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Admissibility of Polygraph Results Under the Military Rules of Evidence

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The proposed executive order prescribing amendments to the Manual for Courts-Martial, United States, 1969 (revised edition) will, if signed by the President, significantly alter the rules of evidence applicable to opinion testimony by expert witnesses. In order to assess the impact that the proposed changes will have on the admissibility of expert testimony concerning the results of polygraph examinations, this paper will explore the present Manual provisions and case prohibitions, examine the provisions of the proposed Military Rules of Evidence, and survey federal cases and theories which might be applicable in the event the proposed changes are made.

The present Manual provision is a straightforward prohibition that "[t]he conclusions based upon or graphically represented by a polygraph test . . . are inadmissible in evidence in a trial by court-martial." [1] This provision appears to be merely declarative of a prior judicially imposed restriction on the use of polygraph test results.[2] In fact, the courts were so afraid that too much significance would be attached to such tests that any reference to a polygraph examination or an offer by the witness to take a polygraph examination which

might bolster the credibility of the witness was prohibited.[3] There was also a prohibition against any reference to a refusal by an accused to take a polygraph test.[4] The rationale for this rule was that a refusal to take such a test falls within the privilege against self-incrimination, and it would appear to be equally applicable to other witnesses.

The courts did allow evidence that an accused had taken a polygraph examination when it was relevant for some other purpose such as establishing a sequence of events [5] or the voluntariness of a confession.[6] In several cases, witnesses were allowed to testify to what the accused had been told concerning the results of the polygraph test; [7] however, limiting instructions concerning the use of such testimony were provided to the court members in each case.

Notwithstanding the severe restrictions on the use of polygraph tests at trial, the appellate courts have been liberal in allowing reviewing authorities to consider them. Because the convening authority has the discretion to disapprove the findings or sentence for any reason [8] and the Court of Military Review may independently assess the credibility of witnesses,[9] they have been allowed to consider exculpatory results of polygraph tests of the accused.[10] In approving the findings and sentence, the convening authority is limited to matters in the record of trial,[11] and he may not consider inculpatory results of a polygraph test taken by the accused. The convening authority may, however, consider an incriminating polygraph test in determining the necessity or advisibility of granting a new trial.[12] This would appear to be similar to the consideration of such information prior to referral.

If the proposed Military Rules of Evidence are implemented, paragraph 142e of the Manual will be deleted. The testimony of expert witnesses under the Military Rules is covered by Rule 702 which provides "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." [13] Although this provision is similar to the present Manual Rule concerning opinion evidence,[14] its implementation, coupled with the deletion of the present Manual prohibition concerning the use of the results of polygraph tests at trial, will significantly broaden the potential use of poly-

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graph results. The stated purpose of the new Rule is:

> The deletion of the explicit prohibition on such evidence is not intended to make such evidence per se admissible. Rather it is the Committee's intent to allow the courts to determine whether such evidence will, in any given case, "assist the trier of fact to understand the evidence or to determine a fact in issue." [15]

This language could cause difficulty for courts interpreting Rule 702 because it is identical to the Federal Rule,[16] and Federal Courts have not been so liberal in considering the admissibility of polygraph test results. Although there are no Supreme Court decisions on this issue, every Court of Appeals circuit except two has considered the problem. One group of cases followed the *Frye v. United States* [17] rationale and held that polygraph results were not admissible because the tests were unreliable and not based on a scientific principle which had gained general acceptance.[18] The Court of Appeals for the eighth circuit stated that unstipulated polygraph evidence should not be admissible in a criminal trial.[19] Presumably, this circuit would be willing to admit stipulated polygraph evidence in an appropriate case. The remaining circuit courts which have considered the issue have held that the admission of polygraph evidence is a matter within the discretion of the trial court.[20] Most of these courts have quoted the following language with approval:

> With the polygraph's misleading reputation as a "truth-teller," the widespread debate concerning its reliability, the critical requirement of a competent examiner and the judicial problems of self-incrimination and hearsay, a trial court will rarely abuse its discretion by refusing to admit the evidence, even for a limited purpose and under limited circumstances.[21]

These cases are hardly what one would describe as a rousing endorsement of polygraph evidence, and the cases decided by district courts in the third and fourth circuits do not, by their condemnation of polygraph evidence, suggest that more favorable results can be expected in those circuits.[22]

Courts which have acknowledged that polygraph evidence might be acceptable under certain circumstances and allowed the district court the discretion to admit such evidence have clearly placed the burden of laying a proper foundation for showing that the evidence is reliable upon the proponent of the polygraph evidence.[23] The problem has been that the courts have been reluctant to try an issue, ordinarily the responsibility of a jury, by use of a polygraph.[24] The problems with the unreliability of the polygraph have related not so much to the invalidity of the underlying scientific principle—that there are measurable, involuntary changes in the function of certain body organs in response to stress—but to the relationship between this principle and the test results.[25] The polygraph is, in effect, measuring the witness' evaluation of his own statement. Other factors affecting the test results such as external stimuli, psychological characteristics, formulation and pace of questions, subjective evaluation by the examiner, the condition of the machine, and the cooperativeness of the subject place an unusually heavy responsibility on the polygraph examiner. For these reasons, courts have been reluctant to admit polygraph results which, unlike other scientific evidence that measures a specific identifiable phenomenon, are not easily susceptible of controlled experimental verification.[26]

Not all federal courts have refused to admit the results of polygraph tests. In *United States v. Hart,*[27] the government had conducted a polygraph examination on its primary prosecuting witness. The results of the test suggested that the government witness was not telling the truth. The court held that under *Brady v. Maryland* [28] the government has a duty to disclose any evidence which may tend to exculpate a defendant.[29] The court also indicated that the credibility of a witness is a matter for the jury to determine and the information should be presented to them for consideration. Furthermore, the government, having initially thought that the results of the test were reliable enough

to assist in evaluating the witness, should have the burden to convince the jury that the test results are of no significance. This case appears to be based more on considerations of fundamental fairness than on the reliability or general acceptance of polygraph results because the court noted that there was no reason to change the general rule that prohibits a party from offering its own polygraph results in evidence. The most significant case in which polygraph results were admitted is *United States v. Ridling*.[30] The court heard extensive evidence concerning the value and reliability of the polygraph. The use of the polygraph in the everyday operations of police, government, and industry was noted by the court, and it concluded that the underlying principle of the polygraph is sound. An additional unusual feature of this case was that it was a perjury case, which involves wilfully and knowingly giving false testimony, and the polygraph results, therefore, go directly to the ultimate issue in the case. The court balanced the factors surrounding the test and its relationship to the case against any possible prejudicial effect of its use and concluded that "the state of the science is such that the opinions of the experts 'will assist the trier of fact to understand the evidence.' "[31] The court did place some restrictions on the procedure to be followed in selecting the examiner and the conditions under which the results would be used. A case from the Eastern District of New York involving similar court action to that in *United States v. Ridling* resulted in dismissal of the case after the court appointed expert's test indicated that the accused was telling the truth.[32] Although there are other cases which acknowledge the accuracy of the polygraph,[33] these cases are the only federal cases which have allowed polygraph results to be admitted on the issue of credibility of the witness.

Federal courts have allowed testimony concerning polygraph tests on the issue of voluntariness, but it has recently been suggested that the coercive impact of a polygraph examination requires that a suspect be advised of his right to refuse the test, discontinue the test at any point, and decline to answer any particular question in order to mitigate the pressure toward self-incrimination.[34] Federal courts have generally excluded evidence concerning the willingness [35] or unwillingness [36] of witnesses to submit to polygraph tests which has been offered to bolster or impeach the credibility of witnesses.

In view of the foreging, it would seem that the proposed Military Rules of Evidence will have little, if any, effect on the present military case law concerning the consideration of exculpatory polygraph results by reviewing authorities. *United States v. Hart* [37] suggests that it might be mandatory for the staff judge advocate to disclose such exculpatory results, but this had already been stated by the Court of Military Appeals [38] notwithstanding language to the contrary which indicated such disclosure is discretionary.[39] There will also be no change in the prohibition against considering inculpatory results during post-trial review. The convening authority will be able to continue to consider polygraph results, regardless of the outcome, prior to referral to trial and in connection with petitions for new trials. The present military and federal case rules concerning bolstering or impeaching the credibility of witnesses by using evidence of willingness or unwillingness to take the test are the same, so the adoption of the proposed changes will have no effect in this area. The rules concerning admissibility of polygraph evidence to establish the voluntariness of a confession will not be changed except that additional warning requirements about the right to refuse the test, discontinue the test at any point, and decline to answer any particular question may be required in order to comply with existing federal case law,[40] but this requirement could be imposed under the present rules.

The main impact of the proposed Military Rules will be upon polygraph evidence which is offered to prove the truth of the test results. In view of the present Manual provision prohibiting the use of such results at trial, the government is not required to disclose polygraph test results, which may tend to exculpate an accused, to the court members as has been required in federal court.[41] The government has

been required to disclose the results of tests on government witnesses to the defense in order to assist the defense in preparing for the court-martial.[42] When the Military Rules of Evidence become effective, military courts might be encouraged to expand the disclosure requirement to coincide with the *Hart* case.[43] Where the proffered polygraph evidence involves the accused or other defense witnesses, courts-martial are likely to follow that line of decisions which allows the trial court the discretion to admit such evidence but suggests that the trial court will rarely abuse its discretion by refusing to admit the evidence, even for a limited purpose and under limited circumstances.[44] The problem with admitting defense proffered polygraph evidence is a lack of control in an area where the conduct and expertise of the examiner are crucial. Thus, even where the court is convinced that the polygraph is reliable and its use "will assist the trier of fact to understand the evidence or determine a fact in issue," [45] it may require, as the court did in the *Ridling* case,[46] that the accused or other witness submit to a test by an examiner selected by the court so that the test can be monitored by the court. This also suggests that courts are more likely to respond favorably to polygraph evidence where there is a stipulation between the parties because the test will be more tightly controlled, there is more likely to be a competent examiner, and test questions may be more specific and effective. Nevertheless, in view of the widespread skepticism of polygraph results by domestic courts, it is unlikely that polygraph result will be admitted except under those tightly controlled situations in which the court can be assured that the underlying scientific principle is being properly applied.

Footnotes

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 142*e* [hereinafter cited as MCM, 1969].

[2] United States v. Massey, 5 C.M.A. 514, 18 C.M.R. 138 (1955); United States v. Ledlow, 11 C.M.A. 659, 29 C.M.R. 475 (1960); United States v. Pryor, 2 C.M.R. 365 (A.B.R. 1951).

[3] United States v. Dolan, 17 C.M.A. 476, 38 C.M.R. 274 (1968); United States v. Wolf, 9 C.M.A. 137, 25 C.M.R. 399 (1958) (The court noted in this case that such evidence was arguably within the rule permitting admission of prior consistent statements in those cases where the witness' testimony is discredited by the imputation of bias, prejudice, or motive to falsify.); United States v. Cloyd, 25 C.M.R. 908 (A.F.B.R. 1957); United States v. Ortiz-Vergara, 24 C.M.R. 315 (A.B.R. 1957).

[4] United States v. Cloyd, 25 C.M.R. 908 (A.F.B.R. 1957).

[5] United States v. Kirkland, 25 C.M.R. 797 (A.F.B.R. 1957).

[6] United States v. Driver, 35 C.M.R. 870 (A.F.B.R. 1964), pet. den. 35 C.M.R. 478 (1965).

[7] United States v. Johnson, 28 C.M.R. 662 (N.B.R. 1958); United States v. Radford, 17 C.M.R. 595 (A.F.B.R. 1954); United States v. King, 16 C.M.R. 858 (A.F.B.R. 1954).

[8] UNIFORM CODE OF MILITARY JUSTICE Art. 64, 10 U.S.C. §§ 864 (1970) [hereinafter cited as U.C.M.J.].

[9] U.C.M.J. Art. 66(c).

[10] United States v. Bras, 3 M.J. 637 (N.C.M.R. 1977); United States v. Massey, 5 C.M.A. 514, 18 C.M.R. 138 (1955); United States v. Martin, 9 C.M.A. 84, 25 C.M.R. 346 (1958) (dictum); United States v. Smith, 45 C.M.R. 483 (A.C.M.R. 1972) (dictum); United States v. Hansford, 46 C.M.R. 670 (C.G.C.M.R. 1972); United States v. Barker, 35 C.M.R. 779 (A.F.B.R. 1964); United States v. Moore, 30 C.M.R. 901 (A.F.B.R. 1960); United States v. Judd, 26 C.M.R. 881 (A.F.B.R. 1957); United States v. Mazurkewicz, 22 C.M.R. 498 (A.B.R. 1956); United States v. Masters, 24 C.M.R. 668 (A.F.B.R. 1957).

[11] U.C.M.J. Art. 64; United States v. Duffy, 3 C.M.A. 20, 11 C.M.R. 20 (1953).

[12] United States v. Inman, 21 C.M.R. 480 (A.B.R. 1956).

[13] PROPOSED EXECUTIVE ORDER PRESCRIBING AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Revised Edition) 155.

[14] MCM, 1969, para. 138*e*.

[15] *Analysis of the 1979 Amendments to the Manual for Courts-Martial* §§ 702.

[16] Fed. Rules Evid. Rule 702, 28 U.S.C.A.

[17] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[18] United States v. Bando, 244 F.2d 833 (2nd Cir. 1957) (dictum); United States v. Clark, 598 F.2d 994 (5th Cir. 1979); United States v. Masri, 547 F.2d 932 (5th Cir. 1977); United States v. Frogge, 476 F.2d 969

(5th Cir. 1973); United States v. Fife, 573 F.2d 369 (6th Cir. 1976); United States v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974); United States v. Zeiger, 475 F.2d 1280 (D.C. Cir. 1972).

[19] United States v. Bohe, 581 F.2d 1294 (8th Cir. 1978); United States v. Smith, 552 F.2d 257 (8th Cir. 1977) (This case suggested that admission of unstipulated testimony was in the discretion of the trial judge.).

[20] United States v. Pelegrina, 601 F.2d 18 (1st Cir. 1979); United States v. Sweet, 548 F.2d 198 (7th Cir. 1977); United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977); United States v. Glover, 596 F.2d 857 (9th Cir. 1979); United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978); United States v. Radlick, 581 F.2d 225 (9th Cir. 1978); United States v. Flores, 540 F.2d 432 (9th Cir. 1976); United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975); United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969); United States v. Russo, 527 F.2d 1051 (10th Cir. 1975).

[21] United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975).

[22] United States v. Grant, 473 F. Supp. 720 (D.S.C. 1979); United States v. Wilson 361 F. Supp. 510 (D.Md. 1973); United States ex Rel. Monks v. Warden, New Jersey State Prison at Rahway, 339 F. Supp. 30 (D.N.J. 1972).

[23] United States v. Flores, 540 F.2d 432 (9th Cir. 1976); United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975); United States v. Grant, 473 F. Supp. 720 (D.S.C. 1979).

[24] United States v. Grant, 473 F. Supp. 720, 723 (D.S.C. 1979).

[25] United States v. Wilson, 361 F. Supp. 510 (D.Md. 1973); Comment, *The Emergence of Polygraph at Trial*, 73 Colum. L. Rev. 1120 (1973); Comment, *Lie Detector Tests; Possible Admissibility Upon Stipulation*, 4 John Marshall Journal of Practice and Procedure, 244, 245 (1971).

[26] United States v. Wilson, 361 F. Supp. 510 (D.Md. 1973).

[27] United States v. Hart, 344 F. Supp. 552 (E.D.N.Y. 1971).

[28] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963).

[29] But see Ogden v. Wolff, 552 F.2d 816 (8th Cir. 1975).

[30] United States v. Ridling, 350 F. Supp. 90 (E.D.Mich. 1972).

[31] Id. at 95.

[32] Comment, *The Emergence of Polygraph at Trial*, 73 Colum. L. Rev. 1120, 1133 (1973).

[33] United States v. DeBetham, 348 F. Supp. 1377 (S.D. Cal), Aff'd, 470 F.2d 1367 (9th Cir. 1972) (Trial court did not abuse discretion in rejecting such evidence despite strong showing of accuracy.); United States v. Zeiger, 350 F. Supp. 685 (D.D.C.), Rev'd, 475 F.2d 1280 (1972).

[34] United States v. Little Bear, 583 F.2d 411 (8th Cir. 1978).

[35] United States v. Bursten, 560 F.2d 779 (7th Cir. 1977); United States v. Smith, 565 F.2d 292 (4th Cir. 1977).

[36] United States v. Cardarella, 570 F.2d 264 (8th Cir. 1978); United States v. Gabriel, 597 F.2d 95 (7th Cir. 1979) (dictum); United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977) (dictum).

[37] United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971).

[38] United States v. Martin, 9 C.M.A. 84, 25 C.M.R. 346, 348 (1958).

[39] United States v. Bras, 3 M.J. 637 (N.C.M.R. 1977); United States v. Massey, 5 C.M.A. 514, 18 C.M.R. 138 (1955).

[40] United States v. Little Bear, 583 F.2d 411 (8th Cir. 1978).

[41] United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971).

[42] United States v. Mougenel, 6 M.J. 589 (A.F.C.M.R. 1978).

[43] United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971).

[44] United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975).

[45] PROPOSED EXECUTIVE ORDER PRESCRIBING AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Revised Edition) § 702, 155.

[46] U.S. v. Ridling, 350 F. Supp. 90 (E.D.Mich. 1972).

Defense of Another, Guilt Without Fault?

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The right of self-defense is fundamental in American society and is well recognized in the criminal law, both civilian and military. The defense of self-defense is appropriate as it not only recognizes that self-defense is socially acceptable—if not preferred—conduct, it also

inherently recognizes that criminal sanction is likely to be ineffective in deterring self-defense. These considerations also play a significant role in a related issue, that of defense of another. While one may say that the defense of self-defense is even favored by the law, defense of another occupies a far less lofty pinnacle. This stems directly from questions of social policy. An individual defending himself knows of the circumstances giving rise to the conduct to be defended against while an individual attempting to defend another may lack critical knowledge and ultimately "defend" the aggressor. Thus the law in coping with a socially desirable intent must attempt to deal with conduct that may have a totally unacceptable result. Consequently, the two different approaches to defense of another have evolved in the criminal law. One, often termed the "alter ego" theory, requires that an individual who aids a third party will do so at his or her own risk.[1] Thus, if the individual is determined to have aided the aggressor, albeit in good faith, that individual is held fully liable. Rejecting this approach, the second theory permits a defense whenever the intervenor reasonably believed that the apparent victim was being unlawfully attacked.[2]

This issue is of potentially great consequence within the armed forces given the large number of assaults which are the predictable consequence of large numbers of service personnel living in limited space. The Manual for Courts-Martial does not require the alter ego theory.[3] However, military decisional law currently follows the "alter ego" theory.[4] Consequently, a careful reappraisal of the issue is appropriate —an appraisal that compels the conclusion that adherence to the alter ego theory is incompatible with the remainder of military substantive law and in conflict with desirable standards of military behavior.

The "alter ego" theory is a tenet of American common law derived directly from English common law, where it has since been abandoned.[5] The American Law Institute and other commentators on the law, federal decisional law and recent state decisional law, alike, reject the "alter ego" theory.[6] The "reasonable belief" theory is urged as an appropriate model for reform in jurisdictions where the "alter ego" theory or the more archaic consanguinity rules of defense of another exist.[7] The primary impetus for change is the realization that the "alter ego" theory is a rejection of a fundamental concept of criminal law, the concept of mens rea. Where the good faith intervenor mistakenly aids the aggressor, application of this rule imposes "guilt without fault." [8] The federal law rejection of this formulation of law is total. Under federal law, where the issue is raised, the accused is entitled to have the jury instructed that it must determine whether or not the accused was *privileged* to act on the facts and circumstances as they appeared to him at the time of intervention.[9] In appraising the military formulation of law on this issue, it is necessary to compare it with the general substantive military law. Are there other circumstances in military law in which criminal responsibility may be found even though the accused acted without a criminal state of mind? If so, then policy reasons created by the unique military environment may favor the resolution of the defense of another issue on the "alter ego" theory. If the general substantive military law favors a finding of guilt only where it is proven that the accused had the requisite mens rea to commit a crime, then the defense of another issue in the military should follow the "reasonable belief" theory, unless there are particularly cogent policy reasons for an anomalous rule.

Guilty State of Mind as an Element of Substantive Military Law

Mistake of fact[10] and law[11] come under the Manual paragraph which discusses the criminal law concept of "guilty mind." [12] Guilty mind or mens rea is the concept of law which "characterizes the act as either criminal or legally blameless." [13] If the crime is one in which "any type of knowledge of a certain fact is necessary to establish the offense," the Manual permits a mistaken belief as to that fact to excuse what would otherwise be criminal activity.[14] In status-type offenses, for instance, mistake as to the status of the victim, excuses the offense.

However, the concept of knowledge alone is so entrenched in the military law of status-type offenses that lack of knowledge may negate the offense altogether:

> "However, assuming such knowledge (that the victim was a superior officer) not to be an essential element, it is a factual issue which, if found in favor of the accused, does not excuse, justify or avoid the crime, but, on the contrary, establishes that the crime charged was not committed. We hold that the magnitude of the offense here charged is established by the status of the victim and that the fact that that accused was unaware of that status is a defense thereto.[15]

Mistake as to status excuses what would otherwise be a crime and a lack of knowledge as to status negates the mens rea necessary for a crime to exist.

Even in offenses in which knowledge is not an essential element, the accused may introduce the knowledge concept by claiming mistake as to an element of the offense. This is known as raising an affirmative or special defense.[16] Once such a defense is raised the prosecution has the burden of proof to negate the defense (that is, prove the requisite knowledge) in order to obtain a conviction.[17] Thus, for example, mistake of fact can be raised against an AWOL[18] or assault offense.[19]

In *United States v. Deveaux*,[20] an Air Force Board of Review held that an assault may be excused where the accused is operating under an honest but mistaken belief that he, the accused, was about to be attacked:

> "Thus, the evidence strongly suggests that . . . if there was any attempt or offer with force or violence to do bodily harm . . . it was done under an honest but mistaken belief, not the result of carelessness or fault on the part of the accused that he was in danger of bodily harm at the hands of the approaching airmen, including Sergeant Adair. . . . Under such circumstances, if they existed in fact, the accused would be exempted from criminal responsibility." [21]

The key requirement for a successful claim of mistake of fact is that the accused's "mistaken belief must be of such a nature that his conduct would have been lawful had the facts been as they were reasonably believed to be." [22] Where the accused goes to the aid of another person reasonably believed to be the victim of an unlawful attack, what ancillary considerations justify the military law in rejecting, totally, this basic principle of the law of mistake of fact? In every other offense under military law, with the exception of certain elements of the offense of carnal knowledge and its lesser included offenses, mistake of fact provides an opportunity for an accused to demonstrate that he acted without criminal intent.

Carnal knowledge is an offense which, for policy reasons, excludes mistake or knowledge as part of the substantive offense. The reason for making the act criminal is to protect females under the age of sixteen. Mistake of fact is no defense because of the societal interest sought to be protected. But where the Manual seeks to eliminate mens rea from certain elements of an offense, it does so with great specificity: "it is no defense that the accused is ignorant or misinformed as to the true age of the female . . . it is the fact of the girl's age and not his knowledge or belief which fixes his *criminal responsibility.*" (Emphasis added.) [23] Defense of another, however, is described in the Manual in the paragraph analyzing self-defense.[24] There is no language in the Manual which signals that policy reasons dictate excluding mens rea concepts in application of the law of defense of another in the military. Yet, military decisional law has chosen the "alter ego" theory, possibly to establish in the military a social policy which protects innocent victims of unlawful assaults from attacks by passersby who mistakenly aid the assaulter.

There is a societal cost for this policy decision. The "alter ego" theory is a theory of strict criminal liability based on facts and circumstances which may be unknown to the accused at the time of intervention. If the accused, by

operation of law, steps into the shoes of the one aided, the reasons which motivated his intervention are irrelevant on the issue of guilt or innocence. The intervenor becomes an unthinking force of nature, an extension of the person aided, whose guilt, but not guilty state of mind, is judged on a one-to-one relationship with the guilt of the person aided. This rejection of the concept of mens rea is foreign to substantive military law.

Guilty state of mind is a vital concept in military jurisprudence. For instance, in a prosecution for indecent assault on a female under the age of 16, while neither mistake nor lack of knowledge as to the age of the female is a defense, the accused may successfully defend by claiming the touching was done for a benevolent purpose (that is, was done without criminal intent of any sort).[25] Two other cases addressing criminal intent will serve to illustrate. In *United States v. Thomas*,[26] the Court of Military Appeals was required to decide if the offense of rape, attempted rape and/or conspiracy to rape could be committed upon a victim who died prior to the actual acts of intercourse. Rape is ruled out because the crime must be committed on a living female. Where the perpetrators believed the victim to be unconscious and planned and carried out the acts of sexual intercourse, the Court found the offense of attempted rape (two judges concurring, one dissenting) and conspiracy to commit rape (all concurring) were committed. The key to the Court's reasoning is that even though the ultimate crime was impossible to commit, the belief of the perpetrators in the facts and circumstances as they perceived them (that is, that the intended victim was alive) and their belief in what they intended to do (commit the crime of rape) combined to establish the crimes of attempt and/or conspiracy. The Court cites the American Law Institute among other authorities. Seven years later, the Court is required to decide if a soldier can be convicted of attempted murder when he believed he was shooting at a corpse and the evidence in the case demonstrably showed that belief to be reasonable under the circumstances.[27] The Court found that the accused could not be convicted of attempted murder.

> "So far as attempted murder is concerned military law 'has tended toward the advanced and modern position' that holds one accountable for conduct which would constitute a crime if the facts were as he believed them to be." (Citing *United States v. Thomas*).[28]

Military jurisprudence clearly emphasizes the "reasonable belief" concept when it focuses upon mens rea in deciding issues of criminal liability. In a jurisdiction that strives to hold one accountable or blameless for one's conduct depending upon whether or not the conduct would be criminal if the facts were as the actor believed them to be, how can an intervenor's belief as to the necessity for his actions be irrelevant to the issue of guilt or innocence? The complementary Manual paragraphs on mistake of fact[29] and special defenses[30] dictate that the military apply the American Law Institute approach to the law of defense of another.

A case can be made for the proposition that the Manual dictates that ignorance or mistake of *law* is an applicable defense concept under the "alter ego" theory of defense of another. The Manual states, "As a general rule, ignorance or mistake of law . . . is not an excuse for the commission of an offense. If, however, to indicate the existence of a requisite intent or *for any other reason*, actual knowledge of a certain law or *of the legal effect of certain known facts is necessary to establish the offense*, ignorance or mistake as to that law or *legal effect* will be a defense."[31] Arguably, the accused asserting defense of another should be permitted to assert that he was ignorant or mistaken about the legal effect of the actions of the person he aided. For instance, the law permits an individual in fear of death or grievous bodily harm to use deadly force in self-defense;[32] an individual involved in a mutual affray may withdraw and break off the fight; if attacked again, the individual may now fight back in self-defense;[33] a person entitled to use self-defense may forfeit that defense if he uses excessive force;[34] and a person may display a

weapon in a menacing manner in self-defense.[35] The intervenor, acting upon circumstances and appearances in the above examples, may choose to aid the wrong person merely by chancing upon the altercation at the wrong time. It is the *law* (that is, the "alter ego" theory) as applied in the military which denies the intervenor any legal excuse when he chooses incorrectly in a situation in which the legal effect of the facts perceived are unknown to the intervenor. When the prosecution proves its case in these circumstances, it proves the "legal effect" of facts showing the accused intervenor aided the aggressor. Does it not follow that the accused must be able to claim a lack of "actual knowledge" of that law or the "legal effect" of the facts proved by the prosecution? [36]

It seems clear, then, that military law in general does not impose criminal liability in the absence of mens rea. Even in the unique status-type offenses, lack of knowledge or mistake are recognized defenses. Where these defenses are excepted from military law, as in the carnal knowledge example, the Manual explicitly defines the exception. And, as seen in *Singletary*,[37] proof of the absence of a guilty state of mind during the touching involved in a charged carnal knowledge offense will suffice to establish that the offense charged was not committed. The dictates of the military environment do not provide policy reasons to abandon the concept of mens rea on the issue of defense of another. Indeed, the general substantive military law tends to "hold one accountable for conduct which would constitute a crime if the facts were as he believed them to be." [38] Are there then, particularly cogent reasons for the military substantive law to follow the "alter ego" theory of defense of another?

The "Alter Ego" Theory Is Not Justifiable in Relation to Other Formulations of Military Law

The Code recognizes a duty in officers and noncommissioned officers to "quell affrays." [39] The Manual states specifically that the actions of one performing a legal duty may be excused in a situation in which those actions would be otherwise criminal.[40] Thus, a commissioned or noncommissioned officer who confuses the defender for the aggressor and intervenes to disarm a soldier fighting for his life, and as a consequence, permits the aggressor to strike the fatal blow, ought to be excused from criminal responsibility by virtue of his duty to act. On the other hand, the Specialist and Private are denied access to this legal excuse in the same situation. In a barracks fight situation, then, where the intervenor comes upon a potentially lethal fight in progress, his ability to avoid criminal liability for intervening will depend on two circumstances: whether he assaults the right person and, even if he chooses incorrectly, his military rank (provided the intervenor is an officer or NCO).

In the management of military duties on a day-to-day basis, is there any justification for a rule of law that changes upon the promotion of a soldier from E–3 to Corporal or differs in application between an E–7 Specialist and an E–4 Corporal but does not differ between an E–7 Sergeant and the Corporal? If a Sergeant chances upon a fight in progress and assaults both combatants (for instance, by pushing them away from each other), he should suffer no criminal liability. If a Specialist or Private does precisely the same thing in the same circumstances, he may assert defense of another as to the assault upon the actual aggressor but will he have to plead guilty to assaulting the defender? [41] Will the rule vary if the intervenor believes himself to have been promoted to Corporal on the date of the intervention, but at the time of trial the prosecution can show the orders were mistaken and he was actually a Private on the date in question? [42]

The underlying principle of the modern law approach is that the law should encourage citizens to go to the aid of persons they believe to be suffering an unlawful attack.[43] This principle is clearly the preferable one in the barracks situation. Attacks often occur in the communal living situation which exists in the barracks, even in the modern apartment style barracks. To maintain the "alter ego" theory is to place every soldier (except officers and "hard stripes") in a legal situation in which it

would be better to not intervene in a barracks fight or at least delay intervention until they can be sure who is the aggressor.

Are there other policy reasons which would support the "alter ego" theory in the military environment? In military law, the use of force in a given situation is consistently analyzed in terms of "reasonable belief" theory. The entire law of self-defense is based on a person's privilege to react in actual or apparent danger situations.[44] Army Regulation 190–28 adopts the "reasonable belief" theory for military police in the defense of another or prevention of a felony situation.[45] Furthermore, military law apparently permits a soldier to use deadly force to defend Government property if the attack upon the property is "forceful," "aggravated" or "serious in nature" and may even excuse homicide if committed in an "honest belief that it was necessary to prevent the loss of the property." [46] The necessity to use force in defense of personal property need not be real, but only reasonably apparent.[47] A soldier may resist apprehension if he has no "reason to believe" the person apprehending him is empowered to do so.[48] And, the law of self-defense is applicable when apprehending military police use unnecessary force in making the apprehension.[49] In *Barker,* the MP's so abused the Master Sergeant they were apprehending that the court justified his disarming and shooting one of them. In the circumstances which existed in that case, under the present military law a soldier who came upon the Sergeant shooting a uniformed military policeman would be criminally liable for assault if he assisted the military police by attacking or shooting the Sergeant! A similar situation exists where a foreign uniformed policeman lacks legal authority to arrest because of the Status of Forces Agreement.[50]

Finally, the military law recognizes the common law defense of prevention of a felony [51] in situations similar to the defense of another situation. This defense, however, has never suffered the draconian "alter ego" interpretation.[52] Therefore, an accused who intervenes in a barracks fight because he believes a felonious assault is taking place may successfully defend on that ground, even if he assaults the wrong person. Similarly, the soldier assisting a uniformed police officer who appears to be under attack may be able to claim mistake on the theory that he believed intervention was necessary to prevent a felonious assault upon the peace officer. In some situations, an accused may be able to raise both defense of another and prevention of a felony as defenses.[53] If this occurs, how will the military judge instruct under the current status of military law?

Conclusion

The "alter ego" theory of defense of another is not prescribed in the UCMJ or Manual. The military law concept of defense of another permits a soldier to aid another person "he could lawfully defend." [54] Under either theory of defense of another, the intervenor can "lawfully defend" another person. Under federal law and the modern articulation of state law, the intervenor can do so based on the facts and circumstances as they appear to him. The Manual provision and current military law on the substantive element of mens rea clearly portend that the soldier will be entitled to assert a lack of criminal intent in all situations as an excuse to otherwise criminal activity.

The exigencies of military life require that the "reasonable belief" theory be applied in our courts. The military law on protection of property, the authority to quell affrays, resisting arrest, and prevention of a felony all utilize "reasonable belief" theory. It is time to bring the military law of defense of another into concert with the modern articulation of the law.

Footnotes

* *The author acknowledges the kind assistance of Major Frederic Lederer, Criminal Law Division, OTJAG, in the preparation of this article.*

[1] Perkins, *Perkins On Criminal Law,* 1018–1022 (2d Ed. 1969); La Fave and Scott, *Criminal Law,* 397–399 (1972). This theory is also known as the "step into the shoes" theory. The intervenor steps into the shoes of the person he chooses to defend.

[2] *Id.*

[3] The Manual provides scant guidance. Defense of another is discussed along with the principles of self-defense. The Manual advises that a soldier may aid another person he could "lawfully defend" provided there existed reasonable grounds to "apprehend that death or grievous bodily harm was about to be inflicted" upon the person aided and the intervenor, in fact, had such an apprehension, *Manual for Courts-Martial, United States, 1969 (Revised edition)* paragraph 216*c* [hereinafter cited as *MCM, 1969*]. The words "lawfully defend" do not dictate the use of the "alter ego" theory in military law. Under either theory the intervenor may lawfully defend another. The "alter ego" theory requires that the intervenor act only on behalf of the individual who was, in fact, the victim of an unlawful assault at the moment of intervention. Only such a person may be lawfully defended. The "reasonable belief" theory permits the intervenor to lawfully defend a person who, under the circumstances, reasonably appears to be the victim of an unlawful attack. The United States Air Force uses this theory of defense of another. *See*, paragraph 4–10b, *Courts-Martial Instructions Guide*, Air Force Manual 111–2, 15 October 1971.

[4] There are four military cases which decide the issue for military jurisprudence. The Court of Military Appeals has considered the issue once, United States v. Regaldo, 13 CMA 480, 33 CMR 12 (1963). The other cases are United States v. Person, 7 CMR 298 (ABR 1953), United States v. Hernandez, 19 CMR 822 (AFBR 1955), and United States v. Styron, 21 CMR 579 (CGCBR 1956). The instruction found in the Military Judges' Guide, in part, states: "(In this regard, the accused may lawfully use force in defense of another if (state the name of the person defended) could have lawfully used such force in self-defense under the circumstances.)" *U.S. Dep't. of Army Pamphlet* No. 27–9, para. 6–3 (1969). Defense of another was raised in United States v. Tanksley, 7 M.J. 573 (ACMR 1979). The trial judge instructed the jury in conformance with the Military Judges' Guide. The jury found the accused guilty apparently because it rejected the accused's claim that reasonable grounds existed to apprehend that death or grievous bodily harm was about to be inflicted upon the person he sought to protect, his wife. The facts of this case show that the accused's wife was being pushed by a soldier during an argument between her and another family over a fight involving their children. The accused ran up to the the soldier and stabbed him in the back. The fact that United States Army and United States Air Force use different substantive rules of law for who may defend another (see footnote 3, above) was brought to the Court of Military Appeals' attention in a motion for reconsideration of issues not granted on in *United States v. Tanksley. See* 8 M.J. 181 (CMA 18 December 1979). The Court of Military Appeals declined to reconsider the issue of the appropriate standard for defense of another on this motion. ____ M.J. ____ (CMA 25 January 1980). The issue was raised in the case which precipitated this article, United States v. Cyr, CM 437766, tried at Ft. Ord, California, in September and October 1978. Private Cyr was found guilty of assault and aggravated assault on an aider and abetter theory. The military judge in that case rejected the defense request to instruct the jury on the "reasonable belief" theory of defense of another and prevention of a felony. The Judge Advocate General of the Army denied relief under the provisions of the Uniform Code of Military Justice, Article 69, 10 U.S.C. § 869 (1970) [hereinafter cited as UCMJ], on 28 June 1979. Private Cyr claimed that he chanced upon a knife fight between his friend, PFC Fuentes (*See* United States v. Fuentes, ____ M.J. ____ (ACMR 9 January 1980), and another soldier in the barracks. He acted to assist his friend who at that point he believed was about to be killed. As a result of Private Cyr's action, his friend gained control of the situation and subsequently stabbed the other soldier. The Government theory, based on the statement of the victim, was that Private Cyr and his friend accosted the victim together and that Private Cyr actively assisted his friend's attempt to murder him.

[5] *American Law Institute, Comments to Section 3–05* (Tentative Draft No. 8, 1958).

[6] *American Law Institute, Comments to Section 3–05, supra; Note: Criminal Culpability for Defense of Third Persons*, 20 Wash. & Lee L. Rev. 98 (1963); *Note, Criminal Law Defense of Another*, 64 W.Va. L. Rev. (1962); *Note, Defense of Third Persons As Excuse for Homicide*, 39 Ky. L. J. 410 (1951); *Note, Criminal Law Self Defense, Homicide, Right to Defend Another*, 11 Min. L. Rev. 340 (1926); United States v. Grimes, 413 F.2d 1376 (7th Cir. 1969); United States v. Heliczer, 373 F.2d 241 (2d Cir. 1967); United States v. Ochoa, 526 F.2d 1278 (5th Cir. 1976); Burke v. United States, 400 F.2d 866 (5th Cir. 1968); Commonwealth v. Monico, 366 N.E.2d 1241 (Sup. Jud. Ct. Mass. 1977); Commonwealth v. Martin, 341 N.E.2d 885 (Sup. Jud. Ct. Mass. 1975); State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (Sup. Ct. N.C. 1965); State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (Ct. App. N.C. 1965); State v. Fair, 45 N.J. 77, 211 A.2d 359 (Sup. Ct. N.J. 1965); State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (Super. Ct. App. Div. 1961); State v. Penn, (89 Wash.2d 63, 568 P.2d 797 (Sup. Ct. Wash. 1977).

[7] Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Columbia L. Rev. 914 (1975); *American Law Institute, Comments to Section 3–05, supra.*

[8] La Fave and Scott, *supra* at 399.

[9] United States v. Grimes, *supra.*

[10] *MCM, 1969,* paragraph 154*a*(4). Manson, *Mistake As A Defense,* 6 Mil. L. Rev. 63 (1959).

[11] *MCM, 1969,* paragraph 154*a*(5).

[12] *MCM, 1969,* paragraph 154*a*(1).

[13] United States v. Evans, 17 CMA 238, 38 CMR 36 (1967). An example of the concept is contained in the Manual discussion of the law of principals. "The person who executes the command of a principal may himself be innocent of any offense, as when a soldier at the command of a superior shoots a man who *appears to the soldier* to be one of the enemy, but who is known to the superior to be a friend." *MCM, 1969,* paragraph 156. This Manual example relies on the circumstances as they reasonably appear to the actor; it frees the actor of criminal liability if the actor's mind is free of criminal intent. This is universally the concept of law applied to the common law defense of prevention of a felony, see FN 51–53, *infra.*

[14] *MCM, 1969,* paragraph 154*a*(4) and 214*a.*

[15] United States v. Murphy, 9 CMR 473, 477 (ABR 1953), citing United States v. Simmons, 5 CMR 119 (CMA 1952).

[16] *MCM, 1969,* paragraph 214*a.*

[17] United States v. Verdi, 5 M.J. 330 (CMA 1978).

[18] United States v. Graham, 3 M.J. 962 (NCMR 1977).

[19] United States v. Deveaux, 3 CMR 823 (AFBR 1952). Many other examples of mistake as an excuse for otherwise criminal conduct are contained in the article, *Mistake As A Defense, supra.* Lieutenant Colonel Manson proposes that the complex rules of law concerning mistake and ignorance should be scrapped in favor of a general theory of law which equates the defense of mistake with the particular state of mind required by the crime charged.

[20] *Id.*

[21] *Id.* at 826.

[22] United States v. Anderson, 46 CMR 1073 (AFCMR 1973); United States v. Rowan, 4 USCMA 430, 16 CMR 4 (1954); United States v. Coker, 2 M.J. 360 (AFCMR 1977).

[23] *MCM, 1969,* paragraph 199*b.*

[24] *MCM, 1969,* paragraph 216*b,* FN 3, *supra.*

[25] United States v. Singletary, 14 USCMA 146, 33 CMR 358 (1963). The accused in this case admitted the touching of the child's private parts, but declared that he did so only to examine an apparent injury to the child in order to determine its extent. An assault must be done with a "general criminal intent, actual or apparent, to inflict violence or harm upon another" (citation omitted), at 362.

[26] United States v. Thomas, 13 USCMA 278, 32 CMR 278 (1962).

[27] United States v. Keenan, 18 USCMA 108, 39 CMR 108 (1969). The accused fired on a Vietnamese woman three to six seconds after another soldier fired a .45 caliber pistol point blank into her head. The .45 caliber round impacted one inch above her eyebrow.

[28] *Id.* at 113.

[29] *MCM, 1969,* paragraph 154*a*(4).

[30] *MCM, 1969,* paragraph 214. Special or affirmative defenses are favored in military law. It is reversible error for the military judge to fail, *sua sponte,* to instruct upon such a defense reasonably raised by the evidence. See United States v. Stewart, 20 USCMA 300, 43 CMR 140 (1971).

[31] *MCM, 1969,* paragraph 154*a*(5) (emphasis added).

[32] *MCM, 1969,* paragraph 216*c.*

[33] *Id.*

[34] *Id.*

[35] *United States Department of Army, Pamphlet No.* 27–9, *Military Judges' Guide,* paragraph 6–2 (1969).

[36] United States v. Bishop, 2 M.J. 741 (AFCMR 1977). In *Bishop,* an Air Force Court of Review considered whether the Manual provisions on mistake of law created a greater latitude for the assertion of this defense than provided by traditional mistake of law theory. The Court stated that the broad language in this provision was confusing but held that it did not provide the service person a broader defense than generally provided under the mistake of law concept.

[37] United States v. Singletary, *supra.*

[38] United States v. Keenan, *supra.*

[39] Article 7(c), UCMJ. A Sergeant operating under the authority of this Article may apprehend a soldier on a "reasonable belief" that an offense has been committed and that the soldier committed the offense, United States v. Lopez-Santiago, 32 CMR 802 (AFCMR 1962).

[40] *MCM, 1969,* paragraph 216*a.*

[41] For purpose of this discussion, the common law defense of prevention of a felony (also applicable in misdemeanor breaches of the peace) which may be applicable in this situation is being ignored. See FN 51–53, *infra.* On prevention of a felony or crime prevention see La Fave and Scott, *supra,* at 406; Perkins, *supra* at 989.

[42] United States v. Walker, 10 CMR 773, 807, 809 (AFBR 1953) (*reversed on other grounds,* 3 USCMA 355, 12 CMR 111 (1953)). The answer, apparently, is

yes! (See 10 CMR at 807–809.) The dissent in the original Walker case contains a complete review of the interrelated defenses of crime prevention, duty to quell affrays, use of force and authority to apprehend in the context of justifiable homicide. The dissenting judge postulates that the duty to apprehend in breach of the peace situations applies to all citizens, even service personnel, and, therefore, regardless of rank, all soldiers have a duty to quell affrays by intervening and apprehending.

[43] See generally, FN 6, *supra.*

[44] United States v. Gordon, 33 CMR 489 (ABR 1963); United States v. Hobbs, 42 CMR 584 (ACMR 1970). United States v. Ginn, 4 CMR 45 (CMA 1952). "The right to self-defense generally exists in sudden and violent cases, where delay would put the party in immediate danger of loss of life or great bodily harm" at 49.

[45] Army Reg. paragraph 4a(4) (March 1975). "Deadly force may be used when it *reasonably appears* to be necessary to prevent the commission of a serious offense against persons that involves violence and threatens death or serious bodily harm . . ." (emphasis added). See also, Peck, *The Use of Force To Protect Government Property,* 26 Mil. L. Rev. 81, 102–7 (1964).

[46] United States v. Lee, 3 USCMA 501, 13 CMR 57 (1953). The discussion of these principles is dicta in this case. Interestingly enough, use of force in defense of Government property is predicated upon the duty of a soldier to safeguard such property created by Article 108, UCMJ. The dissenting judge in the original case of United States v. Walker, FN 42, *infra,* argued that every soldier had a duty to apprehend, by force if necessary, soldiers whose riotous acts endangered other soldiers or civilians. The majority found no such duty.

[47] United States v. Gordon, 33 CMR 489 (ABR 1963).

[48] United States v. Noble, 2 M.J. 672 (AFCMR 1976); *MCM, 1969,* pagaraph 174*a*.

[49] United States v. Barker, 12 CMR 244 (ABR 1953).

[50] United States v. Ramos, 15 CMR 455 (ABR 1954). Again, a soldier assisting the policeman would be criminally liable for assault upon a drunken, assaultive soldier who is resisting arrest (albeit, lawfully resisting a uniformed peace officer who had no actual, but plenty of apparent, authority to arrest). See also, United States v. Rosier, 1 M.J. 469 (CMA 1976).

[51] United States v. Hamilton, 10 USCMA 130, 27 CMR 204 (1959); United States v. Clark, 37 CMR 621 (ABR 1967); United States v. Weems, 3 USCMA 469, 13 CMR 25 (1953).

[52] Note, *Criminal Law, Defense of Others,* 64 W.Va. L. Rev. 342 (1962).

[53] United States v. Hamilton, *supra.*

[54] *MCM, 1969,* paragraph 216*c*.

Union Representation of Federal Employees at "Formal Discussions" and "Investigative Examinations"

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Introduction

In the course of the last two decades, federal employee labor unions have achieved an increasingly important role in defining management-employee relations in the federal government. Nowhere is that role more pervasive than in a union's *right* to be represented at management-employee discussions which are "formal discussions" or "investigative examinations" involving bargaining unit employees. This article will summarize and define the substance and scope of that right as created by executive order, interpreted by executive agencies, and codified by Congress. The article will conclude with a pragmatic approach to management's implementation of the statutory right to union representation at investigative examinations.

Defining the Right to Union Representation at Management-Employee Discussions

A labor union that has been properly certified as the exclusive representative of a specific bargaining unit of federal employees has the right to be represented at: 1) any formal management-employee discussion concerning grievances, personnel policies and practices, and general working conditions in the bargaining unit, and 2) any nonformal management-em-

ployee discussion, upon request of the bargaining unit employee, concerning an investigative examination that the employee reasonably believes could result in disciplinary action against the employee. The union's right to be represented at formal discussions was expressly provided by Section 10e, Executive Order 11491 [1] (effective 1 JAN 70, hereinafter "the Order") and is continued without any substantive change in 5 USC § 7114 (a)(2)(A). Civil Service Reform Act of 1978 [2] (effective 11 JAN 79, hereinafter "CSRA"). The union's right to be represented at nonformal discussions, however, was not expressly stated in the Order and was in fact specifically denied in opinions by the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR) and the Federal Labor Relations Council (FLRC). Not until Congress enacted § 7114(a)(2)(B). CSRA (*supra,* note 2), primarily in response to the U. S. Supreme Court case of *NLRB v. Weingarten, Inc.,*[3] were federal employee labor unions entitled to be represented at a nonformal discussion involving management's investigative examination of a bargaining unit employee. To understand the significance of § 7114(a)(2)(B) it is first necessary to define the union's right to be represented at formal discussions and to analyze the *"Weingarten* rule" and its subsequent incorporation into statute.

Formal Discussions

"Formal discussion" is not defined in either the Order or the CSRA and is more a term of art than a precise description. "Nonformal discussion" is any management-employee meeting that is not a formal discussion. Although the dividing line between formal and nonformal discussions has been delineated on a case-by-case basis by the A/SLMR and the FLRC, some general definition may be gleaned from the cases. A formal discussion is any meeting and conversation between a management official (usually a supervisor) and a bargaining unit employee that is likely to have a demonstrable effect either on other employees in the unit or on the union's ability to effectively represent the interests of the employees in the unit. The subject matter of the conversation must concern grievances, personnel policies and practices, or general working conditions in the unit.

Whether the subject matter affects other employees in the unit often depends on the specific context of the meeting, especially if management officials conduct the meeting in a "formal" (in the dictionary sense of the word) fashion. Having more than one management official present, recording the conversation, following a prescribed interview procedure, or directing a union member to be an observer are factors that will create a formal discussion.[4] However, as the following examples illustrate, many one-on-one management-employee meetings can potentially expand to effect other employees in the unit and thereby become formal discussions. A performance interview in which a supervisor points out to an employee his failure to meet certain standards required by his job description is not a formal discussion,[5] but a performance interview that involves the institution of a new method of performance evaluation which may be used in subsequent appraisals is a formal discussion.[6] Admonishing an employee for not following local regulations pertaining to lunch periods is not a formal discussion.[7] On the other hand, discussing the rationale for a particular tour of duty schedule [8] or notifying employees of a change in work details and new method of staffing those details [9] does constitute a formal discussion. On-the-spot corrections and other instances of counseling are not formal discussions.[10] Training sessions to improve job skills, including group instruction, are not formal discussions; however, classes that relate the subject matter being taught to promotion evaluation criteria are formal discussions.[11] A meeting held between management officials and an employee to discuss the implementation of a hearing examiner's recommendations in an equal opportunity discrimination proceeding was determined by the A/SLMR to be a formal discussion.[12] However, the FLRC has ruled that ". . . agency headquarters-level representatives conducting meetings or interviews with activity-level employees merely for the purpose of soliciting opinions with respect to such matters as the EEO program of the agency are not re-

quired by the Order to permit the exclusive representative of such employees . . . to participate in such discussions or interviews." [13]

Even if other employees in the unit are not personally affected, a management-employee meeting may significantly affect the union's ability to represent the bargaining unit employees. Thus, most management-employee meetings incident to a grievance or adverse action procedure are formal discussions. Interviewing a witness involved in a pending grievance or arbitration is a formal discussion even when conducted by the agency attorney as a matter of necessary "trial preparation." [14] The A/SLMR has rejected the agency argument that permitting a union representative to be present at a witness interview by an agency official undermines management prerogatives in preparing its case.[15] "Off-the-record" attempts to "informally" resolve a grievance after it has been filed are formal discussions.[16] A classification audit [17] or a performance appraisal,[18] while not normally a formal discussion, becomes a formal discussion when conducted as part of a greivance procedure. On the other hand, a meeting between an employee and a management official to discuss the application of agency regulations to the employee is not a formal discussion if conducted *before* the employee files a grievance concerning the regulations.[19] Additionally, meetings between management officials and employees which are not for the purpose of "discussion" (e.g., notifying an employee of the decision to impose disciplinary punishment [20] or delivering a written notice of proposed suspension to an employee [21]) are not formal discussions even though such meetings may be required by agency regulation or a collective bargaining agreement.

When a formal discussion does occur, the union has a right to be notified of the meeting and provided a reasonable opportunity to attend.[22] The right to be represented at the management-employee discussion vests in the union as the exclusive representative of the bargaining unit, not in the individual employee. Thus, management has the obligation to notify the union of a formal discussion even though the employee may not request union representation and even if the employee expressly requests that the union not be present.[23] The union may decline to attend; if it does so, it has waived its right to be represented and the employee cannot properly refuse to attend the meeting.[24] However, the FLRC has recognized that an employee does have a right to demand that management fulfill its obligations (i.e., notice to the union with a reasonable opportunity for it to attend) as a condition precedent to the employee's participating in the formal discussion.[25] If the union decides to send a representative to the formal discussion, the selection of the representative is normally within the sole discretion of the union, not management.[26] If management officials fail to notify the union of a formal discussion or refuse to permit the union to attend, they have committed an unfair labor practice (ULP) under § 7116(a), CSRA. In the rare case, the nature of the violation may be considered *de minimus* and the ULP may not be sustained if 1) a union representative fortuitously happens to attend the meeting anyway [27] or 2) the impact of the meeting on the union or other employees is minimal and the union is permitted to "participate in a substantial manner" at subsequent meetings concerning the same matters.[28]

Under the Order, the federal employee labor union's right to be represented at management-employee meetings extended only to formal discussions;[29] additional union representation rights at nonformal discussions could be secured only by negotiating the rights into a collective bargaining agreement.[30] In "private-sector" labor-management relations, however, the U. S. Supreme Court decided in 1975 in *NLRB v. Weingarten, Inc.* that a labor union has a right to be represented at nonformal discussions whenever management officials conduct an investigative examination of a bargaining unit employee and the employee requests union representation.

The Weingarten Rule

In *NLRB v. Weingarten, Inc.* a female employee of Weingarten, Inc. (which owned about

100 chain variety stores) had been questioned by store officials about her taking food from the store lunch counter without paying for it. Store officials had refused her request to have a union representative present during the interrogation. The National Labor Relations Board (NLRB) ruled, and the Supreme Court affirmed, that the store officials had committed an unfair labor practice under the National Labor Relations Act (NLRA) by refusing the employee's request for union representation and failing to notify the union. The refusal infringed upon her rights under Section 7, NLRA, to act in concert for mutual aid and protection. Since the investigative examination placed her job security in jeopardy, she was entitled to the "aid and protection" of her union representative. Concomitantly, the union was entitled to be notified and to be represented at the examination if the employee so requested.[31]

The Supreme Court enunciated four conditions implicit in exercising the representation rights arising under Section 7, NLRA, in the context of a nonformal, investigative examination of an employee by a management official:

1. The employee must expressly request union representation.

2. The employee must reasonably believe that the investigation will lead to disciplinary action against the employee. In this regard, the Court noted that supervisory instructions, training, on-the-spot corrections, and minor infractions would not give rise to the right of representation.

3. The exercise of the right cannot interfere with legitimate employer prerogatives. Thus, the employer may give the employee a choice between an examination without union representation and no examination at all (with the employee losing whatever benefits that might have accrued from the examination). If the employee refuses to be examined, the employer is still free to pursue the investigation using other sources of information.

4. The employer has no duty to bargain with the union representative permitted to attend. The union representative may not create an adversary proceeding but may only assist the employee in clarifying the facts and suggesting other sources for additional facts.[32]

The *Weingarten* right to representation is a bifurcated one: The employee has the right to request representation [33] and the union has the right to be represented at the examination only if the employee requests union representation. Unlike formal discussions, the union's right to be represented at a nonformal, investigative examination is subject to the desires of the individual employee. If an employee does not expressly request representation, the employee's right is waived and the union has no right to be represented. The right does not arise before the initial investigative examination. Thus, the union does not have the right to meet with the employee on company time before the time of the examination (unless provided by negotiated agreement), since the right to request representation does not arise until then.[34] Likewise, the employee cannot invoke the right and refuse to talk with the management official before the official states the subject matter of the examination.[35] The right does not arise during a management-employee meeting that is not investigative in nature, such as a meeting to impose punishment after the investigation has been completed [36] or a meeting to deliver a warning notice of substandard performance and disciplinary layoff.[37] On the other hand, the *Weingarten* right to representation has been applied to a meeting at which no "investigation" took place but at which the employee asked to choose between improving his present job performance and accepting a demotion.[38] Since his job security was threatened, the employee had a right to the "aid and protection" of his union.

The FLRC Statement on Major Policy Issue No. 75P-2 (2 DEC 76) [39] reiterated the position of prior A/SLMR cases [40] that investigative examinations were not formal discussions and ruled that the *Weingarten* right to representation was not applicable to federal employees. The FLRC rejected the position of one Administrative Law Judge [41] that Section 1 of the

Order guaranteed essentially the same rights to federal employees as Section 7, NLRA, guaranteed to non-federal employees. Since the FLRC was not bound by statute or executive directive to follow NLRB rulings, the applicability of the "*Weingarten* rule" to federal employees was decided by Congress.

Congressional "Adoption" of Weingarten

The legislative history [42] of § 7114(a)(2)(B) reflects that a majority of Congresmen wanted to establish some degree of procedural protection for a federal employee during questioning by management officials which could lead to disciplinary action against the employee.[43] The Senate version of the CSRA. S. 2640, made no provision at all for *Weingarten*-type rights.[44] The initial House proposal, H. R. 3793, drafted by the Committee on Post Office and Civil Service, went beyond *Weingarten* and offered a *Miranda*-type rights warning complete with an exclusionary rule in the event the agency violated the rights.[45] The final version of the bill that passed the House, H. R. 11280, provided: 1) union representation, upon request of the employee, at any investigative interview that the employee reasonably believes may result in disciplinary action against the employee, and 2) notice to the employee of the right to union representation before *each* investigative interview concerning the employee's suspected *misconduct* that could reasonably lead to *suspension, reduction in grade or pay, or removal.*[46] The Senate-House Conference Committee expanded the right to union representation to include any examination in connection with an investigation, whether for misconduct or not, and regardless of the severity of disciplinary action contemplated. In exchange for the broader scope of the right, the committee deleted the provision for notice prior to each examination and substituted a requirement that all employees be informed annually of their right to representation.[47] The committee closed its report on § 7114 by stating: "The conferees . . . specifically intend that future court decisions interpreting the right in the private sector will not necessarily be determinative for the Federal sector." [48] The final version of § 7114(a)(2)(B) emerged in Public Law 95-454 (passed 13 OCT 78 and effective 11 JAN 79).

The extent of the right to union representation under § 7114(a)(2)(B) has not yet been addressed by either the Federal Labor Relations Authority (FLRC's successor under the CSRA) or the federal courts. Civil Service Commission Bulletin No. 711-48 (28 DEC 78) regards § 7114(a)(2)(B) as embracing the basic elements of the *Weingarten* right to representation but points out some limits:

> It is also apparent from the language in the Act and its legislative history that this provision has no application to normal day-to-day supervisor-employee relationships, and does not provide for representation by others (e. g., a personal representative of the employee), or to a union which has not been accorded recognition as the exclusive representative of employees in the unit to which the employee belongs.

The Bulletin directs that the annual notice inform employees only of the exact language of § 7114(a)(2)(B) and that agencies ". . . are advised not to attempt to interpret the language, in the required notice . . ." The Bulletin recommends that agencies provide "guidance to managers and supervisors on how to apply the provision" but offers no suggestions other than reference to *Weingarten*. There has been no further significant interpretation of § 7114(a)(2)(B) as yet.

Implementing 5 USC § 7114(a)(2)(B): A Pragmatic Approach

The *Weingarten* case itself does not provide adequate guidance to federal managers and supervisors who must comply with the provisions of its "statutory cousin." The remainder of this article will suggest answers from a management perspective to three basic questions concerning the implementation of § 7114(a)(2)(B).

How Far Does It Go?

Unlike the *Weingarten* rule, § 7114(a)(2)(B) is not limited to a management investigation concerning an employee's suspected misconduct of a significant nature. The statute includes any management examination of an employee in connection with any investigation which the employee reasonably believes may result in disciplinary action against the employee. Although H. R. 11280 intended to exclude minor infractions which subject an employee to only a verbal or written reprimand,[49] the Senate-House Conference Committee clearly intended that the reasonable possibility of any disciplinary action would trigger the right.[50]

An examination of an employee that is not related to an investigation is not covered by § 7114(a)(2)(B), although such a meeting may be a formal discussion under § 7114(a)(2)(A). "Examination" and "investigation" should be construed in their normal dictionary meanings since there is no indication that Congress intended to attach a special statutory meaning to either word. Thus, routine questioning or counseling with respect to an employee's job performance or overall efficiency creates no right to union representation (absent a collective bargaining agreement to the contrary).[51]

Unlike the *Weingarten* rule, § 7114(a)(2)(B) is clearly restricted to representation by a union that has been certified as the exclusive representative of the bargaining unit to which the employee belongs. The employee's right is to request union representation at the examination. If, after proper notification of his or her right to union representation, the employee fails to expressly request union representation or insists on non-union representation, the employee has waived the right and the union has no right to be represented at the examination. The employee's right to select a personal representative under § 7114(a)(5) does not arise in the context of a nonformal, investigative examination.

The determination of whether the employee "reasonably believes" that disciplinary action may result from the examination involves both subjective and objective criteria. The employee must actually believe that disciplinary action might result (as evidenced by the employee's express request for representation) and the belief must have a reasonable basis in fact (as determined by the management official). While the employee's subjective belief should be given great weight, the Supreme Court pointed out in *Weingarten* that certain management-employee conversations of a "run-of-the-mill" nature would not constitute a reasonable basis for the employee's invoking the right to representation.[52]

One point is clear in CSC Bulletin 711-48, FLRC opinions,[53] and the legislative history of § 7114:[54] Federal employee labor unions may secure stronger representation rights for their bargaining unit employees through collective bargaining with maagement. Section 7114(a)(2)(B) merely codifies and guarantees the minimum rights which cannot be negotiated away.

What Are Management's Obligations?

Section 7114(a)(3) requires that all federal employees (as defined by § 7103(a)(2)), whether a member of an appropriate bargaining unit or not, must be notified by management of their rights under § 7114(a)(2)(B) annually. To insure compliance, employees newly assigned or hired at an installation should be notified during the orientation process as well as at the annually scheduled date. Notification should be accomplished by the Civilian Personnel Officer through the local procedures established for routine communication with all employees, e. g., newsletters or disposition forms through supervisory channels. However, "burying" the notice in a newsletter containing many other non-related items in the same format and type-size should be avoided. Personal acknowledgement, or proof of actual knowledge, by each employee does not appear to be required in view of the Senate-House Conference Committee's deletion of the requirement of personal notification prior to each examination. Constructive knowledge arising from reasonable notification procedures should comply with the

statute. There is no need to inquire as to the individual employee's knowledge and understanding of his or her representation rights prior to each examination. Additional notification procedures are available but may not be desirable. Personally notifying an employee prior to each examination would likely, and unnecessarily, create an adversarial relationship between the management official and the employee being examined. Having each employee personally acknowledge the annual notice could prove to be administratively cumbersome. Incorporating § 7114(a)(2)(B) verbatim into a local collective bargainnig agreement would not meet the requirement of annual notice to all employees but could be helpful in proving actual knowledge of the provision by bargaining unit employees if constructive notice procedures were inadvertently not followed. The content of the notice should repeat § 7114(a)(2)(B) verbatim and indicate that the notice is provided pursuant to § 7114(a)(3) —no more, no less.

When an employee properly requests union representation at a nonformal, investigative examination, management is obligated to cease the examination, notify the appropriate union officer (not steward), and, if the union indicates its desire to attend, reschedule the examination at a time and place that will provide the union representative with a reasonable opportunity to attend. There is no requirement to postpone the examination while the union ferrets out additional facts or "prepares its case." If the union declines to attend, the employee cannot refuse to participate in the examination unless *Miranda-Tempia*/5th Amendment protections apply. Of course, if the union declines for reasons prohibited by § 7116(b), either the employee or management may file an unfair labor practice charge against the union. If there is a reasonable doubt as to whether the employee's request is proper (i. e., Is there a reasonable belief that disciplinary action will result?), the spirit of the statute should prevail and the matter should be resolved in favor of permitting union representation. However, in investigative examinations involving information of a confidential or highly sensitive nature, management may preclude union representation by either 1) granting the employee "immunity" from disciplinary action or 2) exercising its *Weingarten* prerogative to offer the employee a choice between an examination without union representation and no examination at all. Exercising the latter option assumes, of course, that no collateral influence or coercion is exerted over the employee (which would be an unfair labor practice under § 7116(a)).

The union representative's presence at the examination does not create a formal discussion or an adversary proceeding since the representative is not a spokesperson or advocate for the employee. The management official has no obligation to bargain with the union representative. The employee should personally respond to management questions while the union representative acts in an advisory role to aid the employee in formulating answers, clarifying the facts, and suggesting additional sources of information.

What If Management's Obligations Are Not Met?

Management's failure to comply with the annual notice requirements of § 7114(a)(3) will likely result in the union or a bargaining unit employee charging the agency with an unfair labor practice under § 7116(a). An employee who was not subjected to a nonformal, investigative examination or who, if subjected to such an examination, was represented by the union will normally not be able to demonstrate any significant prejudice by not being properly notified. Thus, immediate corrective action by management should result in a *de minimus* violation only and the ULP may not be ultimately sustained for that reason. However, if proper notice was not given and an employee was subjected to a nonformal, investigative examination without union representation, a resulting ULP may be more serious. If management can prove actual knowledge (from whatever source) and waiver of § 7114(a)(2)(B) by the employee, no real prejudice to the

employee exists. Similarly, if the employee made no statements during the examination which were later used against the employee or, if such statements were used, the disciplinary action was totally set aside and expunged from the employee's records, no significant prejudice to the employee has occurred. On the other hand, if statements made by the employee during or as a result of the examination were used against the employee in the disciplinary action of record, the ULP will certainly be sustained. Depending on the nature of the disciplinary action and the content of the statements, the accompanying remedial order could direct that the entire disciplinary action be set aside.

Management's failure to comply with § 7114 (a)(2)(B), i. e., refusal to permit union representation at a nonformal, investigative examination after proper request by a bargaining unit employee, will likely result in a sustained ULP against the agency under § 7116(a). It would be difficult indeed for management to take a corrective action that would "undo" the adverse impact of the refusal on the bargaining unit or to ameliorate the perception of a wilful violation. Management could argue that the refusal was based upon a good faith belief that the employee's request was not proper (i. e., had no reasonable basis in fact). Nevertheless, the *ad hoc* determination that union representation should have been permitted will likely result in a finding of an intentional ULP by management.

There appears to be no *per se* "exclusionary rule" arising from a violation of either § 7114 (a)(2)(B) or § 7114(a)(3) that would preclude management from using, for disciplinary purposes, statements made by an employee during or as a result of a nonformal, investigative examination. On the other hand, an arbitrator (if under a negotiated grievance procedure) or the Merit System Protection Board could modify or set aside a disciplinary action (if grieved or appealed) upon finding that the violation constituted harmful procedural error under the circumstances.

Conclusion

The enactment of § 7114(a)(2)(B) should not greatly alter the manner in which a supervisor deals with his or her employees on a day-to-day basis. However, an examination of an employee beyond routine counseling and performance appraisal should be coordinated in advance with superiors, and possibly the Civilian Personnel Office, to determine if § 7114(a)(2)(B) is applicable. When § 7114(a)(2)(B) does apply, it should not prove to be burdensome. It is not likely that every employee will request union representation or that the union will insist on being represented at every examination. Management offiicals who abide by the spirit as well as the letter of Title VII, CSRA, will resolve doubtful applications in favor of the employee and will insure that union representation rights are scrupulously honored.

Footnotes

[1] The last sentence of Section 10(e), Executive Order 11491, As Amended, reads: "The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

[2] 5 USC § 7114(a)(2): "An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation."

[3] 420 U.S. 251 (1975).

[4] U.S. Army, Training Center, Infantry, Laundry Facility, Fort Jackson, S.C., A/SLMR No. 242.

[5] HEW, SSA, Great Lakes Program Center, A/SLMR No. 419.

[6] FAA, National Aviation Facilities Experimental Center, Atlantic City, N.J., A/SLMR No. 438.

[7] U.S. Navy, Naval Air Rework Facility, Alameda, Calif., A/SLMR No. 781.

[8] FAA, Springfield Tower, Springfield, Mo., A/SLMR No. 843.

[9] HEW, SSA, BRSL, Northeastern Program Service Center, 1 FLRA No. 88.

[10] Dept. of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, FLRC No. 74A–11; Dept. of the Treasury, IRS, Mid-Atlantic Service Center, A/SLMR No. 421, FLRC No. 74A–68.

[11] Dept. of the Treasury, IRS, Chicago District, A/SLMR No. 1120, FLRC No. 78A–145, 1 FLRA No. 14.

[12] U.S. Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278. Interviews conducted by Equal Opportunity personnel of the Civil Service Commission (now Office of Personnel Management) are *not* covered by the Order or § 7114. Although the meetings are "formal discussions," the EO personnel are not considered to be "agency management." CSC, Washington, D.C., A/SLMR No. 640; CSC and IRS, Washington, D.C., A/SLMR No. 642.

[13] National Aeronautics and Space Administration (NASA), Washington, D.C., and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457, FLRC No. 74A–95.

[14] McClellan AFB, Calif., A/SLMR No. 830, FLRC No. 77A–56; Dept. of the Treasury, IRS, South Carolina District, A/SLMR No. 1172, 1 FLRA 92; FAA, National Aviation Facilities Experimental Center, Atlantic City, N.J., *supra* n. 6.

[15] "[T]he representational responsibilities conferred by Section 10(e) of the Order in this regard outweigh any impact its presence might have on management's preparation of its case. . . ." Dept. of the Treasury, IRS, South Carolina District, *supra* n. 14 at 3.

[16] U.S. Navy, Naval Ordnance Station, Louisville, Ky., A/SLMR No. 400.

[17] Dept. of the Treasury, U.S. Customs Service, Region VII, Los Angeles, Calif., A/SLMR No. 926.

[18] Dept. of the Treasury, IRS, Cincinnati District, A/SLMR No. 705.

[19] FAA, National Aviation Facilities Experimental Center, Atlantic City, N.J., *supra* no. 6.

[20] U.S. Navy, Norfolk Navy Shipyard, A/SLMR No. 908, FLRC No. 77A–141, 1 FLRA No. 32.

[21] U.S. Army, Training Center, Engineer, Fort Leonard Wood, Mo., A/SLMR No. 787; Dept. of the Treasury, Bureau of Engraving and Printing, 1 FLRA No. 69.

[22] Dept. of the Treasury, IRS, South Carolina District, *supra* n. 14.

[23] U.S. Navy, Naval Ordnance Station, Louisville, Ky., *supra* n. 16.

[24] Dept. of the Treasury, IRS, Hartford District, A/SLMR No. 649.

[25] "While this right of representation at formal meetings plainly inures to the union, we are of the opinion that the employee involved likewise is vested with a derivative or companion right to insist that the agency fulfill its express obligation under the Order, when the employee deems such representation imperative for the protections of his own employment interests." Statement on Major Policy Issue, Report No. 116, FLRC No. 75P–2 at 2.

[26] U.S. Army, Training Center, Infantry, Laundry Facility, Fort Jackson, S.C., *supra* n. 4.

[27] Dept. of the Treasury, IRS, Chicago District, *supra* n. 11.

[28] FAA, Muskegon Air Traffic Control Tower, Muskegon, Mich., A/SLMR No. 534; Vandenburg AFB, Calif., A/SLMR No. 383.

[29] "An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigation, meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with Section 11(a) of the Order." Statement on Major Policy Issue, *supra* n. 25.

[30] *Id.*

[31] 420 U.S. at 260, 261.

[32] 420 U.S. at 257–260.

[33] Justice Powell's dissenting opinion in *Weingarten* points out that the *Weingarten* right is not limited to *Union* representation (or even to a unionized work unit) but includes any representative that the employee chooses. 420 U.S. at 270 n. 1. Subsequent federal circuit court of appeals' opinions have agreed with his reasoning. NLRB v. Columbia University, 541 F. 2d 922 (2d Cir. 1976); Oil, Chemical and Atomic Workers International Union, AFL-CIO v. NLRB, 547 F. 2d 515 (D.C. Cir. 1976).

[34] Climax Molybdenum Co. v. NLRB, 584 F. 2d 360 (10 Cir. 1978).

[35] AAA Equipment Service Co. v. NLRB, 598 F. 2d 1142 (8 Cir. 1979).

[36] Mt. Vernon Tanker Co. v. NLRB, 549 F. 2d 571 (9 Cir. 1977).

[37] NLRB v. Certified Grocers of California, LTD., 587 F. 2d 451 (9 Cir. 1978).

[38] Newton Sheet Metal, Inc. v. NLRB, 598 F. 2d 478 (8 Cir. 1979).

[39] Statement on Major Policy Issue, *supra* n. 25.

[40] U.S. Air Force, Lackland AFB, Headquarters Military Training Center (ATC), Texas, A/SLMR No. 652; HEW, SSA, Great Lakes Program Center, A/SLMR No. 804; Dept. of Defense, National Guard Bureau, Texas Air National Guard, *supra* n. 10; Dept. of the Treasury, IRS, Mid-Atlantic Service Center, *supra* n. 10.

[41] Dept. of the Treasury, IRS, A/SLMR No. 833.

[42] COMMITTEE ON POST OFFICE AND CIVIL SERVICE, HOUSE OF REPRESENTATIVES, 96TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978 (1979).

[43] "The right to representation *after* formal charges have been filed ignores the fact that preliminary questioning is a critical factor in determining whether or not disciplinary action will be taken by employers." *Id.* at 645.

[44] *Id.* at 550.

[45] *Id.* at 230–232.

[46] *Id.* at 973.

[47] *Id.* at 155–156.

[48] *Id.* at 156.

[49] *Id.* at 646–647. "If the employer realizes that the misconduct will not result in suspension, removal, or reduction in rank or pay, the employee need not be notified of his right to representation. Neither, under these circumstances, could the employee base his refusal to answer questions on the provision of this legislation." *Id.* at 646.

[50] *supra* n. 50.

[51] *See* nn. 36, 37, and 51, *supra.*

[52] 420 U.S. at 258.

[53] *supra* n. 25.

[54] *supra* n. 42 at 995.

Managing Your Career in The Computer Age

Major Sharon E. Best
Personnel, Plans, and Training Office, OTJAG

Vital career decisions are made based on your records. The computer age is now influencing your records, and, therefore, your career.

In an effort to obtain accurate information on the Officer Master File, the Personnel, Plans and Training Office will conduct a one-time audit of information on each individual's officer record brief (ORB) and update certain information on the ORB from the computer terminal recently acquired in this office. Copies of ORB's have been sent to each JAG Corps officer. Your full cooperation and assistance in reviewing your ORB and updating it by correcting it in red and returning it to the Personnel, Plans and Training Office are essential.

Until recently, personnel management decisions in the JAGC were based on stubby pencil work products and individual memories of personnel managers. The Personnel, Plans and Training Office has modernized by acquiring a computer link to the Officer Master File (OMF), an extensive automated personnel information data base at MILPERCEN. This link enables us to tap the information in the data base and use it in our management process. Though we will not abandon our stubby pencils completely, we intend to use this file extensively. Therefore, we need to be sure the information we get from the file is accurate.

The most visible product of the OMF is the ORB. The ORB gives personnel managers a concise, easy to read digest of key personnel information. Every time there is a requirement to review an officer's qualifications, whether it be a career manager looking for a particular skill or a selection board member evaluating

promotion or schooling potential, the ORB is one of the first documents read. Many more documents are available, but the ORB is usually the first document read and inevitably makes a first and perhaps lasting impression. Thus, it is important for the Army, as well as for individual officers, that the ORB be timely and accurate.

The basic information for officers initially entering active duty is usually provided by the agency from which the officer enters the Army, *e.g.*, U.S. Military Academy, an ROTC region, or the Reserve Components Center (RCPAC) in the case of direct commissions. It is reported to DA through an automated officer accession suspense system. As an officer progresses through a career, events occur which are recorded on the OMF. Promotions, changes in marital status, number of dependents, or unit of assignment are examples which require the servicing military personnel office to submit a SIDPERS change transaction to update appropriate sections of the OMF.

On the other hand, some information contained on the OMF is controlled *solely* at DA. Only career managers, for example, are authorized to change specialty data or record the completion of military schools. Changes to verify active federal service or inactive federal commissioned service and Regular Army basic dates must be made by other offices within MILPERCEN. Nonetheless, most of the information contained on the ORB can be corrected by this office. You should, therefore, submit any error you find and we will attempt to correct it through MILPERCEN. Please note that your height and weight entry can be altered only by your servicing MILPO based upon a medical evaluation. Certain other changes to your ORB may require orders or similar documentation. If such documentation is not reasonably available, submit the ORB and note the reasons why you cannot provide the documentation.

In your ORB review, please pay close attention to sex. This is an important biological function, is essential to the survival of the species, and can be fun. It is amazing how many individuals with the name Robert show up as females on the Officer Master File.

Although this office will update these elements of the OMF on a one-time basis, future changes must be made by local MILPO's to the extent possible. Consequently, if after corrections by this office you discover an error in your ORB, the first and best source of assistance is your local MILPO. You should point out the error or omission and be prepared to document the correction. Once a correction has been documented, it is the MILPO's responsibility to be sure the change is properly processed. The desired result, of course, is for the correct information to be forwarded to MILPERCEN by a SIDPERS transaction. It then should be posted to the OMF and be reflected on the next ORB. Like any other system which is dependent on a number of equally complex systems, there are problems. The ORB is not always accurate.

Your officer record brief is a small but vital link in the personnel management chain. Sound, logical personnel management decisions affecting you can only be made when the most current and accurate information is available. Keep your ORB current at all times.

Care and Feeding of Summer Interns

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The summer intern program is vitally important to The Judge Advocate General's Corps, since it serves as a publicity device and recruiting tool for the Corps in the law schools. Staff Judge Advocates who supervise interns should be careful to assign only worthwhile tasks, not only to provide professional satisfaction to the intern at the time, but to give the intern a

favorable impression which can be carried back to school in the fall.

This article is an attempt to reconcile three different needs: those of the intern, the SJA office, and the Corps. It is written from the perspective of a former intern who now (hopefully) appreciates the latter two vantage points as well. Underlying all observations is the necessity to look beyond immediate office needs and focus on the intern as both a possible future officer and as a source of information about Army law for other law students.

Before the Intern Arrives

Once an SJA learns that a summer intern will be assigned to the office several preparatory steps should be taken. These will help acclimate the intern to the office (and vice-versa) and save time once the intern is actually on board.

The first step should be to circulate a copy of the intern's resume. This will serve to get the intern's name and background circulated throughout the office. Secondly, the SJA should designate one officer who will be the intern's sponsor and who will also be primarily responsible for supervising the intern. It is desirable for the sponsor to have something in common with the intern, such as the same law school or home town.

This officer sponsor/supervisor must also be an information service, ready and able to answer questions about the office, the Corps and the Army. The supervisor should also prepare a general work schedule for the intern. Any requests for the intern's services from other officers should always be channelled through the supervisor. The supervisor should be careful when planning an intern's workload and take many factors into account. First, the work should be as interesting as possible. An intern will not remain optimistic after a summer of shepardizing. The supervisor should also realize the intern's limitations. Many know nothing of military law or custom. Finally, it is important to remember the differences between 1st and 2d year law students. Interns who have just completed their 1st year of law school have not generally been exposed to Evidence, Administrative Law or advanced criminal offerings, such as Criminal Constitutional Law or Criminal Procedure. Tailoring the workload to the individual will be efficient in the long run. Such foresight will make the intern feel like he "belongs," as opposed to merely laboring as an itinerant helper.

The First Day

Interns should be treated like other new arrivals. They should have an audience with the SJA and the supervisor before being escorted around the office for introductions. Afterwards, the supervisor should give a more detailed overview of the office and its mission, and the intern's role and planned workload. The supervisor should make sure the intern knows where copies of the major reference works to be used, such as the Reporters and UCMJ, may be located and should be given an opportunity to familiarize himself with them. Whenever possible, a work area should be set aside in close proximity to the sponsor's desk. Interns do not enjoy being banished to the library for the duration of the summer. Try to make the intern feel important; it will insure a positive attitude and better work performance.

The Duties of the Intern

All duties assigned to the intern should be channelled through the intern's supervisor. Not only will decentralized control over the intern lead to confusing instructions and multiplicious assignments, but the law student will begin to think of himself as a chattel.

Interns are not chattels. Nor are they typists or answering services. Interns should have the same clerical duties as do officers; they should not be confused with summer clerical help.

Summer interns should be given assignments which are neither obvious makework nor such monumental projects that the intern will leave well before they are completed. This points out the necessity of finding out when the intern plans to depart and budgeting his assignments accordingly.

The intern's assignments should be significant enough to allow the intern some responsibility in budgeting time and effort to insure completion. While they should be adequately supervised, the supervisor should not duplicate the intern's efforts. Projects should be large enough that the intern feels like he's accomplishing something, but not so large that the tasks seem like they'll never end.

These assignments need not all be research, either. Many law students would be glad to get out of the library and do some legwork and phoning. However, filing and other such elementary jobs should not be assigned, except in conjunction with more meaningful work.

One possible project for interns in the military justice area concerns the new Military Rules of Evidence. Some students have just finished a course on evidence which usually focuses on the Federal Rules. SJA's could doubtless use this expertise when preparing for the fall transition.

The Education of Summer Interns

Supervisors of summer interns should take it upon themselves to educate the interns in the workings of the office, the Corps, and the Army. The supervisor should solicit suggestions and questions from the intern. Not only will this exchange of information better the intern's job performance, but it will make him more knowledgeable in the role and customs of the JAGC.

Interns should be exposed to all facets of military law. A first-year intern may not be thrilled with military justice, but may yearn to try his hand at claims. Or vice versa. Interns in the Admin Law Branch should be taken to view a court-martial. Those in military justice might, in appropriate cases, be allowed to sit in on some legal assistance interviews. By pointing out the variety which is indigenous to a military practice, SJA's help educate interns in the many facets of Army Law.

Interns should also be exposed to military life in general. They should be allowed to attend formations and award ceremonies. Again, a better understanding of the military helps give interns a true picture of the JAGC.

Summer's End

When the interns leave to return to school in August, don't just shake hands and forget them. Take them to lunch their last day and let them know how much you appreciated their help. Offer to write them a recommendation, either for a commission in the Corps or just a general letter of commendation. Secure in advance copies of JAGC recruiting information from PP&TO and ask the interns to distribute them when they return to law school. Even if the interns may not be interested personally, they may know someone who is. Remember that interns end up knowing more about the Corps than do most placement offices. Law students always ask each other about their summer experiences. Make sure that your intern is enthusiastic.

Summer interns should not be taken for granted. With a little thought and effort beforehand, these law students will be afforded a rewarding experience and an understanding of military law which will benefit both them and the Corps.

Criminal Law Note

Criminal Law Division, OTJAG

Some trial judges have observed that counsel are not correctly litigating the issue of insanity, because they are failing to utilize the American Law Institute definition which was adopted for courts-martial practice in *US v. Frederick,* 3 M.J. 230 (C.M.A. 1977). Trial counsel are reminded that the current material in the Manual for Courts–Martial is not up to date on this point. However, by now all counsel should be aware of the *Frederick* decision and the ALI

standard, and all SJAs should ensure that their trial counsel understand the standard and properly prepare the sanity issue for trial. Trial counsel must ensure that the question formats presented to psychiatrists conducting mental evaluations are couched in the proper language rather than in obsolete terms. Analysis of the ALI standard and guidelines for question formats are provided in Major Taylor's articles in the June 1978 and July 1979 issues of The Army Lawyer.

In the Conforming Amendments to the Military Rules of Evidence, effective 1 September 1980, paragraphs 120 and 121 of the Manual for Courts-Martial are revised to conform with the ALI standard on insanity; and, Rule 302 creates a "psychiatrist-patient" privilege for statements made by an accused during mental examinations conducting pursuant to the Manual. An article by Major Yustas, in last month's issue of this publication, discusses mental evaluation procedures under those rules. SJAs are also advised to provide The Army Lawyer articles mentioned in this note to military psychiatrists in their jurisdiction to assist them in understanding the new standards, and their role in the trial process.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Retired Members—Retirement Pay) **A Retired Regular Army Officer Subject to The Dual Compensation Act May Accept Court Appointments With Compensation To Represent Indigent Defendants Pursuant To 18 U.S.C. § 3006A Without Forfeiting Retired Pay.** DAJA–AL 1980/1189 (8 February 1980).

A retired Regular Army officer receiving retired pay requested an advisory opinion as to whether he could legally accept appointments from the United States Magistrate or district court to represent indigent defendants under the Criminal Justice Act (18 U.S.C. § 3006A) without forfeiting his right to any portion of his retired pay. The officer's compensation for the court appointments would be paid out of United States funds.

In response to the officer's request, an advisory opinion was rendered on the effect of the Dual Compensation Act (5 U.S.C. § 5532) in this case. The opinion states that the provisions of the Dual Compensation Act are applicable to retired Regular Army officers receiving salary from a civilian office or position (appointed or elected) in any branch of the U.S. Government, if the retired officer holds the position in an employee-employer capacity with the Federal Government. However, the opinion notes that the Comptroller General of the United States, in 44 Comp. Gen. 605 (1965), held that private attorneys appointed by courts pursuant to 18 U.S.C. § 3006A to represent indigent defendants and who receive compensation for such services are not regarded as forming an employee-employer relationship with the U.S. Government. Consequently, the opinion concludes that the recipient of these court appointments are not considered to be holding civilian offices or positions in the Government and are not subject to the provisions of the Dual Compensation Act. The opinion also states that it is advisory only and that further inquiries concerning application of the Dual Compensation Act should be addressed to the Commander, U.S. Army Finance and Accounting Center.

(Prohibited Activities And Standards Of Conduct—Gifts) **A Proposal By A DOD Contractor To Sponsor And Conduct A Series Of Medical Education Conferences At A Medical Treatment Facility Falls Within The General Prohibition Of AR 600–50 Against Accepting Gratuities From Any Source Doing Business With A DOD Component.** DAJA–AL 1979/2673 (6 June 1979.)

A pharmaceutical company wanted to sponsor and conduct a series of continuing medical

treatment facilities. The company, which was doing more than $10,000 in business with DOD, proposed to provide educational material, faculty, and program development for the conferences. The proposal was rejected by the Commander of Health Services Command because of the general prohibition in paragraph 2–2*b*, AR 600–50, against accepting gratuities from any source seeking or doing business with DOD. The Surgeon General sought the opinion of The Judge Advocate General of the propriety of this rejection. The Judge Advocate General concluded that absent additional information suggested the applicability of one of the exceptions contained in paragraph 2–2*c*, AR 600–50, the proposal submitted by the pharmaceutical company did fall within the general prohibition of paragraph 2–2*b*, AR 600–50. Consequently, as the Commander, Health Services Command apparently did not believe that one of those limited exceptions was applicable, he properly rejected the company's offer.

(Retired Members—Civilian Pursuits) **A Retired Regular Army Officer May Legally Accept An Appointment As An Honorary Consul Of A Foreign Government If Both The Secretary Of State And The Secretary Of The Army Approve The Appointment.** DAJA–AL 1979/3162 (27 August 1979).

A retired Regular Army officer requested an opinion from The Judge Advocate General on whether he could legally accept an appointment as an honorary Consul of the Government of Chile for the City of Honolulu, Hawaii. The officer stated that he would receive no emolument or profit from the honorary consular post and that the duties would be ceremonial and social in nature.

In responding to the individual's request, the opinion points out that, absent the consent of Congress, Article I, section 9, clause 8 of the U.S. Constitution prohibits persons holding positions of trust and confidence in the Federal Government from accepting any office or title of any kind from a foreign state. A retired RA officer is considered to hold a federal position of profit or trust and thus falls within the purview of the Constitutional prohibition. But, as a result of 37 U.S.C. § 801, Congress has consented to such employment by retired members of the uniformed services, provided both the Secretary of State and the Secretary of the military department concerned approve.

The Army has implemented the statute in AR 600–291, by requiring individuals who want to accept employment with a foreign government to submit a written request for approval to the Commander, RCPAC. The request must include a detailed description of the civil duties of the position, a statement indicating whether the individual will receive compensation for the duties, and a signed statement that the individual will not be required to execute an oath of allegiance to the foreign government. Upon approval by the Army, the RCPAC will forward the request to the Secretary of State for approval/disapproval.

(Contributions And Gifts) **The Proffer Of A Patient Monitoring System From A Private Corporation Is A Conditional Gift Which Should Be Processed Under The Provisions Of AR 1–100 For Possible Acceptance By The Secretary Of The Army.** DAJA–AL 1979/3277 (24 August 1979).

A private corporation offered to donate a patient monitoring system for the specific use of training medical equipment repairmen at a specific location. An opinion from The Judge Advocate General was requested on whether the proposed gift should be characterized as conditional or unconditional. Conditional gifts require acceptance by the Secretary of the Army under the provisions of 10 U.S.C. § 2601 as implemented by AR–100; unconditional gifts do not.

Unconditional gifts, as defined in paragraph 3*a*(2), AR 1–100, must be offered with no limitations on ownership or use. However, a donor of an unconditional gift may specify that the gift be used in a certain place, in a certain manner, or for a certain purpose, if nothing more than the normal use dictated by the physical nature of the gift is required.

The opinion notes that a patient monitoring system would ordinarily be used in patient care activities in a hospital. However, because this

gift had been offered for the specific use of training of medical equipment repairmen and was to be used in a specific location, the offer of the patient monitoring system should be treated as a conditional gift. Consequently, the opinion concludes that the offer to donate the patient monitoring system should be processed under the provisions of AR 1–100 as a conditional gift requiring acceptance by the Secretary of the Army.

(Prohibited Activities And Standards Of Conduct—Gifts) **An Army Official May Attend The Annual Convention Of A Private Organization In His Official Capacity At Government Expense And His Wife May Accept Food, Lodging, And Transportation From The Organization In Conjunction With The Official's Attendance At The Convention.** DAJA–AL 1979/3381 (7 September 1979).

An opinion was requested from The Judge Advocate General whether a Department of the Army official and his wife could accept an invitation to attend the annual convention of a private professional organization. The professional organization, consisting of active and retired civilian and military members, does not do or seek to do business with the Department of Defense, and it has no business interest affected by DOD. The Department of Army official, who had been invited to present a speech (without remuneration) at the convention, wanted to attend in an official capacity at government expense if permissible.

The opinion notes that AR 1–211 governs attendance of military personnel at meetings of private organizations. According to paragraph 4*a*, AR 1–211, an Army official may attend a private meeting or convention at government expense if the meeting is of direct benefit to the approving authority and government funds are available. Whether governmental interests would be served is a factual question, not a question of law, which should be resolved either by the head of the appropriate DA staff agency or by the invitee's superior.

The opinion concludes that if the requirement in paragraph 4*a*, AR 1–211, is satisfied, the DA official may attend the annual convention in his official capacity at government expense. In addition, the opinion notes that because of the nature of the private organization, it does not fall within the prohibitions of paragraph 2–2*a*, AR 600–50. Accordingly, there is no legal objection to permitting the official's wife to accept food, lodging, and transportation from the private organization in conjunction with the trip by her husband to the convention.

(Prohibited Activities And Standards Of Conduct—Gifts) **Army Personnel Are Prohibited From Accepting Gratuitous Entertainment Or Hospitality From A DOD Contractor At A Reception Unless One Of The Exemptions In Paragraph 2–2, AR 600–50, Applies.** DAJA–AL 1979/3521 (25 September 1979).

A DOD contractor wanted to invite DOD personnel to attend a reception with cocktails and hors d'oeuvres during the AUSA annual convention as part of ceremonies commemorating the Army's acceptance of the 10,000th TOW Launcher. The reception was not part of the official program but was to follow the formal presentation ceremonies. An opinion was requested from The Judge Advocate General on the propriety of accepting the proposed invitation.

The opinion notes that Army personnel are prohibited from accepting any entertainment or hospitality from a DOD contractor unless one of the specific exemptions in paragraph 2–2, AR 600–50, applies. In this case, the only applicable exemption (paragraph 2–2*c*(13)) required a determination by appropriate officials that attendance by Army personnel would serve the best interests of the government.

The opinion points out that the prohibition against accepting gratuities is normally satisfied if the recipient pays the fair market value for what is received. In this case, payment by participating Army personnel for the value of the food and drink received would satisfy the gratuities prohibition.

(Commissioned Officers—Misconduct) **A Rating Official May Comment, In An Officer Evaluation**

Report, On Misconduct That Is Supported By A Completed Report Of Investigation But May Not Refer To A Court-Martial Conviction Until Appellate Action, If Any, Has Been Completed And The Sentence Has Been Ordered Executed. DAJA–AL 1979/3581 (17 October 1979). An officer appealed an Officer Evaluation Report because both the rater and the indorser referred to his general court-martial conviction for a drug offense. At the time of the report, the convening authority had not approved the finding of guilt or the sentence.

The Commander, MILPERCEN, requested a legal opinion as to whether the court-martial conviction was final and could be commented on in the Officer Evaluation Report. The Judge Advocate General, citing paragraph 1–5*b*, AR 623–105 (1 August 1978—now superseded), decided that references by a rater and indorser to a court-martial conviction are improper until appellate review is complete and the sentence is ordered executed. That same paragraph, however, permits adverse comments based on a completed report of investigation, even if punitive or administrative action is likely to be or has been taken but not completed as a result thereof. Since MILPERCEN has the power under AR 623–105 to amend an OER, as appropriate, The Judge Advocate General advised MILPERCEN to insure that there was a final report of investigation and, based thereon, to amend the OER to reflect the officer's possession of marijuana, rather than his court-martial conviction.

(Separation From The Service—Discharge) **A Soldier May Not Be Retained Involuntarily Beyond The Expiration Of His Term Of Service Unless The Conditions Specified In Paragraphs 2–4 Through 2–7 Of AR 635–200 Exist.** DAJA–AL 1979/3767 (2 November 1979). A soldier was pending civilian criminal charges in the Republic of Korea on the date of his expiration of term of service, but he was in United States Army custody. None of the conditions specified in Chapter 2, AR 635–200, which would authorize an involuntary extension were present, and the soldier refused to extend his enlistment voluntarily. Ordinarily, the Army would be obligated to transport the soldier to the United States and discharge him. However, under the United States-Republic of Korea Status of Forces Agreement, the soldier could not be returned to the United States until the civilian charges were resolved or Korean officials consented to his removal.

ODCSPER requested a legal opinion as to whether the soldier could be retained involuntarily under these circumstances. The Judge Advocate General advised that involuntary retention would only be proper if one of the circumstances set forth in paragraphs 2–4 through 27, AR 635–200 existed. The United States Army could exercise its concurrent jurisdiction gained as a result of the Korean declaration of martial law and prefer charges against the soldier. In the alternative, Headquarters, Department of the Army could approve separation in Korea, as an exception under paragraphs 2–10*c* and 3–4, AR 635–200, in which case the soldier would lose his status of forces protection. If overseas separation is authorized, the command must coordinate carefully with foreign officials and notify the US Consul that an American citizen is facing civilian criminal charges in that country.

(Prohibited Activities And Standards Of Conduct—Gifts) **Acceptance By Army Physicians Of Radios From A Wholly Owned Subsidiary Of A DOD Contractor Involves Receipt Of Gratuities Prohibited By Paragraph 2–2, AR 600–50, Unless Acceptance Would Serve The Government's Best Interest.** DAJA–AL 1979/3927 (12 December 1979).

The Surgeon General requested an opinion from The Judge Advocate General concerning the propriety of Army physicians accepting free side-band radios from a wholly owned subsidiary of a Department of Defense contractor. The subsidiary corporation wanted to distribute free radios to military physicians, but it was concerned that issuance of the ratios would be in violation of Army policy. The Judge Advocate General considered the relationship of the subsidiary corporation to the DOD contractor and rendered an opinion under AR 600–50 concerning the propriety of this action.

The Judge Advocate General concluded that acceptance of the radios by Army physicians would constitute the receipt of a gratuity prohibited by paragraph 2-2*b*, AR 60-50, unless one of the limited exceptions set forth in paragraph 2-2*c*, AR 600-50, were applicable. The only exception which appeared to be applicable was the one contained in paragraph 2-2*c*(13), AR 600-50, which requires a determination that acceptance of the radios would serve the Government's best interests. The opinion notes that the applicability of this execption can be determined only after balancing factors such as the educational value of the radio programs broadcasted on the radios (and the availability of similar educational programs) against the harm which might arise from the existence of real or apparent conflicts of interests. The opinion notes that the acceptance of gratuities by DA personnel may be a source of embarrassment to the Army, may affect the objective judgment of Army personnel, or may impair public confidence in the integrity of the Government.

(Death And Deceased Persons) **There Is No Legal Objection To Military Lawyers Serving As Survivor Assistance Officers Unless The Attorney Is Involved In Representing The Government On Matters Concerning The Particular Deceased Or Survivor.** DAJA-AL 1979-2684 (10 June 1979). The Office of The Adjutant General requested an opinion on whether an ethical conflict exists when a military attorney serves as a survivor assistance officer. The Judge Advocate General found generally no ethical conflict but cautioned that attorneys should be alert for conflicts in an individual case. The opinion also noted that paragraph 11 of AR 27-1 provides JAGC officers "should not routinely be used in the performance of any nonlegal duties."

(Contributions And Gifts) **Although The Secretary Of The Army May Not Delegate The Discretionary Authority Under 10 U.S.C. § 2601(a) To Accept Certain Conditional Gifts, Before-The-Fact Acceptance May Be Granted By AR 1-100, Or Specific Objective Standards May Be Established To Permit A Subordinate To Accept By A Ministerial Act.** DAJA-AL 1979/3143 (24 August 1979).

The Adjutant General intended to recommend that the Secretary of the Army delegate to the Superintendent of the United States Military Academy limited authority to accept certain conditional gifts and donations. Before making the recommendation the Adjutant General sought an opinion from The Judge Advocate General on the propriety of the proposed delegation of authority under 10 U.S.C. § 2601 and AR 1-100. After reviewing the statute and the implementing regulation, The Judge Advocate General noted that although 10 U.S.C. § 2601 authorizes the Secretaries of the military departments to accept conditionali gifts in connection with schools, hospitals, libraries, museums, cemeteries, and other organizations under their jurisdiction, paragraph 5, AR 1-100, prohibits the Secretary of the Army from delegating that discretionary authority. The Judge Advocate General has consistently stated since as early as 1948, that this discretionary authority may not be delegated.

The opinion points out, however, that before-the-fact acceptance of certain limited types of gifts to the United States Military Academy may be authorized by adding specific acceptance provisions to AR 1-100. Paragraph 6*b*(4), AR 1-100, which could be amended to include certain gifts to USMA, provides for this type of anticipatory acceptance for certain categories of gifts.

Alternatively, even though the acceptance authority granted to the service Secretaries by 10 U.S.C. 2601 is discretionary in nature, the acceptance function may be delegated if the Secretary of the Army establishes specific objective standards so that the action of the subordinate in applying the standards is ministerial. Thus, if specific objective regulatory standards were prescribed for determining whether certain gifts were acceptable and a subordinate could apply the standards in a ministerial way, the acceptance function could be performed by the subordinate without violating AR 1-100. The subordinate in this case

would be performing ministerial duties of the type permitted by paragraph 5, AR 1–100.

(Retired Members—Order To Active Duty) **Retired Members Lawfully Ordered To Active Duty In The Event Of A National Emergency Who Fail To Respond Are Subject To Disciplinary Action Under The UCMJ And Will Have Their Retired Pay Suspended. Those Retired Members Who Do Respond Are Entitled To Reemployment Rights Under 38 U.S.C. § 2024 (b)(1).** DAJA–AL 1979/3551 (29 October 1979).

ODCSPER was developing a program for ordering retired personnel to active duty in cases of national emergency or war requiring full mobilization. Retired personnel would be issued "preassignment" orders, during peacetime, specifying that they would have a certain number of days, after a news media announcement of full mobilization, to report to a specific station or installation. In addition, separate orders would be given to retirees in this program for periodic participation in peacetime refresher training or other orientations. In developing this program, ODCSPER requested an opinion from The Judge Advocate General on a number of legal issues raised by the program.

Regarding the time a retiree ordered to active duty under the program would become subject to the UCMJ, The Judge Advocate General stated that under Article 2, UCMJ, retired members of the Regular Army who are entitled to pay are subject to the UCMJ without regard to their active duty status. Retired Reserve component members lawfully ordered to active duty are subject to court-martial jurisdiction from the date they are required by the order to report. Consequently, any retired member (Regular or Reserve), lawfully ordered to active duty in case of national emergency, who fails to respond to the order is subject to disciplinary action, including trial by court-martial, if appropriate. The order to active duty becomes effective when notice of the order, actual or constructive, has been received by the member. Consequently, unless the retiree actually receives the order or is chargeable with knowledge of the order, he or she cannot be regarded as having been effectively ordered to active duty. In the absence of notice, if the retiree is a Reserve component member (other than those receiving hospitalization from an armed force—Article 2(5), UCMJ), he or she does not become subject to the UCMJ.

In response to a question concerning entitlement to retired pay, the opinion notes that paragraph 3–5, AR 601–10, prescribes the procedures to be followed if a retired member ordered to active duty fails to report for duty. Specifically, AR 601–10 (when read together with 37 U.S.C. § 204(b); Rule 8, Table 1–2–1, DOD Pay Manual; and paragraph 1–18, AR 37–104–1) indicates that a properly notified retired member who fails to report for duty will be carried in an active duty/AWOL status and will receive no active duty pay or allowances. In addition, the member's retired pay will be suspended on the effective date of the "properly delivered" mobilization orders. Also, retired pay may be lost by sentence of a court-martial or following conviction by civil authorities for offenses included in the Hiss Act (5 U.S.C. §§ 8311–8322).

Finally, the opinion points out that 38 U.S.C. § 2024(b)(1) provides certain reemployment rights to armed forces personnel, including retirees, ordered to active duty. These rights are generally the same as those provided by 38 U.S.C. § 2021 for inductees, and insure that servicemembers are restored to their original civilian employment or equivalent positions upon completion of military service. Eligibility for these rights is based upon length of service, evidence of honorable separation, timely application for reemployment (generally within 90 days of separation from active duty) and continued qualification for the job. The Department of Labor has the statutory responsibility under 38 U.S.C. § 2025 to render reemployment aid to servicemembers who have satisfactorily completed any period of military active duty.

(Claims, Against the Government) **Claim For Restitution By Enlisted Member Involuntarily Held Beyond ETS.** DAJA–AL 1979/3905, 10 December 1979. An Army enlisted servicemember who was the subject of an Article 32,

UCMJ Investigation, was involuntarily extended beyond his ETS. Normal pay and allowances were received by the soldier during the period of extension, but additional compensation was sought for "lost pay" and transportation. The Judge Advocate General advised that no statute or regulation authorized the additional compensation sought. Nevertheless, two forums were identified in which the soldier's claim could be presented. First, a claim could be presented for a settlement of accounts to the Claims Division, Settlement Operations, Finance and Accounting Center, using DD Form 827, in accordance with para. 40471 *ea seq.*, AR 37-104-3. Second, a written claim for a sum certain could be presented to the nearest claims officer of the United States using Standard Form (SF) 95. The Judge Advocate General cautioned that the advice regarding existence of the forums did not imply that the Army believed the claim to have any validity.

Concerning the soldier's claim for attorney's fees, The Judge Advocate General advised that 10 U.S.C. § 832b (Art. 32b, UCMJ) provides that civilian counsel of an accused's choosing at investigations conducted pursuant to that article must be provided at no expense to the Government; military counsel is provided at no charge to an accused.

Legal Assistance Items

Major Joel R. Alvarey, Major Joseph C. Fowler, and Major Steven F. Lancaster
Administrative and Civil Law Division, TJAGSA

Consumer Law—Truth in Lending Act

The Truth in Lending Simplification and Reform Act was signed into law by the President on 31 March 1980 (P.L. 96-221).

The Truth in Lending Act (TILA) was enacted in 1968 and has not had any major revisions until the present one. Major changes to the TILA include:

1. The exclusion of agricultural transactions from coverage by the TILA.

2. A recision for a three year period of the right for the consumer to cancel, within three days of the purchase, any purchase made with a credit card and secured by his home.

3. Civil liability has been limited only to those improper disclosures which are of material importance. The statutory penalty will not apply for mere technical violations.

The effective date of the TILA Simplification and Reform Act is 1 April 1982.

Consumer Law—Fair Debt Collection Practices Act—Annual Report to Congress

The Federal Trade Commission (FTC) submitted its second annual report concerning the administration and enforcement of the Fair Debt Collection Practices Act (15 U.S.C. 1692). The FTC report summarized its enforcement actions and other activities conducted during the past year which were aimed at preventing abusive, deceptive, and unfair collection practices by debt collectors.

The Report noted that inflation combined with the decline in real growth in Gross National Product has resulted in an increased amount of delinquencies and defaults in consumer credit transactions. Consumers owe more than $1.5 trillion in debts for housing and other goods and sources and hold more than 600 million credit cards.

Over 4000 complaints were received by the FTC during 1979. The three most important complaints were:

1. Debt collectors were contacting persons other than the consumer in the collection process. Employees, relatives, neighbors, and friends were continuing to be illegally contacted with the intent to embarrass, humiliate, and pressure consumers into payment.

2. To coerce payment, debt collectors frequently threatened suit and legal process, often without authority nor with intent to do such. In addition, certain collectors purchased stationery of local attorneys and received authorization to make use of it without referring the case to the attorney.

3. There were instances of collectors imposing unlawful overcharges on consumers. Creditors would add a surcharge to the debt to compensate the debt collector for his services. State laws limited the amount of collection charges or attorney's fees which may be added to a debt which was in default and the surcharge exceeded that which the laws permitted.

The Commission instituted thirty-three formal investigations resulting in twenty-two consent agreements and recommended complaints. The FTC staff expended much effort in educating parties concerning the protections of the Act. The Commission recommended the inclusion of creditors within the coverage of the Act. It found that creditors engage in the same practice as debt collectors and for the same reasons.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Charges and Specifications:

A. *Trial counsel must carefully review charges* to insure that they state an offense and are supported by the evidence. The accused in a recent case was charged with possession and sale of heroin. One specification failed to allege that the possession was "wrongful". While this was merely an oversight it rendered the specification fatally deficient for failing to state an offense. Counsel should have reviewed and compared the specification with the samples found in Appendix 6, Manual for Courts-Martial. This could have been done as a matter of course when setting out the elements of proof in a *trial notebook.*

B. *Trial counsel should not amend charges prior to trial* in anticipation of an accused's guilty plea. A recent accused was charged with two specifications of communication of a threat each containing two separate threats. At a 39 (a) session the trial counsel moved to amend by eliminating one threat from each specification. This was done in anticipation of a guilty plea. The motion was granted. However, the accused ultimately pled not guilty. Instructing the members on finding, the military judge included only the words which had previously been stricken. The members returned findings of guilt based on the deleted language. The defense raised no objection at trial, the trial counsel missed the error, and so did the military judge. The better practice would have been to have had the plea entered and accepted before moving to amend any specification.

2. Pretrial Investigations:

Trial counsel must insure that all charges and specifications taken before a general court-martial *have been investigated pursuant to Article 32,* U.C.M.J. This requires either an actual Article 32 investigation, an adequate substitute investigation to which the defense does not object, or an affirmative waiver by the defense of the requirement for an Article 32 investigation. The accused in a recent general court-martial was charged with possession and sale of heroin and hashish. A pretrial investigation revealed that the accused was found to be in possession of hashish which was not included in the charge. The Article 32 officer recommended an additional charge; such charge was subsequently referred but without any fur ther investigation. A trial the defense objected to the lack of a pretrial investigation, and the charge was dismissed. Trial counsel should have determined prior to trial whether the defense would consent to the prior Article 32 or whether a new investigation was needed. Had the de-

fense affirmatively waived the investigation, trial counsel should have obtained a written waiver. *United States v. Walls*, 8 M.J. 666 (ACMR 1979), *pet. denied*, 9 M.J. 10 (1980).

3. Post-trial Review:

Trial counsel should adequately document service of the post-trial review on a defense counsel. If action is taken within five days of service, the record must reflect an affirmative waiver by the defense of the right to reply. The post-trial review in a recent case was dated 12 October 1979, and action was taken 16 October 1979. The record contained no defense reply to the review. There was a memorandum signed by the staff judge advocate reflecting only that the review was "receipted for" by the defense counsel on 15 October 1979. Apparently the defense did not intend to reply to the review, however this is not reflected in the record. The better practice is to have the defense actually sign for a copy of the record and the review. Also, the defense counsel should be asked to indicate in writing if a reply is to be submitted; in the event no written indication is given, the allied papers should include documentation to the effect that the request was made. Clearly recording what transpires should prevent ambiguity.

4. Speedy Trial:

Trial counsel should vigorously resist speedy trial motions and build a sufficient record of the Government's position for appellate purposes. Counsel must remember that there are two parts to the *Burton* Rule, 21 USCMA 112, 44 CMR 166 (1971); compliance with both parts is necessary to succeed on a speedy trial issue. First, counsel must be aware of the status of the case and insure it is tried before the 90th day of Government responsibility. Second, if the defense makes a written demand for trial, the trial counsel must generally make a written response. If a speedy trial issue is likely, counsel should prepare a detailed chronology so that an adequate record exists for appellate review. If there is no actual pretrial confinement, the Government's factual basis for that position should be made clear on the record. The accused in a recent case returned from his third AWOL and was directed to remain in the unit arms room unless accompanied by an escort. This continued for two weeks when the accused again went AWOL. Upon subsequent apprehension he was placed in pretrial confinement. Prior to trial the accused made a demand for immediate trial to which the trial counsel responded orally. At trial the defense claimed that the Government responsibility began with the period of restriction to the arms room. No evidence was presented by the Government regarding when the period of confinement was begun or about the circumstances surrounding the defense demand for immediate trial.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. JARCGSC Discontinuance: A Follow-up

The discontinuance of the Judge Advocate Reserve Components General Staff Course after the 1980–81 cycle was announced in the last edition of *The Army Lawyer*, May 1980; at 64). The following information is provided with respect to the decision to discontinue the course.

1. At its inception, the course was not envisioned as a permanent, continuing offering. It was designed to clear a promotion "hump" which had developed among field grade reserve component judge advocates in the early '70s which had left many of them hard put to become educationally qualified for promotion through the Leavenworth 5-year course. This promotion hump has been overcome, and the Leavenworth option has been reduced by 40% —it is now designed to be completed in 3 years.

2. The Judge Advocate General seeks equivalence in the training posture of both reserve component and active judge advocates. Many of those active duty JA's who do not attend the resident C&GSC complete the course by correspondence or through USAR schools, but are not eligible for enrollment in the JARCGSC.

3. Most importantly, it is believed that promotion boards are becoming increasingly less impressed with JARCGSC completion. The Judge Advocate General's School has in fact received specific inquiries from the Reserve Components Personnel and Administration Center regarding the precise nature and scope of the material to which reserve component JA's are exposed by taking this course as opposed to the Leavenworth course.

2. Selection of Chief Judge, U.S. Army Legal Services Agency (MOB DES)

Colonel William H. Gibbes, JAGC, USAR, of Columbia, South Carolina, has been selected to succeed Brigadier General Jack N. Bohm, USAR, of Kansas City, Missouri, as Chief Judge, U.S. Army Legal Services Agency (MOB DES). Colonel Gibbes, who assumed this position on 1 May 1980, is a 50-year old native of Columbia, South Carolina, and a veteran of 26 years active and Reserve commissioned service in the JAGC. Colonel Gibbes received his B.S. and LL.B. degrees from the University of South Carolina, and graduated from the Judge Advocate Officer Basic Course in 1954. For three years following his graduation he served as an Assistant Staff Judge Advocate at Fort Jackson, South Carolina, and has been continuously active in the JAGC Reserve program since his release from active duty in January 1957. He has completed, through a combination of resident and nonresident studies, the Judge Advocate Officer Career Course, the Civil Defense Staff College, and the U.S. Army Command and General Staff College, and he is currently enrolled in the Air War College. In recent years, Colonel Gibbes' Reserve assignments have been as Commander, 12th Military Law Center (1976–1979), and Staff Judge Advocate, 120th U.S. Army Reserve Command, Columbia, South Carolina (1979–present). Colonel Gibbes' awards and decorations include the Meritorious Service Medal, the Army Commendation Medal and the Reserve Components achievement medal w/OLC. In civilian life, he is in private practice in Columbia, South Carolina, with the firm of Gibbes and Powell.

3. Mobilization Designee Vacancies

A number of installations have recently had new mobilization designee positions approved and applications may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Colonel William L. Carew, Reserve Affairs Department, Charlottesville, Virginia 22901.

Current positions available are as follows:

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
LTC	18	01C	01	Legal Officer	DCS Personnel	Washington, DC
MAJ	01N	01A	01	Judge Advocate	Fitzsimons AMC	Aurora, CO
MAJ	06	04	02	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston, TX
MAJ	06	04	04	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston, TX
MAJ	01A	01A	01	Dep Ch Atty	Def Supply Svc	Washington, DC
CPT	01A	02A	01	Dep Ch Atty	Def Supply Svc	Washington, DC
LTC	06	04	09	Mil Judge	USALSA	Falls Church, VA

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
LTC	05A	02	01	Dep Chief	USA Clms Svc	Ft Meade, MD
CPT	10D	05	01	JA Pers Law Br	OTJAG	Washington, DC
LTC	14	02	01	Asst Ch, Lands Off	OTJAG	Washington, DC
MAJ	04	02	01	Asst SJA	MTMC Eastern Area	Bayonne, NJ
MAJ	09	01A	01	JA	USA Dep Newcumberland	Newcumberland, PA
MAJ	78B	02	01	Cmd JA	USA Depot	Corpus Christi, TX
MAJ	26C	01A	01	Legal Advr	USA TSARCOM	St Louis, MO
CPT	08C	01A	01	Trial Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	01A	02	Trial Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	02A	01	Defense Counsel	172d Inf Bde	Ft Richardson, AK
CPT	08C	02A	02	Defense Counsel	172d Inf Bde	Ft Richardson, AK
MAJ	09D	03	01	Asst SJA Crim Law	First US Army	Ft Meade, MD
MAJ	03	04	01	Asst SJA	USA Garrison	Ft Ord, CA
CPT	03B	02	01	Asst SJA	USA Garrison	Ft Ord, CA
CPT	03B	02	02	Asst SJA	USA Garrison	Ft Ord, CA
CPT	03B	01B	03	Trial Counsel	USA Garrison	Ft Devens, MA
CPT	03C	01A	03	Defense Counsel	USA Garrison	Ft Devens, MA
LTC	05	02	01	Dep SJA	USA Garrison	Ft Bragg, NC
MAJ	05A	03	01	Contract Law Off	USA Garrison	Ft Bragg, NC
MAJ	05A	04	01	JA	USA Garrison	Ft Bragg, NC
CPT	05A	05	01	JA	USA Garrison	Ft Bragg, NC
LTC	05B	01	01	Ch, Mil Justice	USA Garrison	Ft Bragg, NC
MAJ	05B	03	01	Trial Counsel	USA Garrison	Ft Bragg, NC
CPT	05B	04	01	Asst JA	USA Garrison	Ft Bragg, NC
CPT	05B	05	01	Asst JA	USA Garrison	Ft Bragg, NC
CPT	05B	07	01	Defense Counsel	USA Garrison	Ft Bragg, NC
CPT	05B	08	01	Trial Counsel	USA Garrison	Ft Bragg, NC
MAJ	05C	02	01	JA	USA Garrison	Ft Bragg, NC

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
MAJ	05D	01	01	Claims Off	USA Garrison	Ft Bragg, NC
LTC	03	02	01	Asst SJA	101st Abn Div	Ft Campbell, KY
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell, KY
MAJ	03B	01	01	Ch, Def Counsel	101st Abn Div	Ft Campbell, KY
CPT	03B	02	02	Def Counsel	101st Abn Div	Ft Campbell, KY
CPT	03B	02	03	Def Counsel	101st Abn Div	Ft Campbell, KY
CPT	03B	02	04	Def Counsel	101st Abn Div	Ft Campbell, KY
CPT	03D	06	02	Asst SJA-DC	USA Garrison	Ft Stewart, GA
MAJ	03E	01	01	Asst SJA	USA Garrison	Ft Stewart, GA
CPT	52C	02	02	Asst SJA	USA Garrison	Ft Stewart, GA
LTC	03	02	01	Dep SJ	USA Garrison	Ft Hood, TX
LTC	03B	01	01	Ch, Crim Law	USA Garrison	Ft Hood, TX
LTC	03C	01	01	Def Counsel	USA Garrison	Ft Hood, TX
MAJ	03D	02	02	Asst JA	USA Garrison	Ft Hood, TX
MAJ	03E	01	01	Ch, Legal Asst Of	USA Garrison	Ft Hood, TX
CPT	03E	03	01	Legal Asst Off	USA Garrison	Ft Hood, TX
CPT	03E	03	02	Legal Asst Off	USA Garrison	Ft Hood, TX
CPT	03F	03	01	Asst Clms Off	USA Garrison	Ft Hood, TX
CPT	03B	03	01	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	02	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	03	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	03	04	Def Counsel	5th Inf Div	Ft Polk, LA
CPT	03B	04	04	Trial Counsel	5th Inf Div	Ft Polk, LA
MAJ	03C	01	01	Asst SJA	5th Inf Div	Ft Polk, LA
MAJ	03C	01	02	Asst SJA	5th Inf Div	Ft Polk, LA
MAJ	03B	01	01	Chief	USA Garrison	Ft Sheridan, IL
MAJ	03C	01	01	Ch, Mil Justice	USA Garrison	Ft Sheridan, IL
MAJ	03C	01	02	Ch, Mil Justice	USA Garrison	Ft Sheridan, IL
MAJ	02A	02	01	Ch, Def Counsel	USA Garrison	Ft Riley, KS
MAJ	02B	03	01	Ch, Legal Asst	USA Garrison	Ft Riley, KS
CPT	02B	04	01	Asst JA	USA Garrison	Ft Riley, KS
CPT	02C	02	01	Asst JA	USA Garrison	Ft Riley, KS

GRD	PARA	LINE	SEQ	POSITION	AGENCY	CITY
MAJ	03B	04	01	Ch, Def Counsel	USA Garrison	Ft Carson, CO
CPT	03B	06	04	Def Counsel	USA Garrison	Ft Carson, CO
CPT	03B	07	04	Trial Counsel	USA Garrison	Ft Carson, CO
CPT	03B	03	02	JA	Ft McCoy	Sparta, WI
CPT	03B	03	03	JA	Ft McCoy	Sparta, WI
CPT	03B	03	04	JA	Ft McCoy	Sparta, WI
MAJ	03C	01	01	Mil Aff Leg Asst O	Ft McCoy	Sparta, WI
CPT	03C	02	01	Mil Aff Leg Asst O	Ft McCoy	Sparta, WI
CPT	03C	02	02	Mil Aff Leg Asst O	Ft McCoy	Sparta, WI
MAJ	66	02	01	JA	Ft McCoy	Sparta, WI
MAJ	03D	01	01	Ch, Admin Law Br	9th Inf Div	Ft Lewis, WA
CPT	21J	01	01	JA	9th Inf Div	Ft Lewis, WA
CPT	03B	02	01	JA	USA Garrison	Ft Buchanan, PR
MAJ	03D	01	01	Ch, JA	USA Garrison	Ft Buchanan, PR
CPT	03E	02	01	JA	USA Garrison	Ft Buchanan, PR
CPT	03B	03	01	Asst JA Instr	USA Transportation Cen	Ft Eustis, VA
MAJ	05F	02	01	Mil Affrs Off	USA Armor Cen	Ft Knox, KY
MAJ	04A	03	01	Sr Def Counsel	USA Inf Cen	Ft Benning, GA
LTC	04B	02	01	Asst Ch, MALAC	USA Inf Cen	Ft Benning, GA
CPT	04B	04	01	Admin Law Off	USA Inf Cen	Ft Benning, GA
CPT	04B	05	01	Admin Law Off	USA Inf Cen	Ft Benning, GA
CPT	04B	05	02	Admin Law Off	USA Inf Cen	Ft Benning, GA
CPT	04B	07	03	Legal Asst Off	USA Inf Cen	Ft Benning, GA
CPT	04B	08	01	Claims Off	USA Inf Cen	Ft Benning, GA
MAJ	09A	02	01	Asst SJA	USA Signal Cen	Ft Gordon, GA
MAJ	09B	02	02	Asst SJA	USA Signal Cen	Ft Gordon, GA
CPT	22D	22	01	Instr OCS Tng DI	USA Signal Cen	Ft Gordon, GA
CPT	22D	22	02	Instr OCS Tng DI	USA Signal Cen	Ft Gordon, GA
CPT	07A	03	01	JA	Avn Center	Ft Rucker, AL
CPT	07A	03	02	JA	Avn Center	Ft Rucker, AL
CPT	07A	04	01	JA	Avn Center	Ft Rucker, AL
MAJ	38A	01	01	Asst SJA	USA Garrison	Ft Chaffee, AR

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
CPT	38A	03	02	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	04	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	05	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	06	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38A	03	07	Asst SJA	USA Garrison	Ft Chaffee, AR
MAJ	38B	02	01	Admin Law Off	USA Garrison	Ft Chaffee, AR
MAJ	38B	02	02	Admin Law Off	USA Garrison	Ft Chaffee, AR
CPT	38B	04	01	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38B	04	02	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	38B	04	03	Asst SJA	USA Garrison	Ft Chaffee, AR
CPT	05A	04	01	Trial Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	04	02	Trial Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	01	Defense Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	02	Defense Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	03	Defense Counsel	USA FA Cen	Ft Sill, OK
MAJ	05B	03	01	Admin Law Off	USA FA Cen	Ft Sill, OK
MAJ	05B	03	02	Admin Law Off	USA FA Cen	Ft Sill, OK
CPT	05B	05	01	Proc Fis Law Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	01	Legal Asst Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	02	Legal Asst Off	USA FA Cen	Ft Sill, OK
CPT	05B	07	03	Legal Asst Off	USA FA Cen	Ft Sill, OK
MAJ	05	01A	01	Dep SJA	USA Admin Cen	Ft B Harrison, IN
CPT	11D	06	01	Instr	USA Intel Cen	Ft Huachuca, AZ
CPT	11D	06	03	Instr	USA Intel Cen	Ft Huachuca, AZ
MAJ	04A	05	01	Instr Mid East	USAIMA CA Satl Sch E	Ft Bragg, NC
MAJ	12	02	02	Asst JA	ARNG TSA Cp Atterbury	Edinburg, IN
CW4	02	03	01	Legal Admin Tech	1st Inf Div	Ft Riley, KS
CW4	03A	01	01	Legal Admin Tech	5th Inf Div	Ft Polk, LA
CW4	04	10	01	Legal Admin Tech	USA Garrison	Ft Sam Houston, TX
CW4	04	04	01	Legal Admin Tech	USA Garrison	Ft Bragg, NC
CW4	03	03	01	Legal Admin Tech	101st Abn Div	Ft Campbell, KY

4. Reserve Vacancies

The 411th Engineer Brigade based at Floyd Bennett Field, Brooklyn, has two captain positions open. These positions are paid slots. If interested, please call Major Edward Raskin at the following number: (516) 224–5550 or at his residence (516) 567–2025. Major Raskin may be contacted by letter at the following address: Major Edward Raskin, HQS, 411th Engineer Brigade, Armed Forces Reserve Center, Floyd Bennett Field, Brooklyn, New York 11234.

Claims Item

U.S. Army Claims Service

Tapes, U.S. Army Claims Seminars

Due to the number of requests received for the tapes from the Claims Seminars conducted by the U.S. Army Claims Service in El Paso, Texas, and Atlanta, Georgia, in March 1980, and the costs for reproducing them, the expense for copies of the tapes must be borne by the requesting unit. Therefore, copies can only be obtained by forwarding 15 blank 90 minute cassette tapes to:

Commandant
The Judge Advocate General's School
Attention: TV Operations
Charlottesville, Virginia 22901

These 90 minute cassette tapes may be obtained through local procurement channels. Upon receipt of the blank tapes, The Judge Advocate General's School TV Operations Branch will forward directly to the requestor a complete taping of the Claims Seminars.

CLE News

1. TJAGSA CLE Courses

July 7–18: USAR SCH BOAC/JARC C&GSC.

July 14–August 1: 21st Military Judge (5F–F33).

July 21–August 1: 85th Contract Attorneys' (5F–F10).

August 4–October 3: 93d Judge Advocate Officer Basic (5–27–C20).

August 4–8: 10th Law Officer Management (7A–713A).

August 4–8: 55th Senior Officer Legal Orientation (5F–F1).

August 25–27: 4th Criminal Law New Developments (5F–F35).

September 10–12: 2d Legal Aspects of Terrorism (5F–F43).

September 22–26: 56th Senior Officer Legal Orientation (5F–F1).

2. Civilian Sponsored CLE Courses

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

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

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

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 243-1630.

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

ATLA: The Association of Trial Lawyers of America, Education Department, P.O. Box 3717, 1050 31st St. NW Washington, DC 20007. Phone: (202) 965-3500.

BCGI: Brandon Consulting Group, Inc., 1775 Broadway, New York, NY 10019.

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

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

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

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

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

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

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

FLB: The Florida Bar, Tallahassee, FL 32304.

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

GCP: Government Contracts Program, George Washington University Law Center, Washington, DC.

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

GWU: Government Contracts Program, George Washington University, 2000 H Street NW, Rm. 303 D2, Washington DC 20052. Phone: (202) 676-6815.

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

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

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

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

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson P.O. Box 767, Raleigh, NC 27602.

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

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

NCCDL: National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, TX 77004.

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

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

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

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

NDCLE: North Dakota Continuing Legal Education.

NITA: National Institute for Trial Advocacy, University of Minnesota Law School, Minneapolis, MN 55455.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.

NPI: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

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

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

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

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

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

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

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

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

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

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

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

TBI: The Bankruptcy Institute, P.O. Box 1601, Grand Central Station, New York, NY 10017.

UDCL: University of Denver College of Law, 200 West 14th Avenue, Denver, CO 80204.

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

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

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

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

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

September

3–5: FPI, Practical Construction Law, Washington, DC.

4–5: MICLE, Accounting for Lawyers, Grand Rapids, MI.

4–5: PLI, Federal Consumer Credit Regulation, New York City, NY.

4–5: PLI, Hospital Liability & Risk Management, New York City, NY.

7–12: NCDA, The Prosecutor & the Juvenile & Family Court, Reno, NV.

11–12: ARKCLE, Family Law, Little Rock, AR.

12: NCATL, Medical Evidence, Charlotte, NC.

12: SCB, Judicial CLE: Invasion of Privacy; Torts, Columbia, SC.

13–14: CCLE, Child Custody Workshop, Denver, CO.

15–17: FPI, Claims & the Construction Owner, Denver, CO.

15–17: FPI, Construction Contract Litigation, San Diego, CA.

19: NCATL, Medical Evidence, Raleigh, NC.

19–20: NCLE, Mental Health Law, Lincoln, NB.

19: SCB, Government Law, Columbia, SC.

21–26: NJC, Court Management—Managing Delay, Reno, NV.

21–10/10: NJC, General Jurisdiction, Reno, NV.

21–24: NCDA, Federal Criminal Code, Snowmass, CO.

22–23: PLI, Estate Planning Institute, New Orleans, LA.

22–24: FPI, Practical Labor Law, Washington, DC.

22–26: FPI, Construction Contracts, Phoenix, AZ.

22–23: PLI, Federal Consumer Credit Regulation, Los Angeles, CA.

24–26: PLI, Fundamental Estate Administration, New York City, NY.

25–26: PLI, Evaluation & Settlement of Personal Injury Case, New York City, NY.

25–26: PLI, International Litigation, New York City, NY.

26–27: SCB, Law Office Economics, Columbia, SC.

28: ABA, Appellate Judges' Seminar, San Francisco, CA.

28–3/10: NJC, Civil Litigation, Reno, NV.

29–30: PLI, Computer Contracts, San Francisco, CA.

29–10/1: FPI, Construction Scheduling & Proof of Claims, Atlanta, GA.

29–10/1: FPI, Practical Environmental Law, Williamsburg, VA.

29–30: PLI, Equipment Leasing, New York City, NY.

JAGC Personnel Section

PP&TO, OTJAG

1. Reassignments

COLONEL	*FROM*	*TO*
HOLDAWAY, Ronald	USAREUR	OTJAG
0'ROARK, Dulaney	OTJAG	ICAF, Ft McNair, DC

LIEUTENANT COLONEL	*FROM*	*TO*
DAHLINGER, Richard	Korea	Ft Knox, KY
LAGRUA, Brooks	USAREUR	OTJAG
MANN, Richard	USALSA, w/dty Germany	USALSA, w/dty Ft Lewis, WA
MURRAY, Robert	USAREUR	USAWC, student
NUTT, Robert	TJAGSA, S&F	OTJAG
O'BRIEN, Francis	OTJAG	ICAF, Ft McNair, DC
MAJOR		
ANDERSON, Larry	OTJAG	USMA, S&F
BROWNBACK, Peter	Ft Bragg, NC	Ft Meade, MD
CURTIS, Howard	Ft Meade, MD	TJAGSA, Student
GIUNTINI, Charles	OTJAG	TAF Staff College
HOSTLER, Dorsey	USALSA, w/dty Dept of Justice	Arlington Hall, VA
LONG, John	USAREUR	TJAGSA, S&F
MARKERT, David	USAREUR	Ft Ord, CA
MULDERIG, Robert	USALSA w/dty Ft Hood, TX	Ft Dix, NJ
O'BRIEN, Maurice	USAREUR	TAF Staff College
SPILLER, John	Ft McPherson, GA	Ft Drum, NY
STEARNS, James	USALSA w/dty Presidio, CA	Ft Meade, MD
THOMPSON, Lewis	USAREUR	Ft Benning, GA
CAPTAIN		
ALTHERR, Robert	Columbus, OH	Ft Polk, LA
BATTLES, Emmett	Tallahassee, FL	Ft Stewart, GA
BENSON, Nolon	Nashville, TN	Ft Hood, TX
BLACK, Scott	Sacramento, CA	Ft Bliss, TX
BOND, Kevin	Sacramento, CA	Ft Campbell, KY
BRANSTETTER, Ross	Ft Hood, TX	Korea
BROWN, Harry	Columbia, SC	Ft Ord, CA
CAPOFARI, Paul	Albany, NY	Ft Bragg, NC
CARTER, Richard	Nashville, TN	Ft Meade, MD
CRANE, David	Albany, NY	Ft Bragg, NC

CAPTAIN	*FROM*	*TO*
HAGAN, William	USAREUR	USMA, S&F
HALL, Joseph	Boston, MA	Ft McPherson, GA
HANSEN, Niels	Ft Sheridan, IL	USATDS, Ft Sheridan, IL
HILL, Sharon	Ft Carson, CO	Ft Hood, TX
HOCKLEY, Michael	Lincoln, NE	Ft Campbell, KY
HOUPE, David	Ft Devens, MA	Rock Island, IL
LANCE, Charles	USALSA w/dty Europe	Ft Hood, TX
LYLE, Paul	Ft Benning, GA	USATDS, Ft Wainwright, AK
MASON, Thomas	Lansing, MI	Ft Jackson, SC
McGEHEE, Jack	Austin, TX	Ft Hood, TX
MILLARD, Michael	USAREUR	Carlisle Barracks, PA
MINOR, Robert L.	Indianapolis, IN	Ft Riley, KS
MULLIKEN, Steven	Jefferson City, MO	Ft Carson, CO
MURDOCH, Michael	USALSA w/dty Ft Lewis, WA	USAREUR
NEURAUTER, Jose	Ft Ord, CA	Ft Sam Houston, TX
PYRZ, Thomas	Indianapolis, IN	Ft Hood, TX
ROMIG, Thomas	Sacramento, CA	Ft Hood, TX
SHACKELFORD, William	Ft Riley, KS	Ft Houston, TX
SPAULDING, Milton	Boston, MA	Ft Sill, OK
STOKES, Billy	Ft Sill, OK	Huntsville, AL
STOKES, William	Harrisburg, PA	Ft Dix, NJ
STRUVE, Donald	Austin, TX	Ft Lewis, WA
TWITTY, Theophlise	Richmond, VA	Ft Bragg, NC
WALLACE, Dennis	Ft Meade, MD	USALSA
WARD, Joseph	Atlanta, GA	Ft Belvoir, VA
WARNER, Karl	Charleston, WV	Ft Knox, KY
WHITE, Ronald	Frankfort, KY	Ft Gordon, GA
WRIGHT, Daniel	Tallahassee, FL	Ft Dix, NJ

2. Revocations

WARRANT OFFICER		
GILLIS, James	USAREUR	USALSA
KOHLER, Dieter	Ft Hood, TX	Europe

3. RA Promotions

COLONEL

McNEALY, Richard K.	28 May 80

CAPTAIN

GALLAWAY, Robert L.	21 May 80

4. AUS Promotions

LIEUTENANT COLONEL

JACUNSKI, George G.	8 Apr 80
McNEILL, David Jr.	4 Apr 80
SCANLON, Jerome W.	4 Apr 80
WEBER, John P.	12 Apr 80

MAJOR

IVEY, Karl F.	13 Apr 80

5. DARCOM Contract Law Specialty Program

Since January 1980, five officers have been selected to participate in the DARCOM Contract Law Specialty Program. They are:

CPT Craig S. Clarke—USA Missile Command, Redstone Arsenal, AL

CPT Michael D. Kennerly—USA Troop Support and Aviation Materiel Readiness Command, St Louis, MO

CPT David V. Houpe—USA Armament Materiel Readiness Command, Rock Island, IL

CPT Mark H. Rutter—TACOM, Warren, Michigan

CPT Thomas J. Murphy—MERADCOM, Fort Belvoir, VA

Additional selections for this program will be made in October 1980. An announcement of openings in the program will be made in late summer, 1980.

Current Materials of Interest

1. Articles

Civilians Under Military Justice: A Canadian Study, M. A. Pineau, 25 McGill Law Journal 3 (1979).

M. S. Sheffer, *Free Exercise of Religion and Selective Conscientious Objection: A Judicial Response to a Moral Problem,* 9 Capital University Law Review 7 (1979).

2. Current Messages and Regulations

The following lists of recent messages and changes to selected regulations is furnished for your information in keeping your reference materials up to date. All offices may not have a need for and may not have been on distribution for some of the messages and/or regulations listed.

a. Messages

DTG	*SUBJECT*	*PROPONENT*
292111Z Apr 80	Reports to Regulatory Law Office	JALS-RL
302233Z Apr 80	Clarification of Crime Reporting Requirements	DAPE-HRE
022030 May 80	Immediate Action Interim Change IO5 To AR 27-10, Military Justice	DAJA-CL

b. Changes to Regulations

NUMBER	*TITLE*	*CHANGE*	*DATE*
AR 60-20	Operating Policies	901	17 Apr 80
AR 612-10	Reassignment Processing and Army Sponsorship and Orientation Program	902	21 Apr 80
AR 623-105	Personnel Evaluation Reports: Officer Evaluation Reporting System	901	17 Apr 80
AR 635-200	Personnel Separations—Enlisted	901	2 May 80
DA Pam 27-174	Jurisdiction of Courts-Martial		1 May 80
AR 27-10	Military Justice	IO5	20 May 80

3. Notes

The Application of the Supremacy Clause to State Efforts to Summon Active Duty Military Personnel to Jury Service, *Off the Record,* Issue No. 81, Enclosure 1 (14 April 1980).

Release of Mailing Lists Pursuant to the Freedom of Information Act, *Off the Record,* Issue No. 81, Enclosure 2 (14 April 1980).

Erratum

An error appeared in the article "The Military Rules of Evidence: An Advocate's Tool" by Captain (P) Lee D. Schinasi (*The Army Lawyer,* May 1980 at 3). On page 4, the second sentence of the first paragraph should read: "Chapter XXVII will *now* resemble what it was meant to be: an evidentiary code." (emphasis added).