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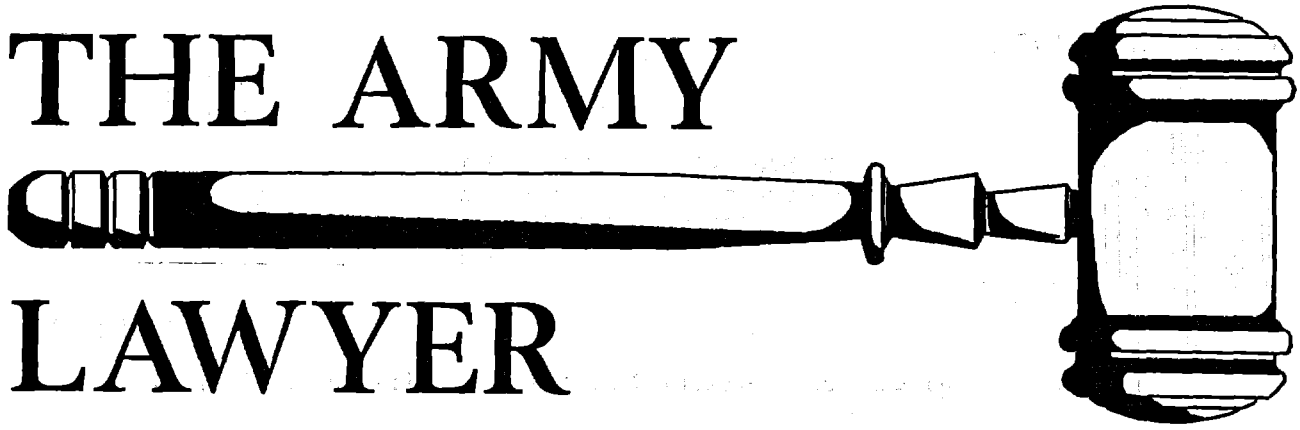
THE ARMY LAWYER



Headquarters, Department of the Army

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May 1984

Table of Contents

The First Gilbert A. Cuneo Lecture The Adversarial Relationship in Government Contracting: Causes and Consequences

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Introduction

The Gilbert A. Cuneo Chair of Government Contract Law was dedicated at The Judge Advocate General's School on 9 January 1984, during the 1984 Government Contract Law Symposium. Mr. Cuneo taught government contract law at The Judge Advocate General's School at the University of Michigan Law School from 1944-1946. He served as an administrative judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals, from 1946-1958, at which time he entered private practice in Washington, D.C. Mr. Cuneo was an Honorary Life Member of the National Contract Management Association, a member of its National Board of Advisors, and a recipient of numerous awards and citations from the Association.

For thirty years, Mr. Cuneo, a pioneer in his field, wrote and lectured extensively on all aspects of government contract law. As a commentator on developments in the field of government contract law and as a premier litigator, Mr. Gilbert A. Cuneo shaped much of the

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310

REPLY TO ATTENTION OF
DAJA-LTT

15 MAR 1984

SUBJECT: Medical Care and Property Damage Recovery Programs, AR 27-40

ALL STAFF JUDGE ADVOCATES

1. In 1983, we made record high recoveries for both medical care ($8.2 million) and property damage ($1.1 million). This is a combined increase of over a million dollars from 1982.

2. I commend the many of you whose fine recovery programs produced this increase. I challenge you to do even better this year.

3. In reviewing the statistics, I do note a few problem areas. These offices should review their programs and take action to insure all potential recoveries are identified, asserted, and completed in a timely manner.

4. Affirmative claims are an important part of the Army's fiscal policy. Wherever recovery is possible, consistent with applicable law and regulation, it will be vigorously pursued.

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

present law of government contracts and, until this death in April 1978, was the unanimously recognized dean of the government contract bar.

The first Gilbert A. Cuneo Lecturer, Mr. John E. Cavanagh, served in the Army during World War II, attaining the grade of Major. He joined the Lockheed corporate legal office in 1956. He has served as assistant and company counsel of the Lockheed Missiles and Space Company, chief counsel, vice president and general counsel, and senior vice president and general counsel of the Lockheed Corporation. Mr. Cavanagh was elected senior vice president—special assistant of Lockheed in April 1983. Since his retirement from Lockheed in February 1984, he has been a partner in the Los Angeles office of McKenna, Conner & Cuneo. He is a member of the California and District of Columbia bars.

Mr. Cavanagh is a member of the Advisory Board of the Federal Contracts Report, published by the Bureau of National Affairs. From 1969-1972, he was a member of the Council of the Section of Public Contract Law of the American Bar Association and is at present chairman of the General Counsel's Advisory Committee of the Section; from 1970-1974, he was chairman of the Committee of Aerospace Law of the ABA.

Following is the text of the first Cuneo Lecture, given by Mr. Cavanagh after the dedication of the Cuneo Chair on 9 January 1984.

Gil Cuneo—A Brief Recollection

Mrs. Cuneo, Miss Cuneo, General Bednar, Colonel Murray, ladies and gentlemen. I am honored and I am touched at being given the opportunity to deliver the first Annual Gilbert A. Cuneo Lecture—honored because Gil was truly preeminent in the government contract field, touched because he was a warm and valued friend over a long period.

His preeminence as a lawyer reflected his high intellectual ability and his scholarship. It resulted, too, from other qualities which made him an invigorating and heartening person to be with. The one which stays with me most clearly is the enthusiasm and energy he brought to whatever he did. He showed this quality when I first met him in the early 1950s, he showed it when I last saw him over twenty-five years later after his long confinement to a wheelchair and a terribly draining illness. A second quality was his ability to discuss and explain extremely complicated subject matter in clear, understandable terms. He could present this kind of translation from the arcane to the plain with deceptive ease; the sophisticated mental process that lay behind the clear explanation did not show. He felt no need to make a show of

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his learning, his intellect or his experience. He was willing to stand on the merits of what he had to say.

The combination of these qualities made Gil a marvelously reassuring trial counsel for the management of a company beset with life-or-death litigation. I know because I was the legal counsel at that company. Those qualities also made him a superb teacher. He taught not only lawyers, but accountants, contract administrators, auditors and managers—thousands of them in total—at lectures, seminars, symposiums and meetings from one end of the country to another. He gave them practical knowledge and advice; what is more important he gave them a sense of the government contracts field as a significant specialty and a profession.

Gil's professional accomplishments, his leading role in forming and nurturing the Public Contracts Section of the American Bar Association, his skill as an advocate are all well recognized and in the public record. My memories are of enjoying the hours I spent with Gil, whether we were attending ABA meetings, socializing, or struggling with some of those overwhelming cases he handled for us. He was quite a man!

There is a seeming anomaly in the fact that Gil Cuneo, a tireless and energetic litigator of claims against the government, should have been deeply concerned at the growing adversarial relationship between the government and its contractors. This concern was consistent, however, with his view that litigation, particularly at the level of the boards of contract appeals, should be an orderly and expeditious means of resolving disputes so as to cause minimal interference with the procurement process. For all his high intellectual ability and delight in exploring the nuances and complexities of the law, he was a pragmatist. Litigation to him was a means to an end; the goal should be to further contract performance, not disrupt it. His concept of a board of contract appeals proceeding was deeply rooted in the original War Department Board of Contracts Appeal practices: discovery consisted of telephone calls agreeing on what documents were relevant; trial consisted of an informal hearing, and briefs, while giving recognition to the relevant laws and regulations, centered on equitable principles.

In discussions with members of the British bar at an American Bar Association annual meeting in London, Gil was struck by the contrast between the quasi-partnership relationship between the government and its contractors in the U.K. and the adversarial nature of the federal procurement process in this country. The adversarial characteristic which concerned him at that time is even more pronounced now. Litigation before the boards of contract appeals has become far more formalistic and time-consuming. Of even more concern is the fact that the entire procurement process has become increasingly contentious—indeed, destructively so.

If he were with us today, Gil Cuneo's concern could only be greater. It seems appropriate, then, on the occasion of the dedication of a chair in his name at this distinguished school, to discuss the adversarial nature of the procurement process and to consider how it can be mitigated. The topic is sufficiently sensitive that my remarks may be construed as an apologia for industry. They are not so intended. My timing may seem disastrously bad considering the current furor about pricing of spare parts and the continuing highly publicized allegations of fraud, waste and abuse. But problems often can be best addressed when they are at their worst. On that basis the timing is propitious for exploring the present adversarial environment.

There is, of course, long-standing and widespread concern about conflict between government and industry in many areas, such as application of health and safety standards to consumer products and to the workplace, environmental controls, labor standards and the like. Government contractors share in these problems. The fact that the government is buyer and the contractor seller, however, significantly differentiates both the characteristics and the consequences of conflict between them from those encountered in commercial business.

What is this adversarial relationship which causes concern? Is it, like pornography, something which can be recognized when seen but

not defined? To an extent, yes. But, in general, it can be characterized as an attitude between the government and its contractors that emphasizes the adverse interests of buyer and seller and that assumes an overriding propensity of each party to try for maximum legal and economic advantage. This is not a universal feature of government procurement. In numerous dealings between contractors and procurement agencies and between individuals on each side, there are cooperative working arrangements. But that kind of relationship is inhibited and in many cases precluded by the systemic emphasis on adverse rather than common interests.

With that as a working definition, let me discuss—not necessarily in order of importance—some of the causes.

Causes of the Adversarial Relationship

First—The Relationship Between The Congress and the Procuring Agencies

The role of Congress in authorizing and appropriating funds and overseeing the activities of the executive departments and agencies creates a tension between the legislative and executive branches. This was foreseen and intended by the framers of the Constitution and the concept remains sound. The Congressional concern with the way in which the executive agencies use the vast sums of money appropriated for procurement of goods and services is understandable. But the way in which that concern is reflected in legislation and in pressures on the executive branch often is counterproductive. In many cases legislation requires procuring agencies to impose additional requirements on contractor and subcontractors. These may be applied through new contract provisions, such as application of cost accounting standards, or through non-contractual administrative controls, such as additional audit and investigative activity. More often than not these added requirements heighten the adversarial temper of the dealings between the parties.

In fairness, it must be said that in recent years DOD and its contractors have enjoyed and endured, respectively, the best of times and the worst of times. Congress has substantially increased defense appropriations and supported major programs. On the negative side, it has involved itself to a worrisome degree in the details of DOD programs and procurements and has passed legislation which places additional administrative burdens on DOD and its contractors. The requirement in the 1984 DOD Appropriations Act that written guarantees be obtained in connection with the procurement of weapon systems, for example, both burdens the procurement process and increases the likelihood of unproductive confrontations between the government and contractors.

The most publicized method of Congressional involvement in procurement is the use of public hearings and investigations. These are necessary and valuable legislative tools. They also can be, and often are, potent weapons for harassment and sources of unfair publicity. Even well-intentioned and well-managed hearings may encounter difficulties in adequately exploring complicated subjects, particularly if time is limited. Typically, the hearings which receive the most attention are those which are investigative, aimed at "finding out what went wrong." Too often in these hearings exposes and horror stories are presented as though they are typical. Accusations are made with ease, explanations with difficulty. Widely publicized as they are, hearings of this kind result in a distorted picture of the government agencies (mostly DOD these days) and their contractors, exaggerating the faults and mistakes of the system and its participants, ignoring their merits and achievements. The result is to explicitly foster an attitude that the principal role of government procurement personnel is to police contractors, and to put on the defensive those who feel a cooperative effort is required.

Second—Dual Role of Government as Sovereign and as Buyer

Neither conceptually nor in practice is it possible to clearly separate the government as sovereign from the government as buyer. This duality is an aspect of the relationship between the government and its contractors which has no counterpart in the commercial world.

The heavy involvement of the sovereign in the procurement process is strongly evidenced by the socioeconomic programs which are so much a part of that process. These are reflected in

provisions in laws, regulations and contract clauses imposing requirements in such areas as wage rates, small business participation, nondiscrimination in employment and the like. Many of the programs represent efforts to achieve worthwhile social goals and as such it is hard to criticize them. But adding these requirements to an already overly complex contracting structure probably is a relatively ineffective and highly expensive way of trying to reach those goals. The requirements themselves are not necessarily reflective of an adversarial relationship but they represent an additional area of potential conflict.

Another aspect of sovereignty which impinges significantly and adversely on contractors and subcontractors is the limitation on liability of the government under the Federal Tort Claims Act and relevant case law. Those limitations have been sufficiently painful and provocative to the companies involved that a significant number of cases have been litigated, particularly when the government has been substantially responsible for the actionable injury. The most notable direct conflicts have been those cases in which contractors have sought indemnity or contribution from the government for their liability to third parties. The relative responsibility of the government and the contractor have also been tested in other cases where the government was not a party and the contractor was defending against third party claims on the basis that the product was manufactured in performance of a government contract and in conformance with government specifications. Following the pattern of commercial product liability cases, the various problems of government and contractor liability predictably will become increasingly important. The Agent Orange and asbestos cases indicate the potential magnitude of the exposure and suggest the possibility of drastic social consequences flowing from government programs.

In many of the individual third party liability cases the best interests of the government appear to be in avoiding liability which would often make them adverse to those of the contractor. However, the litigation and liability costs ultimately are borne by the government in most cases through the cost to contractors of insurance which must be absorbed in contract prices. A more efficient system of handling this liability through legislation or regulations therefore would be to the government's as well as the contractors' interests.

Both the government's and contractors' interests could also be better served by broader statutory authority for government indemnification of contractors against catastrophic risks. Even without additional legislation, the agencies, particularly DOD, could use existing authority much more effectively to give protection against risks for which contractors cannot adequately insure. NASA recently used this authority creatively yet soundly to provide broad indemnification of certain contractors and subcontractors involved in the Space Transportation System. The failure of other agencies to use existing authority or to support new legislation seems to ignore the long term governmental and public interest in assuring protection against the results of catastrophic occurrences resulting from government programs.

Third—Emphasis on Price Competition

When a buyer can clearly and definitively describe what he wants, and can readily determine whether what is delivered is what he described, it makes sense for him to buy from the seller who offers the lowest price. When that buyer is the government, buying on the basis of the lowest price also fulfills an obligation of fair treatment among all those who offer the required product because, theoretically at least, it eliminates subjective judgment as to which offeror shall receive the contract.

The basic statutes which specify the procedures for federal government contracting have long stated a preference for fixed price contracting by means of formal advertising. Although there is statutory and regulatory authority for considering not only price but "other factors," in practice price has had an overriding importance in the award of contracts. This is indicative of one bit of baggage which reliance on price competition carries with it: The rigid emphasis on price may require the government to buy the cheapest rather than the most cost-effective product. And what is worse, it may

eventually drive from the market the most reliable, efficient and creative suppliers.

The legalistic, almost ritualistic, rules governing the award of formally advertised contracts—most of them based on Comptroller General decisions—lead to a rigid contractual relationship. That rigidity is also characteristic of negotiated contracts awarded principally on the basis of price competition. Since the only meaningful variable between offerors is price, it follows that all changes from the original product specifications or contract terms must be reflected in changes in price. This in turn means that responsibility for any deviations from specifications or contract terms must be fixed. However well such a system may work in the procurement of clearly specified products, it is not well suited to complex products such as weapon systems.

Problems which arise in the course of performance often match the product in complexity and solving those problems should take priority over determining contractual responsibility for their solution. On major programs drastic contractual remedies generally are impractical in any case. Ordinarily, it would not be in the government's interest to take steps that would impede or terminate the contractor's performance since it would be unable to turn to another source for the product. On the other side, the contractor would be most unlikely to stop performance because of differences with the government, because usually it would have a major stake both in continuance of the immediate program and in maintaining its potential for additional government business.

Common sense would dictate, in such a situation, that the two parties collaborate fully in identifying problems promptly and in solving them within a contractual framework that allows for a reasonable assignment of responsibility without undue disruption of performance. The price ultimately paid by the government and received by the contractor and the respective rights of the parties under the contract terms *are* important. However, there should not be such concentration on these elements that attention is diverted from delivering the product or service required by the government.

Fourth—Complexity of Contracts

An additional cause of the adversarial attitude—or possibly a mixed cause and effect—is the complexity of government contracts and of the procurement process. The number of contract provisions prescribed by law or regulation, the numerous provisions addressing contingencies which might affect the parties' rights and obligations, and the prevailing doctrine that the government must unfailingly enforce its rights present a rich source of conflict between agency and contractor. Furthermore, in addition to the overall complexity, a number of the individual contract provisions actively and specifically reflect an adversarial posture. Provisions such as anti-claims clauses, forfeiture provisions prescribed by the Contract Disputes Act, and most cost disallowance provisions, for example, are commonly viewed by contractors as one-sided.

Going further, the fact that most of the standard contract provisions are non-negotiable makes the usual government contract—again, from the contractor's viewpoint—a contract of adhesion. This characteristic of limited negotiability of terms and conditions cannot be dismissed with a pejorative, however. Allowing individual contractors to negotiate significantly favorable deviations from standard clauses could create chaos for procuring agencies and result in claims of unequal treatment as between contractors. What is needed is a genuine effort by those who draft the contract clauses to provide even-handed recognition of both parties' interests. Equally important is the assurance that the clauses and the related regulations and laws will be fairly applied by the government. Since the government's interpretation generally is controlling in the absence of litigation, those who do the interpreting should recognize an obligation of fairness to both sides, which often is not the case.

Fifth—Limitations on Contracting Officers' Authority

Contracting officers traditionally, and by regulation, have been the exclusive agents of the government to enter into and administer contracts. This has been a practical means of con-

trolling the government's contractual obligations by limiting and identifying those employees authorized to make contractual commitments. From the contractor's side this has been valuable because the contracting officer has served as an authoritative focal point for contractual dealings with the government.

This authority of the contacting officer has been badly undercut by DOD Directive 7640.2. The directive provides, in part, that when the contracting officer's proposed disposition of contract audit report recommendations differs from those of the auditor, and if certain criteria are met, the contracting officer's proposed disposition shall be brought promptly to the attention of a designated independent senior acquisition official or board for review.

Industry reaction has been that in effect the contracting officer is being required to share his authority with government auditors, who in the past have had an advisory role. The concern is that this can delay procurement decisions and can cause conflict between the contracting officer and the auditor. The potential for conflict is increased by a recent DOD Inspector General instruction to the effect that auditors should review contracting officer decisions on recent contract audits. In addition, GAO has recommended that DOD require that performance appraisals of appropriate officials reflect their effectiveness in acting on audits. Dilution of the contracting officer's authority and increased potential for conflict between him and auditors will increase the probability of disputes between the government and the contractor and will make it substantially more difficult to resolve them.

Sixth—Formalization of Dispute Resolution

In contrast to the relatively informal procedures favored by Gil Cuneo, which I alluded to earlier, the process of disputes resolution by boards of contract appeals has been judicialized and formalized. Not only has the disputes resolution procedure become less expeditious and therefore less effective, but uncertainty as to the outcome of some types of disputes creates problems and delays affecting ongoing procurements. Far from being a panacea, the Contract Disputes Act in solving some problems has created new questions to be litigated.

Despite, and perhaps because of, the ever increasing formalization of the existing disputes process, there is a strong belief by some that an informal disputes procedure should be made available. The Naval Facilities Engineering Command, for example, maintains a Contract Award and Review Board whose purpose is to be a forum for the resolution of disputes on an informal basis. The Contract Disputes Act, which has resulted in greater formality, almost provided for an informal disputes resolution procedure. As passed by both the House and Senate, the Act would have entitled a contractor to an informal conference on any dispute at a level higher than the contracting officer. This provision was deleted during House-Senate conference, however, at the urging of certain government officials who believed that this process would undermine the negotiating authority of the contracting officer. As it now stands, the disputes procedure is a highly inadequate safety valve for the adversarial tensions that exist in government contracting.

Seventh—Fraud, Waste and Abuse

Unhappily, there is a belief—widely held or at least widely publicized—that government procurement is fraught with fraud, waste and abuse. There has always been, and rightly should be, concern that public moneys be honestly and efficiently spent. With the enormous amounts now being spent in buying products and services from the private sector, the government's dealings with its contractors should get careful scrutiny. Suspected fraud should be investigated and punished. ("Of the unholy triad of "fraud, waste, and abuse", I limit my remarks to the first. Elimination of waste is tremendously important but has less significant moral and legal implications than fraud. Just what "abuse" means in that much abused phrase is not clear to me.)

Like many others who are involved with government contracts, I am deeply concerned with the apparently common perception that fraud among contractors is widespread. We recognize that in such a vast system involving millions of transactions and billions of dollars there will be some dishonesty and other criminal conduct. But we feel that generally the federal government's procurement processes and its

contractors are honest. If we are right, the present marshalling of an unprecedented number of auditors and investigators to search for fraud is grossly disproportionate to the problem. If this is so, the result will be not only unwarranted costs to both the government and its contractors and suppliers but an unwarranted loss of public confidence and a seriously corrosive effect on the government-contractor relationship. Contractors are concerned that the zeal of the present campaign may lead to frequent unfounded allegations of fraud, particularly on matters which may invite retrospective judgments on criminal intent, such as defective cost and pricing data or delivery of non-specification products.

Regardless of their belief that the perception of widespread fraud is inaccurate, most contractors probably will cooperate with investigations to the extent that those investigations are fairly conducted. Certainly it is to the benefit of both government and contractors that there be minimum disruption of the ongoing procurement process unless and until there is a substantial basis for believing that there is fraudulent conduct.

Costs and Consequences

The discussion above of causes—or more precisely, combined causes, effects and symptoms—of the adversarial relationship is not comprehensive but it does outline the dimensions of the problem. To fully appreciate the consequences of that relationship, another dimension should be added, the effect of these various factors on subcontractors and suppliers. Major prime contractors can and do accommodate, however reluctantly, to audits and investigations and to additional administrative requirements imposed by new laws, regulations and contract clauses. They can and do create new organizations and add people to fulfill whatever requirements are imposed. Subcontractors and suppliers must try to do the same but some, especially smaller firms and those with an intermixture of government and commercial business, may have great difficulty in doing so.

A report of the Defense Science Board on industrial responsiveness concluded that there were significant deterrents which prevented smaller firms from pursuing defense business, either directly or as subcontractors. Among those listed were stringent cost and pricing data requirements, cost accounting standards, social program requirements and excessive testing. This deterrent effect can be severely adverse because a healthy underpinning of subcontractors and suppliers is critical to virtually all government programs performed under contract.

Unfortunately, the trend is toward more rather than less deterrents. Almost certainly the new mandatory warranty requirements and proposed increased requirements for unlimited rights in data in connection with spare parts procurement will impose more burdens on subcontractors and suppliers and will generate increased resistance.

The overall costs of compliance with the numerous administrative requirements of government contracts, many of which are peripheral to the main purpose of the contracts, are incalculable and seem not to be considered when those requirements are first imposed. Whatever the cumulative costs—and they must be enormous—they ultimately must be included in the price that the government pays. If all the costs incurred by contractors and subcontractors in complying with such requirements as cost accounting standards and cost and pricing data requirements, for example, were added to the costs of enforcement by the government and the continuing costs of resultant litigation, the total might well exceed any possible benefit to the government. This is a highly relevant consideration as to these particular requirements because they were intended to reduce the government's costs.

Conclusion

Neither an adversarial climate nor legal complexity begins or ends with government contracts. For these and other perceived infirmities of the legal system, the entire legal profession has been the target of loud and persistent criticism. One of the more impressive verbal barrages was laid down by President Bok of Harvard University in his 1983 report to the Board of Overseers. We in the government contracts field were too modest a target to get

his specific attention, but rather than have us suffer the indignity of being ignored, I have chosen to redirect some of his rounds our way. Speaking of the effect of the courts' involvement with schools, he said: "In this way, courts frequently hamper abler officials and better institutions in an effort to regulate the inept and the irresponsible. In many cases, the harm done exceeds any benefits achieved." I would suggest that, in like fashion, abler officials and better contractors are frequently hampered by the statutory and regulatory efforts to restrain the inept and irresponsible in the government contract community, with the harm exceeding any benefits.

Regarding statutory efforts to promote social change, he said: "Since laws seem deceptively potent and cheap, they multiply quickly. Though most of them may be plausible in isolation, they are often confusing and burdensome in the aggregate, at least to those who have to take them seriously." As to that, we in the government contracts field can say "Amen."

Finally, looking toward a future in which lawyers might be trained more for reconciliation than for legal combat, he said: "Over the next generation, I predict society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry."

Consistent with President Bok's prediction, we can hope for a pronounced movement toward collaboration and compromise and away from the adversial relationship in government procurement. While we lawyers can be strong contributors to that process we do not necessarily need to be prime movers. There are executives in government and industry who are forceful advocates and practitioners of a highly collaborative style of contract performance and program management. Unfortunately, they must operate in an environment that not only does not encourage that kind of effort but is generally hostile to it.

That adversarial environment can be changed in part by removing or altering at least some of the various factors which cause it. Changes could be made in policies, regulations and contract clauses to facilitate a more cooperative approach if the will were there to do it. Similarly, litigation could be more readily avoided or settled if this were more specifically encouraged by regulations and procedures. Even without major procedural changes, this can be accomplished if both sides are predisposed to do so.

Strenthening and clarifying the authority of contracting officers would be a positive step. This should be accomplished by a program to insure that contracting officers are fully qualified for their jobs and that they are given appropriate professional status and compensation. To state the goal more broadly, contracting officers and others responsible for procurement should be trained to exercise business judgment and encouraged to use it. The constraints and complexities of the procurement process inhibit decision-making. The vulnerability of government procurement personnel to harsh second-guessing discourages the exercise of judgment. There is considerable temptation and opportunity to transform questions which should be handled as matters of business judgment into legal questions to be referred to the lawyers. That is not right. Like auditors, lawyers should be advisors on business matters, not decision makers.

Improving the opportunities and the climate for making decisions on procurement matters will not require legislation. It will require a reversal of the present strong trend toward further inhibiting that process. This should be done and contractors should cooperate and support the effort.

Reducing the effects on procurement of the tension between the legislative and executive branches would be a major undertaking. In recent years high level officials of the executive branch have sometimes joined in Congressional criticism which industry considered to be exaggerated or ill-founded. This may have eased some particular strain with the Congress but at the expense of damaging both government procurement organizations and the contracting community.

Contractors generally have elected to keep a low profile on controversial issues and their

industry associations have not been particularly effective in responding to Congressional and public criticism. Even when contractors and government officials have been in agreement, concern over arousing public opposition often has muffled any effective governmental or industry response. A long-term and comprehensive program to better explain the workings of the procurement process to Congress, key executive branch officials and the public is urgently needed. The goal should be not to eliminate discussion, debate and criticism but to make it more informal and in context.

A more basic problem exists on the contractor side. Since the government controls the dynamics of the process by issuing the governing regulations and otherwise setting the ground rules, there is a tendency to ignore any industry responsibility for the existence of an adversarial problem or for taking steps to resolve it. There are so many companies involved, with such a diversity of interests, organizations, procedures and attitudes, that there can be no one way acceptable to all of arriving at a more cooperative contractual relationship with the government. Contractors and suppliers selling off-the-shelf products are likely to be less tolerant of government intervention and less concerned with close cooperation than contractors on large, complex programs. The maximum benefit to the government and contractors probably would come from reduced adversarial tension on such large programs. Contractors on those programs should be in the best position to take initiatives toward more cooperative arrangements.

From the government's standpoint, plainly something more is needed than assurances from contractors that they can be trusted. Audits to validate contract compliance and other protection against malfeasance, mismanagement and error are appropriate. However, if the procurement system is viewed as depending for its integrity on large scale audits and investigations, on hot lines and whistle blowers, then in the interest of both the government and contractors the system should be changed.

That the adversarial bias of the system can be bettered is established by the fact that some major programs have been and are run on a largely cooperative, non-adversarial basis. One much cited example is the Navy Fleet Ballistic Missile Program. Based on a strong Navy initiative, this program has been a model of a candid, cooperative and highly effective working relationship between government and industry since its inception in the mid-1950's. Clearly, management style and individual attitudes can have a strongly positive effect on day-to-day contract performance.

Considering the rather bleak picture I have painted of the complex causes and consequences of the adversarial relationship, it may seem naive and simplistic to suggest that significant betterment can be accomplished through changes in organizational and individual attitudes. Nevertheless, I believe that to be the case. And that belief is strengthened by the recollection of the enormous changes for the better in the government contracts field which were accomplished through the individual effort, intellect and attitude of the man in whose memory this lecture is offered, Gil Cuneo.

One Potato, Two Potato...: A Method to Select Court Members

Major Craig S. Schwender
Senior Instructor, Criminal Law Division, TJAGSA

The Uniform Code of Military Justice[1] (UCMJ) and the Manual for Courts-Martial[2] (MCM) provide only very general guidance on the selection of members[3] for court-martial duty. It is left to individual staff judge advocates (SJAs) to create a system for acquiring a list of potential members from which the convening authority personally selects the individual members. As a result, the Army uses many different court selection procedures. Most of these procedures are legally sound and have successfully provided members to hear courts-martial around the world in times of peace and war.

In recent years, however, the procedures for selecting members in several jurisdictions have been successfully challenged.[4] In response, it has been suggested that a fool-proof court selection procedure be published. Three potential problems come to mind when attempting to devise such a procedure. First, most jurisdictions are experiencing no difficulty; so, "if it ain't broke, don't fix it."[5] Second, either good or bad, every SJA has his or her own method of selection with which the personnel of the office are comfortable, and the force of intertia inhibits its change. Third, no procedure is safe from the determined fool.

Notwithstanding these limitations, this article will point out potential pitfalls in the court selection area and suggest a procedure for selection of members that should keep everyone out of the appellate court limelight.

When Does the Selection Process Begin?

Very few jurisdictions enjoy the luxury of a caseload low enough to eliminate the need for standing court-martial panels. In most jurisdictions, courts are appointed for periods of three to six months. The process of selecting new court members is onerous enough that most jurisdictions wish to avoid frequent changes. The convening authority determines the length of a tour of duty for the court member.[6] There is a balance to be obtained. A court that hears too few cases will not, "gain experience in the administration of military justice."[7] A court that hears too many cases may become bored and callous in its decision-making.[8] The caseload of the jurisdiction is also a factor. A jurisdiction with a low caseload may be able to use the same panel for six months or more. Another jurisdiction with a very high caseload may be justified in changing panels as often as every two or three months. The convening authority has broad discretion in determining the tour of duty for court members. For example, the duration of a panel's duty need not be fixed beforehand. The convening authority may appoint a panel and change it only when conditions dictate a need for change. Changing a panel for

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[1]Uniform Code of Military Justice art. 25, 10 U.S.C. § 825 (1976) [hereinafter cited as U.C.M.J.].

[2]Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 36*c* [hereinafter cited as MCM, 1969]. Where appropriate, citation is also made to the Manual for Courts-Martial, United States, 1984, which will become effective 1 August 1984 [hereinafter cited as MCM, 1984].

[3]It is incorrect to call the members of a court-martial a "jury." The members look like jurors, but they have many very important differences, some of which this article will point out.

[4]*See, e.g.*, United States v. Cherry, 14 M.J. 251 (C.M.A. 1982); United States v. Crumb, 10 M.J. 520 (A.C.M.R. 1980).

[5]Oft-heard wisdom of Colonel David L. Minton, JAGC, US Army—Retired, former Commandant of The Judge Advocate General's School.

[6]MCM, 1969, para. 37 (when practicable, the convening authority should change the composition of courts-martial from time to time...).

[7]MCM, 1969, para. 37.

[8]*See, e.g.*, Johnson, *Voir Dire in the Criminal Case: A Primer*, Trial, Oct. 1983, at 65; Kelner, *Jury Selection: The Prejudice Syndrome*, Trial, July 1983, at 51.

reasons other than "normal rotation," however, may create an appearance of impropriety.[9]

Requesting Nominees

Once the decision to select a panel has been made, the process typically begins with a letter requesting nominees from the commands within the jurisdiction. The letter should request a certain number of nominees in each grade, and relate the anticipated duration of the panel's duty and the criteria for selection. A sample letter is at Appendix A. Of course, the qualifications listed in the UCMJ should be paramount—active duty soldiers best qualified by reason of age, education, training, experience, length of service, and judicial temperament.[10] Persons in arrest or confinement are ineligible.[11] The convening authority may further define the nominees' qualifications by other relevant criteria such as no PCS or lengthy TDY planned during the court's anticipated tenure; no prior court-martial "felony" convictions; at least eighteen years of age; on active duty at least one year; no "misdemeanor" convictions or Article 15s during the last three years; and ability to speak and understand English.[12] In addition to the names of the service members nominated, the convening authority may also want certain personal data concerning each nominee to assist in determining who will sit.[13] The letter requesting nominations should normally be sent by the SJA office. Alternatively, it can be sent by the personnel office with written guidance from the SJA.[14]

Presenting Nominations to the Convening Authority

The lists of nominations submitted by the units should be integrated by grade—a page of colonels, a page of majors, etc. While it is not error to submit only the number of names needed to fill the panels,[15] the "culling" down to that number must not be done by persons of the prosecutorial arm.[16] To avoid even the appearance that someone other than the convening authority is making the selections,[17] all the nominations should be presented.[18]

Who to Select?

The composition of each panel will reflect the philosophy of the convening authority. Factors such as the number of members of each grade and the members' duty assignments should be considered. Convening authorities are also very sensitive to distributing the duty fairly amongst the subordinate units. The number of members must be sufficient to leave a quorum after challenges and excusals.[19] Available courtroom

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[9]*See, e.g.*, United States v. Walsh, 47 C.M.R. 926 (C.M.A. 1973). *Cf.* United States v. Butson, 47 C.M.R. 973 (A.C.M.R. 1973); United States v. Peck, 41 C.M.R. 732 (A.C.M.R. 1970).

[10]U.C.M.J. art. 25.

[11]MCM, 1969, para. 4*b*.

[12]*See, e.g.*, American Bar Association Standards for Criminal Justice, Trial by Jury § 15-2.1 (1978).

[13]For example, the convening authority may wish to know the duty position of each nominee, their branch, date of rank, total years of service, education level, how long they have been at "Fort Swampy," and when they last served on a court-martial. Many jurisdictions give the convening authority the Officer Record Brief of each nominee which contains much of the above information.

[14]In *Crumb*, the participation of the Chief Trial Counsel and Chief, Criminal Law Section, in receiving the nominations and molding their "recommendations" into specific panels was soundly criticized. Senior Judge Jones said, "There is no place for the use of partisan government advocates in the sensitive area of selection of court members. The practice should be terminated forthwith." 10 M.J. at 528 (Jones, S.J., concurring).

[15]United States v. Kemp, 22 C.M.A. 152, 46 C.M.R. 152 (1973).

[16]United States v. Cherry, 14 M.J. 251 (C.M.A. 1982); United States v. Crumb, 10 M.J. 520 (A.C.M.R. 1980).

[17]Surveys conducted by one author revealed many jurisdictions that allowed persons other than the convening authority to select the members using no guidelines at all. The selection was then ratified by the convening authority. Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 Mil. L. Rev. 71, 91 (1972).

[18]"I believe it better practice to submit the entire list of nominees." *Crumb*, 10 M.J. at 527 (Jones, S.J., concurring).

[19]Not less than five members are required for a general court-martial, and not less than three members are required for a special court-martial. U.C.M.J. art. 16. The minimum numbers would be insufficient in a state court or

facilities will often limit the maximum number, although most locations can accommodate eight or ten members in the "jury box."[20]

The convening authority is required to select members "best qualified by reason of age, education, training, experience, length of service, and judicial temperament."[21] Obviously, the *best* qualified members under these criteria will often be high ranking officers. Similarly, enlisted members selected using these criteria will probably be noncommissioned officers.[22] This reality was recognized by a panel of the Army Court of Military Review which stated, "[t]he criteria of Article 25(d)(2), UCMJ, are such, however, as to make the selection of persons in a grade below E-4 a rare occurrence."[23] Nevertheless, *systematic* exclusion of lower ranks is impermissible.[24]

Several categories of individuals are exempt[25] from court member duty or allowed to sit only under certain circumstances.[26] These include chaplains,[27] medical officers,[28] dental officers,[29] veterinary officers,[30] Army Nurse Corps officers,[31] Medical Service Corps officers,[32] Army Medical Specialist Corps officers,[33] and inspectors general.[34] Military police are not precluded by statute or regulation from sitting as court members.[35] Selection of military police for court-martial membership has been criticized,[36] but the courts have not prohibited the practice.[37]

Surprisingly, attorneys are not precluded from selection as court members,[38] although the

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federal district court. Ballew v. Georgia, 435 U.S. 223 (1978). The sixth amendment right to trial by "jury" does not apply to courts-martial, however. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). The military appellate courts have, therefore, rejected *Ballew's* application to courts-martial. United States v. Montgomery, 5 M.J. 832 (A.C.M.R.), *petition denied*, 6 M.J. 89 (C.M.A. 1978); United States v. Wolff, 5 M.J. 923 (N.C.M.R. 1978), *petition denied*, 6 M.J. 305 (C.M.A. 1979).

[20]Since we do not have "juries" in the military, this location might be more accurately called the "members box."

[21]U.C.M.J. art. 25.

[22]This was recognized by Congress during hearings on the 1948 amendments to the Articles of War. When debating whether to allow enlisted personnel to sit as court members, the opinion was expressed that the "enlisted man who is selected for court-martial duty will probably be one of noncommissioned grade, because of his capacity and his experience." *Hearings on H.R. 2575 Before a Subcommittee of the House Committee on Armed Forces*, 80th Cong., 1st Sess. 1940 (1947), *quoted in* Hansen, *Judicial Functions for the Commander?*, 41 Mil. L. Rev. 1 (1968).

[23]United States v. Delp, 11 M.J. 836, 838 (A.C.M.R. 1981).

[24]United States v. Daigle, 1 M.J. 139 (C.M.A. 1975); United States v. Greene, 20 C.M.A. 232, 43 C.M.R. 72 (1970); United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3 (1964).

[25]Regulatory exemptions are, of course, transitory. Under a given set of circumstances, the regulations could change or exceptions could be granted.

[26]An informational reference to such restrictions is in U.S. Dep't of Army, Reg. No. 27-10, Military Justice, chapter 7 (1 Sep. 1982).

[27]U.S. Dep't of Army, Reg, No. 165-20, Duties of Chaplains and Commanders' Responsibilities, para. 3-6*b* (15 Oct. 1979).

[28]U.S. Dep't of Army, Reg. No. 40-1, Composition, Mission, and Functions of the Army Medical Department, para. 2-3*b* (1 July 1983).

[29]*Id.* at para. 2-7.

[30]*Id.* at para. 2-12.

[31]*Id.* at para. 2-16*b*.

[32]*Id.* at para. 2-19*b*.

[33]*Id.* at para. 2-22*b*.

[34]U.S. Dep't of Army, Reg. No. 20-1, Inspector General Activities and Procedures, para. 1-7*j* (15 Aug. 1982).

[35]United States v. Hedges, 11 C.M.A. 642, 29 C.M.R. 458 (1960).

[36]"[T]he appointment of policemen to courts-martial is not generally a good practice and should be avoided where possible." United States v. Brown, 13 M.J. 890, 892 (A.C.M.R. 1982).

[37]One court has come close to setting down a *per se* rule: "At the risk of being redundant—we say again—individuals assigned to military police duties *should* not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation *must* not be." United States v. Swagger, 16 M.J. 759, 760 (A.C.M.R. 1983) (emphasis added).

[38]In fact, from 1920 to 1950, the convening authority was required to select a judge advocate as a member of the court unless no judge advocates were available for that purpose. The Army Reorganization Act of 1920, ch. 227, 41 Stat. 759, 787-812 (1920), *amended by* the U.C.M.J., 10 U.S.C. §§ 801-834 (1950).

Court of Military Appeals has discouraged the practice.[39] Limited authority for not selecting Judge Advocate General's Corps (JAGC) officers can be found in regulations that encourage the use of JAGC officers to the maximum extent possible in the performance of their professional duties.[40]

The convening authority normally selects members from within his or her court-martial jurisdiction. The selection may include service members stationed within the jurisdiction but who are not in the command. The convening authority may also, however, select members from outside the jurisdiction,[41] or even from another service.[42]

Race and gender are not mentioned in the criteria of Article 25 of the UCMJ, but many convening authorities consider these factors.[43] While the Supreme Court has held that the systematic exclusion of persons from civilian juries based upon race[44] or gender[45] violates the sixth amendment, the Court has also made it clear that sixth amendment jury rights do not apply to military courts.[46] Such exclusion of significant and identifiable groups would, however, be improper on other grounds in the selection of court-martial members.[47]

Convening authorities who consider these factors normally desire to *include* minority members on the court-martial panel in order to achieve a fair cross section of the community. Intentional inclusion of a black has been upheld;[48] intentional inclusion of a woman is pending review.[49]

Some convening authorities select panels with a preference to officers serving in command positions. Perhaps this reflects a desire to select members most attuned to the problems and the disciplinary needs of the unit. The convening authority who selects court members for this reason complies with the literal requirements of the UCMJ, but no cases have yet addressed the issues raised by an all-commander court. Such a panel may well create an appearance of impropriety.[50]

So, to a limited extent, the philosophy of the convening authority may be seen in the panel selected. Within the guidelines of Article 25 and applicable regulations, this is permissible. Use of other improper criteria would run substantial risk of drawing the wrath of appellate courts and reversal of convictions.

The Mechanics of Selecting Members

Some convening authorities may be asked to circle their selections and others may be asked to place certain letters or colored checkmarks next to their selections. Any method that reflects a "personal" selection by the convening authority is legally sufficient.[51] The process should be as simple as possible to reduce the

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[39]United States v. Sears, 6 C.M.A. 661, 20 C.M.R. 377 (1956).

[40]U.S. Dep't of Army, Reg. No. 27-1, Judge Advocate Legal Service, para. 11 (20 Apr. 1976).

[41]United States v. Alvarez, 5 M.J. 762 (A.C.M.R. 1978).

[42]MCM, 1969, para. 4*g*(3); MCM, 1984, R.C.M. 503(3).

[43]*E.g.*, United States v. Smith, CM443298 (pending before A.C.M.R.).

[44]Norris v. Alabama, 294 U.S. 587 (1935).

[45]Duren v. Missouri, 439 U.S. 357 (1979).

[46]*Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1886).

[47]Equal protection of the laws was mentioned in two cases. United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964); United States v. Credit, 2 M.J. 631 (A.F.C.M.R. 1976).

[48]United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3 (1964); United States v. Credit, 2 M.J. 631 (A.F.C.M.R. 1976).

[49]United States v. Smith, CM443298 (pending before A.C.M.R.). For more than a decade, a Woman's Army Corps (WAC) member was required, if available, on any case where the accused was a WAC. U.S. Dep't of Army, Reg. No. 600-3, Women's Army Corps—General Provisions, para. 14 (26 July 1967) (rescinded on 15 November 1979, when the members of the Women's Army Corps were integrated into the various branches of the Army).

[50]A result similar to United States v. Greene, 20 C.M.A. 232, 43 C.M.R. 72 (1970), is possible. In *Greene*, a court-martial panel consisting of all O-5s and O-6s resulted in reversal. One basis for that result was the obvious appearance of a "packed court." *See* United States v. Hedges, 11 C.M.A. 642, 29 C.M.R. 458 (1960) (a panel made up in large part of law enforcement personnel, any of whom would have individually been a qualified member, resulted in reversal because it appeared the court was "hand-picked" by the government).

[51]United States v. Newcomb, 5 M.J. 5 (C.M.A. 1978).

possibility of mistakes. It should also allow for contingencies to lessen the need to return to the convening authority repeatedly to make changes. The personal selection must be memorialized to meet and overcome any later challenge to the selection process.

The size of the jurisdiction and the caseload will be the key factors in deciding how many panels are needed.[52] Some jurisdictions may need only one panel to hear all levels of courts-martial. The following suggested procedure assumes a large and busy jurisdiction.

First, the convening authority must be advised of his or her statutory responsibilities and the regulatory limitations on the exercise of that responsibility.[53] The instructions should recommend the number of panels to select and the numbers of officers, warrant officers, enlisted members, and alternates needed. An example format is at Appendix B. Using this letter, the convening authority can begin studying the nominations and selecting those best qualified as members.

The SJA should follow along with the convening authority's selections, using a worksheet like that at Appendix C. For example, if the convening authority is asked to put a red check next to the selections for GCM panel number 1, the SJA will simultaneously write in the names of the selectees on the worksheet. This allows them both to keep track of how the panels are filling-up, insuring a proper balance of grade, branch, and units to reflect the convening authority's philosophy. After all the slots are filled, the SJA should insure that the convening authority's checkmarks match the worksheet.

After the selections are completed, the convening authority should sign a document to implement the selections. Appendix D is an example format. This order from the convening authority should allow for changes in the court when enlisted personnel are requested or when alternates are needed. It should also clarify which cases should be tried by the newly selected panels.

Changing Court Members

The initial selection of court members is rarely the source of error. Most mistakes occur in the changing of a court's membership.[54] Amendments to the court-martial membership should be kept to a minimum.[55] The convening authority should not allow members to be excused except for the most pressing reasons.[56] Where excusals are freely and loosely granted, the system is more likely to break down.[57]

The Rules for Courts-Martial (RCM) in the 1984 MCM will authorize the convening authority to delegate to his or her principal assistant, or to the SJA, the power to excuse court members.[58] To avoid abuse of this new procedure, every excusal, and the reason therefore, should be reported to the convening authority.[59]

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[52]Geographic dispersion of the units within a court-martial jurisdiction, such as occurs in many jurisdictions overseas, creates many problems. Members, witnesses, and others often experience difficulty traveling to distant trial sites. Communication with members to inform them of schedule changes is also more difficult. Some SJAs have reduced these problems by using a system of separate court-martial panels for each major geographic area. For example, the convening authority selects one panel from units stationed north of the Frankfurt headquarters. When a soldier from that geographic area is tried, the site of the trial is north of Frankfurt. The members are relatively nearby, and the witnesses usually are also from that area.

[53]*See supra* notes 21 to 35 and accompanying text.

[54]*See, e.g.*, United States v. Caldwell, 16 M.J. 575 (A.C.M.R. 1983) (a confusing flurry of orders, recissions, and substitutions resulted in an unappointed "interloper" sitting on the panel).

[55]MCM, 1969, para. 37*c*; MCM, 1984, R.C.M. 505(a) (Discussion).

[56]United States v. McLaughlin, 18 C.M.A. 61, 39 C.M.R. 61 (1968). Here the convening authority selected many more members than were necessary, then "excused" some of them according to a prearranged rotating schedule. The scheme was found "manifestly wrong."

[57]*See, e.g.*, United States v. Livingston, 7 M.J. 638 (A.C.M.R. 1979).

[58]MCM, 1984, R.C.M. 505 (c)(1)(B). The convening authority's delegee may only excuse members before assembly, and may excuse no more than one-third of the total number of members detailed.

[59]The SJA who is delegated authority to excuse will be in a difficult position. Most soldiers, and particularly commanders, have other "mission essential" duties which they feel should take precedence over court membership. There could be substantial pressure applied to the SJA to grant excusals. A possible solution is a limited delegation; for

Excusals should also be made known to the defense counsel; indeed, changes in membership must be reported to the defense.[60] It is error to proceed when the excusal is improper or the member is missing without being excused.[61] The convening authority (or delegee) must properly excuse the member. After assembly, the military judge may excuse a court-member, but only for physical disability, as a result of challenge, or for good cause.[62] The good cause must be a true exigency, something more than the normal incidents of military duty.[63]

Every effort should be made to reflect all changes in timely and proper amendments to the convening order. The MCM allows for oral excusals which need not be reduced to writing,[64] as well as for oral amendments, which "should be confirmed by written orders."[65] Oral changes have an uncanny way of creating error.[66] Where written confirmation does not occur until after appellate review has begun, the appellate courts are unlikely to allow tardy affidavits to save the case.[67]

When, because of challenges or properly granted excusals, the court falls below a quorum, the pre-selected alternates are called upon to serve. The alternates are added to the court by a written amending order. Pre-selection of alternates is clearly preferable to returning to the convening authority with the list of nominees. Some systems authorize alternates to be taken from one of the other court panels. This could be subject to challenge if any discretion is available in the selection of the alternate member.

Ending the Term of Service

At the end of three or four months, new court members will be sought. Some lingering cases will have been referred to the old court panels but not yet tried. Both assembly[68] and arraignment[69] are important in determining which court members should hear the case. Before assembly, the convening authority may replace the court members.[70] After the court is assembled, members may only be absent or excused "for physical disability, as a result of challenge, or by order of the convening authority for good cause."[71]

Arraignment becomes important if the new convening order is written according to the recommended formats in the MCM's appendix. The MCM contains language to be added to convening orders that change the membership of a court-martial to which charges have already been referred.[72] The MCM would send the case to the "new" court where trial "proceedings had not begun."[73] This has been construed to mean

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example, the SJA is authorized to excuse members only in an emergency (defined by the SJA) or when it would be difficult to reach the convening authority for a timely decision.

[60]United States v. Royal, 17 M.J. 669 (A.C.M.R. 1983).

[61]United States v. Colon, 6 M.J. 73 (C.M.A. 1978).

[62]U.C.M.J. art. 29(a); MCM, 1984, R.C.M. 505(c)(2).

[63]United States v. Garcia, 15 M.J. 864 (A.C.M.R. 1983).

[64]MCM, 1969, para. 37*c*(2); MCM, 1984, R.C.M. 505(b).

[65]MCM, 1969, para. 37*c*(1). *Cf.* MCM, 1984, R.C.M. 505(b), where changes "shall be reduced to writing before authentication of the record of trial."

[66]*See, e.g.*, United States v. Carey, 23 C.M.A. 315, 49 C.M.R. 605 (1975).

[67]In United States v. Perkinson, 16 M.J. 400 (C.M.A. 1983), a period of 10 months had passed after an oral amendment. Judge Fletcher, writing for the court, stated, "Absence of the written confirmation means the court members were not properly appointed. This is a jurisdictional defect which affects the entire trial." 16 M.J. at 402. Judge Cook, in a separate opinion, was more accurate when he described the error as one of an incomplete record; the jurisdiction of the court was evident. 16 M.J. at 405.

[68]Assembly of the court-martial is announced by the military judge. MCM, 1969, para. 61*j*. The military judge should ordinarily assemble the court immediately after the members are sworn or, in a judge alone case, immediately after the request for trial by military judge alone is approved. MCM, 1984, R.C.M. 911 (Discussion).

[69]The arraignment consists of the reading of the charges and specifications to the accused (usually waived) and calling on the accused to plead. MCM, 1969, para. 65*a*; MCM 1984, R.C.M. 904.

[70]MCM, 1969, para. 37(a); MCM, 1984, R.C.M. 505(c)(1).

[71]U.C.M.J. art. 29(a). The Military Justice Act of 1983, 97 Stat. 1393 (1983), will change the language of art. 29(a) to give the military judge authority to excuse members after assembly.

[72]MCM, 1969, Appendix 4*a*(1); MCM, 1984, Appendix 6*a*(1).

[73]*Id.*

"all unarraigned cases."[74]

The combination of these rules can be summarized as follows: the accused who has been arraigned *or* whose judge alone request has been approved and the court assembled, should be tried by the "old" court[75] instead of the "new" court.[76]

[74]United States v. Sayers, 20 C.M.A. 462, 466, 43 C.M.R. 302, 306 (1971) (quoting with approval the language in the Manual for Courts-Martial, 1951, Appendix 4, p. 463).

[75]United States v. Smiley, 17 M.J. 790 (A.F.C.M.R. 1983).

[76]United States v. Scantland, 14 M.J. 531 (A.C.M.R. 1982). Counsel may describe the process of replacing the old members with new members as a "rereferral" to a new panel. This is not a correct description. There is no withdrawal of charges, merely a substitution of court members.

Conclusion

The procedure described is a hybrid of several now being used in the field. The proposed procedure and formats offered are not meant to be the epitome of a court member selection scheme. No court selection system is perfect, nor can one system meet every command's needs. This is only a foundation from which SJAs may mold a system that meets the unique needs of their command's situation and military justice structure.

DISPOSITION FORM

For use of this form, see AR 340-15, the proponent agency is TAGO.

REFERENCE OR OFFICE SYMBOL	SUBJECT
ABCD-JA	Nominees for General and Special Courts-Martial

TO DPT Details FROM SJA DATE 23 Nov 84 CMT 1

MAJ Jones/br/4-3544

1. This office requests your nominations, in the numbers and grades specified below, for members of new general and special courts-martial panels for the period 1 January 1985 to 1 May 1985.

a. 12 - Lieutenant Colonels
14 - Majors
18 - Captains
28 - First and Second Lieutenants and Warrant Officers

b. All assigned Colonels

c. 3 - E-9's
4 - E-8's
7 - E-7's
7 - E-6's
5 - E-5's

d. Any E-4's and below who meet the criteria in paragraph 2.

2. All nominees must be on active duty. Nominees must not be in arrest or confinement, nor pending disciplinary action which may result in arrest or confinement. Pursuant to Article 25(d)(2), UCMJ, nominees should be selected who are qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. Nominees should not be scheduled to PCS nor be programmed for extended TDY or other absence during the stated period.

3. The following information should be submitted for each nominee:

a. Name, grade, SSN, Branch, and Unit of Assignment

b. Date of Rank

c. Present Duty Assignment

d. Duty Telephone Number

4. The requested information should be returned to this office NLT 13 December 1984.

JOHN DOE
LTC, JAGC
Staff Judge Advocate

Appendix A

DA FORM AUG 80 2496 PREVIOUS EDITIONS WILL BE USED

DISPOSITION FORM

For use of this form, see AR 340-15; the proponent agency is TAGO.

REFERENCE OR OFFICE SYMBOL	SUBJECT
ABCD-JA	Selection of Court-Martial Members

TO Cdr, 99th Inf Div FROM SJA DATE 16 December 1984 CMT 1
MAJ Smith/cjr/6316

1. PROBLEM: To select members to serve on the primary and alternate General and Bad Conduct Discharge Special Courts-Martial Panels for courts convened by this Headquarters during the next 120 days until approximately 1 May 1985.

2. DISCUSSION:

a. Qualifications: Personnel selected by you as court members must be those best qualified for such duty by reason of age, education, training, experience, length of service and judicial temperament (Art. 25, UCMJ). Except as stated below, neither rank, race, duty position nor any other factor may be used for the deliberate and systematic exclusion of qualified persons from court-martial membership. The membership should reflect a representative cross-section of the military community.

b. Eligibility: You are not bound to select members from the nominees submitted. You may select any member of this command to serve as a member of a court-martial, except officers whose basic branch is MC, DC, VC, CH or who are detailed IG (these officers are precluded from serving as members of courts-martial by regulation). Because of the nature of their normal duties, officers performing judge advocate and military police duties should not be selected.

3. RECOMMENDATION:

a. That you select eight officers to serve on the Officer General Court-Martial Panel Number 1 by placing a red number 1 next to each selection.

b. That you select eight officers to serve on the Officer General Court-Martial Panel Number 2 by placing a red number 2 next to each selection.

c. That you select four enlisted members to serve on either GCM panel when requested by placing a red check next to each selection.

d. That you select three officers from Officer GCM Panel Number 1 and three officers from Officer GCM Panel Number 2 to be excused in those cases in which an enlisted panel is required by placing an asterisk next to each selection.

e. That you select six officers to serve on the Officer BCD Special Court-Martial Panel Number 1 by placing a blue number 1 next to each selection.

f. That you select six officers to serve on the Officer BCD Special Court-Martial Panel Number 2 by placing a blue number 2 next to each selection.

Appendix B

ABCD-JA 16 December 1984
SUBJECT: Selection of Court-Martial Members

g. That you select three enlisted members to serve on either BCD Special Court-Martial panel when requested by placing a blue check next to each selection.

h. That you select two officers from each BCD Special Court-Martial panel to be excused in those cases in which an enlisted panel is required by placing an asterisk next to each selection.

i. That you select five officers and five enlisted members to serve as alternates for any of the panels. Designate your alternate selection by placing a green number 1, 2, 3, 4, or 5 next to each officer and each enlisted selection to signify the order in which you wish them to serve.

j. That you direct that all cases:

(1) Which are scheduled for trial on or after 1 January 1985; and

(2) Which are referred to GCM or BCD Panels Number 1 or 2 which were selected by you on 27 August 1984; and

(3) In which the accused has not yet been arraigned nor the court assembled,

be tried by the respective GCM or BCD Panels Number 1 or 2 which you select this date.

3 Incl (Signed SJA)
1. Rosters of Officer and Enlisted Nominees (TAB A)
2. Current Panel Selectees (TAB B)
3. DA Forms 2 and 2-1 of each nominee

WORKSHEET

COURT MEMBER SELECTION

GCM - Panel 1	GCM - Panel 2	GCM - Enlisted Members
1.	1.	1.
2.	2.	2.
3.	3.	3.
4.	4.	4.
5.	5.	
6.	6.	
7.	7.	
8.	8.	

BCD Special - Panel 1	BCD Special - Panel 2	BCD - Enlisted Members
1.	1.	1.
2.	2.	2.
3.	3.	3.
4.	4.	
5.	5.	
6.	6.	

Alternate officer members for any court	Alternate enlisted members for any court
1.	1.
2.	2.
3.	3.
4.	4.
5.	5.

*These members to be excused if enlisted court is required.

(Signed by GCMCA)

Inclosure 1

ABCD-CG
SUBJECT: Selection of Court-Martial Members

TO SJA FROM Cdr, 99th Inf Div DATE CMT 2
MAJ Smith/cjr/8525

1. I have indicated my selection of courts-martial members on the attached list.

2. If enlisted members are required for a general court-martial or a special court-martial empowered to adjudge a bad conduct discharge, the enlisted members I have selected will be appointed to the appropriate court-martial, replacing the officers I have indicated for automatic excusal.

3. Three alternate officer members shall be detailed automatically, in the order of my selections, under the following circumstances:

a. If before trial the number of members of a general court-martial panel falls below seven.

b. If before trial the number of members of a special court-martial panel falls below five.

c. If at trial an officer panel falls below a quorum.

4. Three alternate enlisted members shall be detailed automatically, in the order of my selections, if a panel with enlisted members falls below a quorum because of too few enlisted members.

5. These court-martial panels will sit for approximately 120 days. The 120-day period will begin on 1 January 1985.

6. I direct that those cases in which the accused has not yet been arraigned nor the court assembled and which have been referred and are scheduled for trial on and after 1 January 1985 with Officer GCM Panel Numbers 1 and 2, which were selected by me on 27 August 1984 be tried by Officer GCM Panel Numbers 1 and 2, respectively, which I have selected this date. Also, I direct that those cases in which the accused has not yet been arraigned nor the court assembled and which have been referred and are scheduled for trial on and after 1 January 1985 with Officer BCD Panel Numbers 1 and 2, which were selected by me on 27 August 1984 be tried by Officer BCD Panel Numbers 1 and 2, respectively, which I have selected this date.

3 Incl (signed by GCMCA)
nc

Pollution Abatement Statutes: An Overview

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Introduction

A proliferation of federal and state environmental statutes which apply to military installations have made pollution abatement laws increasingly important to military attorneys. While statutes such as the Safe Water Drinking Act,[1] the Federal Insecticide, Fungicide, and Rodenticide Act,[2] the Noise Control Act,[3] and the Coastal Zone Management Act[4] affect federal facilities in different ways, collectively they signify the environmental awareness which grew in the 1970s. Army Regulation 200-2 sets out the continuing policy of the Department of the Army to serve as a trustee of the environment.[5] To accomplish this policy, the Army's goal is, "to plan, initiate and carry out all actions and programs to minimize adverse effects on the quality of the human environment without impairing the Army's mission."[6] If the installation commander is to comply with this policy and meet the goals set by the Army, then his or her attorney must be familiar with the current statutory and regulatory framework because its pervasiveness has virtually preempted the federal common law of nuisance for environmental concerns.[7] Recent litigation and claims for damages involving toxic and hazardous wastes have made this area of environmental law particularly important to the commander.

Toxic and Hazardous Substance

Resource Conservation and Recovery Act

Two 1976 enactments, the Resource Conservation and Recovery Act[8] (RCRA) and the Toxic Substances Control Act[9] (TSCA), regulate hazardous waste and toxic substances from their generation or manufacture through disposal.[10] These statutes attempt to protect human health, as well as the environment, while also conserving resources. Previous state controls on hazardous waste were largely inadequate and underfunded. Without comprehensive federal regulation for a uniform minimum level of control the incentive for interstate dumping could not be eliminated. In passing RCRA Congress intended that state-administered hazardous waste programs meet federal standards and that EPA's role be generally one of overseeing approved state programs. As an incentive to the states, federal funding assistance was contingent on approval of state programs, as "equal in effect" to the federal scheme.[11]

The cornerstone of the RCRA cradle-to-grave hazardous waste management program is the definition and listing of hazardous wastes.[12] EPA identifies a solid waste as hazardous by including it on a list of hazardous substances, or by analyzing its characteristics for toxicity, ignitability, corrosivity, and reactivity.[13] Cer-

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[1] 42 U.S.C. §§ 300f-300j-9 (1976 & Supp. V 1981), *amended by* the Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1393; U.S. Dep't of Army, Reg. No. 200-1, Environmental Protection and Enhancement, chapter 3 (15 June 1982) [hereinafter cited as AR 200-1].

[2] 7 U.S.C. §§ 121-1364 (1976). *See also* 40 C.F.R. parts 162-80; AR 200-1, paras. 5-5, 6-10.

[3] 42 U.S.C. §§ 4901-4918 (1976), *amended by* the Quiet Communities Act of 1978, Pub. L. No. 95-609, 92 Stat. 3079; AR 200-1, chapter 7.

[4] 16 U.S.C. §§ 1451-1464 (1976 & Supp. V 1981).

[5] U.S. Dep't of Army, Reg. No. 200-2, Environmental Effects of Army Actions, para. 1-4 (1 Sep. 1981).

[6] AR 200-1, para. 1-5.

[7] *See, e.g.*, Milwaukee v. Illinois, 451 U.S. 304, 317-32 (1981) (water pollution area).

[8] 42 U.S.C. §§ 6901-6987 (1976), *amended by* Pub. L. No. 95-609, 92 Stat. 3081.

[9] 15 U.S.C. §§ 2601-2629 (1976).

[10] *See* AR 200-1, para. 5-2(a).

[11] 42 U.S.C. § 6926(c) (Supp. V 1981).

[12] *Id.* §§ 6903(5), 6921.

[13] *See* 40 C.F.R. § 261 (1980).

tain wastes, such as domestic sewerage and household garbage, are excluded by EPA regulations.[14] Subsequent RCRA sections regulate hazardous waste generators,[15] transporters,[16] and disposal facility owners and operators.[17] Generator standards emphasize recordkeeping and labeling. Generators must use a manifest system to designate waste for treatment, storage, or disposal in proper facilities. Transporters are required to maintain records and handle only properly labeled hazardous wastes. Treatment, storage or disposal facilities (TSDF) must have an operating permit[18] from EPA or an approved state program,[19] as well as maintain records and operate in a way which protects human health and the environment. RCRA permit procedures are coordinated with the permit procedures of other environmental programs[20] to avoid duplication.[21] The EPA or state agency must be given reasonable access on request to hazardous waste facilities, their records, and waste samples for analysis.[22]

Prior to federal authorization of a state program, handlers of hazardous wastes must comply with both federal and state requirements. A state program can be more stringent than federal regulations,[23] except that a state cannot arbitrarily prohibit the siting of waste facilities within its borders nor prohibit the entry of hazardous waste destined for a designated facility with an approved permit.[24]

Enforcement actions by the EPA or a state agency include compliance orders, civil penalties up to $25,000 per day of noncompliance,[25] injunctions, and criminal fines and imprisonment.[26] Citizen suits may be brought against violators or against the EPA Administrator for failing to comply with nondiscretionary responsibilities.[27] EPA has imminent hazard authority to restrain or remedy an imminent and substantial endangerment to health or the environment from a disposal of solid or hazardous waste.[28]

Federal facilities with jurisdiction over solid waste management or disposal sites, or with activities which may result in the disposal of solid or hazardous waste, must comply with all applicable federal, state and local substantive and procedural requirements.[29] This provision largely waives the sovereign immunity of the United States. As a result, federal agencies may be liable for payment of fines[30] and "reasonable service charges."[31] Such charges relate to state permit programs and should not include fees

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[14]42 U.S.C. § 6903(27) (1976).

[15]*Id.* § 6922, *implemented by* 40 C.F.R. part 262 (1980).

[16]42 U.S.C. § 6923 (1976), *implemented by* 40 C.F.R. part 262 (1980).

[17]42 U.S.C. § 6924 (1976), *implemented by* 40 C.F.R. part 264 (1980). Those standards were amended, to suspend their application to owners and operators of waste water treatment and elementary neutralization facilities. 45 Fed. Reg. 76, 74 (Nov 17, 1980).

[18]42 U.S.C. § 6925 (1976).

[19]*Id.* § 6926.

[20]The Underground Injection Control Program of the Safe Water Drinking Act, 42 U.S.C. § 300f (1976); the Dredge and Fill Program and the National Pollution Discharge Elimination Program in the Clean Water Act, 33 U.S.C. § 1251 (1976 & Supp. V 1981); and the Prevention of Significant Deterioration rules of the Clean Air Act, 42 U.S.C. §§ 7470-7491 (Supp. V 1981).

[21]42 U.S.C. § 6905 (1976).

[22]*Id.* § 6927.

[23]40 C.F.R. § 123.1(k) (1982).

[24]*Id.* § 123.32(a).

[25]42 U.S.C. § 6928(a)(3) (1976).

[26]*Id.* § 6928(d).

[27]*Id.* § 6972.

[28]*Id.* § 6973. Trial courts vary on their treatment of this authority. *See, e.g.*, United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980) (actual proof of harm not required to obtain injunction); United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138 (N.D. Ind. 1980) (mere endangerment to health insufficient for a preliminary injunction).

[29]42 U.S.C. § 6961 (1976 & Supp. V 1981).

[30]Administratively imposed civil penalties can be paid from agency appropriations if the expense arose from normal agency operations and the amount of the penalty does not incriminate against federal facilities. Ms. Comp. Gen. B-191747, 6 June 1978. In some cases permanent indefinite appropriations can be used to pay compromise settlements and final judgment. *See* 58 Comp. Gen. 667 (1979).

[31]42 U.S.C. § 6961 (1976).

such as insurance premiums,[32] certain taxes,[33] and local sewage treatment hook-up charges.[34] Exemptions may be granted by the President "in the paramount interests of the United States".[35]

RCRA requires the Secretary of Commerce to promote resource recovery.[36] Furthermore, all federal procurement activities must procure items containing the highest percentage of recovered materials, consistent with maintaining a satisfactory level of competition.[37] Army activities are also required to use recovery methods in managing hazardous materials.[38]

Toxic Substances Control Act

The Toxic Substances Control Act[39] established a primarily federal regulatory program covering the manufacture and processing of toxic substances. There is little state involvement. The objective is to prohibit the marketing of those substances, toxic or not, which create an unreasonable risk to the public health or environment. TSCA requires testing of chemical substances or mixtures whose possible adverse effects are unknown,[40] and imposes recordkeeping and reporting requirements.[41] EPA has established a nationwide inventory of all chemicals in commercial production.[42] Upon determining that a substance presents an unreasonable risk, EPA can take regulatory steps ranging from requiring warning labels to prohibiting manufacture.[43] Technical assistance for Army personnel concerning the proper handling and disposal of hazardous and toxic wastes is available through channels from the U.S. Army Environmental Hygiene Agency.[44]

The Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act[45] (CERCLA) created what is popularly known as the "Superfund"[46] as a means for immediate federal action to control actual or threatened releases of hazardous substances into the environment. The $1.6 billion fund is authorized to continue through 1985 with joint federal and industry financing. Fund expenditures for federal and state response and removal actions will be reimbursed through civil penalties paid by the responsible pollutors.

Reporting

Two types of contamination by hazardous substances must be reported: release from facilities or vessels, and the existence of old sites.[47] Releases of reportable quantities,[48] other than federally permitted releases, must be reported immediately to the National Response Center.[49] The existence of all sites without federal permits where hazardous waste is or has been treated, stored, or disposed must be reported to EPA. This allows EPA to establish the National Priority List for cleanup. Failure to report as required makes the person in charge of the facility or vessel subject to a fine and imprisonment. Persons in charge must also keep accurate operational records available for review or be subject to criminal penalties.

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[32]The United States is a self-insurer. 19 Comp. Gen. 798 (1940) (funds of a government agency may not be expanded, in the absence of statutory authority, to purchase insurance to cover its possible tort liability). *Accord* 35 Comp. Gen. 391 (1956); 42 Comp. Gen. 392 (1963); 55 Comp. Gen. 1196 (1976).

[33]58 Comp. Gen. 193 (1979).

[34]California v. EPA, 511 F.2d 963 (9th Cir. 1979), *rev'd on other grounds*, 426 U.S. 200 (1976).

[35]*Id.*

[36]*Id.* § 6951-6954.

[37]*Id.* § 6962.

[38]AR 200-1, para 5-3(d).

[39]15 U.S.C. §§ 2601-2629 (1976 & Supp. V 1981).

[40]*Id* § 2603.

[41]*Id.* § 2607.

[42]*Id.*

[43]*Id.* § 2605.

[44]AR 200-1, paras. 5-6(e)(4), 6-11. *See generally* AR 200-1, chapter 5, 6.

[45]42 U.S.C. § 9601 (Supp. V 1981).

[46]Hazardous Substance Response Fund, 42 U.S.C. §§ 9601(11), 9631.

[47]*Id* § 9603.

[48]*Id* § 9602.

[49]Telephone toll free (800) 424-8802. AR 200-1 impose internal Army reporting requirements at para. 8-11.

Response

The National Oil and Hazardous Substances Contingency Plan (NCP)[50] establishes procedures for response actions pursuant to CERCLA and the Clean Water Act. Non-emergency releases are evaluated according to a detailed Hazard Ranking System for inclusion on the National Priorities List. An abatement action can be brought to prevent danger from an imminent hazard.[51] Executive Order 12,316[52] gives DOD complete responsibility for response actions for DOD facilities and ships.[53] This responsibility is carried out through contingency plans for spill prevention and control and through the DOD Installation Restoration (IR) program.

Contingency Plans

Army policies for preventing releases of oil and hazardous substances and controlling their effects require each installation or activity where a reportable quantity could be released to have a current Spill Prevention Control and Countermeasure Plan and an Installation Spill Contingency Plan.[54] Releases must be reported immediately to appropriate civilian and military officials.[55] To preserve Superfund resources, DOD may use the fund only for emergency response and assessment activities, not for long-term remedial cleanup of sites.[56]

Remedial Cleanup

Remedial cleanup is the focus of the IR program, which predates CERCLA. This comprehensive DOD program[57] is designed to identify past hazardous material disposal sites on military installations, evaluate their threat to the public health and welfare of on-post personnel and surrounding communities, and control the migration of environmental contamination.[58] Each installation has primary responsibility for tracking hazardous waste and substances from procurement and generation, through use, storage, transport, and treatment, to disposal.[59] DOD's dual goals are to reduce or eliminate hazardous waste generation while developing more advanced and cheaper control technology.

The Army developed the first IR program in DOD and leads the other services in surveying installations for evidence of past activities which might have caused contamination migration.[60] Most Army installations are not potential sites for hazardous waste pollution. However, the larger installations have solid waste concerns similar to a medium-sized city. It is the industrial-type facilities, such as ammunition plants, which generate most of the Army's hazardous waste. The Army's IR program has three phases. First, assessment, including a review of historical records on past mission activities, followed in some cases by on-site physical surveys and sampling, to identify possible contaminated land areas, equipment, or building. Contractors usually perform the surveys. Development of plans for corrective action is the second phase. Containment of contaminants within the affected DOD area and long-term monitoring of the area are usually recommended rather than more expensive removal actions, but off-site cleanup may be

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[50]40 C.F.R. part 300 (1981). The final NCP was issued on 12 July 1982.

[51]42 U.S.C. § 9606(a) (Supp. V 1981).

[52]Responses to Environmental Damage § 2(c), 46 Fed. Reg. 42,237 (1981) (to be codified at 40 C.F.R. part 300), 71 Env't. Rep. (BNA) 0341 (Sep. 18, 1981).

[53]By memorandum, this responsibility was subdelegated to the services. Within the Army, the Deputy Assistant Secretary of Installations, Logistics, and Financial Management for Environment, Safety, and Occupational Health is the point of contact for Superfund and Executive Order 12,316. *See* Breen, *Superfund: The Army as Protector of the Environment*, The Army Lawyer, May 1982, at 1, 4-5 nn. 22, 23.

[54]AR 200-1, para. 8-3(h).

[55]*Id.* at para. 8-11.

[56]42 U.S.C. § 9611(e)(3) (Supp. V 1981).

[57]*See* 13 Env't. Rep. (BNA) 2334-35 (Apr. 22, 1983).

[58]*See* AR 200-1, para. 3-12.

[59]*See, e.g.*, AR 200-1, paras. 5-4(j), 6-5, 8-5(g).

[60]As of August 1982, the Army had reviewed 124 of its 195 installations identified as potential sites for environmental contamination. Emig & Choi, *The Department of Defense Superfund Program: An Overview*, J. Envtl. Sciences, July/Aug. 1982, at 35. In FY 81 the Army budgeted $6 million for IR surveys and DOD alloted $25.1 million for contamination control projects.

necessary where contamination has crossed installation boundaries.[61] The third phase is the operational phase, when cost-effective response measures are implemented, commensurate with anticipated risks and benefits.

Liability

CERCLA created new causes of action for "damages for injury to destruction of, or loss of natural resources,"[62] providing "cradle-to-grave" liability for hazardous substance mismanagement. The standard is strict liability, save for acts of God, acts of war, and unforseen acts or omissions of certain third parties.[63] Liability may extend to owners or operators of facilities or vessels where a hazardous release occurred and to anyone who arranged for, accepted, or carried out transport or disposal of hazardous substances. Generators of hazardous substances may not be liable under CERCLA unless they had an active role in selecting the site where the release occurred.[64] DOD officials and installations are subject to CERCLA provisions, including liability, to the same extent as nongovernmental entities.[65] The ceiling on liability is set at $50 million, plus actual costs of assessment and cleanup, unless the release was willful or in knowing violation of applicable regulations, in which case there is no statutory ceiling.[66] A separate action may be brought against any person liable for money paid from the fund.[67] An offender who fails to cooperate with a Presidential order directing removal or remedial action can be liable for punitive damages of three times the resulting cost to the fund.[68] Suits for damages may be brought by private parties and by federal or state agencies.

Liability for hazardous releases may be transferred to the federal government when a treatment facility which was operated under a RCRA permit is closed according to regulations. CERCLA established a Post-Closure Liability Fund to assume liability for these inactive sites.[69]

Conclusion

It is evident that the administrative law attorney at a military installation must be familiar with not only these federal pollution abatement statutes but also the state and local implementations of federal law. The local environmental law specialist must be alert to both the substantive law and the local procedural requirements. Additionally, the federal facility compliance provisions demonstrate the need for close coordination between military lawyers and other staff officers on the installation, as well as coordination with local state authorities or their counterparts at the regional office of the Environmental Protection Agency. In this way, commanders of military installations can minimize adverse effects on the environment while accomplishing their mission.

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[61] Three installations (Rocky Mountain Arsenal, Redstone Arsenal, and Pine Bluff Arsenal) have identified off-post contamination migration.

[62] 42 U.S.C. § 9607(a) (Supp. V 1981).

[63] *Id.*

[64] Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 Harv. Envtl. L. Rev. 1, 25 (1982).

[65] 42 U.S.C. § 9607(g) (Supp. V 1981).

[66] *Id.* § 9607(c).

[67] *Id.* § 9612(c)(3).

[68] *Id.* § 9607(c)(3).

[69] *Id.* § 9641.

Preventive Law by Handout

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Introduction to Preventive Law

It has long been recognized by legal assistance officers that an ounce of legal prevention is worth far more than a pound of cure. The avoidance of legal problems, through education and publicity, can go a long way toward reducing the time and expense of legal problems for the man or woman in uniform.

Preventive law naturally contributes to higher morale and efficiency because the client is working to get a job done or a mission performed, not worrying about a car repossession, credit problem, or custody dispute. If a problem can be avoided or detected early, the time spent will be far less that if it is brought to the legal officer when it is really too late—the car has been towed away by the finance company, the credit rating is shot, or the child has just been snatched.

Legal assistance officers prefer preventive law; it keeps the client caseload at a manageable level and reduces the incidence of schedule-crippling emergency walk-ins. Commanders are just as fond of preventive law; it keeps the troops busy at work, rather than hanging around the JAG office. Because of the substantial savings in time, money, and anxiety, preventive law is a favorite with the soldier as well.

This being the case, why is it that at post after post, preventive law is still the red-haired stepchild of legal assistance? Why is it so difficult to create and sustain a good, solid preventive law program? The reason is that the program's best advocates are also its worst enemies. In fact, few commanders realize it, but preventive law is a command responsibility. Army Regulation 600-14, Preventive Law Program, mandates that all commanders implement a preventive law program with technical advice and guidance to commanders furnished through local staff judge advocates. Most often, the legal assistance office is the office which works with local commanders to develop preventive law programs.

The legal officer who benefits tremendously from preventive law simply does not have the down time to devote to preparing speeches and panel discussions, ordering pamphlets, slides and educational materials, scheduling presentations, and selling the idea in the first place to the top brass. Too often, legal assistance personnel get caught on a hopeless treadmill: they have to run so hard to catch up with today's problems, both emergency and routine, that no one has time to plan and prepare for prevention tomorrow. It is ironic that if someone *did* have the time to do substantial work in preventive law, it would very likely return an equivalent or greater net savings in time at the legal assistance office. Although empirical measurement is impossible, time saved should more than make up for time spent in a good preventive law program.

In addition, commanders and troops can be roadblocks to efforts to establish preventive legal assistance on-post. Commanders seldom have anything but praise for columns in the base newspaper, handouts, daily bulletin items, and consumer protection libraries. When it comes to the use of legal cadre for speeches and panel presentations at various units, however, significant problems arise in two major areas: commander perceptions and cadre performance. Commanders perceive legal presentations from the staff judge advocate office as boring, dry, and long-winded, and a waste of valuable time that otherwise would be available for accomplishing their mission. Cadre performance, judged by instructional style and structure, often confirms the image. Any substantial change requires a new commander's attitude, coupled with greater competence in cadre aptitude, and determined leadership from the installation commander and staff judge advocate.

Once these handicaps are identified, it is easier to deal with them as obstacles to the preventive law program. With persistence and solid

backing by the staff judge advocate and installation commander, they can be overcome. This article covers the promise, practicalities and problems of a sound preventive law program at a military installation.

The Facts of Life

The newly appointed legal assistance officer quickly learns three facts of life. These are common to all offices, regardless of location or branch of service. First, a high percentage of the office workload is composed of a half dozen or so key subjects. The best examples are:

1) Immigration and naturalization (visas, marriage to citizens, nonresident alien status, and deportation);

2) Housing and real estate (evictions, security deposits, housing codes, interpretation of leases, home purchases, and problems of the absent military landlord);

3) Consumer protection (used cars and car repairs, freezer meat sales, interstate land contracts, door-to-door sales, mail-order offers, time-sharing agreements, and so-called "free gifts");

4) Criminal and traffic offenses (speeding, driving while impaired, lack of proper registration or inspection)[1] if granted an exception under AR 27-3, para. 1-10; and

5) Family law (divorce, separation agreements, property division, child custody and visitation, alimony, child support, and paternity disputes).

Thorough knowledge of these key problem areas will inevitably expedite the intake, interview and assistance processes, as well as improve the ability of the legal assistance officer to render meaningful and effective aid to the client.

Second, there are certain key questions that continue to be asked in each subject area, such as:

1) How do I get a divorce?

2) Do I need a lawyer ("civilian-type") to take Joe's Used Cars to court?

3) How can I get my child support on time?

4) Why can't I get back my rental security deposit?

5) How do I apply for citizenship?

These are asked by dependents and service personnel alike, regardless of education level, age, grade, and job assignment.

Third, the creation and avoidance of legal problems often depends on factors that can be taught as basic skills, *e.g.*, how to read a contract, compare costs or exercise sales resistance; that can be identified and publicized in advance; and that are generic in nature, rather than specific to a certain soldier, installation location or legal problem area. A soldier who knows how to read a contract will usually avoid problems with separation agreements, as well as leases and credit applications. A soldier who can budget, plan ahead and avoid impulse buying will usually avoid problems with repossessions and foreclosures as well as command complaints regarding child support.

Key Questions and the Handout Strategy

So long as certain key questions continue to be asked by legal assistance clients, it will remain the responsibility of the staff judge advocate and the legal assistance officer to devise ways to answer them. This can be done in the time-honored one-by-one method: "Gee, Sarge, you'll have to make an appointment to find out how you can get a divorce here in North Carolina. I've got an opening three weeks from tomorrow—is that okay?". Or, it can be handled on a broad but efficient basis with the use of legal assistance fact sheets, handouts and pamphlets. These can be made available at racks in the legal assistance waiting room as well as in other heavy-traffic locations, such as the base library, exchange, housing referral office and inspector genral office.

Handouts are superior to printed manuals on state law for the soldier because they tend to be picked up, read and used, rather than handed out, skimmed and stored for future use. In addition, they are usually cheaper to reproduce and

[1]U.S. Dep't of Army, Reg. No. 27-3, Legal Services—Legal Assistance, para. 1-10 (1 Mar. 1984).

easier to amend as the law changes. Finally, they can speed up or eliminate the interview process by providing concise and realistic answers to the most common questions in certain key legal areas.

For handouts prepared at the staff judge advocate office, a catchy headline or logo is the first step. The fact sheet must first catch the eye of the soldier or dependent with a legal problem. Common examples might be: "The Legal Eagle," "The JAG Advisor," "Legal Hotline" or "The Soldier's Lawyer." At Fort Bragg recently, a set of legal pamphlets labeled "TAKE-1" was drafted and printed for use at all three legal assistance offices on-post.

In addition to bold printing for the standard logo, the use of drawings at the top of the handout can be helpful. Some frequent examples include a gavel, the JAGC insignia, the scales of justice, or a judge dressed in black robe behind a bench. Illustrations may also be used throughout the text to stimulate the interest of the reader or to emphasize a point. Usually the office on-post that handles photography, slides and visual aids can be of great help in these areas. If a handout series must be done quickly or on a shoestring budget, a few dollars will buy a press-on lettering set or a stencil packet.

The ABCs of Handouts

When choosing the subjects for a pamphlet series to be developed on-post, these rules must be remembered:

1) *Each handout should cover a specific and well-defined subject.* The client should be able to recognize the subject in the title of the fact sheet, such as "Child Support and the Soldier," "So Your Used Car is a Lemon...," or "The Case of the Missing Security Deposit."

2) *The subject covered should not be too broad.* It is simply impossible to treat "Texas Family Law" or "Consumer Protection in California" in a single handout. The more narrow and specific the topic, the better. This, of necessity, makes for shorter, easier read pamphlets, and less strain on the attention span of the target population. In each case, keep it short and (if possible) sweet.

3) *An editor or project officer should be designated to outline the series in advance, delegate the writing responsibilities, and phase-in each set of pamphlets.* It is impossible to do an entire series in a month, or even a season, given the usual schedule priorities and manpower constraints. Doing a factsheet series in phases makes the project manageable and does not overwhelm the editor or authors. It allows for ready revisions based on format modifications or changes in statutes or case law. It permits others to provide criticism, suggestions, questions and other useful feedback, and the workload can be spread evenly and fairly among present and future legal assistance officers, both active duty and Reserve. It may even be possible to obtain contributions from the local district attorney, motor vehicle department officials, consumer protection specialists, the attorney general's office, Better Business Bureau or Chamber of Commerce, local housing or public health officials, and the federal government's Consumer Information Center in Pueblo, Colorado. The assignment of a single project director will give the series continuity and a uniform writing style.

4) *The questions and answers must be clear and readable.* It takes a conscious effort to write for the soldier-client and not for the staff judge advocate or the military judge. Where lawyers use words like "litigation," "marital dissolution" and "motor vehicle," the usual client would prefer "court fight" or "trial," "divorce" and "car." Keep most words at one or two syllables. Use common nouns and verbs. Write in the active voice whenever possible. A reading specialist at a local school can help in the editing process by performing readability studies to determine the reading level required for selected writing samples or pamphlets.[2]

5) *Answers should usually be broader than the original question.* Too many single-line questions and answers will take up more space than necessary and provide less useful information than the format of a single-line question and full paragraph answer. The function of the question

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[2] *See* U.S. Dep't of Army, Pamphlet No. 310-20, Administrative Publications: Action Officers Guide, appendix D (1 Dec. 1981) for the procedure used to determine the reading grade level of Army administrative publications.

is to attract the reader's attention when the question is relevant, and allow him or her to skip ahead when it is not. A paragraph answer can be helpful in addressing the follow-up inquiries generated by the answer to the initial question. For example, compare the following for effectiveness:

Question 1: Can't I get an annulment if I've only been married a very short time?

Answer 1: No. A short-time marriage is not a ground for annulment, as opposed to divorce.

Answer 1A: Just because a marriage has lasted only a short time does not mean it can be ended by annulment instead of divorce. While annulment may sometimes be faster than divorce, it is used for a different reason than divorce. A divorce is the legal break-up of a valid and legal marriage. An annulment is a judge's ruling that a valid marriage, for some reason, has never existed. Some reasons may be that one of the parties is under the legal age of marriage, was already married at the time of the ceremony, or was forced to go through with the marriage by someone. If you want advice on the grounds for divorce or annulment in this or your home state, you should make an appointment with a legal assistance officer.

Question 2: If I am not getting any child support from my ex-husband, I don't have to let him see the kids, right?

Answer 2: Wrong—you cannot withhold visitation legally for this reason in this state.

Answer 2A: The law in this state does not allow parents to use visitation or child support to punish each other. Even if you are not receiving enough or *any* child support, it is not a legal excuse for refusing to allow visitation. You should go to court or ask for help from a legal assistance officer to obtain child support. Similarly, if you cannot obtain visitation with your children, you should go to court for visitation rights rather than withholding needed child support from them.

The second answer in each of the above examples is broad enough to cover two or three simple questions. Because these longer answers were used to answer anticipated follow-up questions, they provide a more comprehensive response than the shorter answers.

6) *Do not re-invent the wheel.* If it is possible to use and modify materials already developed by others, the resulting savings of time will allow more pamphlets in the series to be drafted or other legal assistance projects to be started. Plagiarism is the sincerest form of flattery. In preparing the "TAKE-1" handout on wills currently in use at XVIII Airborne Corps and Fort Bragg, I used and modified the questions and answers in two different will pamphlets, one from the North Carolina Bar Foundation and the other from the Naval Legal Services Office, Norfolk, Virginia. Because of the different approach in each handout, it was possible to generate about seventeen different questions on matters such as interstate succession, executors, division of personal property, estate tax liability, trusts and guardianship for minor children or incompetents. This was twice the number of questions in either individual pamphlet.

7) *Know your resources.* This seventh and final rule is to be used when time and resources do not allow the development of pamphlets and factsheets at the installation itself. It is always more desireable to prepare the materials at the installation legal office to give a specific orientation to the needs and circumstances of service personnel and their dependents. When this is not possible, the legal assistance officer must look elsewhere for handouts for clients; there are usually a good number available for use. The state bar association may have pamphlets on buying a house or choosing a lawyer; the legal aid society on tenants' rights and repossessions; the state trial lawyers' association on automobile accidents and testifying in court; the attorney general's office on unfair trade statutes and how to sue in small claims court, and the governor's office on the new DWI law. An excellent rack of helpful handouts can be prepared for the legal assistance office with these primary source materials. Curiosity, diligence and imagination are the keys to unlocking these resources.

Conclusion

Handouts and factsheets developed for soldiers by military lawyers can be helpful in preventing the soldier's legal problems and useful in solving difficulties at an early stage. They can also reduce legal assistance interview time because the client can obtain many answers before seeing the legal assistance officer. In considering the many advantages of using legal handouts with the time necessary for preparation and the cost of printing, it is clear that the handout strategy is an important phase of a serious preventive law program at the military installation.

Appendix

Following is one of the "TAKE-1" pamphlets used at Fort Bragg. This pamphlet was a project of the North Carolina State Bar's Special Committee on Military Personnel, in conjunction with the American Bar Association's Standing Committee on Legal Assistance for Military Personnel.

Making Your Will

1. Q. What IS a Last Will and Testament?

   A. A Last Will and Testament is the legal document which controls the disposition of your property at death and may provide for guardianship for your children after your death. A will is not effective until death. As long as you are living, your will has no effect and no property or rights to property are transferred by it.

2. Q. Can My Last Will and Testament Be Changed?

   A. Yes. Changes to a will are made by drafting a new will and destroying the old one, or by adding a "Codicil." A Codicil is a legal document which must be signed and executed in the same manner as your will. NEVER MAKE ANY CHANGES TO YOUR WILL without consulting an attorney. Changes on the face of your original will may make it invalid.

3. Q. What IS My Legal Residence?

   A. Your legal residence is the state in which you have your true, fixed and permanent home and to which, if you are temporarily absent, you intend to return. Voting, paying taxes, owning property, motor vehicle registration and so on, are some indicators of one's legal residence. If you are a citizen of the United States, you must be a legal resident of some state. You cannot be a citizen at large. If you are a naturalized U.S. citizen, you are considered to be a resident of the state in which you were naturalized.

4. Q. Is My Legal Residence Important With Regard to My Will?

   A. Yes. Your legal residence affects where your will is probated and the amount of state inheritance or estate tax that may be paid at death.

5. Q. What Is My Estate?

   A. Your estate consists of all of your property and personal belongings which you own or are entitled to possess at the time of your death. This includes real and personal property, cash, savings and checking accounts, stocks, bonds, real estate, automobiles, etc. Although the proceeds of insurance policies may be considered part of your estate, a will does not change the designated beneficiaries of an insurance policy. The proceeds of an insurance policy, although part of your estate for tax purposes in North Carolina, will normally pass to the primary or secondary beneficiary designated on the face of the respective policy.

6. Q. To Whom Should I Leave My Estate?

   A. A person who receives property through a will is known as a "Beneficiary." You may leave

all of your property to one beneficiary, or you may wish to divide your estate among several persons. You may designate in your will that several different items of property or sums of money shall go to different persons. In any event, you should decide on at least two levels of beneficiaries: "Primary beneficiaries"—those who will inherit your property upon your death; and "Secondary beneficiaries"—those who will inherit your property in the event the "Primary beneficiaries" die before you. You may want to also select a third beneficiary in the event that both the primary and secondary beneficiaries die before you.

7. Q. May a Person Dispose of His Property in Any Way?

   A. Almost, but not quite. For example, in North Carolina, a married person cannot completely exclude a spouse. Generally, you are free to give your property to whomever you desire. However, most states have laws which entitle spouses to at least part of the other spouse's estate. This "statutory share" ranges generally from 1/3 to 1/2 of the other spouse's estate. Some states, such as Louisiana, also provide shares of the estate to children of the decedent. Insurance proceeds and jointly owned property may be controlled by other provisions of the law. If you have questions concerning the statutory share law in your home state, you should ask a legal assistance officer.

8. Q. Should I Name a Guardian for My Children in My Will?

   A. Yes. Usually the surviving spouse is designated as the guardian of any minor children. By so naming the spouse in the will, you can sometimes relieve him or her of any requirement to post bond through a court. You should also give serious consideration to naming a substitute guardian. This would provide for a guardian for your children in the event that your spouse dies before you or you and your spouse die at the same time. This substitute guardian need not be the same person in both your will and your spouse's will.

9. Q. What Is an Executor?

   A. An executor (executrix, if female) is the person who will manage and settle your estate according to the will. You should also consider naming a substitute executor in the event that the named executor is unable or unwilling to act as the executor of your estate. By the wording of your will, you can require that your executor or substitute executor be required to post bond or other security, or you can waive this requirement, thereby saving expense to your estate. The choice is yours.

10. Q. What If I Want to Set Up a Trust?

    A. The resources available in this office do not permit the drafting of trust agreements. To accomplish this, you should consult your bank's trust department or contact a civilian attorney.

11. Q. What If I Still Have Questions Regarding My Will?

    A. Ask them while your legal assistance officer is preparing your will. Be sure that you convey accurately your wishes for the distribution of your property to him or her.

12. Q. How Long Is a Will Good?

    A. A properly drawn and executed will remains valid until it is changed or revoked. However, changes in circumstances after a will has been made, such as tax laws, marriage, birth of children or even a substantial change in the nature or amount of a person's estate, can affect whether your will is still adequate or whether your property will still pass in the manner you chose. All changes in circumstances require a careful analysis and reconsideration of the provisions of a will and may make it wise to change the will, with the help of your legal assistance officer.

13. Q. Does a Will Increase Probate Expense?

A. No. It usually costs less to administer an estate when a person leaves a will than when there is no will. A properly drafted will may reduce the expense of administration in a number of ways. Provisions can be placed in wills which take full advantage of the federal and state tax laws. Drawing a will can avoid the expense of posting bond or appointing a guardian for your children. A will can save money for you and your family if it is properly drafted.

14. Q. How Large an Estate Is Necessary to Justify a Will?

A. Everyone who owns any real or personal property should have a will regardless of the present amount of his estate. Your estate grows daily in value through the repayment of mortgages, appreciation of real estate, stocks and other securities, inheritances from relatives and other factors.

15. Q. What Happens When You Don't Make a Will?

A. When a person dies without a will (or dies "intestate," as the law calls it) the property of the deceased is distributed according to a formula fixed by law. In other words, if you don't make a will, you don't have any say as to how your property will be divided. Take the case of a North Carolina resident dying without a will, for example. If this person dies without a will, leaving children, the surviving spouse would share the estate with the children. With no will, the surviving spouse receives the first $15,000 in value and 1/3 of the remaining estate where there is more than one child or 1/2 of the remaining estate when there is only one child. Now usually a person would prefer that all of his estate, if it is not large, go the the surviving spouse. If there are any children under 18, the property cannot be delivered to them and a guardian must be appointed for them. A guardian will require considerable expense and could create legal problems that might have been avoided with a will. Most important for mothers and fathers, however, is not the disposition of their property after their death but rather the proper care and custody of their minor children. Grandparents, other family members and godparents do not automatically receive custody of children who do not have a surviving parent. Your will should specify the individual, as well as an alternate, you would like to designate as the guardian of your children. This decision on your part will be of great assistance to the court in determining who will receive the custody of your children.

16. Q. What Happens to Property Held in the Names of Both Husband and Wife?

A. Joint bank accounts and real property held in the names of both husband and wife usually pass to the survivor by law and not by the terms of the deceased's will. There are many cases, however, in which it is not to your advantage to hold property in this manner.

17. Q. Is a Life Insurance Program a Substitute for a Will?

A. No. Life insurance is only one kind of property which a person may own. If a life insurance policy is payable to an individual, the will of the insured has no effect on the proceeds. If the policy is payable to the estate of the insured, the payment of the proceeds may be directed by a will. The careful person will have a lawyer and a life insurance counselor work together on a life insurance program, as one important aspect of estate planning.

Legal Research Through FLITE

Harold Charles Kullberg, Esq.
Attorney-Advisor, FLITE

After nearly twenty years of operation, FLITE (Federal Legal Information Through Electronics) continues to be the best bargain in computerized legal research for the military attorney. Unlike WESTLAW®, LEXIS®, and JURIS, which require a significant cash outlay for installation and continuing expenditures for usage and equipment rental, FLITE's services are available at no cost to judge advocates, or any employee of the Department of Defense. Moreover, FLITE attorneys are not limited to only one computerized legal research system. In addition to the FLITE system, FLITE attorneys have access to JURIS, WESTLAW®, LEXIS®, DIALOG®, REG-ULATE, and LEGISLATE.

FLITE operates as a service center with a staff of attorneys who perform research. An attorney or employee with a research problem can call FLITE at AUTOVON 926-7531 or Commercial/FTS (303) 370-7531 to discuss the problem with a FLITE attorney. For weekend Reservists and others who work after FLITE's normal hours of operation, a code-a-phone is available at AUTOVON 926-2611 to take messages. The FLITE attorney then uses one or more of the legal research systems to locate cases or other authority applicable to the caller's question.

The research results are provided to the caller by mailing a printed report and/or by calling back with citations. Normally, the results are ready on the day following the request, but FLITE attorneys can provide results more quickly if the caller needs a faster response. On occasion, attorneys have received case citations over the phone during the recess of a trial.

Computerized legal research is radically different from the traditional techniques of legal research which have been taught in law schools to several generations of attorneys. Traditional techniques rely on digests, indices, and encyclopedias that classify cases by topic and issue according to the judgment of the person writing the digest. This factor of human judgment is, in effect, a barrier between the attorney and the law. A given case may have multiple issues, and not all issues may be classified under appropriate headings in a digest. Furthermore, many administative decisions are not adequately indexed. For example, the unpublished decisions of the Comptroller General, which have the same legal authority as the published decisions, are not indexed in any manner.

The essence of computerized legal research is to use the computer to search the full text of legal materials and retrieve those documents which contain words or phrases relating to the research problem. A computer can do many tasks, but it cannot conceptualize; it searches for language rather than ideas or concepts. Thus the FLITE attorney, in consultation with the user, must break the problem down into the words that would most likely appear in a case dealing with the particular issue. The researcher has to strike a balance between broadness and specificity. Assume that a defense attorney has a client whose locker was searched by the military police using a drug detection dog. To have the computer locate all military justice cases mentioning only the word "search" would yield too many cases. Narrowing the search to cases using the words "drugs," "dog," and "search" may still be too broad. By refining the search to locate cases using the words "dog" and "drug" in the same sentence and the word "search" within several sentences of the other search terms, the researcher would be able to locate a manageable number of relevant cases. Reviewing the initial search results may suggest other terms which can further refine the search logic.

Once the search logic is keyed into the computer, the computer will locate every case with language conforming to the search logic. In the example above, the cases selected may discuss the issues of drug detection dogs at length or just briefly. Again, the limitation of the computer is that it cannot evaluate the relative importance of a case. However, the FLITE search reports are designed to make review of the selected cases relatively quick and easy. For

each case, the report shows the citation and the portions of the text that contain the search words, which are highlighted. The case synopsis and/or headnotes may also be printed, at the option of the user and the FLITE attorney. In the past year, FLITE has made major changes in the search report to make it more convenient, organized, and readable.

The most important technical difference between the FLITE system and the other research systems available to FLITE attorneys is the access method. The other systems, *e.g.*, LEXIS[R], or JURIS[R], are accessed on-line through terminals. Although FLITE plans to add this type of service, it currently operates in the "batch processing" mode. In batch processing, the FLITE attorney writes the complete search logic, which is then key-punched and processed by the computer overnight. This system has several advantages. Searches which yield more than a few cases or require a complicated search logic can be processed less expensively and more efficiently than with on-line interactive systems.

The FLITE system also has the greatest number of search commands and the greatest flexibility in search logic. For example, the system can require a search term to appear within a certain number of words of other search terms, within the same sentence, within a specified range of sentences, or anywhere within the same document. Lists of alternative words and phrases may be substituted for single words in these relationships. These word relationships may in turn be combined using any of the logical connectors listed above *e.g.*, within the same sentence. The search logic can be made as complex as the problem requires, but this complexity need not concern the user since the FLITE attorney formulates the search. The FLITE user need only be able to explain the problem or issue.

Another advantage of the FLITE system is the inclusion of data bases of special interest to military attorneys, *e.g.*, Court-Martial Reports and Digest of Opinions of The Judge Advocates General. Many of its other data bases reach back further in time than those of LEXIS[R], WESTLAW[R], and JURIS. For example, FLITE has U.S. Reports, Federal Reporter, Federal Reporter Second, and Federal Supplement starting with the first volume. Similarly, published Comptroller General decisions are searchable from volume one and the unpublished decisions are searchable back to 1955.

FLITE attorneys use the other six research systems when the user cannot wait for the overnight processing required by the FLITE system or when the problem requires access to data bases that only exist on one of the other systems. JURIS (Justice Retrieval and Inquiry System) was developed by the U.S. Department of Justice. JURIS and FLITE cooperate closely, exchanging data bases and other services. Since JURIS has the most flexible search logic of these other systems, it is the first recourse when time constraints prevent use of the FLITE system. Mead Data's LEXIS[R] and West Publishing Company's WESTLAW[R] are used primarily for searching the full text of state court decisions. In addition, LEXIS[R] has the statutes of New York, Ohio, Missouri and Kansas. Unfortunately, the statutes of other states are not available on any of these systems.

Lockheed's DIALOG[R] has more than 100 data bases from many fields, including science, business, news media, and social science. These consist primarily of abstracts and bibliographic entries rather than full text. Several DIALOG[R] data bases are of particular interest to attorneys. The Legal Resource Index covers more than 660 law journals and five legal newspapers from 1980 to the present. Abstracts of labor and patent law decisions from the Bureau of National Affairs are available. Other specialized data bases include abstracts related to child abuse and neglect and criminal justice. LEGI-SLATE is a legislative tracking service that provides up-to-date information on the status of bills before the United States Congress. LEGI-SLATE's coverage starts with the 96th Congress and is updated each day. It includes information about sponsors, hearings, actions taken, and voting records. REG-ULATE provides information about announcements published in the Federal Register since 1981. It provides the volume and page number of an announcement as well as CFR references, caption, issuing agency, persons to contact for further information, and applicable statutes.

REG-ULATE is updated each day and is current with the most recent printed edition of the Federal Register.

Because all of the computerized legal research services have both advantages and limitations, it would be neither practical nor wise to rely on one system to the exclusion of all others. FLITE, with a full range of systems available, can overcome the limitations of a single system. In addition to providing legal research services, FLITE also produces various research aids including indices, digests, and citators. These materials are produced on microfiche and are available on request. Some of the documents for which a Key-Word-In-Context (KWIC) Index are available include the recent Federal Acquisition Regulation (FAR), the Military Rules of Evidence, and the Manual for Courts-Martial. A quarterly newsletter is published by FLITE which provides information on additions and improvements to the FLITE system.

In conclusion, the advantages of computerized legal research become obvious as one notes the almost geometric increase of judicial and administrative decisions, statutes, and regulations. Legal digests and encyclopedias which met the needs of attorneys in the past cannot fully meet the needs of attorneys today. The vast store of information on the seven systems used by FLITE is only a telephone call away*. The government attorney can tap this information without learning seven different search systems and without paying for equipment and subscriptions. In this way, FLITE can help attorneys achieve more thorough and comprehensive research while saving time and money.

*FLITE Services may also be obtained by writing:
FLITE (HQ USAF/JAESL)
Denver CO 80279

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

Opinions of The Judge Advocate General

(Death and Deceased Persons; Dependents—Privileges) **Benefits For Survivors Of Deceased Reserve Component Personnel.** DAJA-AL 1983/2027, 28 June 1983.

The Judge Advocate General was asked to list the primary survivor death benefits available to survivors of deceased members of the U.S. Army Reserve (USAR) on Annual Training (AT), Active Duty for Training (ADT), or Inactive Duty Training (IDT), if the member suffers cardiac arrest and dies during the stress test phase of medical screening. [Editor's Note: AT is normally a two-week period of training performed by USAR personnel assigned to a reserve unit; this training is in addition to weekend drills. Individuals performing two-week training as Individual Mobilization Augmentees are also performing AT. ADT is normally that training performed for a period in excess of AT and weekend drills.] The Judge Advocate General opined that survivors of USAR members described above would be eligible for the following benefits. This list is not an exclusive list of available benefits.

SGLI. Reservists may elect and pay for term life insurance coverage under the Servicemen's Group Life Insurance (SGLI) program. $35,000, or the amount elected, will be paid to the designated beneficiaries of a USAR member who dies while performing AT, ADT, or IDT, unless the member elected not to be covered by SGLI, or failed to keep the SGLI premiums current. 38 U.S.C. §§ 765(3)(A) and 767(a)(1) require that IDT be, "scheduled in advance by competent authority to begin at a specified time and place."

AR 608-2, chapter 2, section III, contains specific guidance concerning USAR SGLI coverage.

Death Gratuity Pay. 10 U.S.C. §§ 1475-1480 provide for a one-time payment of a lump sum death gratuity to statutorily designated survivors of USAR personnel who die while on AT, ADT, or IDT. This payment is equal to six month's pay at the rate to which the reservist was entitled at death but may not be more than $3,000 nor less than $800.

Burial Assistance. AR 638-40 describes a wide range of mortuary services and related benefits authorized, at government expense, to a USAR member who dies while on AT, ADT, or IDT. These benefits include recovery, communications, mortuary services, cremation, clothing, transportation, escort travel, flag, internment, internment allowance, grave marker memorial marker, and memorial service expenses. Some of these benefits are mutually exclusive and some are contingent upon the circumstances of the death.

DIC. 38 U.S.C. § 401 provides for payment of Dependency and Indemnity Compensation (DIC) to surviving family members of USAR personnel who die on AT or ADT from a *disease* or *injury*, or who die on IDT from *injury* incurred or aggravated in the line of duty. The Judge Advocate General's understanding was that the Veterans' Administration (VA) generally considers a heart attack to be the product of a *disease* rather than an *injury;* however, this is a factual determination for the VA. Accordingly, the surviving dependents of USAR members on AT or ADT would be entitled to DIC payments. [Editor's Note: These line of duty determinations are made by VA personnel pursuant to the rules contained in 38 C.F.R. §§ 3.1-.16. Guidance in DAJA-AL 1983-2027, 28 June 1983, was extended to ARNG personnel as described in DAJA-AL 1983-2120, 11 July 1983.]

(Line of Duty) **Casualty Area Commander Cannot Reverse His Prior NLOD/DOM Determination.** DAJA-AL 1983-2538, 16 September 1983.

The Adjutant General requested an opinion on whether the casualty area commander can reverse his own not in line of duty—due to own misconduct (NLOD-DOM) determination, and on whether the evidence in the investigation involving SP4 R justified such a reversal.

SP4 R, on authorized pass, was involved in a gambling game in which he bet $15. According to SP4 R, the operator of the game realized that SP4 R was about to win and cheated. When SP4 R became angry and refused to pay, the operator of the game grabbed SP4 R's $15 from him. SP4 R then pulled a revolver from his pocket, hit the operator over the head with it, grabbed his $15 and ran, dropping the revolver as he ran. The operator of the gambling game ran in another direction; SP4 R began walking back toward the installation.

After about 15 minutes and while enroute to the installation, SP4 R was approached by an automobile in which the operator of the gambling game was a passenger. SP4 R tried to run away but was shot by the operator of the gambling game and paralyzed him from the waist down.

The investigating officer for SP4 R's line of duty investigation determined that the injury was in line of duty (LOD). Both the appointing authority and reviewing authority approved the LOD finding. However, the casualty area commander disapproved the finding, changed it to NLOD-DOM, and so notified SP4 R. After a subsequent staff judge advocate review concluded that the NLOD-DOM determination was in error, the casualty area commander changed his earlier determination to LOD and so notified SP4 R.

The Judge Advocate General opined that under the provisions of paragraph 3-9 of AR 600-33 (Line of Duty Investigations) only the Secretary of the Army, or The Adjutant General acting for the Secretary of the Army, has the authority to change an incorrect line of duty determination. Accordingly, the purported redetermination by the casualty area commander that SP4 R's injury was incurred "in line of duty" is without legal effect.

Responding to the second question, The Judge Advocate General opined that the correct finding should be LOD. After acting improperly, SP4 R withdrew from the affray; when he inad-

vertently encountered his assailant, SP4 R attempted to flee. Accordingly, the facts do not support the conclusion that his injury was foreseeable and proximately caused by his earlier misconduct.

(Line of Duty) **Presumption of Alcoholic Impairment Under AR 600-85 Does Not Necessarily Result in NLOD Determination.** DAJA-AL 1983/2087, 28 June 1983.

The Adjutant General requested an opinion on whether the .05 per cent standard of impairment contained in change 1 to AR 600-85 (Alcohol and Drug Abuse Prevention and Control Program) affects line of duty determinations and the determination of proximate cause under AR 600-33 (Line of Duty Investigations).

The Judge Advocate General noted that AR 600-85, paragraph 1-9.1, prohibits military personnel on duty from having a blood alcohol level of .05 per cent or greater. The intent of this punitive provision is to deter the consumption of alcohol by service members on duty.

AR 600-85, paragraph 1-9.1, does not change the standard of proof applicable to line of duty investigations. The mere violation of a regulation by itself is no more than simple negligence, and simple negligence is not by itself misconduct (AR 600-33, appendex, rule 2; AR 600-33, paragraph 2-4c). While a violation of paragraph 1-9.1 is evidence that the service member's conduct was at least impaired by alcohol, this is but one item of evidence that must be considered.

The proximate cause requirement (AR 600-33, paragraph 2-3b) for a not in line of duty—due to own misconduct finding in these circumstances mandates that the erratic or reckless conduct resulting from the effect of the abuse of alcohol proximately cause the incapacitating injury. AR 600-33, appendix, rules 3 and 4 remain unchanged by AR 600-85, paragraph 1-9.1.

Additionally, paragraph 1-9.1 is applicable only when service members are performing military duty; accordingly, its use as evidence of impairment is applicable only in those cases of incapacitation incurred while the service member was performing military duties.

Guide to Commercial Activities

The Staff Judge Advocate of West Point published a notice in the West Point bulletin concerning prohibited activities. This preventive law measure is reprinted in full below for modification and use at other installations as appropriate; it reminds personnel of restrictions on commercial activities and should reduce the number of last-minute and after-the-fact requests for opinions. Footnotes have been added by MAJ Ward King, Administrative and Civil Law Division, TJAGSA, to provide reference material for judge advocates to use in preparing local bulletin notices and advising commanders on these matters.

Soliciting On Post/Off-Duty Employment

The consequences of improper off-duty employment and commercial solitications on post can be significant. A recent Air Force court martial convicted a field grade officer of making personal solicitations and sales to a noncommissioned officer and of engaging in off-duty employment without obtaining official permission.[1] He was fined $5,000.00 and reprimanded. Military members who improperly use their government quarters for commercial enterprises are subject to having quarters terminated.[2] Civilians who engage in unlawful commercial enterprises on a military installation may be subject to barment from post and prosecution in federal court.[3] The primary business of military installations and service members is our military mission. Conduct that may interfere with that mission by adversely

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[1]This was an unreported case from HQ, 8th Air Force SAC, Barksdale, LA (GCM Order No. 37).

[2]Use and termination of government quarters are governed by AR 210-50, Family Housing Management, chapter 3 (1 Feb. 1982). *See* Hines v. Seaman, 305 F. Supp. 564 (D. Mass. 1969).

[3]Prosecution is for violation of the federal trespass statute, 18 U.S.C. § 1382 (1982). *See* Serrano Medina v. United States, 709 F.2d 104 (1st Cir. 1983); Tokar v. Hearne, 699 F.2d 753 (5th Cir.), *cert. denied*, 78 L. Ed.2d 137 (1983); Lloyd, *Unlawful Entry and Re-entry Into Military Reservations in Violation of 18 U.S.C. § 1382.* 53 Mil. L. Rev. 137 (1971).

affecting soldiers' morale and discipline is not authorized. Whether you wish to earn money for yourself, your organization, or a worthy cause by selling goods or services at West Point and/or STAS,[4] you should be aware of the Army's and USMA's restrictions on these activities. The outline below should help you decide which authority may grant permission for you to conduct your business. IF YOU ARE IN DOUBT ABOUT WHETHER TO GET PERMISSION, MAKE AN INQUIRY.

I. *Commercial Solicitations:* Examples include, but are not limited to, shows or parties in your quarters to sell clothing, jewelry, or cosmetics and door-to-door sales of cosmetics or household supplies. Any activity designed to earn a business profit for you, or a company for which you work, by soliciting on post is controlled by Army Regulation 210-7 and USMA Supplement 1 to AR 210-7. You may not engage in commercial solicitation on post until actual written authority has been granted by the Superintendent, United States Military Academy.[5] Application to solicit should be made to the Adjutant General, ATTN: MAAG-A, in accordance with USMA Supplement 1 to AR 210-7. Special restrictions apply to the sale of life and automobile insurance.[6]

II. *Charitable and Other Fund-Raising Solicitations* (Excluding Combined Federal Campaign and Army Emergency Relief Campaign): Examples include collections and sales of baked goods and other items for medical and religious charities, and other worthy causes, such as programs for underprivileged children and the elderly. Such organizations may apply for participation in the Combined Federal Campaign (CFC) under the provisions of AR 600-29.[7] Otherwise, permission must be obtained from the installation commander through the Deputy Post Commander. AR 600-29 generally limits approval to fund raising which will benefit the local military community.

III. *Solicitations by On-Post Private Organizations:* Examples include sale of food, crafts or clothing, or giving classes for a fee, whether limited to organization members or the general West Point and STAS communities. AR 210-1

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[4]Stewart Army Subpost.

[5]Judge Advocates should be aware of a HQDA (DAAG-DPS) message, dated 041530Z Apr 84, Subject: Home Business Sales in Family Quarters, reproduced in full below:

1. Discussion at the 1984 Division Commander's Conference, queries from installation commanders and a recent increase in congressional inquiries concerning home enterprise sales conducted in quarters on Army installations, indicate that there is confusion and inconsistency in application of pertinent Army policy.
2. Paragraph 2.8*f*(17), AR 210-7, Commercial Solicitation on Army Installations, allows the commander to permit normal home enterprises in government quarters providing there is no conflict with state and local laws. Normal home enterprises can be best defined as those commercial activities normally engaged in by individuals in civilian society in a domestic setting. Examples include sales of cookware, jewelry, cosmetics, and home and personal cleaning products.
3. Overseas commanders, in keeping with Status of Forces Agreement, have generally prohibited home sales in government quarters. This is a sound application of the commander's discretionary latitude in setting policy. Unique problems do exist overseas associated with the use of the Military Postal System for personal commercial gain and with host country officials concerned over the importation of duty free goods destined for resale for profit.
4. Within the United States, there is a need to more sensitively address individual installation policies concerning home sales in government quarters in light of our commitment to the Army family, our understanding of the needs of families living on installations and our recognition of the importance of spouse employment within the Army community. Over 50 percent of Army spouses are working. All face routine turbulence in employment opportunities caused by frequent family relocation. Home enterprise businesses which can be easily moved and reestablished in a new community have appealed to more and more military wives whose employment is a recognized, important, and needed portion of the family income.

Thus for CONUS installations, the thrust of the bulletin entry should be that the individual must obtain *prior* permission to conduct such activities, while for overseas locations, the wording may require modification to reflect the local policy.

[6]U.S. Dep't of Army, Reg. No. 210-7, Commercial Solicitation on Army Installations (15 Dec. 1978), chapter 3; DOD Directive 1344.1, Solicitation and Sale of Insurance on Dep't of Defense Installations (31 Aug. 1977) (codified at 32 C.F.R. §§ 276.1-76.7 (1981)).

[7]*See also* DAJA-AL 1977/4330, 24 May 1977, *digested in The Army Lawyer*, Oct. 1977, at 10.

governs both limited and continuing sales.[8] Inquiries should be directed to the Adjutant General, ATTN: Personnel Services Division.

IV. *Solicitation of Subordinates and Other Uses of Military Position:* AR 600-50, Standards of Conduct, prohibits on or off-duty personal commercial solicitations or sales by service members to those who are junior in rank, grade or position, with certain limited exceptions.[9] Similar limitations apply to civilian employees as well.[10] Care must also be taken when spouses of the superiors are involved in such activities. No conflict of interest is allowed with respect to one's official position and any other enterprise.

Except as authorized by law or regulation, military personnel will not use their military titles of positions in connection with any commercial enterprise.[11] In considering off-duty employment, service members should consider the prohibitions against fraternization contained in AR 600-20, paragraph 5-7f. Relationships between service members of different rank which involve (or give the appearance of) partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale.[12] Improper commercial relationships can result in fraternization charges. Inquiries should be directed to Office of the Staff Judge Advocate, ATTN: MAJA-AL.

V. *Off-Duty Employment:* Service members' first duty is to their military mission. Off-duty employment may not interfere with official obligations at any time. Service members not available for duty because of off-duty employment are subject to disciplinary action under the UCMJ for, among other offenses, AWOL, failure to repair, or missing movement. In accordance with USMA Supplement 1 to AR 600-50, enlisted personnel will direct requests to engage in off-duty employment to the Commander, 1/1 Infantry; all others will direct such requests to their Major Activity Directors.[13]

VI. *Use of Government Quarters for Commercial Activities:* Examples include sales of merchandise or giving classes in one's home whether on one's own, for an employer, or for a private organization operating on post. AR 210-50 and USMA Supplement 1 to AR 210-50 require approval from the Superintendent prior to using quarters for commercial purposes.[14] Inquiries should be directed to the Housing Division, Directorate of Engineering and Housing.

VII. *Use of Official Distribution for Commercial and Related Activities:* Examples include using official distribution to circulate flyers,

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[8]Althouth U.S. Dep't of Army, Reg. No. 210-1, Private Organizations on Department of the Army Installations, para. 4-2 (15 July 1981) allows for both occasional and continuing resale operations by private organizations when certain conditions are met, judge advocates should be aware of U.S. Dep't of Army, Reg. No. 215-1, Administration of MWR Activities and NAFIs, para. 3-17 (20 Feb. 1984) which provides all resale on an Army installation is conducted by NAFIs except for commissary store sales; occasional, and intermittent sales of goods by on-post private organizations per AR 210-1; and sales by private vendors authorized to solicit on post per AR 210-7.

[9]AR 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-1*i*(2) (15 Aug. 1982), provides an exception for (1) the sale or lease, by a person, of a privately owned former residence, (2) the sale of personal property not held for commercial or business purposes, and (3) off-duty employment as employees in retail stores.

[10]AR 600-50, para. 2-1*i*(3) provides that for civilian personnel, this prohibition applies only with regard to personnel under their supervision at any level.

[11]AR 600-50, para. 2-5. Retired military personnel may, however, use their military titles in connection with commercial enterprises, provided they indicate their retired or Reserve status. Overseas commanders may restrict the use of titles by retired or Reserve personnel in an overseas area. AR 600-50, para. 2-5*c*.

[12]*See e.g.*, United States v. Smith, 16 M.J. 694 (A.F.C.M.R. 1983).

[13]U.S. Dep't of Army Reg. No. 215-3, NAF and Related Activities Personnel Policies and Procedures, para. 2-16*d* (20 Feb. 1984) provides that prior to the off-duty employment of enlisted military personnel by a nonappropriated fund instrumentality, the written approval of the service-member's commander must be obtained. Also, restrictions concerning nepotism with respect to hiring and employment by a nonappropriated fund instrumentality are contained in 5 U.S.C. § 3110 (1982).

[14]AR 210-50, para. 3-36, provides that government housing will not be used for commercial endeavors without the written approval of the installation commander. *See also* DAJA-AL 1977/5995, 22 November 1977, *digested in The Army Lawyer*, May 1978, at 38.

letters or pamphlets advertising anything other than official functions, *i.e.*, private organization and charitable fund raising activities and religious programs.[15] Use of a government service for personal benefit may be a violation of Article 134, UCMJ, or New York Penal Law, Section 165.15, as assimilated by 18 US Code, Section 13. Inquiries on the propriety of using official distribution channels for individual or bulk transmittals should be directed to the Adjutant General.

VIII. *Distribution or Posting of Publications:* Newspapers, magazines, handbills, flyers, leaflets, petitions, circulars, and other written or printed material must be approved for distribution or posting in accordance with AR 210-10 and USMA Supplement 1 to AR 210-10. Inquiries should be directed to the Assistant Chief of Staff for Post Operations.

This outline does not list every type of on-post solicitation or commercial activity controlled by statute or regulation. It should alert you to the need to seek proper authority and direction before engaging in money-making endeavors which are not part of your routine official duties as a service member, family member, or civilian employees at USMA.

Interim Change 1 to AR 600-33

Interim Change 1 (dated 30 March 1984) to AR 600-33, Line of Duty Investigations (15 June 1980), provides for the delegation of final approval authority of line of duty investigations by designated commanders to their adjutant general, PERSCOM commander or major subordinate GCM authority, and the further delegation of this authority to an officer on their respective staff. Further, it establishes the requirement that the approving headquarter's staff judge advocate office review all line of duty investigations which are found not in the line of duty.

Campaign Contributions

The text of the 14 February 1984 memorandum for the heads of all federal departments and agencies from The White House, signed by Mr. Fred F. Fielding, counsel to the President, subject: 18 U.S.C. § 603, is reproduced below in full:

Section 603 of title 18 makes it a felony for any officer or employee of the United States to give a political contribution to any other officer or employee of the United States who is the "employer or employing authority" of the contributor.* Although the issue is not free from doubt, this provision may prohibit any Federal employee from contributing to the authorized campaign committee of the President (Reagan-Bush '84).

Although such interpretation** "would raise grave constitutional concerns, prudence requires that any ambiguity in the language of this statute be resolved against placing any Presidential appointee or other Federal employee in the position of inadvertently violating Federal law. Hence, in the absence of any judicial interpretation of this provision or any legislative clarification of it, all Federal employees should be advised that this statute may preclude them from contributing to Reagan-Bush '84, the authorized campaign committee of the President.

I regret that such advice may inhibit Federal employees from the full exercise of their First Amendment rights; nevertheless, in the interest of maintaining strict compliance with all Federal statutes, every Federal employee should be made aware of the language and potential restrictions of this statutory provision.

Your cooperation in disseminating this advice will be greatly appreciated.

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[15]Similarly, U.S. Dep't of Army, Reg. No. 210-1, Private Organizations on Department of the Army Installations, para. 4-12 (15 July 1981), provides that private organizations will not use official mail indicia or the Military Postal Service except as shown in AR 210-1, figure 4-1. AR 215-1, para. 10-9, chapter 4, and appendix C at para. 6*b* provide guidance concerning payment of postal service fees by non-appropriated fund instrumentalities. Also, gambling events will not be publicized in media distributed through the U.S. Postal Service. U.S. Dep't of Army, Reg. No. 215-2, The Management and Operation of Army MWR Programs and NAFIs, para. 3-31 (20 Feb. 1984).

*The terms "contribution" and "authorized committee" are used as they are defined in the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431(8) and 432(e)(1).

**This interpretention would be personal to the employee only, and would not apply to his or her spouse or family, and would be applicable only to contributions to Reagan-Bush '84.

Court-Martial/Nonjudicial Punishment Rates

US Army Judiciary, USALSA

Quarterly Court-Martial
Rates Per 1000 Average Strength
July–September 1983

	General CM	SPECIAL CM		SUMMARY CM
		BCD	NON-BCD	
ARMY-WIDE	.46	.54	.18	.72
CONUS Army commands	.40	.47	.16	.65
OVERSEAS Army commands	.57	.66	.20	.84
USAREUR and Seventh Army commands	.58	.70	.18	.87
Eighth US Army	.86	.79	.34	.48
US Army Japan	—	—	—	—
Units In Hawaii	.28	.28	.11	.56
Units in Alaska	.37	.62	.62	1.73
Units in Panama	.57	.14	—	1.71

Quarterly Court-Martial
Rates Per 100 Average Strength
Fiscal Year 1983

	General CM	SPECIAL CM		SUMMARY CM
		BCD	NON-BCD	
ARMY-WIDE	2.03	2.65	.99	3.65
CONUS Army commands	1.60	2.07	.92	2.95
OVERSEAS Army commands	2.76	3.66	1.12	4.84
USAREUR and Seventh Army commands	3.02	3.76	.98	5.23
Eighth US Army	2.25	4.39	2.25	3.08
US Army Japan	.80	2.39	.40	—
Units In Hawaii	1.40	1.90	1.29	2.52
Units in Alaska	1.92	5.04	1.92	3.72
Units in Panama	2.16	1.22	—	8.79

Nonjudicial Punishment
Rates Per 1000 Average Strength
July–September 1983

	QUARTERLY RATES		
	SUMMARIZED	FORMAL	TOTAL
ARMY-WIDE	10.05	34.19	44.24
CONUS Army commands	10.54	34.22	44.76
OVERSEAS Army commands	9.20	34.13	43.33
USAREUR and Seventh Army commands			42.20
Eighth US Army			51.85
US Army Japan			15.85
Units In Hawaii			49.10
Units in Alaska			50.59
Units in Panama			36.50

Nonjudicial Punishment
Rates Per 1000 Average Strength
Fiscal Year 1983

	SUMMARIZED	FORMAL	TOTAL
ARMY-WIDE	37.30	131.25	168.56
CONUS Army commands	38.65	130.09	168.73
OVERSEAS Army commands	35.01	133.24	168.25
USAREUR and Seventh Army commands			163.60
Eighth US Army			214.84
US Army Japan			63.75
Units In Hawaii			168.62
Units in Alaska			169.35
Units in Panama			168.54

NOTE: The figures in the above tables represent geographical areas under the jurisdiction of the commands listed and are based on the average number of personnel on duty within those areas.

Criminal Law Section

Criminal Law Division, OTJAG

AR 27-10, Military Justice, will be revised, effective 1 August 1984, to implement the new Manual for Courts-Martial, the Military Justice Act of 1983, and the Victim and Witness Protection Act of 1982. The regulation will be published in the UPDATE format and should arrive in the field around 1 July 1984. SJA offices which do not receive a copy of the revised AR 27-10 by mid-July should contact the Criminal Law Division, Office of The Judge Advocate General, WASH DC 20310. AUTOVON 225-2193/227-1484.

Judiciary Notes

US Army Legal Services Agency

Digest—Article 69, UCMJ, Application

A recent application under the provisions of Article 69, UCMJ, *Peterson*, SPCM 1984/5517, reaffirms the valuable use of circumstantial evidence to prove an apprehension or attempt to apprehend. The accused, whose on-post driving privileges had been revoked, was seen driving on post on the night in question by a military policeman (MP). The MP, who was wearing his duty uniform and military police insignia at the time, flagged the accused down with a flashlight. The accused stopped, and the MP identified himself. They talked for two or three minutes, during which time the MP asked the accused for his identification card and driver's license. When the accused just stared blankly at the MP, as if he didn't understand what had been said to him, the MP directed the accused to pull his car over to the side of the road and turn off the ignition. Instead, the accused turned the wheel to his left and bumped the MP with the car as he accelerated toward the gate. The MP had attempted to reach over the steering column and turn the ignition off before the vehicle started to move but was unsuccessful. According to the MP, he did not have time to tell the accused that he was being apprehended.

The prosecution's case against the accused consisted primarily of the testimony of the MP, who related the facts set forth above. A defense motion for a finding of not guilty on the ground that the government failed to present evidence showing that the accused knew or should have known that a lawful attempt to apprehend was being made was denied by the military judge. The accused testified in his own behalf and maintained that he had not been told to turn off the engine, nor had the MP tried to reach the ignition key. The court members ultimately found the accused guilty of resisting lawful apprehension. In his application for relief, the accused challenged the trial judge's denial of the motion for a finding of not guilty and the court members' finding of guilty.

While oral or written notification did not accompany the MP's attempt to apprehend, the government presented sufficient evidence to establish that the accused should have known that a lawful attempt was being made to apprehend him. The prosecution showed that the circumstances were such as would lead a reasonable man in the same position to conclude that an attempt was being made to apprehend him. *See, e.g., United States v. Fleener*, 21 C.M.A. 174, 44 C.M.R. 228 (1972); *United States v. Hardy*, 3 M.J. 713, 715 (A.F.C.M.R.), *petition denied*, 3 M.J. 470 (C.M.A. 1977); *United States v. Noble*, 2 M.J. 672, 674-75 (A.F.C.M.R.), *petition denied*, 2 M.J. 187 (C.M.A. 1976). *See also* MCM, 1969, para. 174*a*.

The military judge correctly denied the defense motion for a finding of not guilty. *See* MCM, 1969, para. 71*a*. The court members, after being properly instructed by the judge, concluded that the government had proved the

essential elements of the offense beyond a reasonable doubt. Their finding of guilty was rationally derived. *Jackson v. Virginia*, 443 U.S. 307 (1979). *See United States v. Smith*, 4 M.J. 210 (C.M.A. 1978); *United States v. Papenheim*, 19 C.M.A. 203, 41 C.M.R. 203 (1970). Thus, The Judge Advocate General denied relief under Article 69, UCMJ.

Legal Assistance Items

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

Michigan Court Recognizes German Custody Decree

The Uniform Child Custody Jurisdiction Act (UCCJA) contains a provision that the Act's application should extend to international cases as long as the law of the foreign jurisdiction provides all affected persons reasonable notice and an opportunity to be heard. In *Klont, v. Klont*, 342 N.W.2d 549 (Mich. App. 1983), the husband, an American citizen, and his wife, a West German citizen, married and lived in Michigan. After the birth of a child, they moved to Germany, where she filed for divorce and sought custody of the child. The day before a hearing was to be held, the husband took the child and fled the country, returning to Michigan. The wife obtained a temporary order awarding her custody.

Upon arrival in Michigan, the husband filed a petition for custody and the trial court, concluding that it had jurisdiction, entered an order awarding custody to the husband. The matter was appealed to the Michigan Court of Appeals which held that the Act was designed to prevent the unilateral removal of a child from a jurisdiction in order to obtain a custody award. The Court of Appeals found that the West German court had jurisdiction in the matter and that the husband had reasonable notice and an opportunity to be heard in West Germany. Because the West German court had not stayed its proceedings and there was no emergency upon which a Michigan court could base jurisdiction, the Court of Appeals found that the West German court's temporary order granting custody to the mother should be honored.

Bar Residency Requirements Overturned

Recently, two federal courts have declared that residency requirements for persons desiring to sit for a state bar examination are invalid.

In *Piper v. Supreme Court of New Hampshire*, 723 F.2d. 110 (1st Cir., 1983), an *en banc* panel of the First Circuit split evenly on a question concerning the validity of a residency requirement for the New Hampshire bar examination. The split means that the district court decision that the requirement was invalid will stand. The district court, in *Piper v. Supreme Court of New Hampshire*, 539 F. Supp. 1046 (D.N.H., 1982), held that the residency requirement violated the privileges and immunities clause of the Constitution because the state had no valid reason for denying privileges to out-of-state residents. The case involved an applicant who was denied admission even though she lived in Vermont less than 400 yards from the New Hampshire border.

In *Giller v. Board of Bar Examiners*, No. 83-1282-A (E.D. Va., Feb. 10, 1984), the court held that Virginia can no longer require applicants for that state's bar examination to meet a 10-week residency requirement. In *Giller*, a 1983 graduate of Washington College of Law at American University in the District of Columbia applied to take the Virginia bar and was turned down because she lived in the District.

In *Piper*, the district court decision was appealed and the First Circuit initially reversed, stating that the principle of "federalism" requires that states be given great leeway in regulating important areas of their government. The decision, however, was 2-1, with the dissent arguing that the real purpose of the requirement was to prevent lawyers in neighboring states who had been trying to practice in New Hampshire for several years from doing

so. There are only four judges in the First Circuit and when the First Circuit agreed to rehear the case *en banc*, the fourth judge joined the dissent.

Disabled Veterans, Survivors Receive Rate Increase

On 1 April 1984, monthly compensation rates for service-disabled veterans and for widows and children of veterans who die from service-connected causes increased 3.5 percent. Congress is reportedly working on legislation that would authorize a second increase of 4.3 percent on 1 December 1984.

Pay on Death/Transfer on Death Legislation

Colonel Leo J. Eickhoff, a Reserve judge advocate in Missouri who is active in the Probate and Trust Section of the Missouri Bar Association, has provided information on a new type of statute known as "Pay on Death" (POD) or "Transfer on Death" law.

According to Colonel Eickhoff, the provision is contained within Section 6-201 of the Uniform Probate Code. It functions as a will substitute and does not require probate at death. The account or property covered by such provisions is transferred to the person named in the instrument upon presentation of a death certificate.

There are twenty states which have Payment on Death laws relating to bank accounts and eleven states with Transfer on Death laws relating to both bank accounts and other property such as certificates of deposit, stock certificates, employee savings accounts, employee wage accounts unpaid at death, mutual fund accounts, and promissory notes. Missouri enacted a "Pay on Death" law which took effect in September 1983.

Although will substitutes should be carefully scrutinized, Colonel Eickhoff sees such laws as an effective tool in the Premobilization Legal Counselling Program mandated under FORSCOM's Mobilization and Deployment Planning System (FORMDEPS) for reservists. He points out that for many young soldiers with simple property holdings, these laws may provide for a complete disposition of their property simply by designating their own beneficiaries in a transfer on death or pay on death direction. The laws are apparently little used because both attorneys and the public lack understanding of how they operate.

Simplified Divorce Procedures Approved in Florida

A change which took effect 1 March 1984 in Florida now permits certain couples to obtain divorces without being represented by counsel. The new procedure permits couples who have settled all matters concerning division of property, have agreed how any joint obligations will be settled, and have no children and are not expecting any, to obtain the simplified divorce.

The parties simply file approved forms with a court clerk. These forms include a petition for dissolution of the marriage, an affidavit which corroborates that the parties meet the state residency requirements for obtaining a divorce, and a final judgment of dissolution of the marriage. Court clerks are authorized to help the parties prepare these documents. At a final hearing on dissolution of the marriage, both parties are required to appear in court.

The Florida Supreme Court gave notice that it was proposing to authorize these simplified divorce procedures on 8 December 1983, and interested parties were invited to propose objections or suggestions until 15 February 1984.

Florida joins California, Colorado, Nevada, Oregon, and Washington as states in which certain couples, generally those with minimal assets and obligations, and no children, may obtain simplified divorces without representation by counsel.

New Utah Garnishment and Wage Assignment Provisions

A new law in Utah, which will take effect 1 July 1984, will require employers or other payors of income to withhold and deliver to the Utah Department of Social Services any amount of child support owed by an obligor. It provides that the order may be implemented through the Department of Social Services after a hearing before a court or administrative hearing examiner.

The new law may have an effect on the mil-

itary involuntary allotment system, codified at 42 U.S.C. § 665. The U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, IN, currently receives many notices to initiate involuntary allotments against the pay accounts of service members. Most of these notices, however, are issued based on underlying court orders for child support. The new Utah law provides for issuance of an administrative order upon which a subsequent involuntary allotment notice could be based. The involuntary allotment law authorizes the initiation of an involuntary allotment based on this type of administrative order but only if the administrative procedures on which the support order is based afford substantial due process and are subject to judicial review as required by 15 U.S.C. § 1673.

New Virginia Garnishment Law in Effect

A new Virginia garnishment law took effect in February, clearing up certain constitutional problems arising from a court decision and an opinion by Virginia's Attorney General that the prior garnishment law was unconstitutional.

Under the new law, judgment debtors are required to be informed of federal and state exemptions from garnishment. A "Notice of Exemptions," that lists specific statutory exemptions, is to be attached to all garnishment notices. Additionally, a judgment debtor is to be provided with an opportunity for a hearing within seven days from the date the claim is filed with the court.

All States Guides Available Through DTIC

With the inclusion of the All States Marriage and Divorce Guide in the materials which can be ordered through the Defense Technical Information Center (DTIC), all the All States Guides and the Legal Assistance Officer's Federal Income Tax Supplement are now available to legal assistance offices worldwide at minimal expense.

Ordering information for the All States Will, Consumer Law, Garnishment, and Marriage and Divorce Guides, and the Income Tax supplement is published separately in this issue in "Current Material of Interest."

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

ARPERCEN Point of Contact

Major Bate Hamiliton, Personnel Management Officer, Army Reserve Personnel Center (ARPERCEN), is available to answer questions concerning the accession of active duty judge advocates into the Reserve Component, Reserve promotions, education requirements, retirement, and the availability of counterpart tours. He may be contacted at (Toll Free) 1-800-325-4916 or FTS 273-7698, or by writing: Commander, US Army Reserve Personnel Center, ATTN: ARPC-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132.

Revised Curricula

Revised curricula for the Judge Advocate Officer Basic Correspondence Course and the Judge Advocate Officer Advanced Correspondence Course are expected to take effect on 1 December 1984. Revisions include substantial changes in subcourse credit hours and in total credit hours for the respective courses. Annual credit hour completion requirements will also change. Students currently enrolled, or who enroll in either course prior to 1 December 1984, will automatically be transferred to the new curricula on 1 December 1984. Completion of subcourses after that date will be under the new curricula. Details of the new curricula will be provided in a future issue of *The Army Lawyer*. Individual questions should be directed to the TJAGSA Correspondence Course Officer, The Judge Advocate General's School, US Army, Charlottesville, VA 22901, COM (804) 293-4046, FTS 938-1304, or AUTOVON 274-7110 (extension 293-4046).

Enlisted Update

Sergeant Major Walt Cybart

Sponsorship Program for 71D/71E

In addition to the provisions of AR 612-10, Chief Legal Clerks should accomplish the following when notified of a gain or loss of a 71D/71E:

a. Losing Chief Legal Clerk—

(1) Obtain copy of SM's 2 and 2-1 and forward to gaining Chief Legal Clerk.
(2) Send letter to gaining Chief Legal Clerk outlining talents (if any) of SM, special requirements, family size, housing, school needs, etc.

b. Gaining Chief Legal Clerk—

(1) Write to SM regarding the area and installation.
(2) Send SM welcome packet, map of area, local newspapers, etc.
(3) Assist SM with any problems regarding schools, housing, etc.
(4) Inform SM of sponsor's name, grade, and mailing address.

Arrange for the sponsor to meet the service member upon arrival and escort him or her and family to post. Assist with inprocessing and monitor progress until the service member has been inprocessed and settled.

For personnel going overseas, the following points of contact should be used:

a. Europe: Office of the Judge Advocate
HQ, USAREUR & Seventh Army
ATTN: Chief Legal Clerk
APO New York 09403

b. Korea: Office of the Judge Advocate
HQ, Eighth US Army
ATTN: Chief Legal Clerk
APO San Francisco 96301

Other addresses may be found in the annual JAGC Personnel Directory.

SFC Bartch, NCOIC Legal Clerks' School, is making every effort to notify Chief Clerks of potential gains from the School sometime during the fifth week of training. Your cooperation is vital to the success of this program.

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 MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

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 Recuiting Training Seminar.

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

July 23-September 27: 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 Officer Legal Orientation (5F-F1).

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

October 2-5: 1984 Wolrdwide JAG Conference.

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

3. Civilian Sponsored CLE Courses

August

4: CCLE, Estate Planning, Glenwood Springs, CO.

5-10: ATLA, Advanced Course in Trial Advocacy, Cambridge, MA.

5-10: NJC, Evidence—Graduate, Reno, NV.

5-10: NJC, Judicial Writing in Trial Courts—Specialty, Reno, NV.

6-10: SBT, Advanced Criminal Law, San Antonio, TX.

9-11: ABICLE, Trial Advocacy, Tuscaloosa, AL.

11: UDCL, Preparing Witnesses, Cortez, CO.

19-24: ATLA, Advanced Course in Trial Advocacy, Reno, NV.

20-24: SBT, Advanced Family Law, Houston, TX.

20-24: TOURO, Contract Administration Course, Lake Tahoe, NV.

23-24: PLI, Environmental Law Impact on Real Estate Development, San Francisco CA.

24-25: NCLE, Bankruptcy, Omaha, NE.

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 officer 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.

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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 BO77550	Criminal Law, Procedure, Pretrial Process/ JAGS-ADC-83-7
AD BO77551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD BO77552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD BO77553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD BO77554	Criminal Law, Evidence/JAGS-ADC-83-11
AD BO77555	Criminal Law, Constitutional Evidence/ JAGS-ADC-83-12
AD BO78201	Criminal Law, Index/JAGS-ADC-83-13
AD BO78119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD BO79015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1
AD BO77738	All States Consumer Law Guide/JAGS-ADA-83-1
AD BO79729	LAO Federal Income Tax Supplement/JAGS-ADA-84-2
AD BO77739	All States Will Guide/JAGS-ADA-83-2
AD BO78095	Fiscal Law Deskbook/JAGS-ADK-83-1
AD BO80900	All Marriage & Divorce Guide/JAGS-ADA-84-3

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 14th Legal Assistance Course (held 12-16 March 1984) and the 13th Kenneth J. Hodson Lecture (held 20 March 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-294-1 Mar 84 45:00	**Drafting Separation Agreements** Speaker: Colonel George Kalinski, Senior Instructor, Individual Mobilization Augmentee (IMA), Administrative and Civil Law Division, TJAGSA. Colonel Kalinski, who is a presiding Superior Court Judge in Los Angeles, California, discusses practical aspects of drafting separation and property settlement agreements in divorce cases from the viewpoint of a presiding judge. He discusses some of the do's and don'ts and some of the pitfalls practicing attorneys should be aware of when drafting such agreements.
JA-294-2 Mar 84 29:30	**Negotiating Separation Agreements** Speaker: Colonel George Kalinski, Senior Instructor, Individual Mobilization Augmentee (IMA), Administrative and Civil Law Division, TJAGSA. Colonel Kalinski, who is a presiding Superior Court Judge in Los Angeles, California, discusses practical aspects of negotiating separation and property settlement agreements in divorce cases from the viewpoint of a presiding judge. He discusses some of the do's and don'ts and some of the pitfalls practicing attorneys should be aware of when negotiating such agreements.
JA-294-3 Mar 84 47:08	**Estate Planning, Part I** Guest Speaker: Mr. C. Richard Whiston, Principal Deputy General Counsel and Chief of Legal Services, Office of the General Counsel, Department of the Army. Mr. Whiston, formerly a partner in the law firm of Mullen, McCaughey and Henzell, Santa Barbara, California, discusses practical and personal aspects of estate planning for military personnel, particularly for senior officers or enlisted personnel. He discusses the use of Crown Notes, Clifford Trusts, unified credit bypass trusts and other aspects of estate planning which can be used by legal assistance officers to render a broader range of client services to military personnel.

Tape #/Date Running Time	Title/Speaker/Synopsis
JA-294-4 Mar 84 41:02	**Estate Planning, Part II** A continuation of JA-294-3.
JA-294-5 Mar 84 47:15	**State Taxation, Part I** Speaker: Major Michael E. Schneider, Instructor, Administrative and Civil Law Division, TJAGSA. Major Schneider discusses the scope of coverage, the types of property protected and other aspects of this provision of the SSCRA which precludes the multiple taxation of service members by several states. He also discusses recent case law developments in this area.
JA-294-6 Mar 84 44:00	**State Taxation, Part II** A continuation of JA-294-5.
	13th Kenneth J. Hodson Lecture (20 March 1984)
JA-368-1 Mar 84 38:54	**War Powers: Constitutional Implications, Part I** Guest Speaker: Professor James W. Bishop, Jr., Sam Harris Professor of Law, Yale University presents an evaluation of the term "war powers." He discusses three categories of war powers: the power to commit the armed forces to combat; the power to prepare for war through conscription; and the power to take actions during a war which would otherwise be unconstitutional.
JA-368-2 Mar 84 47:27	**War Powers: Constitutional Implications, Part II** A continuation of JA-368-1.

3. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 60-10	Exchange Service Army and Air Force—Exchange Service (AAFES) General Policies		15 Mar 84
AR 350-30	Training: Code of Conduct Training		15 Mar 84
AR 600-21	Personnel—General Equal Opportunity Program in the Army	1	15 Mar 84
AR 623-105	Personnel Evaluation Reports: Officer Evaluation Reporting System	901	22 Mar 84
AR 624-100	Promotions: Promotion of Officers on Active Duty	903	16 Mar 84
AR 633-30	Apprehension and Confinement: Military Sentences to Confinement	901	13 Apr 84
AR 635-200	Personnel Separations: Enlisted Separations	909	15 Mar 84
Unit Supply UPDATE	S/S Unit Supply UPDATE, 1 Dec 84		1 Mar 84

4. Articles

Brigham & Wolfskiel, *Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 337 (1983).

Carter, *The Constitutionality of the War Powers Resolution*, 70 Va. L. Rev. 101 (1984).

Donigan, *Child Custody Jurisdiction: New Legislation Reflects Public Policy Against Parental Abduction*, 19 Gonz. L. Rev. (1983-1984).

Henderson, *Marital Agreements and the Rights of Creditors*, 19 Idaho L. Rev. 177 (1983).

Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release for Insanity Acquittees*, 1983 B.Y.U.L. Rev. 499.

Johnson, *The Return of the* Christian Burial Speech *Case*, 32 Emory L.J. 349 (1983).

Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers of the Constitution*, 63 B.U.L. Rev. 811 (1983).

Murray & Vaughan, *The Accountant's Role in a Community Property Divorce Case*, 10 Community Prop. J. 205 (1983).

Nagel, *Policy Evaluation and Criminal Justice*, 50 Brooklyn L. Rev. 53 (1983).

Peirce, *Employer Participation in the Decertification Process: How Big a Helping Hand?* 31 Buffalo L. Rev. 737 (1982).

Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, Stan. L. Rev., April 1983, at 681.

Ruffo, *The Law of Labor-Management Relations in Flux*, 28 N.Y.L. Sch. L. Rev. 295 (1983).

Schwartz, Bivens *Claims*, 17 Clearinghouse Rev. 841 (1983).

Shuman, *Testimonial Compulsion: The Involuntary Medical Expert Witness*, 4 J. Legal Med. 419 (1983).

Tepfer, *The Contracting Officer's Representatives*, 24 A.F.L. Rev. 1 (1984).

Walters, *Federal Pre-Emption of State Products Liability Laws and Limitations of the Strict Liability of Manufacturers*, 32 Drake L. Rev. 961 (1982-1983).

Comment, *Conditioning Student Aid on Draft Registration: The Legislation and Regulations*, 10 J. College & U.L. 379 (1983-1984).

Comment, *Continuing Criminal Enterprise Statute: Effect of Forfeiture Provisions on Third Parties*, 22 Duq. L. Rev. 171 (1983).

Comment, *Expansion of the* Feres *Doctrine*, 32 Emory L.J. 237 (1983).

Comment, *Pushing the* Feres *Doctrine A Generation Too Far: Recovery for Genetic Damage to the Children of Servicemembers*, 32 Am. U.L. Rev. 1039 (1983).

Comment, *The* Feres *Doctrine: Has It Created Remediless Wrongs for Relatives of Servicemen?*, 44 U. Pitt. L. Rev. 929 (1983).

Comment, *The* Feres *Doctrine: Should It Continue to Bar FTCA Actions by Servicemen Who Are Injured While Involved in Activities Incident to Their Service*, 49 J. Air L. & Com. 177 (1983).

Note, *Federal Judicial Review of Military Administrative Decisions*, 51 Geo. Wash. L. Rev. 612 (1983).

Note, *No Federal Habeas Corpus in Child Custody Disputes:* Lehman v. Lycoming County Children's Service Agency, 22 J. Family L. 129 (1983-1984).

Note, *Prohibiting Indirect Assistance to International Terrorists: Closing the Gap in United States Law*, 6 Fordham Int'l L.J. 530 (1982-83).

Consumer, 17 Clearinghouse Rev. 947 (1984).

Family Law, 17 Clearinghouse Rev. 1019 (1984).

The Supreme Court, 1982 Term, 97 Harv. L. Rev. 1 (1983).

Veterans Law Developments in 1983, 17 Clearinghouse Rev. 1024 (1984).