force or promise of benefit" and are "not made under coercive conditions."

Given Judge Devaney's bifurcated construction of section 7116(e), which was adopted by the Federal Labor Relations Authority (FLRA),[20] a review of the decisions of the A/SLMR and FLRA[21] will illustrate the interplay between this "free speech"

[13] 5 U.S.C. §§ 7116(a)(1)-(4) (Supp. V 1981) are taken almost verbatim from § 19(a)(1)-(4) of the Executive Order. 5 U.S.C. § 7116(a)(5) (Supp. V 1981) corresponds to § 19(a)(6) of the Order. 5 U.S.C. §§ 7116(a)(6)-(8) (Supp. V 1981) are new provisions.

[14] *Id.* at § 7116(e).

[15] Section 7216(g) of the Senate bill stated that the expression of "any personal views, argument, opinion, or the making of any statement shall not constitute an unfair labor practice or invalidate an election if the expression contains no threat of reprisal or force or promise of benefit or undue coercive conditions." *Compare* note 7 *supra*.

[16] 95 1978 U.S. Code Cong. & Ad. News 2890.

[17] *Compare* Antilles Consol. Schools, Ceiba, Puerto Rico, A/SLMR No. 349, 4 A/SLMR 114 (1974) (during solicitation periods and subsequent election campaigns, management must remain strictly neutral) *with* Marine Corps Exch. 8-2, Marine Corps Air Sta., El Toro, Cal., A/SLMR No. 865, 7 A/SLMR 576 (1977) (a supervisor's attempt to persuade an employee not to join a union, without more, might not be an unfair labor practice).

[18] *E.g.*, Veterans Admin. Hosp., Shreveport, La., 1 FLRA No. 48, 1 FLRA 383 (1978), *discussed* (*in* Section III C *infra*.)

[19] 6 FLRA No. 32 (1981).

[20] *Id. Accord* Army-Air Force Exch. Serv., Ft. Carson, Colo., 9 FLRA No. 69 (1982); Norfolk Naval Shipyard, Portsmouth, Vir., 5 FLRA No. 105 (1981).

[21] There are few U.S. Court of Appeals decisions reviewing unfair labor practice cases under the Order or the Statute. Research fails to reveal any federal court decision construing section 7116(e). District courts lack jurisdiction to adjudicate unfair labor practice charges. National Federation of Federal Employees, Local 1263 v. Commandant, Defense Lang. Inst., West Coast Branch, 493 F. Supp. 675 (N.D. Cal. 1980).

provision, the neutrality doctrine, and the specific unfair labor practice provisions carried forward from the Order to the Statute.

A Review of Administrative Decisions Under Executive Order 11,491 and the Statute

The Scope of the Inquiry

At the outset, it was asserted that the real utility of the neutrality doctrine is its application to situations not involving deliberately anti- or pro-union actions by management. Certainly, actions such as reprisals against employees who join unions evidence a lack of neutrality. But these clearly unfair labor practices are not the focus of this inquiry.[22] The neutrality doctrine is more clearly defined by cases in which overt anti-union animus, threats, or discrimination were absent, yet statements or actions by management triggered unfair labor practice charges.

Union vs. Union: Management in the Neutral Corner

Unfair labor practice charges based on nonneutral management statements are most frequently brought under section 7116(a)(1) of the Statute,[23] alleging interference, restraint, or coercion in the employees' exercise of their right to engage in union activity. As previously discussed, section 7116(e) limits management comments during an election to those publicizing the election and encouraging employees to vote, correcting the record with respect to false or misleading statements, or reiterating the markedly nonneutral government policy concerning labor representation found in section 7101 of the Statute.[24] Activity beyond these areas in an election context is improper. For example, correcting the record does not permit a counterattack on the union challenging its usefulness on the even of an election.[25] The inclusion of a protected statement, such as one encouraging employees to vote, will not preclude an otherwise nonneutral message from violating section 7116(a)(1).[26]

Management must remain neutral during a decertification battle as well. In a Veterans Administration case,[27] the agency failed to adequately disassociate itself from such a campaign by allowing the incumbent union's opponents to use its mail routing system, while denying such use to the

[22]Examples of overtly nonneutral management action include disciplinary action motivated primarily by the employee's union membership, Environmental Protection Agency, Perrine Primate Laboratory, A/SLMR No. 136, 2 A/SLMR 87 (1972); cutting back overtime to retaliate for union activities, United States Customs Service, Atlanta, Ga., 1 FLRA No. 108; 1 FLRA 941 (1979); threatening a reduction-in-force if employees continue to use the grievance procedure, Army-Air Force Exch. Serv., Ft. Carson, Colo., 6 FLRA No. 108 (1981); and discharging an employee soon after he became a union steward, Marine Corps Base, Barstow, Cal., 5 FLRA No. 97 (1981). These examples all constitute discrimination to encourage or discourage union membership, in violation of section 7116(a)(2) of the Statute. Other overtly nonneutral actions beyond the scope of this analysis include retaliation against an employee because he files a complaint or gives information, 5 U.S.C. § 7116(a)(4) (Supp. V 1981); refusing to negotiate in good faith, *id.* at § 7116(a)(5); refusal to cooperate at impasse, *id.* at § 7116(a)(6); and enforcement of rules in conflict with a collective bargaining agreement. *Id.* at § 7116(a)(7). Any unfair labor practice violating section 7116(a)(2) through (a)(8) is held derivatively to violate section 7116(a)(1), which prohibits interference, restraint, or coercion of the employee in the exercise of his or her rights under the statute. Defense Logistics Agency, 5 FLRA No. 21 (1981); Army-Air Force Exch. Serv., A/SLMR No. 454, 4 A/SLMR 790 (1974) (violations of sections 19(a)(2) through (a)(6) of the Executive Order derivatively violate section 19(a)(1)).

[23]This was also true under its predecessor, section 19(a)(1) of the Executive Order.

[24]The Congress finds that—

> . . . the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> . . . safeguards the public interest.
>
> . . . .
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

5 U.S.C. § 7101(a) (Supp. V 1981).

[25]Agency statements in a newsletter issued during an election campaign had asserted that the employees' decision on the union would be binding for years, and asked what the union could do for them that their congressmen could not, thereby violating section 7116(a)(1). Air Force Plant Representative Office, Det. 27, Ft. Worth, Tex., 5 FLRA No. 62 (1981).

[26]*Id.*

[27]Veterans Admin. Data Processing Ctr., Austin, Tex., A/SLMR No. 523, 5 A/SLMR 377 (1975), *revision denied*, 1977 FLRC No. 75A-80; 5 FLRC 75.

union. In addition, a supervisor participated in the decertification campaign. Both of these actions were held violative of section 7116(a)(1).[28]

The use of the agency's mail routing system in the Veterans Administration case suggests another set of neutrality problems under section 7116(a)(3). This section, as did its predecessor, section 19(a)(3) of the Order, generally forbids management assistance to unions, but qualifies the prohibition to permit the provision of services and facilities, such as telephones, office space, and bulletin boards, on an impartial basis to unions of equivalent status.

A challenging union attains equivalent status with the incumbent exclusive representative by properly filing a representation offering (RO) petition.[29] The incumbent often will already have access to certain agency facilities under the collective bargaining agreement (CBA). It retains those rights of access, but the challenger must also be given effective access to the employees. If management, in an attempt to be neutral, denies all access and facilities to both unions, this may not only breach the incumbent's CBA, but also improperly restrict employees from engaging in union activity during nonduty time in nonwork areas.[30]

Once management provides access to its facilities, it must continue to avoid actions which might reasonably be interpreted to favor one union over the other. For example, if both unions are given bulletin board space, one should not be given a portion of a board still being used by management because such commingling of agency and union materials gives the appearance of agency favoritism for that union.[31] If such an arrangement is necessary, due to limited space, the agency should post a disclaimer to avoid any misinterpretation.[32]

The agency must not allow its interest in stable labor-management relations to compromise its neutrality in favor of an incumbent union over a challenger. Of particular importance is the rule established in *Naval Air Rework Facility, Jacksonville, Florida.*[33] The incumbent's CBA had expired and a challenger filed an RO petition. Management, seeking to maintain stable relations during the pendency of the election, began negotiating a new CBA with the incumbent. This was held violative of sections 19(a)(3) and 19(a)(1) of the Order.[34] The A/SLMR noted that a limited extension of an existing CBA would have been permissible in the interest of stability, but that negotiations for a new agreement during the pendency of an election unlawfully assisted the incumbent.

The rules are markedly different when the challenger has not filed an RO petition and, therefore, does not enjoy equivalent status with the incumbent. Here, the interest in stability prevails over equal access. Thus, it is an unfair labor practice under section 7116(a)(3) to allow a nonintervening union to conduct a "vote no" campaign using agency facilities during a representation election.[35] Further, the A/SLMR held in 1973 that section 19(a)(3) of the Order prohibited an agency from furnishing its facilities and services to nonemployee representatives of a union lacking equivalent status with the incumbent. The agency had violated section 19(a)(3) by allowing the outsiders to use office space to conduct an organizing campaign while management negotiated a new

[28] One union may campaign vigorously against another; as long as management neither endorses nor opposes either party, it commits no violation of section 7116(a)(1). California Army Nat'l Guard, A/SLMR No.47, 1 A/SLMR 244 (1971).

[29] Under the Statute, the exclusive representative is deemed to be a party to the election automatically. Under the Order, it was required to formally intervene to retain equal status. Consistent with the neutrality doctrine, RO petition filed by a member of agency management is invalid. Department of the Air Force, Arnold Eng'r Dev. Ctr., 1973 FLRC No. 72A-19, 1 FLRC 315.

[30] Charleston Naval Shipyard, A/SLMR No. 1, 1 A/SLMR 27 (1970).

[31] Department of Justice, Immigration and Naturalization Serv., 9 FLRA No. 36 (1982).

[32] *See, e.g.*, Grissom Air Force Base, Peru, Ind., 1978 FLRC No. 77A-77, 6 FLRC 406 (1978) (an explicit disclaimer in a base newspaper served to disassociate the command from a rival union's advertisement).

[33] A/SLMR No. 155, 2 A/SLMR 248 (1972).

[34] The violations were mooted when the challenger won the election. *Id.*

[35] Department of the Interior, Pacific Coast Region Geological Survey Ctr., Menlo Park, Cal., A/SLMR No. 143, 2 A/SLMR 160 (1972).

CBA with the incumbent.[36] The A/SLMR noted that management could improperly use the threat of access by a rival union as leverage against the incumbent during collective bargaining. The only recognized exception to this rule is where the challenger establishes that the employees are not reasonably accessible by alternate means of communication, other than mail. In such a case, the interest in an informed electorate may prevail over stability.[37]

The Supervisor's Freedom of Expression: Speak Softly and Don't Wave the Big Stick

When no elections or upstart unions are on the horizon, the mutual interest of management and labor in stable and harmonious relations gains renewed emphasis. Management's scrupulous neutrality can enhance this relationship. However, these daily interactions between supervisors, employees, and union representatives have forced a confrontation between the neutrality doctrine, as originally developed under the Executive Order, and the Statute's "free speech" provision. The question to consider is whether section 7116(e), as interpreted in the *Tinker Air Force Base* decision, gives supervisors some needed breathing space, or provides a path to the threshhold of prohibited activity.

A typical frustration for the supervisor is the employee who habitually brings his or her problems to the union representative before giving the supervisor an opportunity to resolve them. The supervisor should not respond by suggesting that the employee bypass the union representative, particularly if this suggestion is coupled with the implied promise of easier resolution of future problems.[38] Even if similar language does not amount to an inducement to bypass the union, it may be unlawfully coercive, particularly when the frustrated supervisor speaks angrily to the employee.[39]

The correct approach to this problem is illustrated by a Veterans Administration case decided in 1981.[40] The supervisor emphasized to employees that they should come to her with their problems *before*, not instead of, going either to the union representative or to higher management. The FLRA found this approach to be not only permissible but also a desirable effort to solve problems at the lowest possible level.[41]

Public attacks by management on the credibility or competence of union representatives have normally been found to breach neutrality and interfere with the employees' right to representation.[42] The fact that the discreditable information may be

[36]U.S. Army Natick Laboratories, A/SLMR No. 263, 3 A/SLMR 193 (1973). In this case a supervisor had also violated section 19(a)(3) by posting the rival union's literature on a bulletin board reserved for the incumbent.

[37]*Id. See also* Bureau of Customs, Boston, Mass., A/SLMR No. 169; 2 A/SLMR 312 (1972), discussing the possible application of the doctrine enunciated by the Supreme Court in NLRB v. The Babcock and Wilcox Co., 351 U.S. 105 (1956), to the federal sector.

[38]U.S. Army School & Tng. Ctr., Ft. McClellan, Ala., A/SLMR No. 42, 1 A/SLMR 225 (1971) (commander's letter to an employee stated that she could settle her grievances more easily without union representation).

[39]A frustrated commissary officer angrily demanded of a meat cutter: "Why, when you have problems, do you go to Singleton [the union president] all the time? Things would go a lot smoother if you would come to me instead of him. I run the Commissary, not Singleton." Navy Resale Sys. Field Support Office Commissary Store Group, 5 FLRA No. 42 (1981). The FLRA found that this was not an attempt to induce the employee to bypass his representative, but nevertheless violated section 7116(a)(1) because it was coercive.

[40]Veterans Admin. Medical and Regional Office Ctr. White River Junction, Vt., 6 FLRA No. 68 (1981).

[41]The FLRA's view is consistent with the approach to this situation in the private sector. *See* American Bldg. and Maintenance Co. of Cal., 166 NLRB 142 (1967), where the manager asked employees to first come to him with their problems rather than "run to the union."

[42]*E.g.*, U.S. Army Tng. Ctr., Inf., Ft. Jackson Laundry Facility, A/SLMR No. 242; 3 A/SLMR 60 (1973). Union insults directed at management officials, however, enjoy a more protected status. *See* Internal Revenue Serv., North Atlantic Serv. Ctr, Andover, Mass., 7 FLRA No. 92 (1981) (the union distributed literature in the cafeteria naming a supervisor "this season's holiday turkey").

true has not prevailed as a defense.[43] Even a supervisor's letter to a union official may be evidence of an unfair labor practice where it is so critical of the official as to comprise a failure to consult in good faith, in violation of section 7116(a)(5).[44]

There remain for review those situations in which a supervisor expresses criticism of union activity in general, either publicly to a group of employees, or privately to one or a few. One may ask whether the cases decided before the adoption of section 7116(e) and its bifurcated interpretation would have been decided differently thereafter.

In a case decided under the Executive Order, a supervisor called a meeting in response to a union steward's complaint that employees were beginning work early without authorized overtime. The supervisor had reminded the employees of their official hours, and attributed this restrictive approach to the union's presence. He added that unions no longer served a useful purpose. The FLRA found that these remarks, though lacking animus, coercively interfered with employee rights, thereby violating section 19(a)(1) of the Order.[45] In an early case decided under the Statute, the FLRA reached a similar conclusion where a school superintendent had told a teacher's meeting that collective bargaining would be undesirable because it would put teachers and administrators on "opposite sides of the table." This was deemed coercive because the superintendent headed the school system and controlled the hiring and firing of teachers.[46] In both of these early FLRA decisions, the unfair labor practice charge was sustained on the basis of coercion. Therefore, they presumably would not have been saved by a bifurcated reading of section 7116(e), since even nonelection opinions must be noncoercive. The *Tinker Air Force Base* decision itself inevitably rests on the finding that a supervisor's private comments to three employees, to the effect that union dues were a waste of money, were not threatening or coercive.[47] Similarly, a decision concerning a shipyard commander's newspaper column, which clearly implied his opposition to picketing, turned on the absence of threatening or coercive conditions.[48]

A final example involves a supervisor who was a former union president. She spoke to an employee sales clerk in the store in a normal tone of voice, asserting that the union never did anything for the employees. The FLRA adopted the administrative law judge's opinion, which emphasized that neither the supervisor's tone nor manner was

[43]When a supervisor read a memorandum to employees concerning an equal employment opportunity complaint filed by the union, he revealed that the union had used a secretary's name in the complaint without her permission. The A/SLMR found that this discredited the union representative by implying that confidential matters brought to his attention would be compromised. Veteran Admin. Data Processing Ctr., Austin, Tex., A/SLMR No. 523, 5 A/SLMR 377 (1975).

[44]U.S. Army School and Tng. Ctr., Ft. McClellan, Ala., A/SLMR No. 42, 1 A/SLMR 225 (1971) (involving violation of section 19(a)(6) of the Executive Order, the predecessor of section 7116(a)(5)). While personal criticism of union officials *as union officials* should be avoided, employees in union positions are not immune from adverse personnel actions *as employees*. For example, an employee who accepts a union position which creates a conflict of interest with his federal job may be removed from that job if he refuses to relinquish his union post. Department of Health, Edu. and Welfare, Region VIII, Denver, Colo., 6 FLRA No. 110 (1981). *See also* Navy Public Works Ctr., Norfolk Naval Base, 5 FLRA No. 51 (1981) (no violation of section 7116 to inform an employee who was a union steward that she would have to discontinue union activities to serve as a confidential personnel clerk to a supervisor who had significant labor relations responsibilities).

[45]Veterans Admin. Hosp., Shreveport, La., 1 FLRA No. 48, 1 FLRA 383 (1978).

[46]Department of the Army, Ft. Bragg Schools, 3 FLRA No. 57, 3 FLRA 363 (1980). This decision also held that the presence of school principals at teachers' union meetings constituted "overt surveillance" of union activity. Noting that such surveillance is prohibited in the private sector by the National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), administrative law judge concluded that the principals' presence could reasonably have inhibited the teachers' exercise of their union rights in violation of section 7116(a)(1) of the statute. Thus, it is sometimes not enough for management to speak softly when its big stick is clearly visible.

[47]There was no election pending when the employees individually approached the supervisor for his views. He was found to have said to one: "The union isn't worth the paper it is printed on" and "$11.00 a month isn't worth the money invested in it." He commented to a second man: "Do you know your union dues are going up?" and to a third: "The union has to represent you whether you are a member or not, dues are high and I hate to see you waste your money."

[48]Norfolk Naval Shipyard, Portsmouth, Va., 5 FLRA No. 105 (1981).

threatening and that this was a private opinion not disseminated to other employees. The judge found the comment noncoercive, noting that the mere expression of an opinion was not, *per se*, interference under section 7116(a)(1).[49]

The common thread running through these five cases is the issue of coercion. Rather than carving out a totally new area of protected speech,[50] section 7116(e) may simply have encouraged judges and the FLRA to take a harder look at the facts in a nonelection setting before concluding that coercive conditions are present. It would, however, be dangerous for management to relax its neutral stance in reliance on section 7116(e), because the coercion issue is a factual one decided upon the facts of each case,[51] and the FLRA is not bound by stare decisis.[52] The better approach is for every supervisor to refrain from unnecessary criticism of union affairs by recognizing the coercive impact such comments may have on employees: "What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart."[53]

The Statutory Framework of the Neutrality Doctrine

Management's adherence to the neutrality doctrine implements the command of section 7102 of the Statute that "each employee shall be protected in the exercise of [his or her rights]." As noted above, this doctrine may be violated as easily by deliberate unfair labor practices as by subtle management indiscretions. In this latter context, the doctrine finds application principally in cases concerning interference, restraint, or coercion under section 7116(a)(1) and improper provision or denial of agency facilities under section 7116(a)(3).

[49]Army-Air Force Exch. Serv., Ft. Carson, Colo., 9 FLRA No. 69 (1982).

[50]See note 17 *supra*.

[51] Whether a statement is coercive is an objective test under all the circumstances. Army-Air Force Exch. Serv., Ft. Carson, Colo., 9 FLRA No. 69 (1982).

[52]National Broiler Council, Inc. v. FLRC, 382 F. Supp. 322 (E.D. Va. 1974).

[53]NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hond, J.).

These decisions help define the limits of neutrality circumscribed by the bifurcated interpretation of the Statute's "free speech" provision, section 7116(e).

To summarize, the employees' rights and management's responsibilities as defined in section 7102, coupled with the unfair labor practice prvisions of sections 7116(a)(1) and (a)(3) and the free speech provision, section 7116(e), provide the statutory framework supporting the continued viability of the neutrality doctrine. A synthesis of these statutory provisions and the related cases provided the basis for the definition and guidelines that follow.

The Straight and Narrow Neutral Path: A Definition and Guidelines for Supervisors

Following this section is an expanded definition of the neutrality doctrine, to include parts lettered A-E. It is hoped that this will provide a useful initial reference, particularly for counsel. Enumerated under each part are related guidelines distilled from the cases. These are provided to assist supervisors and management officials in their efforts to avoid the inadvertent breach of neutrality that may constitute an unfair labor practice, and to foster stable and harmonious labor-management relations in the federal workplace.

The Neutrality Doctrine in Federal Sector Labor-Management Relations: Definition and Guidance for Managers and Supervisors

The neutrality doctrine in federal labor-management relations serves to protect the statutory right of federal employees to freely engage in or refrain from union activities. It requires that agency management officials and supervisors—

A. Avoid any official statement or action that indicates favoritism or opposition toward either a particular labor organization or union activities in general.

    1. Do not express pro- or anti-union views in an official capacity or as a matter of agency policy.

2. Do not allow supervisors to assist a particular union in an organization, election, or decertification campaign.

3. Issue disclaimers of any agency endorsement of union materials posted on agency bulletin boards or circulated in agency facilities.

4. Do not memorialize anti- or pro-union attitudes in official correspondence.

5. Do not conduct negotiations with an incumbent exclusive representative for a new collective bargaining agreement when the existing agreement has expired and a challenger has filed an RO petition. It is permissible to temporarily extend an unexpired agreement during the pendency of the election.

B. Avoid any personal statement or action that could reasonably be interpreted to threaten, coerce, or promise a benefit to employees with respect to the exercise of their rights under the statute.

1. Do not express personal criticism of union officials or attempt to discredit them to employees.

2. Do not encourage employees to bypass the union representative with their problems. It is proper to encourage employees to come to their supervisor *before*, but not *instead of*, going to their representative. Do not imply that they will benefit by avoiding their representative.

3. Avoid the expression of nonneutral personal opinions about unions to employees whenever possible. Any personal opinion that is expressed should preferably be—

a. prompted by an employee's inquiry;

b. made privately, not disseminated to employees at large;

c. uttered in a normal tone of voice; and

d. identified as the speaker's personal view, not as an agency policy.

4. Do not permit supervisors to conduct surveillance of union meetings.

C. Further limit any official or personal statements made during a representation election to those which publicize the election and encourage employees to vote, correct false or misleading statements, or inform employees of the government policy that labor organizations and collective bargaining in the civil service are in the public interest.

1. Publicize representation elections and encourage employees to vote.

2. Do not issue countercharges against a union when correcting false or misleading statements.

3. Strictly limit any statement made during an election to the categories described in (C) above. Make no exceptions.

D. Provide labor organizations of equivalent status with adequate and comparable access to employees and agency facilities.

1. Do not deny all access to all unions in an attempt to be neutral. Employees have the right to organize and exchange union information during nonduty hours in nonwork areas.

2. Do not withhold from the incumbent union any facilities it is entitled to use under a collective bargaining agreement.

E. Do not provide agency facilities to nonemployee representatives of an organization lacking equivalent status with the incumbent exclusive representative.

1. Do not allow nonemployees to use agency facilities or services to conduct a "vote-no", decertification, or

organizing campaign on behalf of a union which has not filed an RO petition.

2. The only recognized exception to the above prohibition is where the employees are not accessible to the challenger through reasonable efforts by alternate means of communication other than mail.

American Bar Association/Young Lawyers Division Mid-Year Convention

Captain Bruce E. Kasold
ABA/YLD Delegate
Tort Branch, Litigation Division, OTJAG

The Young Lawyers Division (YLD) often has had a significant impact on resolutions ultimately adopted by the American Bar Association (ABA). At the mid-year meeting discussions and issues ranged from criminal law to immigration law to legal ethics. Here is a summary of the Assembly action.

Model Rules of Professional Conduct

Although proposed changes to the proposed Model Rules of Professional Conduct are consuming less of the Assembly's time, several propositions were offered. The Assembly finally supported the often called "snitch" rule requiring all attorneys knowing of a violation of the Rules of Professional Conduct to report this violation to the appropriate authority. A specific provision requiring attorneys to make such reports on judges was also adopted.

The Assembly again rejected the Kutak proposal that would require an attorney to refuse to offer evidence that he "reasonably believes" is false. While there is general agreement that false evidence should not be presented, the Assembly objected to the words "reasonably believes" as being too subjective. They would substitute "knows".

As you are probably aware the ABA assembly rejected the Kutak proposals at the mid-year meeting. There will most likely be continued study and revision on this topic, however.

The Insanity Defense

The Assembly rejected a recommendation that it support a change in the insanity defense so that focus will be "solely on whether the defendant, as a result of mental disease or defect, was unable to appreciate the wrongfulness of his or her conduct at the time of the offense . . ."

It rejected a proposal that it support a dual system for allocation of the burden of proof in insanity defense cases. The proposal would have placed the burden of proof on the prosecution, beyond a reasonable doubt, in jurisdictions where the test for insanity was that proposed in 1) above. If the ALI-Model Penal Code test was used then the burden would be on the defendant, by a preponderance of the evidence.

It passed a proposal that it support ABA opposition to the enactment of statutes supplanting the verdict of not guilty by reason of insanity with an alternative verdict of guilty but mentally ill. However, the ABA Assembly supported a change in the verdict.

Other Activity

The Assembly rejected a recommendation that the ABA oppose current legislation relating to immigration and naturalization which would limit the rights of those seeking entry into this country.

It adopted a recommendation that timing and venue of judicial proceedings to review federal agency actions be modified. Under the proposal, each federal agency would be required to specify the time at which its action became final, and that time would normally be no less than thirty days before the effective date of the rule. In addition, venue for reviewing decisions appealable in federal courts of appeal would be determined on a random basis for those filing within five days of final agency action, as opposed to the first come, first

served situation that exists now. This proposal is intended to save judicial time by eliminating hearings on who actually filed first.

It passed a recommendation that net worth exhibits and supporting financial information submitted in conjunction with fee award applications under the Equal Access to Justice Act not be automatically released to the public. Procedural provisions designed to permit a balancing of the public's right to such information and the individual's or association's right to privacy and confidentiality were also adopted.

It supported the proposed Uniform Transboundary Pollution Reciprocal Access Act which creates a new forum for litigants previously denied the right to have their complaint heard. Specifically, plaintiffs claiming injury resulting from pollution generated in a foreign state sometimes have no right to sue in the foreign state and might not be able to secure jurisdiction over the defendant in their own state. The adopted rule would give the plaintiff jurisdiction in the foreign state. This rule is intended for adoption by Canada as well as the fifty states.

The Assembly passed a resolution supporting adoption of the Uniform Conflict of Laws-Limitations Act. This Act would make the statute of limitations substantive, rather than procedural, law. Accordingly, once the judicial determination has been made that a particular state's law applies, the appropriate statute of limitations of that state would also apply.

It "strongly opposed" recommendations which would encourage recognition and regulation of specialists. Despite the language "strongly opposed," there was a close vote on this issue. The majority felt that specialization would work to the disadvantage of the young lawyer by placing restrictions on the right to call oneself a specialist. Another major argument, however, was that the restrictions being proposed *i.e.*, not less than 25% of the practice must be in the specialty, three years of practice before application, and ten hours CLE per year in the specialty, five references from peers, and consent to independent investigation by the specialty agency, were too lenient and would detract from those who were truly specialists.

The Assembly recommended against mandatory CLE; however, it supported continued study of this issue. Generally, there was a belief that mandatory CLE would not achieve the desired result of competent attorneys. It was largely felt that CLE attended on a voluntary basis was much more effective than when it was mandatory. This position may change in the next few years.

General Comments

This body of young lawyers is generally conservative in their ideas and their approach to the law, although not as conservative as the ABA assembly seems to be. The various young lawyer committees and affiliate organizations are quite active and generally produce valuable programs which are an assistance to the young lawyer, indeed, to most lawyers. The major affiliate project presented in New Orleans was titled "Working With The Media" and topics covered "How to do a News Release," "Preparing a Newsletter," and "Developing a TV and Radio 'Ask-A-Lawyer Program,'" among others. The idea is obvious—to educate the citizen. The information provided could be helpful in establishing educational projects on an installation. In similar ways, much of what the ABA does either affects the military attorney or could be useful to the military community.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Line of Duty) **Injuries From "Russian Roulette" Were NLD-DOM; Separation Without Severance Pay Proper.** DAJA-AL 1982/2840 (20 October 1982).

A line of duty investigation found that a soldier, while playing "Russian roulette" in conjunction with his drinking during a party, accidentally shot himself. As a result, he was separated from the service, without severance pay, for physical disability.

The injury was correctly determined to have been not in line of duty—due to own misconduct (NLD-DOM). Rule 6, Appendix, AR 600-33, provides that an injury incurred while willfully handling a firearm in disregard of its dangerous nature is NLD-DOM as a result of willful negligence. The same determination results from injuries that result in incapacitation because of the abuse of intoxicating liquor. Rule 4, Appendix, AR 600-33. Therefore, the line of duty investigation correctly determined the injury to be NLD-DOM. Accordingly, the soldier's separation was in accordance with para. 4-24*e*(6), AR 635-40, which provides for separation for physical disability without severance pay "when the disability was incurred as a result of intentional misconduct, willful neglect, or during a period of unauthorized absence (*see* 10 U.S.C. § 1207)."

(Separation From The Service, Grounds) **Administrative Separation Board's Finding That The Respondent Demonstrated A Propensity To Engage In Homosexual Conduct Which Would Seriously Impair The Accomplishment Of The Military Mission Made Further Findings Under Paragraph 15-4*a*, AR 635-200 Unnecessary.** DAJA-AL 1982/2456 (7 September 1982).

The soldier was separated from the Army in April 1982 for homosexuality. The basis for separation was an admission of homosexuality and solicitation of a homosexual act with an officer of the same sex. The board found that the respondent/soldier demonstrated a propensity to engage in homosexual conduct which would seriously impair the accomplishment of the military mission. The board did not make additional findings concerning the circumstances in paragraph 15-4*a*, AR 635-200 (then in effect) which would permit retention in some limited circumstances. Following discharge, the former soldier petitioned for relief from the Army Board of Correction of Military Records (ABCMR) alleging that it was error for the board not to make specific findings on all of the matters contained in paragraphs 15-4*a*(1)-(5).

The Judge Advocate General stated that the board was not required to make specific findings as to each circumstance set forth in paragraph 15-4*a*(1)-(5) because the single finding of a propensity to engage in homosexual conduct, a negative determination as to the circumstance in paragraph 15-4*a*(4), precluded retention. That finding made additional findings immaterial and unnecessary as *all* five circumstances in paragraph 15-4*a* must be satisfied to warrant retention.

(Separation From The Service, Grounds) **Discharge Of A Servicemember From A Previous Enlistment Prior To Final Action On A Pending Separation Action Effectively Terminated That Action; But Subsequent Reenlistment Was Erroneous Because Service Member Should Have Been Flagged At The Time of Discharge.** DAJA-AL 1982/2493 (3 September 1982).

A soldier with over 18 years of service was considered for separation under Chapter 15, AR 635-200, for homosexual acts. A board of officers met in May 1982 and recommended retention in spite of a finding that the service member/respondent had engaged in homosexual conduct. The convening authority forwarded the proceedings to U.S. Army Military Personnel Center (MILPERCEN) under paragraph 1-25*e*, AR 635-200, then in effect, and recommended separation. Following the board's findings and recommendation, but prior to final action on the separation recommendation at HQDA, the soldier's company command-

er erroneously removed the suspension of favorable personnel action (the flag) and permitted the soldier to reenlist. MILPERCEN requested an opinion on whether the soldier could be separated under paragraph 5-25, AR 635-200, then in effect, for erroneous reenlistment because of the company commander's mistake in removing the flag from the soldier's records and permitting reenlistment.

The Judge Advocate General stated that the soldier was required to be flagged pending final disposition by Headquarters, Department of the Army on the separation action, citing paragraph 6*a*(2), AR 600-31. The service member was in a nonpromotable status and therefore not eligible for reenlistment in accordance with paragraph 2-23*a*(6), AR 601-280. The erroneously lifted flag did constitute sufficient basis for declaring the reenlistment erroneous under AR 635-200.

Use Of Appropriated Funds for Physical Fitness Purposes

1. References: (a) DAJA-KL 1983/4045
   (b) DA Msg 211900Z Mar 83, subject: Physical Fitness Extension Services
   (c) CDRDARCOM Msg 181600Z April 83, subject: Physical Fitness Extension Services

2. TJAG opined (ref 1(a)) that 5 U.S.C. § 5946 does not prohibit the use of appropriated funds (AF) to purchase organizational memberships or permits to use facilities for physical fitness purposes, for members of the armed forces.

3. Prior to authorizing AF for this purpose, under ref 1(b) commanders must confirm that:

(a) commuting to the nearest military installation, for the purpose of participating in physical fitness activities, is truly a hardship;

(b) the activities are not available without cost to military personnel in the civilian community assigned;

(c) funds are available within current resources to support the requirement.

4. Ref 1(b) provides that multi-use facilities, which would meet the overall physical fitness needs of the normal military population, are preferred to single-use facilities. Examples of arrangements authorized from AF are: use of gymnasiums, running tracks, athletic fields, shower/locker facilities, recreational centers and community centers. Examples where AF are not authorized are: use of health spas, golf courses, bowling alleys, sporting clubs, tennis courts, racquet clubs, and swimming facilities (except USAREUR) not included as part of a gym or recreation center.

5. Para. 5 of Ref 1(b) provides that it may be used as authorization to enter into appropriate contracts pending receipt of regulatory guidance. Also, incidental use by civilian employees or dependents is not objectionable if their use does not increase the basic cost to the government to provide for use by military personnel.

Criminal Law News

Criminal Law Division, OTJAG

Excusal of Court Members

In a recent case decided by the ACMR, a court member was excused by the convening authority after assembly and voir dire to perform duties "of an exigent nature . . ., crucial to the units mission." Trial counsel explained that the member was chief of his unit's firing battery which had been moved to the field to practice live firing and that the member's presence was needed there to supervise the live firing. Trial defense counsel objected on grounds that good cause (pursuant to Article 29(a), UCMJ) had not been shown. When the trial counsel offered to elaborate, the military judge denied the objection stating that he would not override the convening authority. ACMR reversed on the basis that the record was inadequate to permit judicial review.

SJAs should insure that records of trial adequately reflect the reasons for excusal of a member after assembly and that the reasons enumerated demonstrate "good cause" as defined in paragraph 37*b*, MCM.

Suspension of Favorable Personnel Actions for Summarized Article 15s

Paragraph 3-37a, AR 27-10, Legal Services—Military Justice (1 Sept. 1982), requires the submission of DA Form 268, Report for Suspension of Favorable Personnel Action, in accordance with AR 600-31, when a formal Article 15 is imposed. AR 27-10 is silent regarding flagging action when a summarized Article 15 is imposed. However, paragraph 6a(2)(b), AR 600-31 requires that favorable personnel actions be suspended for members in grades E-4 through E-9 against whom nonjudicial punishment has been initiated.

Because the summarized Article 15 was intended as a disciplinary tool for commanders which would allow them to take swift and effective corrective action for very minor misconduct without permanently stigmatizing the service member, initiation of a flagging action under the provisions of AR 600-31 is counter-productive. Moreover, the initiation of flagging action when the offense is being disposed of by summarized procedures in most instances serves merely to increase without practical justification the administrative workload of unit commanders.

Accordingly, a forthcoming interim change to AR 600-31 will delete the requirement for initiation of DA Form 268 in those cases where nonjudicial punishment is imposed through summarized proceedings.

HQDA Message—Urinalysis Program

P 101600Z May 83
FOR SJA. Pass to subordinate court-martial jurisdictions.

SUBJECT: Legal Support of the Urinalysis Program

1. This office has received several inquiries concerning the legal sufficiency of the recently implemented urinalysis program in support of disciplinary action.

2. It is the opinion of this office [DAJA-CL] that the results of urinalysis in which the urine specimens were obtained by lawful search and seizure (MRE's 312, 314, 315, and 316), or by military inspection (MRE 313), are legally sufficient to support the imposition of nonjudicial punishment, in those cases in which commanders determine nonjudicial punishment is appropriate. Moreover, in the event that servicemembers offered nonjudicial punishment based upon positive urinalysis results demand trial by court-martial and commanders determine trial by court-martial is appropriate, or in those cases in which commanders determine initially that trial by court-martial is appropriate rather than nonjudicial punishment, lawfully obtained urinalysis results acquired in accordance with AR 600-85 are admissible in trials by courts-martial.

3. Questions or requests for assistance concerning the introduction of urinalysis results into evidence (e.g., the legality of the seizure, the adequacy of the chain of custody, the scientific validity and reliability of the laboratory test, how to charge offenses based on positive urinalysis results, and jurisdiction over the offense) may be addressed to the office of the Trial Counsel Assistance Program (TCAP) or the U.S. Army Trial Defense Service (TDS), as appropriate. TCAP stands ready to assist SJA's who request assistance with information including sample specifications and trial procedures designed to resolve issues likely to arise during litigation. Likewise, TDS stands ready to provide their counsel with similar information and assistance. Additionally, two recent articles in the Trial Counsel Forum and an article in the Advocate have addressed many of the issues involved.

4. SJA's are reminded that determinations regarding the availability of funds in courts-martial proceedings for expert and other witnesses is a responsibility within the discretion of the convening authority rather than a legal impediment to trial or imposition of nonjudicial punishment.

5. It is not the policy of the Department of the Army, nor is it the intent of this message to mandate, to encourage or to discourage UCMJ action. The decisions whether to offer soldiers nonjudicial punishment or to refer a case to trial have been placed by law within the sole discretion of com-

manders and convening authorities. Of course, before and after these decisions are made, SJA's must insure that they are ready to provide accurate and meaningful legal advice to commanders and convening authorities. The purpose of this message is to clarify the legal position of DAJA-CL, and to alert and insure SJA's are aware that advice and assistance in recognizing and resolving trial issues is available to the government as well as to the defense.

Legal Assistance Items

Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger, and Major Charles W. Hemingway
Administrative and Civil Law Division, TJAGSA

The Driver License Compact

Legal assistance officers should be aware of the existence of the Driver License Compact when counseling clients regarding traffic offenses. This Compact, which results from the Beamer Resolution (PL 85-689), seeks state cooperation in exchanging driver license information. It is intended to supplement state driver licensing enforcement programs and to reduce accidents.

The agreement provides for the exchange of information about certain serious offenses. It also encourages procedural uniformity among states in the handling of license suspensions, revocations, and other processes involving offenses—particularly in states other than the "home" jurisdiction.

The thirty states currently participating are:

Alabama	Indiana	New Mexico
Arizona	Iowa	New York
Arkansas	Kansas	Oklahoma
California	Louisiana	Oregon
Colorado	Maine	Tennessee
Delaware	Mississippi	Utah
Florida	Montana	Virginia
Hawaii	Nebraska	Washington
Idaho	Nevada	West Virginia
Illinois	New Jersey	Wyoming

Drivers should know that among the goals of the Compact are to prevent drivers from obtaining multiple licenses and to create a "one-record" concept to insure that an individual's *entire* driving record (from *all* states in which the individual has driven) is used to determine license eligibility in the home state as well as all other states.

Garnishment—Military Pay

The U.S. Court of Appeals for the Federal Circuit, in *Morton v. United States*, Doc. No. 290-77, Fed. Cir. (May 17, 1983), held that military finance centers can be held liable for withholding pay from a service member under a state court garnishment order when the state court lacks personal jurisdiction over the service member. This decision challenges the traditional rule requiring military finance centers to honor any garnishment order determined to be "valid on its face." It is expected that by the time this article is published, the government will have requested that the appeals court reconsider its decision. If the request for reconsideration is denied or the reconsideration decision is adverse to the government, the Air Force has indicated the case will be appealed to the Supreme Court.

Legal assistance officers are advised to consider the implications of the *Morton* decision when counseling service members concerning involuntary allotments, garnishment, and division of military retired pay. In all three cases, military finance centers have applied the "valid on its face" test prior to withholding money from a service member or retiree. After *Morton*, a service member or retiree with a *valid* jurisdictional challenge should bring the jurisdictional issue to the attention of the military finance center. The finance centers, however, have not announced their procedures for processing such cases. Additional information on *Morton* and its impact on legal assistance will be published in an upcoming issue of *The Army Lawyer*.

Reserve Judge Advocate Legal Assistance Advisory Committee

Major General Clausen has authorized the formation of the Reserve Judge Advocate Legal Assistance Advisory Committee to assist The Judge Advocate General's School's Legal Assistance Branch by advising the Branch on changes in state law. Details of this new program are provided in the Reserve Affairs Items section of this issue of *The Army Lawyer.*

Nonjudicial Punishment

Quarterly Punishment Rates Per 1000 Average Strength
October–December 1982

	Quarterly Rates
ARMY-WIDE	39.24
CONUS Army commands	38.73
OVERSEAS Army commands	40.09
USAREUR and Seventh Army commands	39.23
Eighth US Army	51.10
US Army Japan	13.08
Units in Hawaii	36.01
Units in Alaska	36.25
Units in Panama	50.55

Courts-Martial

Quarterly Court-Martial Rates Per 1000 Average Strength
October–December 1982

	GENERAL CM	*SPECIAL CM*		*SUMMARY CM*
		BCD	*NON-BCD*	
ARMY-WIDE	.48	.72	.32	1.02
CONUS Army commands	.36	.50	.29	.80
OVERSEAS Army commands	.68	1.09	.37	1.38
USAREUR and Seventh Army commands	.74	1.16	.32	1.47
Eighth US Army	.37	1.00	.73	.83
US Army Japan	.40	1.19		
Units in Hawaii	.51	.45	.56	.85
Units in Alaska	.24	1.55	.36	.83
Units in Panama	.99	.43		3.57

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Reserve Judge Advocate Legal Assistance Advisory Committee

Major General Clausen has authorized the formation of the Reserve Judge Advocate Legal Assistance Advisory Committee to assist The Judge Advocate General's School's Legal Assistance Branch by advising the Branch on changes in state laws. The primary objectives of the Advisory Committee will be:

(1) Assist the School's Legal Assistance Branch with the updating of the already published *All States Guides*;
(2) Assist the Branch with the publication of additional texts;
(3) Submit timely reports on selected topics in legal assistance, recent developments, recommended approaches, and model forms; and
(4) Answer specific state law questions submitted from the Branch.

The Advisory Committee will be comprised of at least one reserve officer appointed from each state and, where possible, each territory. Qualified reserve judge advocate volunteers will be designated "Special Legal Assistance Officers" under paragraph 5b(2), AR 608-50. Reserve officers will be eligible to receive approximately 35 points for each year they participate in the program. To earn these points under AR 140-185, an appointed officer will be required to do some combination of the following:

(1) Submit a quarterly report on recent state law developments which relate to legal assistance matters (e.g., wills, divorce, state taxation);
(2) Review and update the appropriate state law summaries in the *All States Guides*;
(3) Provide additional state law summaries within a reasonable time upon request of the Legal Assistance Branch;
(4) Respond to inquiries from the Legal Assistance Branch concerning issues of state law raised in the field; and
(5) Provide additional advice on legal assistance matters to the Legal Assistance Branch as needed.

The Advisory Committee will be under the direct supervision of the Chief, Administrative and Civil Law Division, Lieutenant Colonel John Cruden. He will determine all issues concerning retirement points credit. The Legal Assistance Branch, TJAGSA, will be the direct contact between the School and the committee. This Branch will also serve as liaison between the committee and the field. Clerical support will be the responsibility of the individual reserve officer.

Retirement points for the work accomplished will be calculated in accordance with Rule 16, Table 2-1, AR 140-185, and paragraph 2-4b(3), AR 140-185. Advisory Committee members will forward a completed DA Form 1380 along with their work product to the Chief, Administrative and Civil Law Division. He will certify the number of retirement points to be accredited and forward the form to the Reserve Affairs Department. Reserve Affairs Department will forward the DA Form 1380 to RCPAC, mail a copy to the officer concerned, and maintain a copy in the reservist's file.

Interested reserve judge advocates should submit a letter requesting consideration for the Advisory Committee with a current resume to The Judge Advocate General's School, ATTN: ADA-LA, Charlottesville, VA 22901. All letters should be submitted before 1 September 1983. Committee members will be selected on the basis of their legal expertise in legal assistance-related areas of the law (e.g., wills, family law, taxation).

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

Noncommissioned Officer Education System (NCOES)

NCOES is divided into primary, basic, advanced, and senior levels. While not officially a part of NCOES, the U.S. Army Sergeants Major Academy is the capstone of the system.

a. *Primary Level*: The primary level is designed to prepare individuals in the grade of E4 for duty and responsibility as an E5.

b. *Basic Level*: The basic level of training prepares individuals in the grade of E5 for duty as an E6.

c. *Advanced NCO Course*: The Advanced NCO Course (ANCOC) stresses MOS-related tasks, with emphasis on technical and advanced leadership skills and knowledge of the military subjects required to train and lead. NCOs selected for promotion to sergeant first class or platoon sergeant who have not previously been selected to attend ANCOC *will be automatically scheduled for attendance.*

d. Senior NCO Courses: Senior NCO Courses (SNCOCs) are currently in the early stages of development. Training courses such as the First Sergeant Course, intelligence, operations, and many other technical courses have been approved and personnel from various MOSs are being enrolled. These courses are designed to provide skill and knowledge necessary for promotable E7s, and E8s to perform their duties.

e. *U.S. Army Sergeants Major Academy (USASMA)*: The U.S. Army Sergeants Major Academy trains selected individuals for positions of the highest responsibility throughout the Army and in certain Department of Defense positions in both troop and senior staff assignments. This course is primarily for promotable E8s and sergeants major.

NCOES is designed to provide progressive and continuous training from the primary level through the senior level in all MOSs. NCOES objectives include training noncommissioned officers to be the trainers and leaders of soldiers. For the past three years, legal clerks and court reporters have been fortunate in being selected to attend most of the listed courses.

CLE News

1. Montana Continuing Legal Education Requirements

The Montana Board of Continuing Legal Education has informed TJAGSA that it will not, as yet, provide credit for courses offered at The Judge Advocate General's School. An attempt to revise the rules concerning the recognition of CLE credits is currently underway for presentation to the Montana Supreme Court.

Military members of the Montana bar who have found it difficult to attend CLE courses acceptable to the Board may apply for a hardship waiver of CLE requirements. The Board has recognized that a Montana attorney stationed, for example, in Korea, would be in a poor position to meet his or her CLE requirements. Presumably, similar difficulties would be encountered by military attorneys stationed elsewhere. Questions may be directed to the Board at P.O. Box 4669, Helena, Montana 59604; telephone (406) 442-7660.

2. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Minnesota	1 March every third anniversary of admission

Jurisdiction	*Reporting Month*
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February every third year
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1983 issue of The Army Lawyer.

3. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

4. TJAGSA CLE Course Schedule

August 1-5: 12th Law Office Management (7A-713A).

August 1-May 18, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

October 17-21: 6th Claims (5F-F26).

October 24-28: 10th Criminal Trial Advocacy (5F-F32).

October 31-November 4: 13th Legal Assistance (5F-F23).

November 7-9: 5th Legal Aspects of Terrorism (5F-F43).

November 14-18: 1st Advanced Federal Litigation (5F-F29).

November 14-18: 17th Fiscal Law (5F-F12).

November 28-December 2: 6th Administrative Law for Military Installations (5F-F24).

December 5-9: 24th Law of War Workshop (5F-42).

December 5-16: 97th Contract Attorneys (5F-F10).

January 9-13: 1984 Government Contract Law Symposium (5F-F11).

January 16-20: 73d Senior Officer Legal Orientation (5F-F1).

January 23-27: 24th Federal Labor Relations (5F-F22).

January 23-March 30: 103d Basic Course (5-27-C20).

February 6-10: 11th Criminal Trial Advocacy (5F-F32).

February 27-March 9: 98th Contract Attorneys (5F-F10).

March 5-9: 25th Law of War Workshop (5F-F42).

March 12-14: 2nd Advanced Law of War Seminar (5F-F45).

March 12-16: 14th Legal Assistance Course (5F-F23).

March 19-23: 4th Commercial Activities Program (5F-F16).

March 26-30: 7th Administrative Law for Military Installations (5F-F24).

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop.

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Course.

June 18-29: JAGSO Team Training.

June 18-29: BOAC: Phase III.

July 9-13: 13th Law Office Management (7A-713A).

July 11-13: Chief Legal Clerk Workshop (1984).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-18: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trial Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-22: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference.

October 15-December 14: 105th Basic Course (5-27-C20).

5. Civilian Sponsored CLE Courses

October

Oct 1983: NCDA, Prosecution of Violent Crime, New Orleans, LA.

Oct 1983: NCDA, Public Civil Law Problems, Washington, DC.

2: MICLE, Recent Developments in the Law of Eminent Domain, Ann Arbor, MI.

2-7: NJC, Civil Litigation—Graduate, Reno, NV.

3-5: AAJE, Search & Seizure, Alexandria, VA.

6-7: AAJE, Stress & Judicial Performance, Alexandria, VA.

6-8: ALIABA, Pension/Profit-Sharing/Deferred Compensation Plans, Washington, D.C.

7-9: NCCD, Psychodrama, Jackson, NY.

9-14: NJC, Criminal Evidence—Graduate, Reno, NV.

13-14: PLI, Estate Planning Institute, New York, NY.

13-14: SLF, Labor Law Institute, Dallas, TX.

14-15: LSU, Evidence Law for Trial Practitioners, Baton Rouge, LA.

14-15: PLI, Medical Malpractice, New York, NY.

17-18: PLI, Research & Development Limited Partnerships, New York, NY.

19-21: FJC, Seminar for Federal Appellate Judges, New Orleans, LA.

20-21: ABA, Real Estate Bankruptcies & Workouts, New York, NY.

21-22: LSU, Torts, Comparative Negligence & Products Liability, Baton Rouge, LA.

24-28: UDCL, Government Construction Contracting, Washington, DC.

26-28: FJC, Seminar for Federal Appellate Judges, San Diego, CA.

27-28: PLI, Federal Civil Practice—1983, New York, NY.

27-28: PLI, In-House Management of Mass Tort Litigation, Chicago, IL.

27-28: PLI, Title Insurance, New York, NY.

27-29: PLI, Taking/Defending, Depositions—Corporate Lit. San Francisco, CA.

28: BNA, Labor Relations in the Public Sector, Washington, DC.

10/30-11/4: NJC, Judicial Writing in Trial Courts—Specialty, Reno, NV.

10/31-11/1: ITL, Computer Literacy for Lawyers, Houston, TX.

10/31-11/4: TOURO, The Skills of Contract Administration, New Orleans, LA.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver CO 80202. Phone: (303) 543-3063.

IED: The Institute for Energy Development, P.O. Box 19243, Oklahoma City, OK 73144

IICLE: Illinois University for Continuing Legal Education, 2395 West Jefferson Street, Springfield, Illinois 62702 (Phone: (217) 787-2080)

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MICLE: Institute of Continuing Legal Education, University of Michigan Hutchins Hall, Ann Arbor, MI 48109

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC. 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NKUCCL: Chase Center for the Study of Public Law, Salmon P. Chase College of Law, Northern Kentucky University, Highland Heights, KY 41076. Phone: (606) 527-5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street NW, Washington, D.C. 20036.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, DC 20036.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65221.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

This list should be retained. It will be published quarterly.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Informations Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive "camera

ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative indices are provided users. Commencing in 1983, however, these indices have been classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B071083	Criminal Law, Procedure, Pretrial Process/ JAGS-ADC-83-1
AD B071084	Criminal Law, Procedure, Trial/JAGS-ADC-83-2
AD B071085	Criminal Law, Procedure, Posttrial/JAGS-ADS-83-3
AD B071086	Criminal Law, Crimes & Defenses/JAGS-ADC-83-4
AD B071087	Criminal Law, Evidence/ JAGS-ADC-83-5
AD B071088	Criminal Law, Constitutional Evidence/JAGS-ADC-83-6
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

Those ordering publications are reminded that they are for government use only.

2. Articles

Bonventre, *Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 Brooklyn L. Rev. 31 (1982).

Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 Creighton L. Rev. 441 (1982-83).

Dugan, *Application of Substantive Unconscionability to Standardized Contracts—A Systematic Approach*, 18 New Eng. L. Rev. 77 (1982-83).

Falk, *Posthypnotic Testimony—Witness Competency and the Fulcrum of Procedural Safeguards*, 57 St. John's L. Rev. 30 (1982).

Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 Am. J. Int'l L. 109 (1983).

Freedman, *Arguing the Law in an Adversary System*, 16 Ga. L. Rev. 833 (1982).

Hazard, *Arguing the Law: The Advocate's Duty and Opportunity*, 16 Ga. L. Rev. 821 (1982).

Morgan, *Goode Response—Seven Years Later*, The Reporter, Apr. 1983, at 32.

Olson, *Copyright Originality*, 48 Mo. L. Rev. 29 (1983).

Pasewark & Craig, *Changing Insanity Plea Statutes*, 11 U.C.L.A.—Alaska L. Rev. 173 (1982).

Phrannenstill, *Usefulness of Polygraph Results in Paternity Investigations When Used in Conjunction With Exclusionary Blood Tests and a Seven Day Conception Period*, 21 J. Fam. L. 69 (1982-83).

Roach, *Rules of Engagement*, Naval War Coll. Rev., Jan.-Feb. 1983, at 46.

Slocum, *The Article 69 (UCMJ) Application: Jurisdiction and Use*, The Reporter Apr. 1983, at 41.

Smith & Metzloff, *The Attorney as Advocate: "Arguing the Law,"* 16 Ga. L. Rev. 841 (1982).

Vaughn, *Civil Service Discipline and the Application of the Civil Service Reform Act of 1978*, 1982 Utah L. Rev. 339.

Vaughn, *Statutory Protection of Whistleblowers in the Federal Execuive Branch*, 1982 U. Ill. L. Rev. 615.

Weisberger, *The Exclusionary Rule: Nine Authors in Search of a Principle*, 34 S.C.L. Rev. 253 (1982).

Comment, Lundy, Isaac, *and* Frady: *A Trilogy of Habeas Corpus Restraint*, 32 Cath. U.L. Rev. 169 (1982).

Comment, *Search and Seizure: From* Carroll *to* Ross, *The Odessey of the Automobile Exception*, 32 Cath. U.L. Rev. 221 (1982).

Comment, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 Creighton L. Rev. 487 (1982-83).

Note, *Excluding Evidence to Protect Rights: Principles Underlying the Exclusionary Rule in England and the United States*, 6 B.C. Int'l & Comp. L. Rev. 133 (1983).

Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983).

Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159 (1983).

Note, *Rethinking Soverign Immunity After* Bivens, 57 N.Y.U.L. Rev. 597 (1982).

Note, *Duty to Warn as an Inroad to the Feres Doctrine: A Theory of Tort Recovery for the Veteran*, 43 Ohio St. L.J. 267 (1982).

Note, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune From Products Liability?*, 36 U. Miami L. Rev. 489 (1982).

Note, *The Uniform Determination of Death Act: An Effective Solution to the Problem of Defining Death*, 39 Wash. & Lee L. Rev. 1511 (1982).

Recent Cases, *Right to Privacy, Removal of Life-Support Systems*, 16 Akron L. Rev. 162 (1982).

Recent Developments, *The Uniform Arbitration Act*, 48 Mo. L. Rev. 137 (1983).

3. Recruiting

a. The Personnel, Plans and Training Office, OTJAG, and the Professional Recruiting Office announce the appointment of the following Field Screening Officers (FSOs) for 1983-84:

NAME	*RANK*	*DUTY ASSIGNMENT*
Artzer, Paul E.	LTC	Fort Leavanworth, KS
Haas, Michael A.	LTC	Fort Hamilton, NY
Kesler, Dickson E.	LTC	Fort Benjamin Harrison, IN
Roberson, Gary F.	LTC	Fort Leonard Wood, MO
Adams, William V.	MAJ	West Point, NY
Brawley, Michael J.	MAJ	Presidio of San Francisco, CA
Cork, Timothy R.	MAJ	Fort Devens, MA
Deckert, Raymond R.	MAJ	Fort Riley, KS
Jackson, Robert T.	MAJ	Fort Devens, MA
Rogers, Donald A.	MAJ	USALSA, Falls Church, VA
Smith, James J.	MAJ	Fort Bragg, NC
Squires, Malcolm H.	MAJ	Fort Campbell, KY
Tromey, Thomas N.	MAJ	Fort Huachuca, AZ
Wamstead, Michael L.	MAJ	Fort Gordon, GA
Winter, Marion E.	MAJ	Fort Buchanan, PR
Allinder, William L.	CPT	Fort Benning, GA
Ashford, Rickey D.	CPT	Fort Polk, LA
Davis, John G.	CPT	Fort Hood, TX
Dubia, Donald H.	CPT	Fort Sheridan, IL
Fitzpatrick, John M.	CPT	Fort Carson, CO
Gilliam, James H.	CPT	Fort Dix, NJ
Jentzer, Lyle D.	CPT	Carlisle Barracks, PA
Lee, Joseph K.	CPT	Schofield Barracks, HI
Lynch, Phillip H.	CPT	Fort Lewis, WA
Lyons, Brenda	CPT	USALSA, Falls Church, VA
Meyer, Jack L.	CPT	TJAGSA, Charlottesville, VA
Reinold, Craig L.	CPT	Fort Sam Houston, TX
Romaneski, Mark J.	CPT	Fort Knox, KY
Will, Clark B.	CPT	Fort Sill, OK

b. The following Adjuncts have been appointed for 1983-84:

NAME		
Johnson, Russell D.	MAJ	Fort Lewis, WA
Murrell, James O.	MAJ	TJAGSA, Charlottesville, Va
Fletcher, Douglas	CPT(P)	Fort Bragg, NC
Girvin, James E.	CPT	Fort Knox, KY
Norfolk, Anne	CPT	Fort Benning, Ga
Odegard, Adele M.	CPT	Fort Campbell, KY
Schaefer, John A.	CPT	West Point, NY
Stroup, Marsha R.	CPT	Fort Devens, MA
White, Ronald	CPT	Fort Gordon, Ga

c. Effective 15 July 1983, the JAGC Professional Recruiting Office will be staffed by Major Fred E. Bryant, Captain Rogena H. Clary, and Captain Blake D. Morant.

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

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