THE ARMY LAWYER

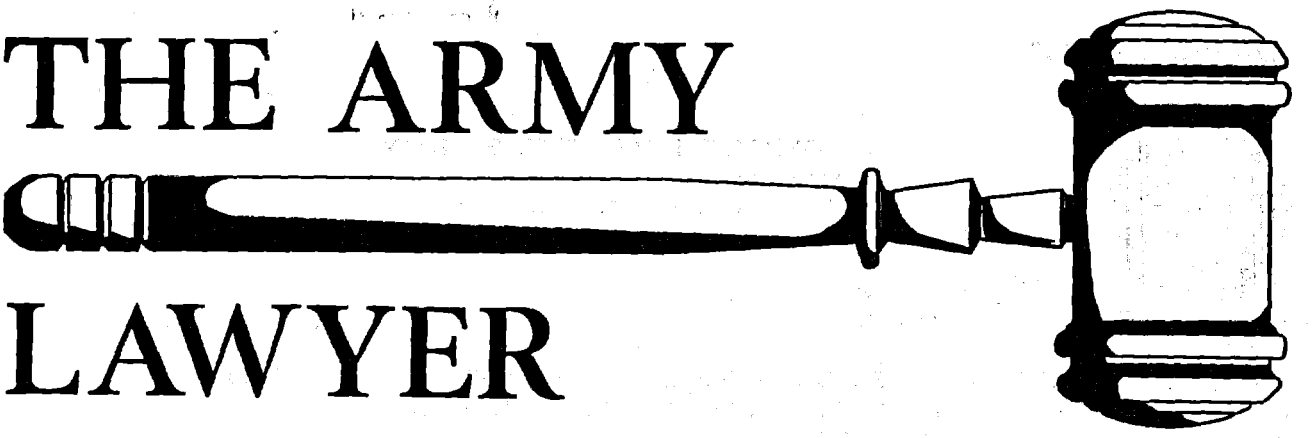

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Table of Contents

Taxation of Government Contractors	1
TJAG Letter - JAGC Reserve Support for Instruction in Legal Matters	2
Officer Eliminations - The Emphasis on Quality	9
Mullen v. United States: The Effect of Readjustment or Severance Pay on Eligibility for Subsequent Retirement Pay	15
Word Processing and a Systems Approach to Law Office Typing	20
Criminal Law Section	25
Legal Assistance Items	41
Reserve Affairs Items	43
Addendum	44
Enlisted Update	44
CLE News	44
Current Material of Interest	49

Taxation of Government Contractors

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and Mr. Matt Reres, Jr.
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Introduction

This is a two-part article which addresses tax issues confronting the Army. Part I deals with the Army and its contractors' amenability to federal and state taxation. Part II deals with state *ad valorem* taxes, with emphasis on ascertaining a contractor's interest in government-owned, contractor-operated (GOCO) and commercial activity operations. That part also treats other current tax issues of interest to the Army.

I. Federal and State Taxation

Every tax dollar that the Army pays reduces the amount that it can spend for its needs. Tax dollars are also important to government contractors because fewer dollars spent by the government for taxes means more dollars available to be spent for goods and services. There have been recent developments in tax law which affect the Army, its activities, and its contractors. Attorneys can better advise their commanders if they know how the Army is affected by taxes, how taxes impact on their command's budget, and how their command might be able to save some tax dollars. Tax problems appear in many different forms with each tax problem

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO ATTENTION OF
DAJA-PT

29 [illegible]

MEMORANDUM FOR STAFF JUDGE ADVOCATE, U. S. ARMY FORCES COMMAND
STAFF JUDGE ADVOCATE, FIRST U. S. ARMY
STAFF JUDGE ADVOCATE, SECOND U. S. ARMY
STAFF JUDGE ADVOCATE, FIFTH U. S. ARMY
STAFF JUDGE ADVOCATE, SIXTH U. S. ARMY

SUBJECT: JAGC Reserve Support for Instruction in Legal Matters

1. This letter is to advise you of a program, jointly sponsored by the ROTC Section, TRADOC, and me involving the use of JAGC Reservists to provide instruction on legal matters to ROTC Cadets. For the past several years, members of the 14th, 15th and 144th JAG Detachments in Houston, Texas, have been providing legal instruction to the ROTC detachments at Rice Institute and the University of Houston. They earn retirement points or credit for attendance at weekly drills in return for their participation in the program. The Professors of Military Science (PMS) and the JAGC Detachment Commanders are enthusiastic about the program.

2. ROTC legal instruction has been the subject of an extensive Training Support Package (TSP) prepared by The Judge Advocate General's School. Although the TSP is in sufficient detail that a non-lawyer could provide the instruction, a judge advocate instructor would enhance the quality of instruction. The judge advocate instructor can depart from the lesson plan, permitting extensive questioning by the students, and discussing trials currently taking place, as well as historical military judicial events. Accurate dicussions led by a judge advocate can correct misleading portrayals of the military justice system.

3. The success of this program is dependent on your cooperative efforts with each PMS, and our judge advocates. This program is entirely voluntary and open to all reserve judge advocates. This is an excellent opportunity to significantly improve the military education of the young men and women in today's Senior ROTC program, and to expose our Reserve officers to the very rewarding challenge of working with the future leaders of the Army.

4. You should pass this information to the JAG Detachments under your authority and other reserve judge advocates in your area and give it your strongest support. I also expect you to establish a procedure to be sure the reservists selected to teach are the type of officers we want to instruct our ROTC students. The TRADOC Deputy Chief of Staff for ROTC has informed his staffs of this program (Incl) so they will also be participating.

Incl
as

Hugh J. Clausen
HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

requiring special expertise to resolve. Procedurally, Army attorneys should be aware that the Contract Law Division, Office of The Judge Advocate General, is responsible for all tax matters affecting the Department of the Army, its instrumentalities and its contractors, to include litigating and negotiating with state taxing authorities, obtaining revenue rulings and opinions from the Internal Revenue Service (IRS), and, believe it or not, defending the Army's flanks from federal taxes. A member of the Division also chairs the Armed Services Tax Group Committee and the FAR-DAR Subcommittee for Taxes.

The Painful Reality

Few people think of the Army as a taxpayer. In fact, until World War II, the Army neither paid nor bore the burden of any tax. Today, however, the Army's *annual* tax burden far exceeds $1 billion and is growing. Although few taxes are imposed on the Army directly, the economic burden of all indirect taxes is passed on to the Army by its contractors through higher contract prices. For these indirect taxes, the contractor files returns and makes payments, but the Army reimburses the contractor for these taxes under the contract. Although they may not be identified in the contract, as in the case of firm-fixed-price contracts, these taxes are being passed on to the Army.

An Unsovereign-Like Act

Few sovereigns tax themselves. However, the Army pays a number of federal excise taxes, including those on transportation articles, *e.g.*, fuel, tires, and motor vehicles. As an illustration, for every gallon of diesel fuel or gasoline used in Army highway vehicles, nine cents is paid to the IRS. For every highway tire purchased, 9.75 cents per pound is paid. For every heavy highway vehicle purchased, twelve percent of the sales price is paid.

Revenues from all these transportation-based taxes are earmarked for the Highway Trust Fund which finances the federal highway system. With this Fund inadequate to pay for needed extensive, expensive highway repairs, the IRS has been aggressive in applying all Highway Trust Fund taxes. For example, even though the Retailers Excise Tax is supposed to apply only to highway vehicles, the IRS has attempted to impose this tax on Army vehicles designed for use in off-road, forward-combat areas. With a twelve percent tax rate applied to the high purchase price of modern tactical vehicles, the stakes to the Army are obvious.

A Glimmer of Rationality

The Army does not pay penalties and interest to the U.S. Treasury. Of course, this does not mean that the Army will not be billed for these

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The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, (U.S. Army), Charlottesville, Virginia, 22901. Footnotes, if included, should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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items. For example, the Army failed to make timely tax deposits on the purchase of diesel fuel delivered to Fort Leonard Wood. Although the Army subsequently paid the tax, the IRS was insistent that it pay a five percent penalty. In September 1983, the IRS sent a "Final Notice" that it was about to proceed with "Enforcement Action," warning that if the Army did not pay within ten days:

> A notice of federal tax lien may be filed which constitutes public notice to your creditors that a tax lien exists against your property. As provided by section 6331 of the Internal Revenue Code, salary or wages due you, bank accounts, commissions, or other kinds of income you have may be levied upon. Property or rights to property, such as automobiles, may also be seized and sold to satisfy your tax liability.

So far as can be determined, the IRS has not yet attempted to sell Fort Leonard Wood at a public auction! The Army reminded the IRS of a Comptroller General decision[1] that agency appropriations are not available for payment of penalties and interest under the Internal Revenue Code for failure to pay an acknowledged tax liability on time. In pertinent part, this opinion states:

> The United States as an employer is liable for the payment of salaries and employment taxes in the same manner as the private sector employer. However, these payments come from the appropriated funds of the particular Federal agency or instrumentality employer, which are available only for the purposes for which they are appropriated. As such, these funds would not be available for the payment of interest and penalties... The fact that a particular Federal agency...fails to make the paper transfer of funds to another agency by a certain date would not, in our opinion, be a basis for making the appropriations of the first agency available to pay penalties or interest to the second agency, absent a statute specifically so providing.
>
> The rationale for applying these [interest and penalty] provisions against the private sector employer is not present when the employer is the United States since the funds are already in the hands of the United States. We therefore conclude that Federal agencies may not use their appropriations for payment of such interest and penalties.

A Tax Is Not a Tax

At the state level, taxation presents a much more complex and costly burden for the Army. Although states cannot constitutionally tax the federal government directly, they have done so indirectly by taxing government contractors. The types of taxes imposed on federal contractors by the states include business and occupation, environmental, excise, franchise, gross receipts, income, privilege, property, sales and use, and utility.

The United States may not be taxed directly based on the doctrine of implied constitutional immunity established by the United States Supreme Court in the historic case of *McCulloch v. Maryland*.[2] In practice, this immunity has been effectively circumvented because the United States is required to bear the economic burden of state or local taxes provided the legal incidence of these taxes does not fall on the United States.

The "legal incidence test" was first adopted by the Supreme Court in *Alabama v. King & Boozer*,[3] which overruled the earlier "economic burden test" of *Panhandle Oil Co. v. Knox*.[4] The legal incidence test ignores the economic reality regarding who must ultimately bear the burden of the tax and considers only the person who has the legal obligation to pay. The single issue under the legal incidence test is: Who is the taxpayer actually liable for the tax?

The "legal incidence" test opened the floodgates to indirect taxation of the federal government by the states. Of course, the determination

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[1] Ms. Comp. Gen. B-161457 (May 9, 1978).

[2] 17 U.S. (4 Wheat.) 579 (1819).

[3] 314 U.S. 1 (1941).

[4] 277 U.S. 218 (1928).

of the legal taxpayer is dependent upon the language of the taxing statute and upon how the tax is applied, but the mechanism is in place for any state willing to draft appropriate statutes—and many already have.

Where federal constitutional immunity is involved, interpretation of a state taxing statute is a federal question.[5] In determining where the legal incidence of a tax falls, the Supreme Court has looked to the taxing statute to determine whether the statute requires the seller to pass the questionable tax to the purchaser. If so, and the United States is the purchaser, the immunity doctrine may apply. That the United States ultimately bears the economic burden of a tax under the terms of an Army contract is, in itself, insufficient to make a tax improper if the incidence of the tax falls on the Army contractor.

For many years, some federal departments were able to avoid paying state and local taxes by designating their operating-contractors as purchasing agents.[6] However, in 1955, the Department of Defense established a policy *not* to designate defense contractors as agents, a policy not endorsed by all other federal departments.

In a landmark decision, *United States v. New Mexico*,[7] the Supreme Court held that federal agencies may not establish a principal-agent relationship by the mere use of principal-agent terminology. The Court reasoned that contract language is not enough in itself to establish the existence of such a relationship. The decision is consistent with the DOD policy not to designate contractors as agents. The Court went so far as to imply that, unless Congress itself designates a contractor as an agent of the United States, no agency relationship is established.

A Little Discrimination Is All Right

For forty years, states have levied taxes on federal contractors. The courts have upheld these taxes where our contractors have been treated the same as non-federal contractors. Conversely, courts have been quick to strike down statutes which discriminate against federal contractors. Last year, however, the discrimination defense took an unprecedented step backward. The Supreme Court held that the State of Washington may tax a federal contractor differently than a non-federal contractor provided the ultimate economic burden of the tax is not greater than what a non-federal contractor must pay under the state's other tax statutes.[8] The Court, in effect, applied a "separate, but equal" doctrine and upheld a tax statute which applied *only* to federal contractors. This decision could have serious repercussions for federal contractors if other states enact similar statutes aimed exclusively at federal activities.

The facts are interesting. In 1975, the state of Washington modified its tax statutes so that a contractor, when building on federally owned land, would be treated as the "consumer" or "user" of supplies, materials and equipment used in construction. The effect of this change was that, on federal construction projects. the contractor became directly liable for the state sales and use taxes on the materials it supplied for the project. Prior to the 1975 amendment, Washington law defined the taxable consumer of construction materials as the landowner. Hence, if the federal government was the landowner, Washington could not levy its sales or use taxes because of the government's constitutional immunity from state taxation.

The United States challenged the 1975 amendment as discriminatory, arguing that a contractor would be taxed for federal contracts but not for private contracts, which were taxable to the landowner. In its opinion, the Supreme Court held that these differences in tax treatment were constitutional. Justice Rehnquist concluded that a state could alter the general application of its tax laws with respect to transactions of federal contractors as long as similar private transactions were also taxed and no greater overall tax burden was imposed on the federal transactions.

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[5]First Agricultural Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968).

[6]Kern-Limerick v. Scurlock, 347 U.S. 110 (1954).

[7]455 U.S. 720 (1982).

[8]Washington v. United States, 103 S. Ct. 1344 (1983).

As a result of this decision, a state can apply its tax laws directly against federal contractors without making such a tax applicable to private transactions. This will make it easier for states to tax federal contractors and, therefore, increase the contract costs of the federal government. In fact, this decision resulted in increased contract construction costs for the Army of more than $10 million in the state of Washington alone. The Departments of Navy and Energy are faced with similar increases.

"One State, One Bite," May Not Be the Rule

Although most states are satisfied with a single tax bite from federal contractors, New Mexico took two bites by levying a gross receipts tax on the sales made by both sub and prime contractors and the sales by vendors to the sub and prime contractors. The second bite was not taken from private contractors because of state tax exemption procedures available to private contractors. The Department of Energy resisted the New Mexico tax impositions on the theory that its contractors were its agents when these contractors made purchases for performance of the DOE contracts. The Supreme Court found that there was no agency relationship, however, and held that the state of New Mexico could tax the federal contractor.[9]

Certainly the overall tax impact on federal contractors in New Mexico was greater than on private contractors. Even under the rationale in the *Washington* decision, the New Mexico tax procedure appeared discriminatory. Rather than litigate this tax issue, however, DOD and other affected federal agencies concluded an agreement with New Mexico which provides for the use of exemption certificates by prime contractors to avoid this double taxation burden.[10]

The agreement with New Mexico provided for the payment of New Mexico gross receipts and compensating use taxes by federal contractors and for the avoidance of double taxation that was imposed on federal contractors prior to the agreement. Contingent upon the amount of future contracting by the Army in New Mexico, the agreement may result in significant savings for the Army and other federal agencies. However, these savings will not soon offset the Department of Energy's tax bill to New Mexico which exceeded $277 million.

II. State *Ad Valorem* and Other Taxes

This part deals with state *ad valorem* taxes, with emphasis on ascertaining a contractor's interest in GOCO and commercial activity operations, and also treats other current tax issues.

Creating Value

The Army historically has engaged in certain commercial-type operations, such as the manufacture of munitions and armaments. These have typically been capital-intensive operations, often requiring investment of billions of dollars in plant and equipment. The expertise to run such operations was once largely furnished by government employees. Now, most are run by civilian contractors. These contracts provide that the Army furnish all plants, equipment, and materiel; the contractor generally furnishes only the labor force and its management skill. For the most part, the contract extends to the contractor no ownership interest in the Army property. Nevertheless, states are now attempting to establish that a contractor has some measurable and taxable interest in the government's property. The state tax vehicle is an *ad valorem* tax, which is an annual tax based on the value of the government-furnished property and the contractor's interest in that property. If these taxes are upheld, the United States will have to reimburse the contractor for them as indirect costs under cost contracts.

In short, states are now attempting to skirt the United States' immunity from state taxation by enacting a possessory interest or use tax on federal contractors. A state taxing authority determines that a contractor has some private property interest in the government-owned property which the contractor uses to perform a federal contract. The state then taxes that interest. The issue presented by these taxes is

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[9]United States v. New Mexico, 455 U.S. 720 (1982).

[10]Agreement Between the U.S. Army and the State of New Mexico, executed by the Director, Revenue Division, Taxation and Revenue Department of New Mexico, and the Assistant Secretary of the Army, Research, Development and Acquisition, effective on 31 January 1983.

whether this imposition constitutes an unconstitutional tax on United States property. Because of the variety of interests created by federal contracts, it is necessary to make a case-by-case review of state taxing schemes to determine whether any particular tax passes constitutional muster. For any tax to succeed, the state must show that its tax assessment scheme has separated the beneficial (taxable) interest of the contractor from the full value of the United States property. As long as the tax does not reach the federal ownership interest, the tax will be upheld even though the financial burden of the tax, by contract or otherwise, ultimately falls on the United States.

A determination as to the validity of a state tax on a federal contractor cannot be made on a literal reading of the statute. Instead, it is necessary to consider all relevant circumstances surrounding the statute and to determine whether the state taxing scheme, as it is practically operated, is being applied in a constitutional fashion. It is clear that under a properly drafted statute, a taxing authority may impose a tax on the beneficial use of United States' property held by a federal contractor, even if the tax is measured by the value of the United States property, provided a beneficial use truly exists. The state must, of course, establish that the contractor has an interest and properly evaluate it.

Impact on Capital-Intensive GOCO Facilities

This type of tax has serious financial repercussions for the Army, particularly where it involves GOCO operation of capital intensive government plants and equipment. To illustrate the magnitude of the problem, consider one example. Holston Defense Corporation is the contractor operator of the Holston Army Ammunition Plant located in Hawkins County, Tennessee. Holston manufactures high explosives for the Army. These explosives, because of their shattering rather than their pushing effect, have only a military use. Holston is furnished all equipment, supplies, and property by the Army to produce these explosives. The plant is entirely owned by the United States. Holston's annual fee for operating the Army's plant is approximately $2.5 million. The recent *ad valorem* assessment of Holston by Hawkins County for Holston's beneficial interest in the plant exceeds $7.5 million per year for tax years 1982 and 1983. This is an *annual* tax. Hawkins County has also sought to impose a back-tax assessment for tax years 1979, 1980, and 1981 which exceeds $26 million. Thus, the total assessment for these five years exceeds $42 million. In exchange for this revenue, Hawkins County provides no services of any kind, *i.e.*, police, fire, street cleaning, or sanitation, to the plant.

The dollar figures involved in this case underscore both the adverse effect on the United States by these taxes and the financial incentive for the states to impose them. It is interesting that a neighbor of Hawkins County, Anderson County, has made a similar assessment against Union Carbide, the contractor operator of the capital intensive Oak Ridge Nuclear Facility, which likewise could amount to millions of dollars annually. The Department of Justice has brought suit on behalf of both federal agencies to test the issues of taxability as well as quantum.

Impact on Commercial Activity Programs

These possessory interest and use taxes expose the Commercial Activities Program established by OMB Circular A-76 to nearly unlimited taxation. Once exempt property is placed in the hands of a contractor, the contractor's mere use of that property, even though used exclusively in the performance of a United States contract, may expose the contractor to these taxes. The only questions that remain after federal property is provided to a contractor are: Does the state tax statute allow for a possessory interest or use tax? Is the valuation of the contractor's interest correct?

The cost of taxation is not always included in cost estimates in deciding whether to contract-out a particular activity. Moreover, taxation is not static. There is no requirement that tax laws remain unchanged. Even where taxes are properly considered, tax laws may be changed to the detriment of the Army. One of the incalculable costs of Commercial Activities is the myriad of taxes to which an activity may ultimately be subjected once the activity has left the shelter of in-house performance.

States Are in a Taxing Mood

Taxation of every kind is on the increase. In West Virginia, an Army contractor, pursuant to a GOCO contract, produced hulls, turrets, and gun shields for the Army's M60 series tank. In 1979, Ohio County, West Virginia, assessed the contractor for the contractor's leasehold interest in the government-furnished buildings, machinery, and equipment. The assessment exceeded $1 million. Despite the fact that the contract terms did not establish a leasehold interest in the contractor, both the West Virginia tax administrative agencies and judicial forums held otherwise. A federal suit is now being prepared to recover the Army's money.

In Missouri, another Army contractor, pursuant to a GOCO contract, manufactures ammunition. For thirty years, the state exempted purchases by the contractor to perform its Army contract. After the *New Mexico* decision, Missouri withdrew its exemption and assessed sales and use taxes on the Army contractor's purchases. As a result, the Army has entered into negotiations with Missouri to resolve the method and application of these taxes to the Army's contractor.

States Are Getting Smarter

Some states have enacted new legislation to replace statutes formerly held by the courts to be unconstitutional or inapplicable to the United States. A recent example is a Vermont gasoline tax. In 1977, the United States successfully challenged a Vermont gasoline tax as unconstitutional because the incidence of the tax fell on the purchaser, rather than the seller.[11] As a purchaser, the United States was immune from the tax.

In 1979, Vermont amended its statute to shift the legal incidence to the seller, whereupon the U.S. Customs Service asked the Comptroller General to rule on the propriety of paying the tax. The Customs Service furnished the Comptroller General with a copy of an opinion letter by the Department of the Treasury, Office of General Counsel, which concluded that, because of the amendment of the statute, it "is clear that the legal incidence of the tax falls squarely, and only, upon the distributor,. . . and thus the Federal Government will no longer be exempt from the payment of the Vermont state gasoline tax."[12] The Comptroller General said:

> We concur in that determination. With the elimination of the requirement that the tax be collected from the dealer and then from the consumer, the legal incidence of the tax now falls solely on the vendor. We have held in previous similar cases that it is permissible for the Federal Government, as a retail purchaser, to shoulder the economic burden of such state taxes, even when those taxes result in increased pump prices. *See, e.g.*, 28 Comp. Gen. 706 (1949) (Washington); 55 Comp. Gen. 1358 (1976) (Pennsylvania, Hawaii). Accordingly, in view of the amendment of the relevant Vermont statute, payment for purchases of gasoline by the Federal Government in Vermont may be inclusive of the amount of tax.[13]

Today's economic realities have had a significant impact at all levels of government in the United States. Limited budgets, declining revenues, and taxpayer revolts have been particularly troublesome for state governments. In this era of "New Federalism" (greater responsibilities with fewer dollars), the states are searching for new ways to generate tax revenues. States perceive untapped sources in the agencies, activities, and instrumentalities of the federal government. It is clear that state governments are becoming increasingly aggressive in their attempts to tax federal property and operations. Also, with increasing federal deficits, federal taxes to fund special programs such as highways and environmental clean up are likely to persist. In light of these factors, the Army's tax burden will continue to grow, and we, as government attorneys, will have to be more creative and diligent in protecting the Army's purse strings.

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[11]57 Comp. Gen. 59 (1977).

[12]Ms. Comp. Gen. B-211399 (Nov. 19, 1983).

[13]*Id.*

Officer Eliminations—The Emphasis on Quality

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Over the past few years there have been dramatic changes in military personnel law in the Army. The thrust of these changes has been to emphasize quality in selection and retention of both enlisted[1] and officer personnel. Although most officers abide by the moral, professional, and ethical code of a commissioned officer of the United States Army, a small percentage fails to adhere to those standards.[2] The purpose of this article is to review the methods available to the commander to involuntarily separate the substandard officer. The command-initiated administrative separation action[3] will be emphasized and recent statutory and regulatory changes will be highlighted.

Army policy is that, "no person has an inherent right to continued service as an officer."[4] Faced with officer misconduct or poor performance, a commander is required to implement the Officer Qualitative Management Process by first documenting the officer's poor performance or misconduct to ensure that the Official Military Personnel File accurately portrays the officer's character of service. The commander must then decide if the officer should be allowed to continue to serve or be separated immediately. In taking action, the commander must ensure that all applicable statutory and regulatory requirements are identified and satisfied. As a result of the complex statutory system on which officer service is based, accurate and continuous advice from a judge advocate is essential for the commander to effectively discharge all responsibilities in this area. If the officer involved is not in the Regular Army component and the commander decides that administrative separation is appropriate,[5] the choice is between releasing the officer from active duty or initiating an elimination action.

Refrad or Discharge?

An other than Regular Army officer may be involuntarily released from active duty (Refrad) by a Department of Army Active Duty Board for substandard performance, misconduct, or moral or professional dereliction.[6] The action may be initiated by Headquarters, Department of the Army or the officer's commander. The significance of releasing an officer from active duty is that the officer retains a reserve appointment after completion of the action. The advantage to the commander of using this action is that it can usually be accomplished quickly because the officer receives minimum due process protection.[7] Officers involuntarily released from active duty may be considered subsequent-

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[1]*See generally* U.S. Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel (1 Oct. 1982). This completely revised regulation substantially increases the power of the commander to separate enlisted service members.

[2]Message, HQDA WASH DC/DAPE-MPO-RT, 141758Z Jan 83 subject: Officer Qualitative Management Program [hereinafter cited as HQDA Message].

[3]*See generally* U.S. Dep't of Army, Reg. No. 635-100, Personnel Separations—Officer Personnel (C27, 1 Aug. 1982) [hereinafter cited as AR 635-100].

[4]*Id.* at para. 5-31.

[5]Although the Defense Officer Personnel Management Act (DOPMA) does not mandate an All-Regular Officer Corps, it is Congress' intent that all officers on active duty be integrated into the Regular Army component upon promotion to the grade of major. H.R. Rep. No. 1462, 96th Cong., 2d Sess. 24, 25 (1980). The Army has implemented an involuntary separation provision for the Reserve commissioned officer on active duty who declines integration into the Regular Army. AR 635-100, para. 3-111. Since this provision applies only to Reserve commissioned officers who entered active duty after 30 September 1981, there are still a number of Reserve officers in the grade of major and above on active duty. Of course, there are also many Reserve commissioned officers on active duty in the grade of captain and below.

[6]AR 635-100, para. 3-58.

[7]*Id.* at para. 3-59. Prior to forwarding a recommendation for relief to HQDA, the initiating commander must refer the action to the officer for comment. An officer facing involuntary release from active duty is not entitled to present his or her case in person to a board of officers. This officer receives only minimum due process protection because the action does not result in the loss of the officer's commission.

ly by the Commander, U.S. Army Reserve Personnel Center (ARPERCEN) for elimination action.[8] Because it is Army policy that the same standards of efficiency and conduct apply to officers of all components of the Army, the commander must face the key issue of whether to release the officer from active duty or terminate the officer's status through the chapter 5, AR 635-100 elimination process.[9]

The Chapter 5 Elimination

Officers on active duty in all components may be eliminated involuntarily under the provisions of chapter 5, AR 635-100. This elimination action may be based on substandard performance of duty; misconduct, moral or professional dereliction; or in the interest of national security.[10] If the sole basis for separation is substandard performance of duty, the officer must receive an honorable discharge upon separation.[11] It is, however, no longer necessary to choose only one basis for separation. An amendment to the statutory provisions governing officer eliminations by the Defense Officer Personnel Management Act (DOPMA) allows the reasons for separation to be used simultaneously.[12] Misconduct, for instance, is broadly defined as conduct by the officer which tends to bring the Army or the individual into disrepute.[13] In view of this broad definition, it might be advisable to combine misconduct and substandard performance when the circumstances permit use of both reasons for separation.

The chapter 5 elimination procedure remains both complex and time consuming.[14] This elimination action may be initiated by the commander or HQDA.[15] Initiation of an action requires that the officer be advised of the specific reasons and the factual allegations on which the action is based.[16] A sample notification letter is included in the regulation.[17] The factual allegations must be supported by all available documentary evidence, such as official records, health records, and CID reports. With the exception of business entries and official records, all statements submitted must be sworn.[18] For example, unsworn counseling statements and memoranda for record may not be appended to the notification letter.[19] Upon notification, the officer receives seven days to consult with a judge advocate and provide written comment.[20]

The elimination action is processed through

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[8] *See generally* U.S. Dep't of Army, Reg. No. 135-175, Army National Guard and Army Reserve—Separation of Officers (22 Feb. 1971). The procedures to separate the Reserve officer after involuntary release from active duty are as complex as those used to terminate an officer's status while on active duty.

[9] AR 635-100, para. 5-31.

[10] *Id.* at paras. 5-11, 5-12.

[11] *Id.* at para. 1-4*a*.

[12] 10 U.S.C. § 1181 (Supp. V 1981); AR 635-100, para. 5-14*f*(1).

[13] AR 635-100, para. 1-3*o*.

[14] A chart depicting the chapter 5 elimination process is at Appendix A.

[15] *Id.* at para. 5-14*a*. DOPMA contains a provision that requires all promotion selection boards to report to the service secretary the name of all officers before them for consideration whose records indicate they should be eliminated from the service. 10 U.S.C. § 617(b) (Supp. V. 1981). The Army has expanded this requirement and directed that all HQDA boards, such as school and command selection boards, identify officers who should be involuntarily separated. U.S. Dep't of Army, Reg. No. 624-100, Promotion of Officers on Active Duty, para. 2-7*c* (1 May 1982); HQDA Message, *supra* note 2. These initiatives have resulted in an increase in the number of officers facing elimination under AR 635-100, chapter 5. Likewise, over the last two years, more actions have been initiated by commanders. Statistics for chapter 5 eliminations are: calendar year 1981: 69; 1982: 108; 1983: 200. Interview, Major David Z. Freeman, Personnel Management Branch/Officers, U.S. Army Military Personnel Center, Alexandria, Virginia.

[16] AR 635-100, para. 5-14*b*(1).

[17] *Id.* at page 5-25, figure 5-1. Of course, this sample letter should be tailored to the facts of each individual case.

[18] AR 635-100, para. 5-14*e*.

[19] If the officer facing elimination acknowledges, in writing, receipt of a counseling statement, this unsworn counseling statement may be appended to the notification letter. Interview, Major David Z. Freeman, Personnel Management Branch/Officers, U.S. Army Military Personnel Center, Alexandria, Virginia.

[20] AR 635-100, para. 5-14*b*(2).

the chain of command to the commander exercising general court-martial jurisdiction.[21] Upon receipt of the action, the general court-martial convening authority (GCMCA) may disapprove the case or approve the action and offer the officer the following options:

(a) Resignation in lieu of elimination.[22] If the officer submits this resignation, he or she may receive a discharge under other than honorable conditions and will be barred from later reappointment.[23] The officer is also not entitled to separation pay if the resignation is submitted at this stage of the proceeding;[24] or,

(b) Apply for voluntary retirement in lieu of elimination. In order to qualify for voluntary retirement the officer must have twenty years of qualifying service. The regulation permits an officer facing elimination to submit a retirement request when he or she is within six months of eligibility for retirement.[25]

If the officer fails to elect one of the options offered by the GCMCA, the case is forwarded to HQDA to be processed through the three-tiered board system. The action is first sent to the DA Selection Board which may close the case or direct the officer to show cause why he or she should be retained.[26] After the officer is directed to show cause, the case is sent to the major commander for the appointment of a field board of inquiry.[27] Prior to convening a board of inquiry, the officer is again offered the opportunity to resign in lieu of elimination, request discharge, or submit a retirement request.[28] If the officer resigns or requests discharge in lieu of elimination at this stage of the proceeding, he or she is entitled to separation pay up to $15,000, depending on the total years of service.[29]

The officer facing elimination is entitled to extensive due process protection at the field board of inquiry.[30] A board recommendation of retention terminates the action. If the board recommends separation, the case is sent to the DA Board of Review, the third board in this system. The DA Board of Review may recommend retention or send the case to the Secretary

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[21] *Id.* at para. 5-14*b*. Any commander in the officer's chain of command may determine that elimination is not appropriate and close the case. Action must be initiated and forwarded to the GCMCA for officers who are medically diagnosed as drug dependent or as having committed an act of personal misconduct involving drugs. Actions initiated by HQDA may not be closed by a commander.

[22] A resignation in lieu of elimination will be processed under U.S. Dep't of Army, Reg. No. 635-120, Personnel Separations—Officer Regulations and Discharges (C16, 1 Aug. 1982) [hereinafter cited as AR 635-120].

[23] *Id.* at para. 4-3*a*. However, the resignation in lieu of elimination need not be approved.

[24] *Id.* at para. 1-6*b*(3). *See generally* Dep't of Defense Dir. No. 1332.29, Eligibility of Certain Regular and Reserve Personnel for Separation Pay Upon Involuntary Discharge or Release from Active Duty (18 Sep. 1981).

[25] AR 635-100, para. 5-19*b*, *c*. To be eligible for voluntary retirement, the officer must meet the requirements of 10 U.S.C. § 3911 (Supp. V 1981). An officer facing involuntary elimination is not protected by the two-year sanctuary applicable to officers twice nonselected for promotion. 10 U.S.C. §§ 631, 632 (Supp. V 1981); AR 635-100, para. 3-111*d*.

[26] AR 635-100, para. 5-14*g*. The officer is not entitled to appear personally before the DA Selection Board.

[27] *Id.* at para. 5-18. A request for discharge will be processed under AR 635-120, chapter 10. A Regular component officer facing elimination under AR 635-100, chapter 5, will normally request discharge to insure his or her entitlement to separation pay under 10 U.S.C. § 1174 (Supp. V 1981).

[28] AR 635-100, para. 5-18*b*. However, the resignation or request for discharge need not be approved.

[29] AR 635-120, para. 1-6*b*(6). An officer who is discharged under other than honorable conditions is not qualified to receive separation pay. To be entitled to separation pay, the officer must have completed at least five continuous years of active service. 10 U.S.C. § 1174 (Supp. V 1981), *amended by* the Department of Defense Authorization Act (1984), Pub. L. No. 98-94, 97 Stat. 614 (1983).

[30] AR 635-100, para. 5-20. The officer is entitled to counsel for representation, 30 days preparation time, personal appearance, full access to all records relevant to his case, the opportunity to present evidence and cross-examine Government witnesses, and a copy of the verbatim record of proceedings of the board of inquiry. The board of inquiry will consist of not less than three officers in the grade of colonel or above and senior in grade and rank to the officer being considered for elimination. *Id.* at para. 5-35*a*. A minority, female, or special branch officer may request that an officer of the same category be appointed to the board. *Id.* at para. 5-35*e*.

of the Army for final action.[31] If the DA Board of Review recommends retention, the case is closed.

Recently, Army field commanders have expressed concern about the administrative burden involved and extensive time required in processing an officer elimination action.[32] Although this concern is clearly justified, these complex procedures are required by law[33] and Department of Defense guidance.[34] In the past, commanders have normally avoided using this system by initiating court-martial charges in appropriate cases.[35] The officer facing criminal action may be inclined to resign for the good of the service to avoid the stigma of a federal conviction and the potential of confinement.[36] Although commanders do not like the administrative elimination process, administrative elimination actions have increased because HQDA is routinely initiating actions on the basis of record reviews and recommendations of promotion and other selection boards that officers be considered for administrative elimination.

Probationary Officers

The statutory and regulatory rules applicable to probationary officers provide additional reasons authorizing elimination and expedited procedures for processing the action.[37] Probationary officers are Regular Army commissioned officers with less than five years commissioned service[38] and Reserve Component officers with less than three years commissioned service.[39] Additional reasons authorizing separation include failing a service school course of instruction and discovery of a condition which indicates that the officer's retention is not in the best interests of the Army.[40] Elimination procedures are streamlined for the probationary officer by permitting separation without board consideration if the commander recommends the officer be separated with an honorable discharge.[41] If the commander does not recommend an honorable discharge, the action is submitted to the DA Selection Board.[42] Likewise, if during the processing of the action the officer's commissioned service exceeds the designated probationary period, the case will be submitted to the three boards in the chapter 5 elimination process.[43] A probationary officer facing elimina-

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[31] *Id.* at para. 5-22. The officer is not entitled to appear personally before the DA Board of Review but may submit a written statement for consideration by the major commander and the board of review. *Id.* at para. 5-22*b*(2)(b).

[32] HQDA Message, *supra* note 2.

[33] 10 U.S.C. §§ 1181-1187 (Supp. V 1981). The Department of Defense recently forwarded to the Office of Management and Budget a legislative proposal which would give the service secretaries authority to eliminate the first board in the involuntary elimination action.

[34] Dep't of Defense Dir. No. 1332.30, Separation of Regular Commissioned Officers for Cause (15 Oct. 1981).

[35] Commanders have discretion to initiate disciplinary action under the Uniform Code of Military Justice *or* an elimination action under AR 635-100. An elimination action may be initiated on the basis of conduct which was the basis of judicial or nonjudicial punishment after charges are dismissed or appellate review is completed. AR 635-100, para. 5-14*f*.

[36] A resignation for the good of the service will be processed under AR 635-120, chapter 5. An officer who resigns for the good of the service normally receives a discharge under other than honorable conditions. AR 635-120, para. 5-7. Since a resignation for the good of the service is considered a voluntary separation action, the officer is not entitled to separation pay. AR 635-120, paras. 1-6*a*(3)(a), 5-5.

[37] 10 U.S.C. § 640 (Supp. V 1981) (Regular Army); AR 635-100, section IX (officers in all components).

[38] AR 635-100, para. 5-28*a*. Regular Army commissioned officers who were on active duty on 14 September 1981 have a three year probationary period.

[39] *Id.* at para. 5-28*b*.

[40] *Id.* at para. 5-29. A Reserve component officer who fails to meet branch school standards due to misconduct, moral or professional dereliction, or academic or leadership deficiencies may be released from active duty *or* discharged. *Id.* at chapter 3, section II. This is commonly referred to as the faculty board elimination and is one of the few actions where the officer exercising general court-martial jurisdiction has been delegated separation authority.

[41] *Id.* at para. 5-30*a*. The officer has the right to consult with counsel and submit a written statement prior to action by HQDA on the elimination recommendation.

[42] *Id.* at para. 5-30*b*(3). If the DA Selection Board determines that the officer should be separated under other than honorable conditions, the case is processed through a field board of inquiry and board of review. *See supra* text accompanying notes 19-30 for a discussion of this procedure.

[43] *Id.* at para. 5-30*a*.

tion is also offered the options of retiring if eligible or tendering a resignation.[44]

Nonselection for Promotion to First Lieutenant

Although attempts to delegate separation authority to the GCMCA have been generally unsuccessful, a recent regulatory change gives the GCMCA the authority to separate the officer nonselected for promotion to first lieutenant.[45] When a second lieutenant approaches eighteen months in a grade, a DA Form 78 (Recommendation for Promotion of Officer) is forwarded by the servicing military personnel office to the lieutenant's 05 commander.[46] The 05 commander may promote the officer or recommend that the officer be denied promotion.[47] If nonselection is recommended, the DA Form 78 is forwarded to the promotion review authority, the officer's GCMCA. The GCMCA may:

(a) Deny promotion and order the officer separated,

(b) Promote the officer, or

(c) Retain the officer for six months for further evaluation.[48]

Included in the authority to separate the officer for nonselection to first lieutenant is the authority to waive statutory, regulatory, and contractual obligations. Since the officer receives only notice of the 05 commander's nonselection recommendation and the opportunity to submit comment, this delegation of separation authority gives the GCMCA an expeditious method of administratively eliminating the substandard junior officer.[49] Before approving the nonselection of a second lieutenant, the GCMCA should review the officer's evaluation reports to ensure that the basis for nonselection is documented. Likewise, the GCMCA should determine if the cost of the officer's education can be recovered from those officers who participated in fully funded education programs.[50]

Conclusion

The involuntary elimination of the officer who fails to accomplish his or her duty effectively, or conduct him or herself in an exemplary manner at all times, will continue to be emphasized by the Department of the Army. It is the commander's responsibility to implement the Officer Qualitative Management Process to ensure that only those individuals who adhere to the high standards required of an Army officer are permitted to continue to serve. It is the judge advocate's responsibility to advise the commander of the tools available to document officer misconduct and poor performance and separate the deficient officer.

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[44] *Id.* Normally probationary officers are serving statutory, regulatory, or contractual obligations. Army policy is that officers are expected to complete these obligations prior to voluntary separation. However, the obligation of the deficient officer may be waived in most cases to permit involuntary separation.

[45] AR 624-100, para. 3-5*a* (IC1, 1 Feb. 1983). This authority also applies to warrant officers nonselected for promotion to CW2.

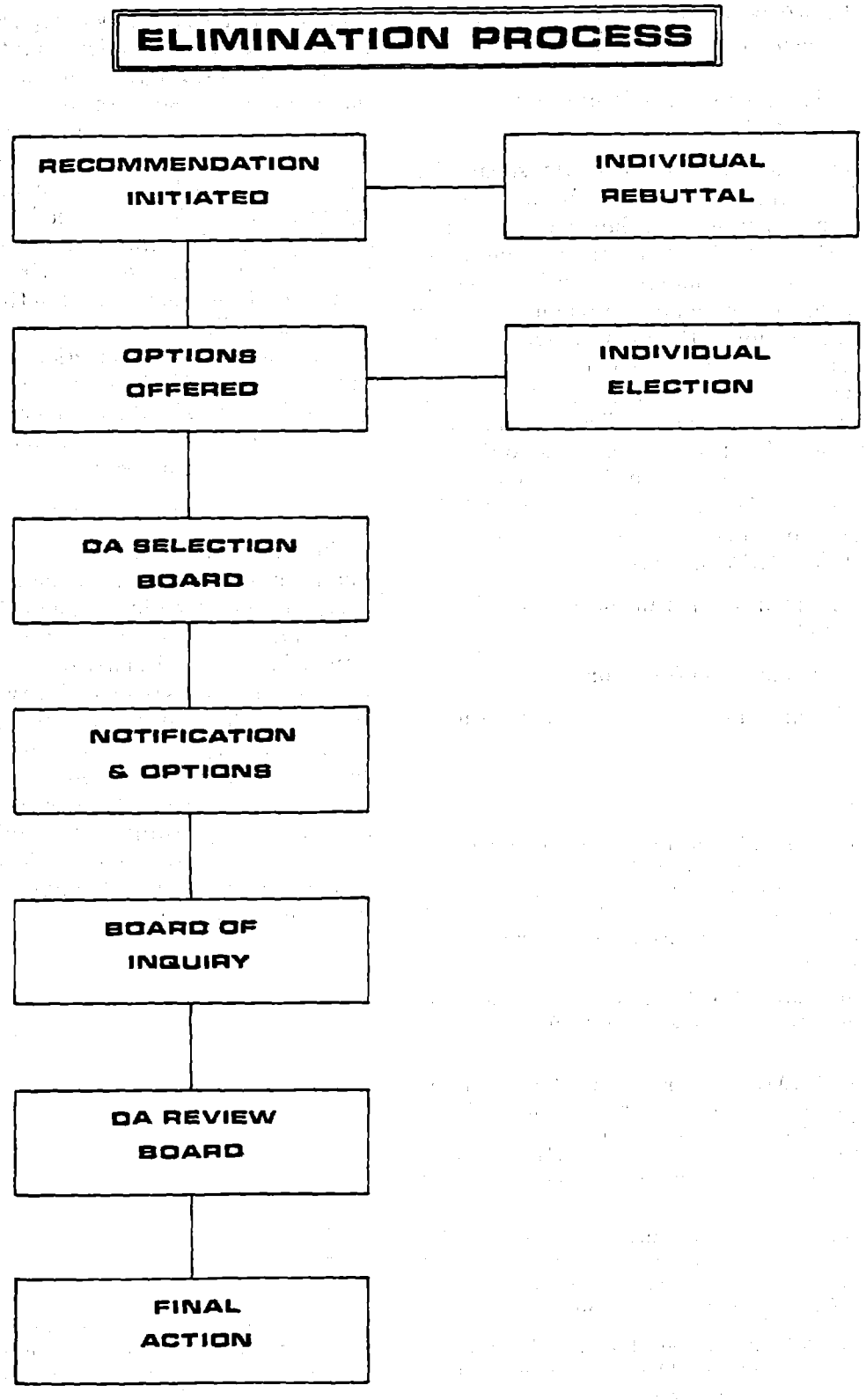
[46] *Id.* at para. 3-5. A commander who is a LTC or higher may promote officers assigned to his or her command. In the absence of a LTC commander, the promotion review authority (GCMCA) may designate the first colonel having supervisory responsibility to be the approval authority. *Id.* at para. 3-2*a*.

[47] *Id.* at para. 3-5*d*. If the 05 commander recommends that the officer not be promoted, the officer is given the opportunity to submit written comment prior to action being sent to the promotion review authority (GCMCA).

[48] *Id.* at para. 3-5*e* (IC1, 1 Feb. 1983). An officer will be retained for six months only if his or her continued service will not be inconsistent with good order and discipline. AR 624-100, para. 3-6*a* (IC1, 1 Feb. 1983).

[49] *Id.* at para. 3-5*d*.

[50] The Secretary of the Army may require reimbursement of the costs of educational assistance from service members who are separated at their request or because of their misconduct prior to completing service obligations incurred as a result of that assistance. 10 U.S.C. § 2004 (Supp. V 1981).


ELIMINATION PROCESS
RECOMMENDATION INITIATED
INDIVIDUAL REBUTTAL
OPTIONS OFFERED
INDIVIDUAL ELECTION
DA SELECTION BOARD
NOTIFICATION & OPTIONS
BOARD OF INQUIRY
DA REVIEW BOARD
FINAL ACTION

Appendix A

Mullen v. United States: The Effect of Readjustment or Severance Pay on Eligibility for Subsequent Retirement Pay

Captain Mark P. Ort
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Introduction

The status and treatment of military retired pay has received much attention recently in light of *McCarty v. McCarty*[1] and the subsequent enactment of the Uniformed Services Former Spouses' Protection Act.[2] However, neither *McCarty* nor the Uniformed Services Former Spouses' Act resolve the controversy over the status and treatment of retired pay. Issues in this area continue to arise, often in unlikely areas, as is evidenced by a recent decision of the Sixth Circuit Court of Appeals.

The Sixth Circuit was asked to resolve a question involving the status of readjustment or severance pay on eligibility for subsequent retired pay within the context of a bankruptcy proceeding in the case of *Mullen v. United States.*[3] Although the Sixth Circuit decided the case in the government's favor on narrow grounds of statutory construction, broader issues of military law remain which may be encountered by military attorneys in their future practice. The purpose of this article is to discuss these issues in light of *Mullen.*

The Case History

Peter J. Mullen entered the United States Air Force in 1953 and was honorably discharged in 1957. Thereafter, he served in the Air Force Reserves while attending college. Mr. Mullen completed college in 1962, and in 1964 returned to the Air Force where he served on active duty as a commissioned officer until 31 July 1975, at which time he was released pursuant to a reduction-in-force.

At the time of his release from active duty, Mr. Mullen was paid a $15,000 readjustment allowance.[4] When he received this allowance, he was informed of the accompanying statutory restrictions. The pertinent restriction which gave rise to this case was that Mr. Mullen would not later be eligible to receive any retirement pay unless and until 75% of the readjustment allowance ($11,250) had been recouped by the government pursuant to 10 U.S.C. § 687(f).[5]

Mr. Mullen immediately enlisted in the service so that he could complete twenty years of active federal service and ultimately became eligible for retirement. Mr. Mullen retired from active duty on 1 March 1980, having completed

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[1]McCarty v. McCarty, 453 U.S. 210 (1981).

[2]The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, Title X, §§ 1001-1006, 96 Stat. 730 (1982) (codified at 10 U.S.C.A. § 1408 (West 1983)), became effective 1 February, 1983. This statute effectively reversed *McCarty.* The issue addressed in *McCarty* and referred to in *Mullen* remains unaltered by this act. *See* Grendell, *Accepting the Challenge: Congress Reverses McCarty,* The Army Lawyer, Nov. 1982, at 19.

[3]Mullen v. United States, 696 F.2d 470 (6th Cir. 1983).

[4]10 U.S.C. § 687(a) (1976).

[5]10 U.S.C. § 687(f) (1976) stated:

> If a member who received a readjustment payment under this section after June 28, 1962, qualifies for retired pay under any provisions of this title or title 14 that authorizes his retirement upon the completion of twenty years active service, an amount equal to 75 percent of that payment, without interest, shall be deducted immediately from his retired pay.

This particular section was repealed on 15 September 1981, by Pub. L. No. 96-513, tit. I, § 109(c), 94 Stat. 2870 (1980), and replaced by Pub. L. No. 97-22, § 10(b)(10)(A), 95 Stat. 137 (1981) (codified at 10 U.S.C. § 1174 (Supp. V 1981)).

The new section 1174(h)(1) parallels the old section 687(f) wherein it states:

> A member who has received separation pay under this section, or severance pay or readjustment pay under any other provision of law, based on service with the armed forces, and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay so much of such pay as is based on the service for which he received separation pay under this section or readjustment pay under any other provision of law until the total amount deducted is equal to the total amount of separation pay, severance pay, and readjustment pay received.

twenty-two years of active duty and five years of reserve service. At the time of his retirement, Mr. Mullen was not entitled to receive retired pay until the condition precedent established by 10 U.S.C. § 687 was fulfilled.[6]

On 24 April 1980, Mr. Mullen filed a voluntary petition in bankruptcy pursuant to 11 U.S.C. chapter 7.[7] Notice of this petition was mailed to all parties listed in the schedule of creditors, including the Air Force. The Air Force, on the advice of the U.S. Attorney that no debtor-creditor relationship existed between Mr. Mullen and the Air Force, asserted no claim against Mr. Mullen on the alleged "debt" and filed no proof of claim.[8]

Because the Air Force was not a creditor and therefore not subject to the automatic stay provisions of 11 U.S.C. § 362, the Air Force continued to follow the mandate of 10 U.S.C. § 687(f) and refrained from making retirement payments to Mr. Mullen. On 11 July 1980, Mr. Mullen, proceeding on the assumption that the Air Force was, in fact, a creditor, contended that the continued refusal by the Air Force to pay him retirement pay was a violation of the stay imposed by 11 U.S.C. § 362. Pursuant to his belief, he filed a motion to show cause why the Air Force should not be held in contempt for refusing to comply with 11 U.S.C. § 362.

A hearing was held on this motion and the bankruptcy court refused to issue a contempt citation because the court questioned whether the stay provisions should be applied to Mr. Mullen's obligation to repay 75% of the readjustment allowance. Mr. Mullen appealed to the U.S. District Court, where, after a hearing on the matter, the court affirmed the finding of the lower court.[9] A rehearing on Mr. Mullen's motion was subsequently denied. On appeal to the Sixth Circuit Court of Appeals, the findings of the two lower courts were affirmed. The Sixth Circuit cautiously addressed the issue of the nature and treatment of military retired pay.

The Opinion

In a somewhat vague two-and-one-half page decision, the court held that the transaction between Mr. Mullen and the Air Force did not give rise to a debtor-creditor relationship.[10] The court's rationale was that, absent such a relationship, the automatic stay provisions of 11 U.S.C. § 362 were inapplicable. Consequently, the lower courts did not abuse their discretion in failing to cite the Air Force for civil contempt.

In rendering its opinion, the court did not reach the military law issues that were raised and argued by the government. Instead, the court scrutinized the language of 11 U.S.C. § 362 and then examined the definitional sections of the Bankruptcy Code[11] to determine the

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[6] 10 U.S.C. § 8911 (1976). The parallel statute dealing with the Army is 10 U.S.C. § 3911 (1976).

[7] The theory upon which Mr. Mullen founded his case should be clear. He argued that he had an "obligation" to repay $11,250 to the Air Force and consequently this putative obligation to repay was a "debt." If a debt existed within the meaning of 11 U.S.C. § 101(11) (Supp. V 1981), he would then argue that the debt was dischargeable. If the putative debt was discharged, the Air Force would have no authority to refrain from paying Mr. Mullen his retirement salary. Because the purpose of the automatic stay provided in 11 U.S.C. § 362 (Supp. V 1981) is to protect debtors from their creditors during the pendency of the case in bankruptcy, Mr. Mullen argued that he should be provided the protection of 11 U.S.C. § 362 until his case was finally adjudicated. The government planned to contest the issue of dischargeability if it was unable to convince the court that no debtor-creditor relationship existed. The issue of dischargeability was never reached in this case due to the fact that the government prevailed on the issue of the inapplicability of 11 U.S.C. § 362.

[8] 11 U.S.C. § 362(a) (Supp. V 1981) states in pertinent part that:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay applicable to all entities of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

[9] Mullen v. United States, 14 Bankr. 39 (S.D. Ohio 1982).

[10] *Mullen*, 696 F.2d at 472.

[11] Title 11, United States Code.

nature of a claim.[12] After reciting the definition and discussing the legislative history of this section, the court concluded that a readjustment allowance "appears to be nothing more than a type of prepaid retirement benefit."[13]

The opinion gives little insight into the reasoning behind the court's decision. The court limited its opinion to a narrow statutory construction. However, the court's statutory construction in *Mullen* is inconsistent with the prevailing rule of law in the United States[14] and with its own prior decisions.[15] The nature of this ruling clearly demonstrates the court's reluctance to address an area of law with which it is unfamiliar.[16] It is, therefore, important to examine possible reasons for the Sixth Circuit's deferential treatment of an apparent violation of 11 U.S.C. § 362 in a case involving the military retirement system to gain an understanding of how *Mullen* fits into the complex area of bankruptcy law. Consequently, the arguments of the government will provide guidance to military attorneys who may be confronted with this question in the future.

Discussion

The government pursued two lines of argument to demonstrate why no debtor-creditor relationship existed between Mr. Mullen and the Air Force. The basic premise upon which both of these arguments are founded is the well settled principle that a "soldier's entitlement to pay is based upon statute and not upon common

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[12]The definition of a claim is found at 11 U.S.C. § 101(4)(a) (Supp. V 1981), which states: "A claim is a right to payment, whether or not such right is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

[13]*Mullen*, 696 F.2d at 472.

[14]In Mueller v. Nugent, 184 U.S. 1 (1902), the United States Supreme Court held that the filing of a bankruptcy petition is supposed to give notice to all the world of the pendency of the proceedings and operates as an injunction restraining all persons from interfering with the debtor's property. The term persons includes all legal entities, including federal agencies. The holding and applicability of this case is unchanged despite the passage of the 1978 Bankruptcy Reform Act which replaced the 1898 Bankruptcy Act in force at the time this case was decided.

That federal agencies are persons enjoined by 11 U.S.C. § 362 is clearly demonstrated by three recent cases involving the violation of this section by federal agencies and/or agents. In the case of *In re* Hill, 19 Bankr. 375 (D. Tex. 1982), the Farmers Home Administration (FmHA) and its cognizant officials were held in contempt of court because of their conscious and intentional disregard of the automatic stay provisions of 11 U.S.C. § 362 when the FmHA requested an involuntary setoff of any Agricultural Stabilization and Conservation Services monies, to which the debtor, a farmer, might be entitled, to apply against obligations owed by the debtor to FmHA. In a similar case, a bankruptcy court in Pennsylvania held the Internal Revenue Service (IRS) in contempt of court as a result of its violation of the 11 U.S.C. § 362 stay when the IRS set-off amounts owed to IRS from prior years against a refund owed to the debtors. *In re* Norton, 15 Bankr, 623 (Pa. 1981). Yet another bankruptcy court held that the IRS and its agents violated the stay provisions of 11 U.S.C. § 362 when the IRS contacted the debtor's employer to obtain a portion of wages held by the employer pursuant to a pre-petition levy by the IRS and then forwarded the check received from the employer for deposit. Matter of Cudaback, 22 Bankr. 914 (D. Neb. 1982).

It is therefore clear that the prevailing rule of law is that any setoff, attempted setoff, or other attack against a debtor's assets by a government agency is a violation of the automatic stay imposed by 11 U.S.C. § 362. These cases involve situations, like *Mullen*, where action adverse to the debtor was taken without leave of court and without a grant of relief from the stay being granted by the court. *See also* 28 U.S.C. § 1471 (Supp. V 1981); 11 U.S.C. §§ 105, 106 (Supp. V 1981); *In re* Donald Calhoon Douglas, 7 Bankr. Ct. Dec. (CCH) 690 (D. Neb. 1981), *In re* Whiting Pools, 7 Bankr. Ct. Dec. (CCH) 658 (W.D.N.Y. 1981) (concerning the IRS); *In re* Seeburg Corp., 6 Bankr. Ct. Dec. (CCH) 756 (N.D. Ill. 1980) (concerning the NLRB); *In re* Howell, 4 Bankr. 102 (M.D. Tenn. 1980) (concerning the Department of Labor); *In re* Hughes, 7 Bankr. 791 (E.D. Tenn. 1980); *In re* Buren, 6 Bankr. 744 (M.D. Tenn. 1980) (concerning the Social Security Administration).

[15]In a case decided less than six months before *Mullen*, the Sixth Circuit ruled on the applicability of the automatic stay provisions of 11 U.S.C. § 362 and stated: "We concur with the bankruptcy court's conclusion that § 362 indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions, *but to deny those units the power to collect money in their enforcement efforts.*" *In re* Kovacs, 681 F.2d 454, 456 (6th Cir. 1982) (emphasis added). *See also In re* Mansfield Tire & Rubber Co., 660 F.2d 1108, 1114-15 (6th Cir. 1981) (a governmental entity is not stayed from exercising police or regulatory powers but it is stayed from the enforcement of any acts to collect money from the estate).

[16]The Sixth Circuit infrequently addresses military law issues.

law rules governing private contracts."[17] Military service and its attendant pay and retirement scheme are unique and must be recognized as such. Because any entitlement is based on statute, it is a matter wholly within the control of Congress.[18] Accordingly, the right must be measured by the terms of the statute giving rise to it as applied to the circumstances.[19] The government arguments focused on this fact and asserted that the statute applicable to the interrelationship between readjustment allowances and retirement pay converts a previously paid readjustment allowance from severance pay to a limitation upon the retiree's eligibility to receive retired pay.[20]

The position most strenuously argued was that the mandate of 10 U.S.C. § 687(f) converts the readjustment allowance into a retirement salary prepayment to the extent of 75% of the readjustment allowance. The court appeared to accept this argument because the opinion stated that the readjustment allowance appeared to be nothing more than a type of prepaid retirement benefit.[21] The court, however, gave no indication of how it determined the nature and status of military retired pay although a civilian pension fund case was considered analogous.[22] This finding confused the issue of the unique status of military retired pay.

The *McCarty* case concisely reviewed the law governing the status and nature of military pay. The Supreme Court reiterated what the law had been for 100 years; military retired pay is indeed a salary.[23] A retired member remains a member of the armed forces, subject to the Uniform Code of Military Justice (UCMJ) and to recall to active duty.[24] The Court concluded that, for its purposes, military retirement salary is considered reduced compensation for reduced current services.[25]

The applicability of *McCarty* to the *Mullen* case, which concerned a retired reservist rather than a member of the regular component, may not, at first, be evident. A closer examination, however, reveals that the characterization of retired pay as salary for regular officers applies to members of the retired reserve. Although not subject to the same constraints imposed upon a regular component officer, the retired reserve officer's eligibility to receive a retired salary is founded upon his or her status as a member of the armed forces.[26] The retired reserve officer's entitlement to receive a retirement salary ends upon termination of military status.[27] The retired reserve was created as the military organization to which a retired reserve officer must belong to be eligible to receive a retirement salary.[28] Retired reserve officers are subject to recall to active duty in time of war or during an emergency declared by Congress.[29] Finally, the retired reservist may be subject to the UCMJ in certain circumstances.[30] Consequently, the rationale of the Court in *McCarty* is clearly applicable to *Mullen* as it pertains to the status and nature of military retired pay.[31]

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[17] United States v. Larionoff, 431 U.S. 864, 879 (1977) (citing *Bell v. United States*); Bell v. United States, 366 U.S. 393, 401 (1961); Wood v. United States, 107 U.S. 414 (1883); Costello v. United States, 587 F.2d 424, 425 (9th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979); Goodley v. United States, 441 F.2d 1175, 1178 (Ct. Cl. 1971); Andrews v. United States, 175 Ct. Cl. 561 (1966); Abbott v. United States, 287 F.2d 573, 576 (Ct. Cl.), *cert. denied*, 368 U.S. 915 (1961).

[18] *Bell*, 366 U.S. at 401.

[19] *Goodley*, 441 F.2d at 1178.

[20] 10 U.S.C. § 687(f) (1976).

[21] *Mullen*, 696 F.2d at 472.

[22] Villarie v. New York City Employees' Retirement System, 648 F.2d 810 (2d Cir. 1981).

[23] *McCarty*, 453 U.S. at 222; United States v. Tyler, 105 U.S. 244, 245 (1881); Costello v. United States, 587 F.2d 424, 427 (9th Cir. 1978); Lemly v. United States, 75 F. Supp. 248, 249 (Ct. Cl. 1948).

[24] 453 U.S. at 222; 10 U.S.C. § 802(4) (1976); 10 U.S.C. § 3504(a) (1976).

[25] *McCarty*, 453 U.S. at 222-23.

[26] 41 Comp. Gen. 715, 717 (1962).

[27] *Id.*

[28] 10 U.S.C. § 274(1) (1976).

[29] 10 U.S.C. §§ 672(a), 675 (1976).

[30] 10 U.S.C. § 803(3), (5) (1976).

[31] Note that both *Lemly* and *Goodley* involved retired reserve officers.

Because retirement pay is a salary rather than a pension, any funds advanced which later reduce the amount of salary due a retiree should be viewed as an advance of retirement salary. Therefore, it should be clear that upon retirement, subsequent to an involuntary separation and restructuring of career status, the readjustment allowance paid at the time of preretirement separation converts to an advance against the salary due after retirement.[32]

The alternative argument asserted by the government was that the mandate of 10 U.S.C. § 687(f) establishes a condition precedent to the receipt of retirement salary in the event that a retiree had previously accepted a readjustment allowance. The acceptance of a readjustment allowance alters the recipient's later acquired retired status. The retiree is no longer automatically entitled to receive a retirement salary. By accepting the readjustment allowance, the service member accepts this limitation to receipt of subsequent retirement payments. The condition precedent is simply that the government will defer the payment of a retirement salary until the mandated repayment or recoupment is made.

The government further argued, and the court accepted, that this is not a debt or an obligation because the retiree has absolutely no duty to repay or to make reimbursement. In other words, no claim existed in favor of the government.[33] Although the statutory definition of a claim is sweepingly broad, a claim requires a *right to repayment.* By definition, absent a right to payment there is no claim.

The provisions of 10 U.S.C. § 687(f) do not create a right to payment on behalf of the government. This is further demonstrated by the fact that other than 10 U.S.C. § 687(f), there are no provisions for the repayment of the readjustment allowance in the United States Code. The operation of 10 U.S.C. § 687(f) itself is dependent upon at least a provisional entitlement on the part of the retiree to receive a retired salary and his or her choice to draw it.[34] If the retiree becomes ineligible to receive retired pay prior to the time that the recoupment mandated by 10 U.S.C. § 687(f) occurs, there is no provision which would obligate the retiree or the estate, in the event of death, to repay any part of the previously paid readjust-

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[32]The court apparently adopted this argument when it stated, "[T]he USAF's readjustment allowance appears to be nothing more than a type of prepaid retirement benefit." *Mullen,* 696 F.2d at 472. To bolster its conclusion and to analogize the military retirement system to that of the civilian sector with which the court has greater familiarity, the court cited the case of Villarie v. New York City Employees' Retirement System, 648 F.2d 810 (2d Cir. 1981), *Villarie* held that an advance from an employee retirement system does not create a debt dischargeable in bankruptcy. This case, however, is not analogous. The *Villarie* court rested its decision upon the settled principle that such advances from the account of an annuitant are merely loans to the annuitant of his own funds. Furthermore, the holding in *Villarie* addressed the question of dischargeability and not the nature and status of an annuity. The military retirement scheme does not consist of an annuity into which the service member makes contributions. As noted previously, retirement salary is a salary and not a pension where payments are made on a regular basis as deferred compensation for past services. Consequently, the retired service member who had previously accepted a readjustment allowance cannot be said to have merely borrowed from his or her own funds.

The new section, 10 U.S.C. § 1174, clarifies Congress' intended treatment of severance or readjustment allowances in the event of retirement subsequent to the payment of one of these allowances. The new section provides that retirement pay will be reduced by the amount of such pay as is based on the years for which such prior payment was made. This clearly evidences an intent by Congress to treat a readjustment or severance allowance as a partial prepayment of retired pay. Congress mandates that so much of current reduced salary as is based on years served prior to premature severance from the service will be deducted from the amount currently payable until the entire prepayment is accounted for.

The reasonable explanation for this is that Congress intended to prevent a double payment to the service member for the same service. Because it had been established for some 100 years that a retirement salary is a current salary for current reduced services, it is apparent that the double payment intended to be avoided is the payment of current retirement salary.

[33]*See supra* note 11.

[34]Eligibility to receive a retired salary is based upon military status. *See supra* note 24. It is conceivable that a retiree could terminate military status either voluntarily or involuntarily prior to the time that the recoupment mandated by 10 U.S.C. §687(f) (now 10 U.S.C. § 1174(h)(1)) has been completed or even commences. A retiree could die or engage in certain proscribed activities. *See* U.S. Const., art. I, § 9, cl. 8; 5 U.S.C. § 5531 (1976 and Supp. IV 1980); 58 Comp. Gen. 566, 568-69 (1979).

ment allowance. The statute merely alters a retiree's status and denies a right to payment for his or her present services for a set period of time. Phrased another way, 10 U.S.C. § 687(f) does not create a claim on behalf of the government; this statute merely prevents a claim on behalf of a retiree from coming into existence. Absent a claim on behalf of the government, the provisions of 11 U.S.C. § 362(a)(6) staying "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case..." are inapplicable.[35]

[35]The court adopted this argument in conjunction with the retired pay prepayment concept. The court states in the same paragraph that this appears to be a prepaid retirement benefit *and* that the Air Force did not have a right to recoup the readjustment allowance from any other source. *Mullen*, 696 F.2d at 472.

Conclusion

The premise upon which both of the government's arguments were founded is that no debtor-creditor relationship existed between the retiree and the government as a result of the mandate of 10 U.S.C. § 687(f). Therefore, a retiree with the status imposed by the statute cannot shed this status by resort to the bankruptcy courts and thereby become entitled to benefits to which other similarly situated retirees are not entitled. Although the court's ruling appears to be correct in law and equity, it did not resolve the issues raised. The question is likely to recur, and the decision in *Mullen* and the government's reasoned arguments will provide a starting point for military attorneys who encounter this issue in the future.

Word Processing and a Systems Approach to Law Office Typing

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Introduction

Word processing is erroneously considered by many to be synonymous with typing—a task relegated to the care, custody, and control of the typing pool with little managerial involvement. However, today's office managers must understand the capabilities of the automated office, including word processing, so that individual and collective efficiency can be increased.

"Word processing" is the use of either a dedicated word processing microcomputer or a microcomputer supplied with word processing software. A dedicated word processor is nothing more than a microcomputer with dedicated function keys which perform only specified word processing functions. For example, a dedicated word processor has keys appropriately labeled so that special functions can be used by pressing keys marked "center," "search," and "replace." On the other hand, a microcomputer, which performs tasks other than just word processing, maintains its versatility by labeling its function keys generically. For example, function key number 1, or "F1," on the microcomputer may perform a search capability when used with the word processing software, but may perform another, entirely different capability when used with a data base management system or an electronic spreadsheet program. The manager need not understand the internal architecture or the inner workings of the word processor. However optimal utilization requires some knowledge of the performance capabilities of the equipment and an understanding of how to apply these capabilities to meet the needs of the job.

The various types of dedicated word processing equipment and word processing software which operate with a microcomputer are too numerous to mention. However, most of the programs that operate within a business environment possess common features which can be adequately summarized. Again, the goal is neither to make the manager a touch typist nor

to convert him or her into a programmer; rather, it is to start the manager on the road towards becoming conversant with the word processor's capabilities and give some insight into practical applications for the law office environment.

Using the Word Processor

Document Creation

Creating a file or document is the first step in using the word processor. A document, be it a letter, memorandum, or a brief, must be entered, or typed, into the machine, using the keyboard, so that it may be stored as a file in the word processor's permanent storage medium. This storage medium may be either a magnetic floppy disk or a hard disk. The primary functional differences between the two methods are storage capacity and disk access time. Disk storage capacity refers to the amount of information that can be stored, and disk access time is the amount of time it takes to find or store information on tracks of the disk. Hard disks can store far greater amounts of information than floppy disks and retrieve the information from the disk at a quicker rate. Hard disks are usually available with a minimum storage capacity of five million characters of information (also referred to as five megabytes) and range in sizes up to 500 megabytes, whereas most floppy disks store no more than 360,000 characters (360 kilobytes or 360K) of information. The word processor's disk storage capacity establishes the physical parameters of the system because the word processor's storage, like file cabinet storage, is not infinite. Each 8-1/2 x 11 inch, double-spaced, typewritten page contains approximately 2,000 characters of information (2,000 bytes or 2K). If the storage capacity of your floppy disk is 360K (remember that not all floppy disks have the same storage capability), the maximum number of pages that can be stored on a floppy disk at any one time is approximately no more than 180 pages.

Editing

Editing documents previously created and placed in storage is probably the most common use of a word processor. The benefits derived from making small changes to a document already filed rather than re-typing the entire document are self-evident. Changes to existing text are mady by using the insert, delete, or overlay functions. New text is inserted into a document by finding the desired location for the insertion, pressing the insert function key and typing the new text. The remaining text is preserved, and the document is appropriately formated using previously set margins and page lengths. The document can also be edited by changing the margins or page lengths. Text is deleted in a similar manner by finding the text to be deleted and pressing the delete key. Again, the document's format (margins and page length) is preserved. Overlay is nothing more than striking over an old letter with a replacement letter.

File Insertion

As documents are created and edited, they are stored as files on disks and each disk may contain several previously created or edited files. The terms "file" and "document" are often used interchangeably in the context of word processing. During the creation or editing process, these files can be retrieved for insertion into the current document. Frequently used clauses or paragraphs, *i.e.*, "boilerplate", can be copied for insertion and utilized in new documents by simply pressing a few keys.

Files are inserted by either "reading," or copying, the external file, or by using a glossary or library of previously created files or clauses. The assemblage of boilerplate leaves the original clauses unchanged. Some systems possess the added capability of allowing the operator to insert variable information into the new document during the file insertion process without permanently changing the old boilerplate clauses.

An efficient use of boilerplate is a standardized will-drafting system. A number of will clauses are stored as files on the disk, with each clause containing variables for information to be added, such as the names of a testator, spouse, children, or state of domicile. The word processor then "reads" these clauses into the current document pursuant to a command given by the operator, finds the location of the variable within the clause, "prompts", or tells, the

operator to input the needed information, and automatically places the supplied information into the newly copied boilerplate paragraph. The result is a will that is customized for the individual testator while at the same time leaving the boilerplate clauses unscathed by the process.

Admittedly, the above approach is a sophisticated use of the word processor and requires advanced planning to set up standardized clauses as well as a system for communicating the requested clauses, variables, and changes to the word processor operator. However, once the system is installed, whether it is for pre-trial advices, post-trial reviews, or simple wills, significant savings in time can be achieved. The author can draft the document, and the word processing operator can assemble it, more quickly and with less error since the clauses have been previously entered and stored on the word processor.

A simpler approach to the file insertion process for assembling boilerplate is to "read," or copy, whole files into the current document and make changes to this new document using the various editing capabilities of the system, *i.e.*, insert, delete, block moves and copies, and search and replace.

Block Moves and Copies

A "block" is simply a part of the text. It can be a word, sentence, paragraph, page, or any portion thereof. The amount of text to be moved or copied is "marked" on the screen of the word processor and literally copied or moved to another location within the document or onto an external file or document. Block moves allow the rearrangement of text; pressing a few keys can transform the first paragraph into the last paragraph of the document. Copying a block allows the duplication of a previously marked section of text and insertion of that copy into either another portion of the current document or into a new file or document. The copied text is identical to the original which is left unscathed by the process.

Search and Replace

Manually searching a document for a specific word of phrase and replacing it with a different word or phrase is tedious and time consuming. It can be accomplished on a word processor in seconds by pressing a few keys to institute the search, the word processor then finds the text automatically and replaces it with the new text. The search and replace function can either be accomplished on a one-time basis or the changes can be made throughout the document by using a global search and replace.

Search and replace can be used in conjunction with boilerplate whenever the word processor is not sophisticated enough to allow the use of advanced boilerplate techniques such as file insertions with variables. For example, a standard will can be created to cover common estate dispositions. A married testator with children typically desires to make a complete residuary disposition to his wife, if surviving, then to his children. A standardized will can then be created with unique character designations representing the names of testator, spouse, children, executors, and guardians which are to be inserted. For example, labeling the primary executor as "EX1" in the document enables the word processor to search for the term "EX1" and replace it with a specific executor's name. This standardized document is copied *in toto* as needed, leaving the original for use again. The copied document is then edited further to cover any deviations from the standardized version, such as specific bequests. Furthermore, the spouse's coordinating will, if similar, can be created by making a copy of the testator's will, and then searching and replacing the testator's name with that of the spouse. Obviously, substantial prior planning is required to create a document with sufficiently neutral phraseology to allow for these multiple uses. This concept of document standardization is equally applicable in other situations throughout the office whenever documents frequently use the same phraseology.

The search function can also be used alone to simply find text within the document. This not only enables a simple search of a document but also allows the creation of a "quick and dirty" data base system. For example, a system can be set up to monitor military justice cases by creating a one-page form containing all the essential information that must be supplied on each case,

such as the information already contained on the courts-martial wall charts. Every time a new case is opened, another page is added to the old document by copying, or reading, into the file a copy of the previously created blank form. The information is then filed in on the page as needed. All the current cases can be searched for names, dates, unit, or offense by using the global search function which examines all the pages (cases) in the document. Old cases can be removed from the file by copying the appropriate page to an "old case" document file for archive purpose.

Strikeout

A strikeout is text that is printed with a hyphen running through the middle of each character. This feature is often used to show text that has been deleted when there is a need to save the old material, *e.g.*, out-dated provisions of law or regulations.

Spelling Checkers or Dictionaries

An electronic dictionary is a boon to both the operator and the creator of the document. The need to examine the dictionary to verify spelling is reduced because the word processor can access an electronic dictionary containing up to 80,000 words. The spelling checker determines whether words are spelled properly by matching each word in the document with those words stored in its electronic lexicon. Those words not recognized are then marked by the program for verification by the operator. The marked words are then selectively corrected by the operator since the words not recognized may be spelled correctly but are simply not part of the computer's electronic dictionary. The operator either corrects the misspellings or adds the unique words to the dictionary for later recognition.

Programs exist which extend the concept of the electronic dictionary one step further by checking the document for punctuation, style, or grammar. However, these programs add a subjective element to the creation and editing process. A word is either spelled correctly or it is not, but it is a matter of judgment whether a sentence is too wordy or should be phrased differently. However, the grammar checker does allow the author to analyze the writing by spotting wordy phrases, sexist phrases, and overused phrases as well as maintaining a running count on the length of sentences and the number of infinitives and prepositional phrases contained therein. Also becoming available are electronic thesauruses which provide a list of synonyms at the touch of a key.

Merge Printing

Merge printing is commonly associated with form letters, such as the mailing of a standard letter where the only changes in each letter are the name and address. An easy way to accomplish this is to use the mailmerge or merge capability of the word processor. First, a document is created containing the form letter using special codes at appropriate locations throughout the document to indicate the place of insertion for the variable information, such as the name and address. Second, a data file is created containing the names and addresses, or other variable information, to be inserted into the standard letter. Implementing the merge function causes the variables from the data file to be automatically inserted into each form letter. The output can be printed or it can be stored on disk in a document file containing all the letters with the appropriate names and addresses. Once the data file has been created it can be used with various documents. Furthermore, the data file can be edited and updated to reflect changes or to remove information that is not needed in the form letter. Merge files can also be used to allow for operator input as opposed to a data file input. This is similar to the use of boilerplate variables as mentioned earlier. Form letters created by operator entry can also be printed immediately or stored on disk as a document file.

Headers and Footers

Headers and footers offer the capability of printing specified text at the top or bottom of each page within a document without the necessity of typing that information manually onto each page. This allows the title or chapter of a book to be printed at the top of each page as a header. The header or footer remains constant throughout the document until it is changed or removed.

Footnotes

Automatic footnoting is now an advanced feature available on several word processors. Writing footnotes with a word processor is a significant improvement over using a conventional typewriter; the new automatic footnoting features remove the manual process previously required to insert the footnote at the bottom of each page. For example, a special control character is inserted into the text denoting the "call" for the footnote. The footnote is also marked with a special control character recognizable by the word processor. The calls and footnotes are entered sequentially so that they will automatically be numbered and placed together on the same page. As the calls and footnotes are in proper sequence in the document, text can be added later without ruining the sequence. If a call is moved to another page, the corresponding footnote simply "tags along" and automatically follows so that the footnote and its call are always on the same page.

Enumerators

Enumeration is nothing more than the printing of numbers in the left margin of the page to indicate the line numbers. This not only saves the purchase of expensive pleading paper but makes it much easier to print the document since there is no need to make sure the line numbers match up evenly with the lines of the printed text.

Miscellaneous Capabilities

The word processor also accomplishes many other functions quickly and easily, including automatic pagination, page break display, and centering, justifying, underlining, boldfacing, subscripting, and superscripting text. Automatic pagination automatically numbers the pages and prints the number at the bottom center of each page, or any other location supplied by the operator. Page breaks are either visual (horizontal line across the screen) or audio (a beep when a new page is started) markings which indicate on the screen the location where one page ends and another begins. Centering text eliminates the frustration of counting the number of characters so that the text can be started in the appropriate location on the line—a true time-saver for the typist. Justification describes the process of printing documents with a smooth right margin as seen in magazines and newspapers as opposed to a "ragged right" margin. Case citations can be automatically underlined with the touch of a key. Boldface or enhanced print is accomplished by the printer striking the same letter several times in succession with each strike a little offset to give it a "shadow" effect. Superscript is used in footnotes and causes the character to be printed a little above the rest of the text on the line. A subscript is the exact opposite of superscript and prints text below the current line.

Conclusion

The key to office productivity is to never reinvent the wheel. Any activity which is constantly repeated is a good candidate for the creation of a system to avoid inefficient and uncontrolled repetition. A systems approach need not conjure up visions of dreaded paperwork. It is merely a systematic way for increasing efficiency by minimizing error and saving time. The system must plan for and handle the flow of communication from beginning to end; word processing is merely one step in the process. Forms, such as questionnaires for the testator and instruction transmittal slips from the draftsman designating which clauses are to be inserted into the will, should be used extensively for communicating information to the operator. Clearly marked changes on the document for revision will minimize the amount of time wasted by needless print-outs.

The major pitfalls to be avoided with the word processing system are automating tasks that are not cost or time effective and editing documents merely for stylistic changes. This latter point is crucial to maintaining office productivity, if not harmony. It is difficult to work for hours in front of the "green screen" of the cathode ray tube without suffering from fatigue. Fatigue, when coupled with repetitive and, arguably, unnecessary editing, can make for an unhappy and less efficient word processing operator. Therefore, it is crucial for the manager to emphasize careful proofreading of documents so that work need not go back to the

operator for unnecessary revisions due to careless mistakes.

The goal in law office automation is to use word processing as a tool for providing timely and accurate legal documents. Understandably, most legal documents, such as wills, must be executed without mistakes; this can easily be accomplished because the word processor retains the document in storage indefinitely and corrections can be made with the touch of a key. However, simple disposition forms used within the office need not be letter perfect. The standards for Army correspondence apply equally to the written product of both word processors and typewriters.*

*U.S. Dep't of Army, Reg. No. 340-15, Office Management—Preparing Correspondence, para. 1-14 (1 Jan. 1979).

Criminal Law Section

Criminal Law Division, TJAGSA

Instructing Commanders on the MCM Revision

There are many changes in the Military Justice Act of 1983 and the new Manual for Courts-Martial which are important to commanders, legal clerks, and others. All judge advocates should receive instruction on the changes from the Working Group team that is travelling world-wide thru mid-June. The Army instructor, MAJ John Cooke, is available to give a short briefing to commanders during the on-site instruction. For details, *see The Army Lawyer*, January 1984. The following outline is provided to assist judge advocates in teaching the changes to their commanders and others who do not attend the on-site presentation.

Outline for Instructing Commanders, Legal Clerks and Others on MCM, 1984

I. **Background.**

[NOTE TO INSTRUCTOR: *See* the Introduction to the Analysis of MCM, 1984.]

A. The Manual for Courts-Martial is an executive order signed by the President in the exercise of his authority under the Constitution as Commander-in-Chief and under the Uniform Code of Military Justice.

B. The MCM revision was begun in 1980, under the direction of The Judge Advocates General and the General Counsel, Department of Defense.

C. The revision was done by the Joint-Service Committee on Military Justice (JSC).

1. The JSC consists of an O-5 or an O-6 from the Offices of The Judge Advocates General of the Army, the Navy, and the Air Force, and from the Coast Guard and the Marine Corps. It also includes a non-voting representative from the Court of Military Appeals.

2. Research and drafting was done by the Working Group (WG) of the JSC. The WG consisted of 6 persons—a field grade JA from the Army, Navy, Air Force, and Marine Corps, and 2 representatives from the Court of Military Appeals.

3. Drafting was completed in 14 increments. Each increment was circulated to SJAs and others in the field for comment and was reviewed in OTJAG before approval by the JSC.

D. At the end of the drafting process the Code Committee (the 3 Court of Military Appeals judges, The Judge Advocates General, and the Chief Counsel at the Coast Guard) reviewed the draft and approved it.

E. On 6 December 1983, the President signed the Military Justice Act of 1983, amending the Uniform Code of Military Justice. These amendments improve the quality and efficiency of the Military

Justice system and revise the laws concerning review of courts-martial.

F. The provisions of the Military Justice Act of 1983 were incorporated into the revised Manual for Courts-Martial.

G. Copies of the revision were made available for public comment through notice in the Federal Register. At the same time, the revision was staffed in DOD.

H. After these comments were considered, final changes were made and the draft was approved by DOD and forwarded to the President. The Department of Justice reviewed the draft before it was submitted to the President.

I. The President signed the new MCM on _____, and it will be effective on 1 August 1984.

II. Organization and Format.

A. The new MCM uses a very different format from previous MCM's.

1. MCM, 1969, was organized into some 213 paragraphs which were in 29 chapters. It also included 18 appendices.

2. The new MCM is divided into 6 parts (including a separate section for appendices) to more clearly distinguish—and facilitate finding—materials on different aspects of the military justice system. Each part is subdivided into chapters which include rules and discussion.

B. The 6 parts of the new MCM are:

1. Preamble—a brief overview of the nature of military criminal law and its sources.

2. Rules for Courts-Martial (R.C.M.)—the pretrial, trial, and posttrial procedures for courts-martial.

3. Military Rules of Evidence (M.R.E.).

4. Punitive Articles—comprehensive treatment of each punitive article under the UCMJ, including treatment of some 53 offenses under Article 134. [Note: Article 112a is a specific punitive article proscribing drug abuse offenses.]

5. Nonjudicial Punishment.

6. Appendices.

C. Users should become familiar with the new format.

[NOTE TO INSTRUCTOR: Students should be given an opportunity to examine the new MCM at this point. If insufficient copies are available for this purpose, it is recommended that sample provisions be copied for each student or shown on an overhead projector. *R.C.M. 306* is a good example of a Rule for Courts-Martial to use for commanders and legal clerks. Article 89 is a good example of a punitive article.]

1. PART II: R.C.M.—

a. Organization—

[NOTE TO INSTRUCTOR: Refer students to the Table of Contents, if available.]

(1) The R.C.M. begins with some rules of construction, definitions, and a few general rules in Chapter 1.

(2) Chapter 2 contains basic guidance on jurisdictional requirements for courts-martial. (Jurisdiction means the power to hear a case and deliver a valid judgment.)

(3) Chapters 3 through 12 contain rules and guidance covering the criminal process from the time an offense is reported until final review is complete. These rules are generally in "chronological" order; that is, they follow *the same sequence* which a case would ordinarily follow.

(4) Chapter 13 is a separate chapter concerning summary courts-martial. Except in unusual circumstances, this chapter should provide all the guidance

necessary to try a case by summary court-martial. [NOTE: In MCM, 1969, references to summary courts-martial are scattered through the MCM.]

b. Format—

(1) The R.C.M. uses a "rule-discussion" format.

(2) Each rule states a binding legal requirement.

(a) Failure to follow a rule is error which may result in legal consequences.

(b) Therefore, the rules must be followed.

(3) The rules are annotated with discussion.

(a) The discussion is not part of the Executive Order—that is, it was not signed by the President.

(b) The discussion is prepared by the Joint-Service Committee and included in the MCM by DOD.

(c) The discussion provides guidance on how to comply with a rule.

(d) The discussion is not, of itself, binding.

(e) Failure to follow the discussion is not, in itself, error.

(f) Sometimes the discussion is used to alert the reader to additional requirements in other rules or requirements which have been established by other authorities—for example, judicial decisions.

(g) It is anticipated that the discussion will be updated periodically to take note of judicial decisions and other developments.

(4) When the 1984 MCM is finalized, "rules" and "discussion" will appear in different styles of print. This will assist the user in easily distinguishing the mandatory rule from guidance in the discussion.

[NOTE TO INSTRUCTOR: It is important that users understand the difference between "rule" and "discussion." The foregoing may warrant some repetition, and students should be asked if they have questions.]

2. Part III: Military Rules of Evidence.

a. These are in a rule format, just as they are in MCM, 1969.

b. There is no discussion here as there is in the R.C.M. This may be added in the future.

c. Because both Parts II and III of the new MCM will contain "rules," users should be careful to specifically refer to Part III "rules" as "the Military Rules of Evidence."

3. PART IV: Punitive Articles.

a. Part IV of the new MCM deals with the punitive articles of the UCMJ. Articles 77-134; that is, those articles which describe offenses under the UCMJ.

b. This part is organized in a paragraph format.

(1) The first 59 paragraphs deal with Articles 77-133.

(2) Paragraph 60 discusses Article 34 generally. Article 134 does not describe a specific offense. Instead, it makes punishable conduct prejudicial to good order and discipline or of a service discrediting nature, as well as conduct which violates civilian criminal codes under some circumstances.

(3) Paragraphs 61 through 113 describe specific acts in violation of Article 134.

c. Each paragraph in Part IV covers all matters relating to a specific offense.

(1) In MCM, 1969, there was a general discussion of each offense in one place, a listing of maximum punishments in another place, sample specifications and lesser included offenses were each listed in a separate appendix, and the Code was in a fifth place.

(2) In the new MCM, each paragraph on a punitive article includes 6 basic subdivisions.

(a) Text of that article from the Code (*e.g.*, for AWOL, the text of Article 86).

(b) Elements of each offense under that article.

(c) Explanation—a discussion of the application and scope of the article.

(d) Lesser included offenses—a listing of the commonly included offenses. Note that these lists are not exhaustive. They are intended to be illustrative. What is an included offense depends on the specific facts of each case.

(e) Maximum punishment—for each offense under that article.

(f) Sample specifications—to assist in drafting charges. Again these are only guides. Additional guidance is found in R.C.M. 307, which will be discussed later.

(3) The 53 paragraphs under Article 134 use this format—except that the text of Article 134 is not repeated in each paragraph.

d. This format should be easier to use—if you are considering preparing charges for a violation of Article 108—destruction of military property, for example—you could turn to paragraph 32 of Part IV for guidance on the matter, without having to skip around the book.

4. Part V: Nonjudicial punishment procedure also uses a paragraph format.

a. It is fairly short—only 8 paragraphs.

b. It prescribes basic rules and procedures for nonjudicial punishment under Article 15. Of course, more detailed requirements will still be found in service regulations—AR 27-10 in the case of the Army.

5. Part VI: Appendices contain forms and guides for various actions under the new MCM. I will discuss these in more detail later.

a. The Appendices include an Analysis of the new MCM. The Analysis explains the sources of each provision, identifies changes from previous procedure and the reason for them, and provides additional guidance on interpretation of these rules.

b. The Analysis is often technical and is intended primarily as a research tool for lawyers, but you should be aware of its existence.

III. Important New Provisions.

A. Unlawful command influence.

1. R.C.M. 104 dealing with command influence is not really new; it is based on Article 37 of the UCMJ, but it is important to remember.

2. Commanders are prohibited from

censuring, reprimanding, or admonishing any member, judge or counsel of a court-martial for any of their actions in connection with the court-martial.

3. No person may try to coerce or improperly influence a court-martial or its personnel.

4. However, this rule clarifies that counsel and the military judge are subject to professional supervision by The Judge Advocate General and that counsel, the military judge and members are not immune from appropriate action for any offense they might commit while serving in such capacity.

B. Apprehension and restraint. [For commanders and MPs]

1. R.C.M. 302 covers apprehension.

a. It makes no changes concerning who may apprehend or the grounds for apprehension.

b. One important new provision covers where an apprehension may be made.

(1) Ordinarily a person authorized to make apprehensions may do so upon probable cause, without prior authorization.

(2) Based on two US Supreme Court decisions (*Payton v. New York*, 445 U.S. 573 (1980); *Steagald v. United States*, 451 U.S. 204 (1981)), R.C.M. 302(e) requires that, when an apprehension is made in the apprehendee's private dwelling, prior authorization be obtained.

(a) If the apprehendee's dwelling is not under military control and is in the United States, then the apprehension must be authorized by a civilian warrant.

(b) If the apprehendee's dwelling is under military control or is in a foreign country, an appropriate commander must authorize the apprehension—for example, the installation commander would be the appropriate commander to authorize an apprehension in family quarters on the post.

(c) If the apprehendee is located in another person's dwelling which is not under military control and is located in the United States, then both the entry and the apprehension must be pursuant to a warrant issued by competent civilian authority.

(d) If the apprehendee is located in another person's dwelling which is military property or under military control, or located in another country, then the entry must be authorized by competent military authority based upon a determination of probable cause to apprehend the person and a reasonable belief that the apprehendee is or will be present at the time of the entry.

(3) The rule specifically provides that such a warrant or authorization is not required to apprehend a person in living areas such as those on military vessels or in military barracks, vehicles, aircraft, tents, or bunkers.

2. In R.C.M. 304 various forms of pretrial restraint are covered; R.C.M. 305 provides additional procedures when pretrial confinement is imposed.

a. For any form of pretrial restraint, there must be probable cause to believe the person committed an offense and that the restraint ordered is required by the circumstances.

b. Forms of restraint include conditions on liberty, restriction, arrest, and confinement.

(1) Conditions on liberty are new to the MCM, although such conditions have long been used.

(2) Conditions on liberty include orders to sign in periodically or not to go to certain places.

(3) Pretrial restraint may not improperly interfere with access to counsel or the right to prepare one's case.

c. When a person is placed under pretrial restraint, the person must be advised, under R.C.M. 304(e), of the nature of the offense for which restrained.

d. The grounds for pretrial confinement are expanded to include foreseeable serious criminal misconduct as well as risk of absence before trial. (R.C.M. 305(h))

(1) These grounds are both being used now, but there was not express authority for the first in the 1969 Manual.

(2) Serious criminal misconduct includes—

(a) Intimidation of witnesses.

(b) Obstruction of justice.

(c) Seriously injuring others.

(d) Offenses seriously threatening the safety of the community or the the effectiveness, morale, discipline, readiness, or safety of the command or the national security of the United States.

(3) The Analysis notes that a person who refuses to obey orders may be placed in pretrial confinement when such conduct seriously threatens morale or mission performance.

e. When a person is placed in pretrial confinement, he or she must be informed—

(1) Of the nature of the offenses for which held;

(2) Of the right to remain silent and that anything the person says may be used against him or her;

(3) Of the right to request the assignment of military counsel, to retain civilian counsel at no expense to the government; and

(4) Of the procedures by which pretrial confinement will be reviewed, that is:

(a) That, if he or she has not already done so, the accused's commander will decide, within 72 hours, whether to approve pretrial confinement;

(b) That within 7 days of the imposition of confinement the grounds for pretrial confinement will be reviewed by a neutral and detached officer;

(c) That the accused and his or her counsel may present written matters to the reviewing officer and may, if practicable, appear before the reviewing officer and make a statement;

(d) That the accused may pre-

sent additional information to the reviewing officer at a later time; and

(e) That the accused may ask the military judge to review these matters at trial.

f. When a person is placed in pretrial confinement, within 72 hours that person's commander must prepare a written memorandum of the grounds for pretrial confinement.

(1) If the commander prepared the initial confinement order, and if it contains sufficient grounds for pretrial confinement, a second document need not be prepared.

(2) The memo may be a statement on the back of the confinement order and may incorporate other documents, such as witness statements, MP reports, etc., by reference.

g. Pretrial confinement will be reviewed for legal sufficiency by a neutral and detached officer within 7 days of imposition. (R.C.M. 305(i))

(1) This is consistent with the current Magistrate Program in the Army.

(2) The accused is entitled to counsel before such review is accomplished. (R.C.M. 305(f))

h. The legality of pretrial confinement may be reviewed by the military judge on motion at trial. The remedy for substantial violations of R.C.M. 305 (that is, subsections (f), (h), or (i)) is 1-1/2 days credit against the sentence for each day of confinement served as a result of the violation. (R.C.M. 305(j), (k))

i. Under very recent care law, *U.S. v. Allen*, 17 M.J. 126 (C.M.A. 1984) the accused must receive credit for pretrial confinement relating to the offense for which a sentence was adjudged on a 1-for-1 basis.

C. Initial disposition.

1. R.C.M. 306 sets out the authority of commanders to dispose of offenses and describes the options available to a commander to dispose of offenses.

2. Other rules, or Part V of the new Manual, provide more detailed requirements concerning the various options. R.C.M. 306 includes cross-references to these provisions.

3. Thus, R.C.M. 306 is the logical starting point for a commander in deciding initially how to proceed to dispose of an offense.

4. R.C.M. 306 establishes that every commander has authority to dispose of an offense, with certain limitations and subject to such authority being withheld by a superior authority.

5. It also continues the policy that offenses be disposed of at the lowest appropriate level.

6. The options listed in R.C.M. 306 for disposition of an offense are:

a. Take no action.

b. Administrative disposition.

c. Nonjudicial punishment under Article 15.

d. Disposition of charges under R.C.M 401.

e. Forwarding to another commander for disposition.

D. Preferral of charges.

1. R.C.M. 307 provides requirements for legally sufficient charges and specifications.

2. The discussion provides detailed guidance concerning preparation of charges and specifications.

3. In addition to R.C.M. 307, each para-

graph dealing with specific offenses in Part IV contains sample specifications to assist in the preparation of charges.

a. Remember that those samples are only guides.

b. When in doubt about how to prepare a specification, you should:

(1) Examine the elements and the explanation under the same paragraph pertaining to that offense.

(2) Examine R.C.M. 307 and the discussion under it.

(3) Seek advice from a judge advocate.

c. Appendix 4 provides a new, shorter format for the charge sheet. It is no longer necessary to list witnesses and other evidence on the charge sheet.

E. Notification to accused. R.C.M. 308 continues the current requirement that the immediate commander notify the accused when charges are preferred. This notice must include the identity of the accuser, including the name of any person who ordered the charges preferred, if known to the commander.

F. Pretrial investigation.

1. R.C.M. 405 makes no major changes in Article 32 investigations.

2. The rule, however, provides greater detail on the duties of the investigating officer and the conduct of the investigation.

3. Appendix 5 also provides a new form for the IO's report. The form should be useful as a guide in conducting the investigation.

4. The Military Justice Act of 1983 amends Article 34(2)(a) to reflect that the Article 32 investigation may be waived by the accused. Any waiver must be knowing and voluntary, signed by accused and counsel, and made part of the record.

5. The government may require the investigation regardless of such waiver.

G. Pretrial advice. R.C.M. 406.

1. The SJA's pretrial advice will be shorter; no summary of evidence is required.

2. The SJA must state whether the specifications allege offenses, are warranted by the evidence and are subject to court-martial jurisdiction.

3. If the answer to any of the above questions is no, the charges may not be referred to a general court-martial.

H. R.C.M. 501-506 provide guidance on convening courts-martial and on the qualifications and duties of court-martial personnel. [FOR LEGAL CLERKS] The requirements for convening orders are reduced. Sample orders are contained in Appendix 6. AR 27-10 should also be consulted. The following new provisions are highlighted:

1. R.C.M. 503—The convening authority does not have to select the military judge or counsel for courts-martial. AR 27-10 will prescribe regulations providing for the manner in which military judges and counsel are detailed for courts-martial. Written orders reflecting the detail or the military judge and counsel are not required.

2. R.C.M. 505—The convening authority may delegate authority to excuse up to one-third of the total court members before assembly to the SJA or other principal assistant. After assembly, the military judge may excuse court members for good cause.

I. R.C.M. 601-604 concern referral of charges, service of charges on the accused, amendment of charges, and withdrawal of charges. Once again, there

are no major changes from current law, but you should be aware of several matters.

1. Before charges may be referred to any court-martial, the convening authority or a judge advocate must find that there are reasonable grounds to believe that a court-martial offense has been committed, that the accused committed the offense, and that each specification alleges an offense. (R.C.M. 601(d)(1))

2. The convening authority has discretion whether to try charges jointly (that is, at a single court-martial) or separately. It is ordinarily more efficient, and preferable, to dispose of all offenses at a single trial. (R.C.M. 601(e)(2))

3. Referral or other action on charges by a subordinate does not bar a superior authority from considering the matter and ordering a different disposition, subject generally to the rules which govern withdrawal of charges and double jeopardy. (R.C.M. 601(f))

4. No charge or specification may be referred to a general court-martial unless the convening authority has been advised by the staff judge advocate that:

   a. The specification alleges an offense under the Code;

   b. The specification is warranted by the evidence indicated in the report of investigation if there is such a report; and,

   c. The court-martial has jurisdiction over the accused and the offense. (R.C.M. 601(d)(2))

J. Discovery.

1. The rules codify the liberal discovery practice which has long been used in courts-martial.

2. These do not affect you directly, but you should be generally aware of them because your actions with respect to statements and other evidence may result in litigable issues at a court-martial.

3. Of primary importance is avoiding the loss or destruction of witness statements, reports or other evidence (including unsworn, handwritten statements and recordings).

   a. Whether these matters must be produced in a given case is for counsel and, ultimately, the military judge to decide.

   b. This is true even if there is a claim of privilege or other apparent reason not to disclose the matter.

   c. Loss or destruction precludes a judicial determination of the matter and may result in other relief, including exclusion of relevant evidence or dismissal of charges.

4. The rules governing these matters are R.C.M. 701 and 914.

K. Immunity for witnesses is covered in R.C.M. 704. Only a GCM convening authority can grant immunity and the rule provides specific procedures for doing so.

L. Speedy trial.

1. R.C.M. 707 establishes a specific speedy trial standard for all cases.

2. Charges must be brought to trial (that is, when a guilty plea is entered or evidence on the merits is introduced) within 120 days of *either*:

   a. The imposition of *any* restraint for an offense (including restriction to post); or,

   b. Notice to the accused of preferral of charges. (Note that this applies even if the accused is not in restraint.)—WHICHEVER IS EARLIER!

3. Failure to meet the standard requires dismissal of the charges.

4. In addition, an accused must be released from pretrial confinement after 90 days (the military judge may grant an extension of 10 days).

5. The rule contains several circumstances which are excluded when calculating whether the 90 or 120 day period has run.

   a. These include delays requested, agreed to, or caused by the defense; delays because of unusual problems in preparing the case of securing the presence of witnesses; delays because of military operations or other exigency; and others.

   b. On the whole the rule is flexible and makes allowances for unusual problems or matters beyond the control of the command or the prosecution.

6. Nonetheless, it places a burden on everyone involved in processing a case to move the case with promptness. Once an accused is restrained or told he is under charges, *whichever is earliest*, the clock is ticking.

[NOTE TO INSTRUCTOR: The speedy trial requirements under *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971), are somewhat more stringent than under this rule. Students should be reminded that, until the Court of Military Appeals modifies *Burton*, judicial decisions may require stricter standards when the accused is in arrest or confinement.]

M. Chapters 8 through 11 deal with trial procedure and do not affect you directly. A few provisions merit mention, however.

1. Appearance of accused.

   a. The 1969 Manual makes the trial counsel responsible for the accused's appearance, including ensuring the accused is in a proper uniform.

   b. R.C.M. 804 shifts this burden to the accused and defense counsel. However, upon request, the accused's commander must render reasonable assistance in this regard. This is important, for example, when the accused is in the field or in confinement.

2. Government appeal.

   a. Prior to the Military Justice Act of 1983, the government had no right to appeal certain adverse rulings by the military judge. In order to achieve parity with federal civilian court procedures, Article 62, UCMJ, was amended.

   b. Article 62 and R.C.M. 908 permit the government to appeal adverse rulings of military judges presiding at BCD SPCMs and GCMs that terminate proceedings with respect to a charge and specification, or which exclude evidence.

   c. Trial counsel or superior decides whether to file notice of appeal.

   d. Notice of appeal must be given to the military judge within 72 hours of the ruling stating:

      (1) The identity of the ruling or order to be appealed.

      (2) The charges and specifications affected.

      (3) That the appeal is not taken for the purpose of delay.

      (4) That the evidence excluded is substantial proof of a fact material in the proceeding if the order or ruling appealed is one which excludes evidence.

   e. At this point a verbatim record of the relevant parts of the proceeding must be prepared.

   f. The record is forwarded to a designate of TJAG (GAD under AR 27-10) to decide whether to file the appeal.

g. The appeal is forwarded directly to ACMR and, where practicable, receives priority over pending appellate reviews.

h. This provision does not permit appeal of rulings amounting to a finding of not guilty.

3. Sentencing.

a. R.C.M. 1001 permits the prosecution to introduce more evidence on sentencing than it now can. This includes:

(1) Aggravation evidence such as the direct effect of the offense on the victim or on the unit.

(2) Opinion evidence of rehabilitative potential of the accused, whether or not the accused presents character evidence.

b. R.C.M. 1003 lists the punishments a court-martial may adjudge. Admonition and detention of pay are no longer authorized.

c. R.C.M. 1004 provides additional procedures for capital cases.

N. R.C.M. 1101 governs posttrial confinement and deferment of confinement.

1. When confinement is adjudged, any commander of the accused may order the accused into confinement.

2. The rule permits this authority to be delegated to the trial counsel.

3. The commander is not required to order a person into confinement when confinement is adjudged. However, that person receives credit for confinement beginning from the day it is adjudged, unless confinement is deferred.

4. Confinement may be deferred only by the convening authority or, if the accused is no longer in the convening authority's jurisdiction, by the officer exercising general court-martial jurisdiction over the accused. Moreover, confinement may be deferred only upon written request by the accused.

O. R.C.M. 1103 governs preparation of the record of trial and recognizes modern technology by allowing the Service Secretaries to permit general and special courts-martial to be recorded by videotape, audiotape, or similar material. This authority is likely to be sparingly used.

P. R.C.M. 1105-1106 establish procedures for the SJA recommendation and for the accused's submission of matters for the convening authority to consider prior to action on the case.

1. The convening authority must be notified promptly of the results of trial.

2. For GCMS and BCD SPCMS, the accused has 30 days from date of sentence to submit matters to the convening authority for consideration in his action (may be extended 20 days with good cause), or 7 days from receipt of record of trial (may be extended to 10 days), whichever is later.

3. For SPCMS, the accused has 20 days from date at sentence to submit matters or 7 days from receipt of record of trial. For SCMS, 7 days (all these times may be extended 10 days with good cause).

4. Accused may waive the right to submit matters.

5. No posttrial review but a written recommendation from the SJA containing matters relevant to sentencing.

a. No legal review is required but SJA may comment on whether corrective action is required and must do so if defense alleges error. No explanation is required for the SJA's conclusions, however.

b. SJA recommendation must be

served on DC before submission to CA. Codifies the 5 day *Goode* requirement.

Q. R.C.M. 1107. Convening authority's action.

1. CA need not review case for legal error or factual sufficiency. CA may, however, in the exercise of command prerogative, disapprove or reduce the severity of the findings of guilty, and may approve, disapprove, reduce, change, or suspend the sentence.

2. CA may not correct errors, but is not required to. CA may direct rehearing.

3. In other words, CA retains same powers as under MCM, 1969, but without the responsibility to review for legal error.

R. R.C.M. 1108 covers suspension of court-martial sentences. R.C.M. 1109 covers vacation of suspension.

1. Once again there are no major changes in this section.

2. Note that when the sentence is suspended, the accused must be notified of this and of the conditions on suspension, in writing.

3. Appendix 18 contains the report to be used in vacating suspensions involving GCM sentences or special courts-martial involving a BCD.

S. [For Legal Clerks] Action, execution, orders.

1. R.C.M. 1107 covers the convening authority's action.

a. The rule does not require that the action designate a place of confinement if secretarial regulations provide for this. You should consult AR 27-10 as to this matter.

b. Appendix 16 provides sample actions, including several new ones. Again these should be consulted in conjunction with AR 27-10.

c. Action on the findings is not required. If any findings of guilty are disapproved, the action must specifically say so (even if the sentence is disapproved).

d. The action must be served on accused or defense counsel.

2. R.C.M. 1113 covers execution of sentences.

a. Unlike under MCM, 1969, parts of the sentence may be ordered executed at different times. Thus, even if a sentence includes a punitive discharge which is not final, other parts of the sentence may be ordered executed in the initial action.

b. All parts of a sentence, except death, dismissal, dishonorable discharge, or bad-conduct discharge, may be ordered executed by the convening authority in the initial action.

c. Forfeitures are no longer applied, and their execution is not contingent on whether the sentence includes confinement. Forfeitures may always be ordered executed in the initial action. Forfeitures may not be deferred. (They may be suspended, of course)

d. If authorized by the Secretary, the action need not designate a place of confinement. (Check AR 27-10)

3. R.C.M. 1114 covers promulgating orders.

a. The requirements for promulgating orders are reduced to permit a more streamlined order.

b. The same information is still required—but much of it can be summarized.

c. Only the action is required to be reproduced verbatim.

d. The charges and specifications can be summarized. The summary

must be accurate, however.

e. Appendix 17 provides sample forms.

f. AR 27-10 should be consulted for additional requirements and guidance.

T. Appellate Review: R.C.M. 1110, 1112, 1205.

1. R.C.M. 1110 implements the complete revision of Article 61 allowing the accused to waive appellate review under Articles 66 and 69a.

a. The accused has 10 days after notice of the convening authority's action to file a statement waiving appellate review. (*See* Appendices 19 and 20, MCM)

b. The accused must consult with counsel.

c. The 10 day limit may be extended to 30 days upon a showing of good cause.

d. The accused may also withdraw any appeal already commenced.

e. Once submitted, a waiver or withdrawal may not be revoked.

f. Does not apply to cases in which the death penalty has been approved.

2. R.C.M. 1112 requires a judge advocate review of all special courts-martial and summary courts-martial and in each general court-martial or BCD special court-martial in which the accused has waived or withdrawn appellate review.

3. R.C.M. 1205 implements one of the most significant changes in the military justice system: review by the U.S. Supreme Court.

U. Chapter 13 provides specific rules for summary courts-martial.

1. There are no basic changes in summary courts-martial. R.C.M. 1304 provides in detail the procedures for SCMs.

2. Appendix 9 contains a trial guide specifically for SCMs.

3. Appendix 15 provides a form for the record of trial at a summary court-martial. The record is now separate from the charge sheet. The record may be useful to the SCMO as a checklist during trial.

4. The rule provides no right to consult with counsel before deciding whether to object to trial by summary court-martial. This is left to service regulations and local practice.

[NOTE: Under current case law from the Court of Military Appeals, records of conviction by SCM in which the accused was not afforded the opportunity to consult with counsel before deciding whether to object to trial by summary court-martial are inadmissible at a later court-martial. *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980)]

V. Military Rules of Evidence. There are several changes in the search and seizure area of which commanders should be aware.

1. Inspections.

a. Mil. R. Evid. 313 has been modified in two respects, based on recent judicial decisions. (*United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981), *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983))

(1) The rule expressly states that compulsory urinalysis is a permissible part of an otherwise valid inspection.

(2) The test to determine whether an inspection which includes as its purpose the discovery of weapons or contraband is valid has been modified.

(a) Under the new test a commander may inspect for weapons and contraband as

long as the inspection is not a subterfuge for a search; in other words, is not for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings.

(b) An inspection for weapons or contraband is not proper if: (i) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (ii) specific individuals are selected for examination; or (iii) persons examined are subjected to substantially different intrusions during the same examination—*unless* it can be established by clear and convincing evidence that the primary purpose of the examination was not to secure evidence for a court-martial or disciplinary proceeding.

(c) Thus it is permissible to inspect for contraband and weapons. Such an inspection should not single out specific individuals or immediately follow a report of an offense unless the commander has—and is satisfied he can establish by clear and convincing evidence—a nonprosecutorial purpose for the examination.

2. The test for probable cause has been modified, based on a recent Supreme Court decision (*Illinois v. Gates*, 76 L. Ed. 2d 527 1983). (Mil. R. Evid. 315(f), 316(b))

a. The test is somewhat less technical now, and depends on the totality of the circumstances.

b. Most of what you have learned previously concerning probable cause is still valid—you should still seek to check out the reliability of persons on whose reports probable cause is based, and how they came by their information.

c. The rule allows somewhat greater latitude—and common sense—in making the decision whether probable cause exists.

3. [For MPs] Two important changes, based on recent Supreme Court decisions, are made for vehicles. (*Michigan v. Long*, 103 L. Ed. 2d 1201 (1983), *New York v. Belton*, 453 U.S. 454 (1981))

a. Mil. R. Evid. 315(f) is modified to authorize a limited search of the passenger compartment of an automobile pursuant to lawful temporary detention of the driver or a passenger in the car.

(1) The stop must be lawful, although it need not be a formal apprehension. To be lawful it must be based on at least a reasonable suspicion that an offense is being committed.

(2) The passenger compartment may be searched *for weapons only* under this rule—not for other evidence such as contraband (specific probable cause that such matter was present would be required for such a search). (*See* Mil. R. Evid. 315(g)(3))

(3) The law enforcement official must have a reasonable belief that the person stopped is dangerous and that he or she may gain immediate control of a weapon from the car. (Thus,

MPs cannot automatically search the passenger compartment incident to a lawful *stop*)

b. Mil. R. Evid. 315(g) is modified to authorize a complete search of the passenger compartment of an automobile incident to a lawful apprehension.

(1) If the person being apprehended (that is, taken into custody) is the driver or passenger of an automobile, the passenger compartment of that auto may be searched.

(2) The search is not limited to weapons, and there need be no probable cause or even suspicion that weapons, contraband, or evidence are present.

(3) This search may take place even if the apprehendee has been removed from the vehicle and cannot return to it.

W. Punitive articles.

1. No major changes were made in the discussions under most of the punitive articles.

2. Some of the maximum punishments were adjusted. For example, for several offenses, such as robbery and aggravated assault, the maximum penalty is higher when the offense is committed with a firearm.

3. Several offenses are newly listed under Article 134. These include—

a. Kidnapping (¶ 92).

b. Bomb threat (¶ 109).

c. Destruction of evidence to prevent its seizure (¶ 103).

d. Prostitution (¶ 97).

e. Fraternization—by officers with enlisted persons (¶ 83).

[NOTE that such conduct—and similar conduct between NCOs and junior enlisted persons—may also be governed by regulations.]

X. Nonjudical punishment.

1. The new MCM provides basic rules and procedures for nonjudicial punishment under Article 15.

2. More detailed procedures are provided in service regulations—so AR 27-10 must be examined carefully before administering nonjudicial punishment.

3. The basic procedure for nonjudicial punishment in the new MCM is substantially the same under the previous procedure.

a. If NJP is considered appropriate, the member is entitled to notice of this and of certain specified information to assist in deciding whether to demand trial by court-martial or to prepare for NJP.

(1) This information is described in paragraph 4a., Part V, MCM.

(2) This information will be included on the new Article 15 form.

b. The Manual provides no right to consult with counsel before accepting NJP. This will be left to service regulations and local practice. [NOTE: Under current case law from the Court of Military Appeals, records of NJP imposed without affording the accused the opportunity to consult with counsel before deciding whether to demand trial by court-martial are inadmissible at any later court-martial. *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980)]

c. The remaining procedures for NJP are consistent with current requirements.

4. Detention of pay is eliminated as an authorized punishment.

5. Additional guidance on suspension of

punishment and vacation of punishment is provided in paragraph 6.

6. The time for appeals and action on appeals of NJP has been modified (¶7d).

   a. The member must file an appeal within 5 days of imposition of punishment. Failure to file a timely appeal waives the appeal unless the member demonstrates good cause for the later filing. (Service regs may provide a longer appeal period.)

   b. The member may be required to serve any punishment while the appeal is acted on, except that if action is not taken within 5 days after the appeal is filed, any unexecuted punishment involving restraint or extra duty must be stayed pending action on the appeal if the member so requests. If the punishment is stayed, it begins to run when action is taken on the appeal (unless the punishment is set aside).

   c. Consult AR 27-10 for any modifications to timeliness of the appeal.

Y. Appendices.

1. Several (charge sheet, Article 32 investigation report, record of trial by summary court-martial, sample convening and promulgating orders, and sample actions) have been mentioned.

2. Commanders should also be aware of Appendix 3, which contains the new Memorandum of Understanding between DOD and the Department of Justice relating to the investigation of crimes over which the two departments have concurrent jurisdiction.

3. [For legal clerks] Legal clerks should also be aware of Appendix 7, which contains a form for subpoenas and for travel orders [*See* R.C.M. 703 concerning production of witnesses].

4. Appendix 12 contains a chart of maximum punishments for quick reference.

IV. Conclusion.

A. As with any change, there will be some initial questions and adjustments during the transition to the new MCM.

1. These will be experienced by lawyers as well as others.

2. Still, your SJA or other legal advisor should be able to resolve most problems.

B. As you begin to use the new MCM, you should find it easier to use and that it answers most common questions.

C. The Joint-Service Committee will monitor the new MCM closely.

1. If problems are identified it will consider possible remedies.

2. If you encounter significant problems with the new MCM, bring them to the attention of your SJA—if appropriate, the SJA can forward the matter to the Army representative on the Joint-Service Committee.

D. Remember that rules are no better than the people who apply them. Common sense and good leadership principles are as important as any specific rules in the Manual.

Legal Assistance Items

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

Illinois Adopts No-Fault Divorce Law

The Illinois legislature has amended the Illinois Marriage and Dissolution of Marriage Act to provide for no-fault divorce in the state. The legislation, recently signed by the state's governor, takes effect July 1, 1984. It permits dissolution of marriage after a six-month voluntary separation. It also provides for a no-fault divorce in a contested divorce action where there has been a two-year separation or if reconciliation attempts have failed or would be impracticable because of irreconcilable differences causing the irretrievable breakdown of the marriage. South Dakota is now the only remaining state without some form of no-fault divorce.

Identification Cards for Former Spouses

The Adjutant General's Center, Department of the Army, local military personnel offices, identification card offices, retirement services offices, and legal assistance attorneys continue to receive inquiries from former spouses of military retirees and active duty personnel concerning their eligibility for an identification card under the Uniformed Services Former Spouses' Protection Act (USFSPA).

The USFSPA, which took effect February 1, 1983, authorizes a limited number of unremarried former spouses of military members an entitlement to certain military benefits and privileges. AR 640-3, Identification Cards, Tags, and Badges, is being changed to reflect changes made by the USFSPA.

Pending that change, however, considerable confusion exists among identification card offices, legal assistance attorneys, and former spouses concerning eligibility. Numerous cases have been reported of ineligible former spouses receiving identification cards entitling them to medical, commissary, exchange and theater privileges. Because of that, the following guidance has been provided by the Adjutant General's Center, Department of the Army:

Commissary, exchange and theater privileges are authorized to an unremarried former spouse of an active military member or a retired military member if (1) the marriage ended in a final divorce, dissolution or annulment dated February 1, 1983 or thereafter, and (2) the marriage lasted for at least twenty years during which the military member had at least twenty years of service creditable toward retirement, and (3) the former spouse has not remarried. Unless all three conditions are met, then the former spouse will not be eligible for an identification card.

CHAMPUS and military medical care are authorized if the three conditions specified above are met *and* if the former spouse does not have medical coverage under an employer-sponsored health plan. If the former spouse is entitled to Medicare, then CHAMPUS is not authorized. (Although the USFSPA ties eligibility to commissary, exchange and theater privileges to the employer-sponsored health care plan limitation because of inartful legislative drafting, the Adjutant General's Corps will not apply this limitation. That is, the USFSPA indicates that in order to qualify for commissary, exchange or theater privileges, the former spouse must not have an employer-sponsored medical plan.)

To issue the identification card, the following steps are required:

The former spouse applies for the identification card on DD Form 1172 with military sponsor data listed in blocks 1-10 of the form completed. In block 12, the former spouse places "URFW" (unremarried former wife) or "URFH" (unremarried former husband) and the former spouse signs block 62.

The former spouse then submits the application with the following documentation: (1) the final divorce, dissolution or annulment decree dated February 1, 1983 or thereafter; (2) the marriage certificate; and (3) additional documents depending upon whether the sponsor is retired or remains on active duty.

For retirees, the former spouse submits a DD Form 214 reflecting twenty years service. Personnel processing the application are directed to check to see that the marriage-to-divorce period includes at least twenty years listed on the DD Form 214, or, if the applicant is the former spouse of a reservist, insure that the application is accompanied by a statement from the Reserve Components Personnel Action Center (RCPAC) certifying dates of service reflecting at least twenty years total service. A sample letter which former spouses of reservists may use to request verifying data from RCPAC follows this item.

For former spouses of service members who remain on active duty, the following statement from the sponsor's military personnel office is required:

> A review of the personnel file of *(grade, name and SSN)* reveals that the entry on active duty date was *(enter BASD)* and has been continuous until this date, or breaks in service occurred *(date from)(date to)* and the total active duty time equals or exceeds twenty years.

To receive CHAMPUS or military medical care, the former spouse must write in block 60 of the application: "I hereby certify that I do not have medical coverage under an employer-sponsored health plan." In most cases, the medical care effective date for the unremarried former spouse will be the original medical care effective date for the individual since continuous CHAMPUS coverage exists for a spouse and for an unremarried former spouse under USFSPA. Should a former spouse initially not be authorized military medical benefits because of an employer-sponsored health plan, and this employer coverage is later lost, the medical care effective date would be the date of the loss of the employer-sponsored plan.

The military services recently entered into a cross-servicing plan in which personnel or dependents of one service may apply for and be issued identification cards at identification card facilities of other services. This cross-servicing agreement, however, does not apply to former spouses. These applicants must apply at an installation of the member's parent service.

Personnel processing applications by former spouses for identification cards are directed to ask to see the former spouse's current identification card. If the former spouse is not entitled to a new card and is carrying an invalid old card, the old card is to be confiscated and a change made in the DEERS database reflecting termination of benefits, effective back to the date of the final divorce decree.

Personnel who verify identification card applications are directed to carefully examine all documents because of the explicit provisions of the USFSPA and because many ineligible former spouses, unaware of the limitations contained in the law, are seeking benefits.

Legal assistance and administrative law attorneys should be familiar with the conditions under which former spouses may be issued identification cards and the requirements for processing applications because the Adjutant General has directed that local adjutant general officers responsible for processing applications obtain guidance from local staff judge advocates in difficult or questionable determinations.

The Legal Assistance Center, TJAGSA, and the Personnel Services Inquiries Office, DAAG, Washington, D.C., continue to receive inquiries from the field concerning whether there are any circumstances under which a former spouse who does not meet the requirements of the USFSPA may be issued an identification card. The Personnel Services Inquiries Office has advised the Legal Assistance Branch of the following:

If the former spouse does not qualify for an identification card under USFSPA but has a medical condition caused by or attributable to accompanying the service member or retiree on military service tours, the Secretary of the Army may authorize limited medical treatment for the injury or illness. For example, if the former spouse, as the result of accompanying the service member or retiree on a tour of duty in Panama, contracted malaria, the Secretary of the Army has the authority to authorize medical treatment for the former spouse for that condition. Privileges would not be extended for commissary, exchange or theater purposes.

Should a former spouse appear to meet all eligibilty criteria but does not have, or cannot obtain from her former spouse, a DD Form 214 to document twenty years service, the former spouse should send the following letter:

SUBJECT: Statement of Service

Commander
US Army Reserve Components Personnel & Administration Center
ATTN: AGUZ-PSE-VC
9700 Page Boulevard
St. Louis, Missouri 63132

Request you provide an official statement of military service creditable for the retired pay on the Army retired member identified below:

Last name, first name, middle initial, SSN

This information will be used to verify former spouse benefit eligibility under PL 97-252.

Former spouse signature & return address

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Army Physical Readiness Test Requirements

Reserve Component personnel are reminded that, effective 1 October 1983, Army Regulation 350-15 requires that you take and pass the three-part Army Physical Readiness Test (APRT) at least once a year. Testing will normally be conducted during Annual Training (AT) for Troop Program Unit (TPU) personnel because of the lack of full medical coverage during Inactive Duty Training (IDT). Individual Ready Reserve (IRR) members will be administered the APRT when placed on tours of 12 days or longer.

The APRT requirement applies to all personnel up to age 40 and those 40 and over who have been medically screened and cleared. Those 40 and over who have not undergone the prescribed medical screening are precluded from taking the APRT and will satisfy their APRT requirement by completing the four-mile march in one hour. *See* letter, RCPAC, 15 July 1983, subject: New Army Physical Fitness Standards and Policy on Drug Abuse, for further details.

IMA Items

IMAs and IMA organizations are reminded that annual training (AT) is scheduled by the organization of assignment in coordination with the IMA. Paragraph 4-4, AR 140-145 requires that the request for AT orders be forwarded to ARPERCEN no later than 60 days prior to the reporting date (but before 31 March each year). A few untimely requests have been submitted and returned for noncompliance.

If you are an IMA officer looking for a second tour during Fiscal Year 84, that may be feasible. If interested, contact the JAG Personnel Management Officer (PMO), Major Bate Hamilton, at ARPERCEN (Toll Free No. 1-800-325-4916; AV 693-7698; in Missouri call collect to (314) 263-7698). Major Hamilton has several Site Support Tours left to be filled. Most of them are for the grade of major or below.

IMA officers, be aware that you may earn extra retirement points by doing projects assigned to you by your organization to complete at home during the year. You will be awarded credit under AR 140-185.

Addendum

The Right to Financial Privacy Act: Tool to Investigate Fraud and Discover Fruits of Wrongdoing, the article which appeared in the November 1983 issue of *The Army Lawyer* at page 10, states that the Navy has not promulgated regulations to implement all sections of the Right to Financial Privacy Act. The Navy has, in fact, implemented the Act in Secretary of the Navy Instruction 5500.33, issued 23 June 1980, Subject: Obtaining information from financial institutions. The Naval Investigative Service has successfully used the Act to obtain financial information; in calendar year 1983, they made 179 requests for access to financial records by customer authorization, search warrant, judicial subpoena, and formal written request.

Enlisted Update

Sergeant Major Walt Cybart

Enlisted Training

Training for our enlisted personnel is a major concern throughout the Army. This concern has been voiced by soldiers at each installation I have visited since my appointment in June 1983.

Training for our legal clerks and court reporters falls into two major categories: common soldier skills and technical, MOS-related subjects. Of primary concern at this time is the technical training available for our legal clerks and court reporters. There are currently several training opportunities available to our personnel, ranging from formal (on location) courses to correspondence courses. Some of the available on location possibilities are:

1. Lawyer's Assistant Course.
2. Legal Clerk/Court Reporter Refresher Training Course.
3. Chief Legal Clerk/Senior Court Reporters Refresher Training Course.
4. Law Office Management Course.

A complete list of Army correspondence courses available to our enlisted personnel is in DA Pam 351-20, January 1984. Also, TJAGSA administers two courses for enlisted soldiers: Law for Legal Clerks, and Legal Administrator Course. Additionally, our personnel are eligible to take the AGNCOES Advanced Course for E-6—E-9, MOS 71D/71E/71L/71C, which consists of 41 subcourses available through Fort Ben Harrison.

In summary, training opportunities are available right now for our enlisted personnel and more are being developed. We, as supervisors, must ensure that all of our personnel take maximum advantage of what we have available, be it on location or correspondence courses. If we allow our soldiers to sit and wait for "something to happen," they will be left behind by the ones who took the initiative.

CLE News

1. 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 MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs 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, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

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).

May 22-25: Chief Legal Clerks/Court Reporter Refresher Training.

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

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training.

June 18-29: JAOC: Phase IV.

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

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 20-24: 8th Criminal Law New Developments (5F-F35).

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

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

October 2-5: 1984 Worldwide JAG Conference.

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

3. Civilian Sponsored CLE Courses

July

1-6: NJC, Evidence in Special Courts—Specialty, Reno, NV.

1-6: NJC, Civil Actions in Special Courts—Graduate, Reno, NV.

1-6: NJC, Court Management/Managing Delay—Specialty, Reno, NV.

1-13: NJC, Non-Lawyer Judge—General, Reno, NV.

1-13: NJC, Special Court Jurisdiction—General, Reno, NV.

3-6: NCLE, Institute on Estate Planning, Breckenridge, CO.

5-20: NCDA, Career Prosecutor Course, Houston, TX.

8-13: NJC, The Judge in Special Court—Graduate, Reno, NV.

8-13: NJC, Traffic Court Management—Specialty, Reno, NV.

8-13: NJC, Introduction to Computers & Technology in Courts—Specialty, Reno, NV.

11-13: PLI, Institute on Employment Law, San Francisco, CA.

14-21: CCLE, Dissolving a Colorado Marriage, Cortez, CO.

14-22: PLI, Trial Advocacy, New York, NY.

15-8/10: NJC, General Jurisdiction—General, Reno, NV.

15-27: NJC, New Trends—Graduate, Reno, NV.

15-27: NJC, Decision Making Process, Skills & Techniques—Graduate, Reno, NV.

15-20: NJC, Victims' Rights in General Jurisdiction Courts—Specialty, Reno, NV.

16-20: SBT, Advanced Civil Trial, Dallas, TX.

16-20: UDCL, Concentrated Course in Government Contracts, Vail, CO.

17-19: SBT, Arts & the Law, Santa Fe, NM.

19-21: GICLE, Fiduciary Law, Hilton Head, SC.

22-27: NJC, Advanced Computers & Technology in Courts—Specialty, Reno, NV.

22-27: NJC, Advanced Computers & Technology in Courts—Specialty, Reno, NV.

23-24: PLI, Workshops for Legal Assistants, San Francisco, CA.

23-27: SBT, Advanced Civil Trial, San Antonio, TX.

29-8/10: NJC, The Judge and The Trial—Graduate, Reno, NV.

29-8/3: NJC, Criminal Law—Graduate, Reno, NV.

29-8/3: NJC, Alternative Methods of Dispute Resolution—Specialty, Reno, NV.

30-8/3: FPI, Concentrated Course in Construction Contracts, Las Vegas, NV.

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 903, 2025 Eye Street, N.W., Washington, DC 20006. Phone: (202) 775-0083.

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, N.W., 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 Institute 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., N.W., 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.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

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, N.W., 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, DC 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, N.W., Washington, DC 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.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110.

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.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is 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.

Users are provided biweekly and cumulative indices. These indices are 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 TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B077550	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7
AD B077551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD B077552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD B077553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD B077554	Criminal Law, Evidence/ JAGS-ADC-83-11
AD B077555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD B078201	Criminal Law, Index/JAGS-ADC-83-13
AD B078119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1
AD-B077738	All States Consumer Law Guide/JAGS-ADA-83-1
AD-B079729	LAO Federal Income Tax Supplement/JAGS-ADA-84-2
AD-B077739	All States Will Guide/ JAGS-ADA-83-2
AD-B078095	Fiscal Law Deskbook/ JAGS-ADK-83-1

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

2. Videocassettes

The Television Operations Office of The Judge Advocate General's School announces that videocassettes from the 24th Federal Labor Relations Course, held 24 through 27 January 1984, are available to the field. Listed below are titles, running times, synopses and speakers for each program. If you are interested in obtaining copies of any of these programs, please send a blank 3/4" videocassette of the appropriate length to: The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

Tape #/Date Running Time	Title/Speaker/Synopsis
JA-292-1 Jan 84 60:20	**The Labor View of Federal-Labor Management Relations, Part I** Guest Speaker: Mr. Robert M. Tobias, President, National Treasury Employees Union discusses the union view of the federal labor-management relations program and his union's view of current issues of interest.
JA-292-2 Jan 84 44:32	**The Labor View of Federal-Labor Management Relations, Part II** A continuation of JA-292-1.
JA-292-3 Jan 84 41:41	**The Role of the Federal Labor Relations Authority and Important Cases Before the Authority, Part I** Guest Speaker: Mr. David L. Feder, Assistant General Counsel, the Federal Labor Relations Authority, discusses current issues of interest facing the Authority and the General Counsel's role in developing unfair labor practice procedures.
JA-292-4 Jan 84 51:00	**The Role of the Federal Labor Relations Authority and Important Cases Before the Authority, Part II** A continuation of JA-292-3.
JA-292-5 Jan 84 48:41	**The Role of OPM in Federal Employment, Part I** Guest Speaker: Mr. Joseph A. Morris, General Counsel, Office of Personnel Management (OPM) discusses the role of OPM in providing policy and guidance for federal agencies concerning the law of federal employment. He also outlines current OPM proposals aimed at reforming some areas of federal employment.
JA-292-6 Jan 84 50:40	**The Role of OPM in Federal Employment, Part II** A continuation of JA-292-5.
JA-292-7 Jan 84 18:33	**The Role of OPM in Federal Employment, Part III** A continuation of JA-292-5 and JA-292-6.
JA-292-8 Jan 84 43:39	**Practice Before the Merit Systems Protection Board and Appeals Arbitration, Part I** Guest Speaker: Ms. Deborah Stover-Springer, staff attorney, the Merit Systems Protection Board, discusses MSPB practice and procedures, and a new appeals procedure called appeals arbitration.
JA-292-9 Jan 84 45:08	**Practice Before the Merit Systems Protection Board and Appeals Arbitration, Part II** A continuation of JA-292-8.
JA-292-10 Jan 84 51:58	**The Role of the Labor and Civilian Personnel Law Office and Significant Recent Cases** Guest Speaker: Colonel Robert M. Nutt, Chief, Labor and Civilian Personnel Office, OTJAG, discusses the role of his office in advising installation labor counselors and current issues of interest facing these labor advisors.

3. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 135-18	Army National Guard and Army Reserve: Active Duty and Full-Time Duty in Support of the Army National Guard, National Guard of the United States, and the US Army Reserve.		1 Mar 84
AR 350-225	Survival, Evasion, Resistance and Escape Training.		15 Feb 84
AR 600-85	Alcohol and Drug Abuse Prevention and Control Program.	906	1 Feb 84
AR 635-200	Personnel Separation: Enlisted Separation	908	1 Feb 84
	*Morale, Welfare and Recreation UPDATE (Issue 1)		20 Feb 84

*This UPDATE contains key policy and procedures regarding Army morale, welfare and recreation activities and nonappropriated fund instrumentalities.

4. Articles

Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 Ind. L.J. 1 (1982-1983).

Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 Ind. L.J. 59 (1982-1983).

Coleman, *Federal Preemption of State Law Prohibitions on the Exercise of Due-on-Sale Clauses*, 100 Banking L.J. 772 (1983).

Massaro & O'Brien, *Constitutional Limitations on State-Imposed Continuing Competency Requirements for Licensed Professionals*, 25 Wm & Mary L. Rev. 253 (1983).

Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95 (1983).

Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. Fla. L. Rev. 422 (1983).

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By Order of the Secretary of the Army:

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