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Publish or Perish: An Analysis of the Publication Requirement of the Freedom of Information Act

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Introduction

The Freedom of Information Act (FOIA)[1] is fundamentally a disclosure statute.[2] It provides members of the public access to governmental information in three ways.[3] Agency records must promptly be provided to any person upon request reasonably describing such records and complying with published agency rules.[4] Agencies are also required to affirmatively disclose certain government information in two ways. These latter two means of public access to government information are affirmative government obligations not dependent upon request. Some information must be indexed by the agency and made available for public inspection and copying.[5] Other information must be published in the Federal Register for the guidance of the public.[6]

The publication requirement encompasses five categories of information.[7] Of these, the fourth

category, substantive rules, statements of policy or interpretations of general applicability, is the least defined.[8] What is certain is that those statements of policy and interpretations adopted by the agency which are not published in the Federal Register must be made available for public inspection and copying.[9] While the line which separates publication from indexing may not be bright, it certainly is significant. Failure to publish information subject to the publication requirement may preclude agency action which is based upon the unpublished information.[10] However, absence of an adverse effect [11] or actual and timely notice of the information will cure the failure to publish.[12]

Periodically some Army regulations are published in the Federal Register.[13] Even installation-level military regulations have been required to be published.[14] The publication requirement has also been held to apply to overseas command regulations.[15] An important standard used by the Administrative Law Division, OTJAG, to determine whether publication is required has been to identify the primary effect of the regulation. If the regulation primarily affects servicemembers or civilian employees, then publication has not been required.[16]

Is this conclusion defensible? Can a servicemember or a civilian employee raise nonpublication as a defense to agency enforcement proceedings? Is failure to publish a punitive regulation a defense to prosecution under Article 92(1)?[17] For example, can a servicemember, being prosecuted for unlawful possession of a straightedge razor in violation of an installation-level general regulation, successfully move to dismiss for failure to have published the regulation in the Federal Register? No definitive resolution of the problem has yet appeared. This article seeks to contribute toward discussion of the problem by identifying pertinent issues and authorities both pro and con.

Are Members Of An Agency Members "Of The Public?"

Initially, this question appears to be of critical importance. The single reason why five categories of information are required to be published in the Federal Register is "for the guidance of the public." [18] Of course, the defense would argue that servicemembers are members "of the public." If members of an agency are not members of the public, then information which primarily has internal effect does not pro-

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vide guidance to the public and need not be published.

There are no cases squarely addressing whether agency personnel are members "of the public." Where the issue has surfaced, courts have differentiated agency personnel from members of the public at large.[19] Recently a federal district court for the District of Columbia held that agency employees were not members of the public within the meaning of the indexing requirement of FOIA.[20] This case would support the government argument that servicemembers are not members "of the public." On behalf of its members, a union representing federal employees sought access to an agency manual relating to articles of the employees' collective bargaining agreement. The court believed that if federal employees were to be considered members of the public, then the phrase would be stripped of meaning, for everyone would be a member of the public. Congress intended to distinguish the general public from agency employees. Consequently the court concluded that not all administrative staff manuals were subject to public inspection. Only those manuals which affected the public—not those regulating internal agency operations—were subject to affirmative disclosure.

It could, of course, be argued by defendant's counsel that a court in analyzing the meaning of a statute ". . . must first look to the language of the statute itself to resolve the controversy, for if the plain meaning of the statutory language is clear resort to secondary sources such as legislative history is inappropriate." [21] The words in contention appear clear in import. "But, while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,' . . . and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history." [22]

The phrase, "for the guidance of the public," has its origins in § 3 of the Administrative Procedure Act (APA).[23] In its original form, the phrase was not part of the introductory sentence requiring publication of various categories of information. Instead, it was included within one of several categories of information requiring publication. "Every agency shall separately state and currently publish in the Federal Register . . . (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency *for the guidance of the public. . . .*" [24] (emphasis added). Like the present legislation, the APA did not define this phrase. However, the legislative history suggests that this phrase was simply descriptive of the purpose of this section and was not a substantive limitation on the type of rules, statements or interpretations which were to be published.[25]

With the passage of FOIA, the phrase was preserved but shifted. The phrase was moved to the introductory sentence of the publication section where it reads, "Each agency shall separately state and currently publish in the Federal Register for *the guidance of the public. . . .*" [26] (emphasis added). Nothing in the legislative history of the FOIA explains precisely why this change was made.

It has been suggested that the shift of this phrase signifies congressional intent to broaden the scope of the publication requirement.[27] By removing this limitation in FOIA, so the argument runs, all rules, statements or interpretations of general applicability must be published, even those not intended to guide the public.

There are two weaknesses in this argument to be pointed out by government counsel. First, it mistakenly assumes that the phrase originally was a substantive limitation in the A.P.A.[28] Secondly, the argument contradicts the insignificance Congress gave to the changes it made to this subsection. The Senate Report on the bill which became the 1966 FOIA statute characterized its changes to the publication requirement of the A.P.A. as "minor":

> This subsection has fewer changes from the existing law than any other; primarily because there have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of too much publication rather than too little.[29]

Construing the shift in the placement of the phrase as requiring greater publication ignores express congressional recognition that already too much was being published. A conclusion that the shift was without substantive effect would be more harmonious with Congress' perception of the change.

The legislative history of the phrase "for the guidance of the public" demonstrates that the words are hortatory. Under the original A.P.A., the words simply explained Congress' purpose in publishing certain rules, statements or interpretations. The 1966 legislation evinced no intent to alter the purpose of the publication requirement. It remained what it had been before: "for the guidance of the public." Even assuming the words had been of substantive effect, no evidence demonstrates congressional intent to change and expand its meaning to include "all policies of general applicability, not only those that regulate or supply 'guidance' to the public." [30] Because the phrase is hortatory, the question of whether members of an agency are members "of the public" is one without legal significance.

Responding to defense counsel's argument concerning the plain language of the statute, the legislative history gives government counsel a ready reply: the words state a *rationale* for the provision in question and do not define the *scope* of its application.

Internal Regulations Need Not Be Published Because They Are Not Of General Applicability

FOIA does not compel agencies to publish all rules, statements or interpretations. Only those of "general applicability" need be published, and the remainder must be made available for public inspection and copying.[31] The obvious problem has been to identify which rules, statements, or interpretations are of "general applicability" and must be published in the Federal Register. Defense counsel would contend that internal regulations are of "general applicability" subject to publication. Professor Kenneth Davis has written,

> [P]robably no judge, no administrator, no practitioner, and no commentator knows the answer. Even though the question of what must be published is so highly practical, the meaning of the FOIA on this question remains about as vague after more than a decade as it was when it was enacted.[32]

Although the term is not defined within FOIA, a similar phrase derived from the Federal Register Act (F.R.A.),[33] does shed some light. The F.R.A. uses the term "document having general applicability and legal effect." This term has been defined by The Administrative Committee of the Federal Register as "any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations".[34]

The few cases which have explored this area have identified some elements which establish "general applicability." An early case arising under what previously was codified as § 3(a) of the Administrative Procedure Act was *United States v. Hayes*.[35] In that case the government had instituted proceedings to recover overpayments of allotments to the wife of a servicemember. Photostatic copies of checks offered in evidence had been certified as true by an employee of the General Accounting Office acting pursuant to a delegation of authority by the Comptroller General. The court held that the delegation was not required to be published in the Federal Register. Agency operations had to more directly affect public interests than mere alteration of records.

A later case involving FOIA added several elements to the degree of impact standard established in *Hayes*. In *Anderson v. Butz*,[36] occupants of federal subsidized housing challenged an instruction of the Secretary of Agriculture which required that certain federal housing subsidies be treated as income for food stamp purposes. The court concluded that the instruction had to be published in the Federal Register. The instruction "directly affected" the substantive

rights of persons, and those individuals were persons outside the agency.

"General applicability" does not require impact upon the public at large. A significant impact on any segment of the public is sufficient. While this is implicit in the court's opinion in *Butz*, this limitation was drawn without elaboration in *Lewis v. Weinberger*.[37] There a memorandum of the Indian Health Service which denied contract medical care to Indians living off reservations was claimed to be ineffective for lack of publication in the Federal Register. The effect of the memorandum was direct and significant, and the entitlement to contract medical care benefits was a significant substantive right. No authority was cited for the court's conclusion that a direct and significant impact could be on the substantive rights of either the general public or a segment thereof.[38] What is clear, however, is that a "segment of the public" as used in *Weinberger* refers to persons outside the agency.

Army regulations affecting soldiers or civilian employees would not be subject to publication unless the regulations could be considered to have "general applicability." The regulations would have to have a direct and significant impact affecting substantive rights of the "general public" or a segment thereof. Whether any of these elements could be satisfied by a servicemember attacking an Army regulation is questionable.

Should it be determined that the phrase "for the guidance of the public" is of material import, and internal regulations are of general applicability, then in order to justify nonpublication of agency regulations primarily of internal effect, some other basis must be found. Exemption 2 of FOIA may provide authority for nonpublication.

Agency Regulations Which Relate Solely To Internal Agency Rules And Practices Need Not Be Published

FOIA does not require all matters to be published, indexed or released upon request. Nine categories of information called 'exemptions' permit agencies to withhold documents.[39] These exemptions are permissive, not mandatory.[40] Agencies are not required to withhold the information simply because government documents fall within the scope of one or more exemptions. Agencies have discretion to disclose even exempt information.

Generally an exemption relieves an agency of all disclosure requirements. The information need not be released upon request, and it need not be disclosed affirmatively either by publication or indexing.[41] Exemption 2 permits agencies to withhold matters that are "related solely to the internal personnel rules and practices of an agency." [42] Because exemptions relieve agencies of affirmative disclosure requirements, those Army regulations which amount to "internal personnel rules and practices" are not subject to publication in the Federal Register. Government counsel would argue that Exemption 2 relieves the service of any requirement to publish a regulation having primarily internal effect.

Several cases have explored whether Exemption 2 excuses an agency's nonpublication. In *Hicks v. Freeman*,[43] a seasonal employee of the Department of Agriculture challenged a department directive changing the method of compensation for tobacco inspectors. The court summarily concluded that the department's reduction-in-force procedures were valid even though unpublished "since reduction-in-force procedures are related 'solely' to * * * internal personnel rules and practices." [44] Similarly in *Pifer v. Laird*,[45] a soldier contended that an Army regulation limiting opportunity to file for conscientious objector status was void for failure to publish in the Federal Register.[46] The court concluded that the Army regulation governing conscientious objection was "manifestly" an internal personnel matter within the meaning of Exemption 2.[47] To support its conclusion, the court observed that voiding the regulation for failure to publish would leave no provision for discharge of conscientious objectors. Finally, in *United States v. Bryant*,[48] a servicemember argued that his court-martial conviction for violating a punitive Air Force regulation was im-

proper because the regulation had never been published in the Federal Register.[49] Exemption 2 of FOIA was not specifically cited as excusing nonpublication, but the court's rationale was identical. Publication was not required because the regulation "pertained only to those in the Air Force organization, and did not affect the general public." [50]

The more recent cases have not accepted Exemption 2 as a basis for nonpublication. Typical of this view in *Onweiler v. United States.*[51] In that case a fee appraiser for the Veterans Administration had been suspended pursuant to an unpublished agency circular. The agency's contention that publication was not required because of Exemption 2 was rejected. Citing the Supreme Court's opinion in *Department of Air Force v. Rose,*[52] the district court concluded that Exemption 2 was to be narrowly construed. This narrow interpretation is typical of recent litigation, but for the issue of disclosure to the public by means of publication in the Federal Register, it misperceives the Supreme Court's holding in *Rose.*

The *Rose* case involved release of agency documents upon request. The affirmative methods of disclosure, publication and indexing for public inspection, were not involved. There the Department of Air Force had refused to provide case summaries of ethical hearings at the Air Force Academy in part based on Exemption 2. The court rejected this argument, concluding that matters having substantial potential for public interest outside the Government could not be withheld based on Exemption 2. It must be emphasized that *Rose* involved whether the information would be made available to the public at all. The case did not address affirmative disclosure obligations of FOIA. Whether Exemption 2 has the same meaning for agencies concerning their affirmative disclosure requirements was not at issue.

Rote application of the *Rose* test of substantial public interest to all three methods of access to government documents smacks of a "one size fits all" analysis. This issue was recognized by the district court in its opinion in *Onweiler.* The court believed that if the agency's argument were accepted that Exemption 2 relieved it of publication requirements, then the circular "would be unavailable even upon request of potential applicants." [53] Implicit in the court's conclusion was that Exemption 2 had the same meaning regardless of the type of disclosure involved. The court seemed to think that if the agency did not have to publish the circular based on Exemption 2, it likewise would not have to release it upon request for the same reason. This premise ignores how publication, indexing and release upon request disclosures provide access to government documents in different ways for different reasons.[54] What has to be released upon request need not necessarily be published.[55] Conversely, just because something need not be published does not mean that it could be withheld upon request.

The legislative history of Exemption 2 suggests that its meaning may vary with the type of disclosure involved. Under former § 3 of the Administrative Procedure Act, "any matter relating solely to the internal management of an agency" was not subject to any type of disclosure.[56] An unsuccessful attempt in 1963 [57] to amend this section would have distinguished publication from the other forms of disclosure. The "internal management" exemption was preserved for matters subject to publication, but for matters subject to indexing or release upon request, the exemption protected only "internal personnel rules and practices of any agency." While similar, Congress intended that the latter exemption be more tightly drawn.[58] The difference in meaning was reflected in the difference in construction. In the subsequent bill which become FOIA, the exemptions from all types of disclosure were consolidated.[59] Nothing in the legislative history explains why the consolidation was made or whether the consolidated exemption was intended to apply uniformly to all types of disclosure. However, because Congress clearly did not intend more materials to be published,[60] it must be concluded that in the context of disclosure under (a)(1) publication, Exemption 2 retained the broad meaning of the predecessor "internal management" exemption.[61]

The Supreme Court has recognized that an exemption's effect varies with the type of disclosure involved. In *N.L.R.B. v. Sears, Roebuck & Co.*,[62] the company sought memoranda generated by the General Counsel to the National Labor Relations Board pertaining to unfair labor practice complaints. The company contended that not only were the memoranda subject to release upon request, the government had the affirmative duty to make disclosure because the memoranda constituted "final opinions" within the meaning of the (a)(2) indexing requirement. While normally an exemption would relieve agencies from even affirmative disclosure responsibilities,[63] the Court concluded that Exemption 5 [64] could never apply to § 552(a)(2) "final opinions." Therefore, memoranda directing that a charge be dismissed was a "final opinion" outside the scope of Exemption 5 and had to be disclosed. On the other hand, memoranda recommending filing of an unfair labor practice complaint could be protected by the Exemption 5 attorney work-product privilege regardless of whether the memoranda constituted § 552(a)(2) "instructions that affect a member of the public" which otherwise would be subject to indexing. What is significant is that the Court gave careful consideration to the competing purposes of the particular exemption and the types of disclosures at issue. A procrustean methodology was not employed.

On the other hand, counsel for the defense would argue that Exemption 2 has uniform meaning. The basis for the exemption is not derived in one way for § 552(a)(1), another for § 552(a)(2), and a third for § 552(a)(3). The analysis and explanation of the provision is catholic and applies equally to all sections of the act. Clearly, *Rose* was not a "publication" case but this is of no import. Succinctly stated, the Court found the Exemption only applied to the most mundane matters.[65] Similarly the Department of Justice has opined that the exemption ". . . covers internal agency matters which are more or less trivial in the sense that there is no substantial and legitimate interest in . . . disclosure. . . ." [66] "The purpose of the statute is to reduce administrative burdens in an ongoing employer-employee relationship." [67] Indeed, it would be the consummate advocate who could reconcile inconsistent positions, *i.e.*, prosecute upon a violation of a lawful general order or regulation on one hand and on the other espouse its inconsequential nature.[68] The Court in *Rose* was concerned with the validity of the public's interest in military disciplinary matters.[69] It found "[t]he importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military." [70] The defense would argue that surely military regulations which set standards and procedures by which an individual can be eliminated from the service, or establish a basis to grant, deny or withdraw on-post driving privileges are matters of significant public interest and are required to be published for the benefit of the public. Prior to the enactment of the Act one jurist recognized that not only did the item sought to be brought within the purview of 5 U.S.C. § 552(b)(2) have to relate ". . . to such matters as employee use of the employer's plant and equipment, and the amount of time in each working day which is to be devoted to the employer's business and such activity" but moreover, the information had to relate 'solely' to such matters.[71] Thus, the decision in *Bryant*, which was premised on Exemption 2 as excusing publication of internal regulations,[72] would no longer be persuasive authority in light of the narrowed interpretation of this exemption by the Supreme Court's decision in *Rose*.

Conclusion

As a practical matter, there is little counsel in the field can do to resolve this problem. The military departments, however, have several alternatives. Four courses of action can be pursued. In no particular order of merit these are: do nothing at all, seek amendment of the Freedom of Information Act, publish all substantive rules in the Federal Register and/or "incorporate by reference" all regulations. These will be discussed seriatim.

To take no action at all in a sense transfers the decision process and the concomitant power to control one's destiny to the judicial branch. In the last analysis the matter will be litigated on a number of fronts (*e.g.*, courts-martial, collateral attack in federal court on any number of armed force actions) to be resolved finally through judicial decision. The process is unpredictable and untimely. In short, all parties are held in limbo uncertain of their legal positions for too long a time.

A second path which might be taken involves sponsorship by Department of Defense of a legislative change to FOIA. The change would exempt the military departments from the publication requirement in a manner similar to the exception contained within the rule-making provisions of the Administrative Procedure Act.[73] This also would appear to be a dead end street. Time constraints as well as legislative dubiety (particularly considering the basic purpose for the act—full disclosure of governmental activity) neutralize the potential of this approach.

Affirmative action to ameliorate the situation by publishing all matters required by §§ 552(a)(1)(D) and (E) is equally untenable. The size of the initial undertaking is equaled only by the monumental task in continual follow-up which would be required. The responsibility assumed would require the commitment of inordinate amounts of human resources. Balanced against the latter would be the lack of assuredness that the Director of the Federal Register would publish all items forwarded.[74]

A fourth alternative is rooted in FOIA. The Act provides that ". . . matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register." [75] It may be possible to satisfy this provision by publishing Department of the Army Pamphlet No. 310–1, Index of Administrative Publications, in the Federal Register. The 'public' would be served in law and spirit by being placed on notice of the military department's rules and the government would save time, effort and expense in precluding further litigation in all forums on the matter.[76] Moreover, in a wartime environment the system would present no additional burden to the service.

What of the practitioner in the field? Is there any available remedial action which can be instituted? The staff judge advocate of a command must take full advantage of the "actual and timely notice" clause of the Act. An evaluation must be made of those departmental and local regulations which frequently support administrative and criminal actions. Thereafter each company size unit should keep available those rules which are required reading for each newly-assigned member of the unit. After perusal, the individual would be caused to subscribe to a statement maintained at the unit that the reading had been accomplished. This tack is not unique. For years units involved in nuclear surety programs have followed such a procedure. Similarly, standards of conduct regulations have been required annual reading. The effort involved would be slight compared to the potential problems vitiated.

In conclusion, lurking within its subsections, the Freedom of Information Act may provide a novel defense against government actions. The sanction afforded an aggrieved party has generally gone unnoticed and has received little interpretation. The beast is emerging from the depths of the lagoon with the capability of reaping havoc.[77] In order to avoid any untoward effect on Department of Defense activities, the government must prepare its case with care.

FOOTNOTES

[1] 5 U.S.C. § 552 (1976), as implemented by Army Reg. No. 340–17, Release of Information and Records from Army Files (25 June 1973).

[2] *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

[3] 5 U.S.C. § 552(a) (1976).

[4] 5 U.S.C. § 552(a)(3) (1976).

[5] 5 U.S.C. § 552(a)(2) (1976).

[6] 5 U.S.C. § 552(a)(1) (1976).

[7] 5 U.S.C. § 552(a)(1) requires the following five categories of information be published in the Federal Register:

(A) descriptions of its central and field organization and the established places at which, the employ-

ees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

These categories are repeated in almost identical language in ch. 2, Army Reg. No. 310–4, Publication in the Federal Register of Rules Affecting the Public (22 July 1977).

[8] 1 K. Davis, Administrative Law Treatise, § 5.10, at 341 (2d ed. 1978) [hereinafter cited as K. Davis].

[9] 5 U.S.C. § 552(a)(2)(B) (1976).

[10] 5 U.S.C. § 552(a)(1) (1976). Any agency inclination to publish all rules, statements or interpretations is tempered by cost. The Government Printing Office presently charges agencies $320.00 for each page printed in the Federal Register.

[11] *Id. See, e.g., Pesikoff v. Sec'y of Labor*, 501 F.2d 757 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 1038 (1974); *Hogg v. United States*, 428 F.2d 274 (6th Cir. 1970).

[12] 5 U.S.C. § 552(a)(1) (1976); *see. e.g., Giles Lowery Stockyards v. Dep't of Agriculture*, 565 F.2d 321 (5th Cir. 1977); *Timber Access Indus., Inc. v. United States*, 553 F.2d 1250 (Ct.Cl. 1977).

[13] Recent examples include: Army Reg. No. 600/15, Assistance of Creditor by the Department of the Army (15 November 1979), 44 Fed. Reg. 55,857 (1979); Army Reg. No. 210–10, Installations Administration (12 September 1977), 44 Fed. Reg. 7,948 (1979); Army Reg. No. 601–210, Regular Army Enlistment Program (15 January 1975), 44 Fed. Reg. 9,745 (1979).

[14] U.S. Army Support Command, Hawaii Reg. 210–2, Entry Regulations for Certain Army Training Areas in Hawaii, 43 Fed. Reg. 46,971 (1978); Entry Regulations for Naval Installations in the State of Hawaii, 44 Fed. Reg. 76,279 (1979); *see United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978); *cf. United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962).

[15] DAJA–AL 1977/5572, 11 Oct. 1977, and DAJA–AL 1977/3856, 16 Mar. 1977 (CINCUSAREUR regulations are subject to agency regulations implementing the publication requirement).

[16] For this reason, publication was not required for either Army Reg. No. 15–6, Procedure for Investigating Officers and Boards of Officers (24 August 1977), or Army Reg. No. 27–14, Complaints Under Article 138, UCMJ (1 February 1979). DAJA–AL 1979/2286, 27 Mar. 1979. This position is consistent with guidance from the General Counsel of the Department of Defense. In an attachment to a memorandum for the Secretaries of the military departments on 3 March 1978, the General Counsel opined that substantive regulations directed at agency employees or servicemembers need not be published in the Federal Register. However, the Air Force appears to apply a different standard. Air Force Reg. No. 12–33 suggests at ¶ 4 that internal regulations are subject to publication. Illustratively, the regulation points out at ¶ 4c(6)(h) that regulations concerning conscientious objection must be published.

[17] 10 U.S.C. § 892(1) (1976). This defense has been suggested by Paul L. Luedtke in his article, *Open Government and Military Justice*, 87 Mil. L. Rev. 7 (1980).

[18] 5 U.S.C. § 552(a)(1) (1976).

[19] In *Cox v. United States Dep't of Justice*, 601 F.2d 1 (D.C. Cir. 1979) and *Jordan v. United States Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978), agency personnel were distinguished from members of the public in defining the scope of Exemption 2 of FOIA. For example, in *Cox* the court concluded that the number of bullets in a Marshal's gun was of legitimate interest ionly to members of the Marshal's staff and not to the public at large.

[20] *National Treasury Employees Union v. Dep't of the Treasury*, No. 79–1417 (D.D.C., Apr. 24, 1980), 1 Gov't Disclosure (BNA) ¶ 80,118. The plaintiff union contended that an agency manual was subject to the affirmative disclosure provisions of 5 U.S.C. § 552(a)(2)(C) which provides:

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

* * * * *

(C) administrative staff manuals and instructions to staff that affect a member of the public.

[21] *Tax Analysis and Advocates v. IRS*, 362 F. Supp. 1298, 1303 (D.D.C. 1973). *See also United States v. Ware*, 1 M.J. 282 (C.M.A. 1976).

[22] *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972).

[23] Pub. L. No. 79–404, 60 Stat. 237 (1946).

[24] Administrative Procedure Act, ch. 324, § 3(a), 60 Stat. 238 (1946).

[25] "The section [§ 3] has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance." S. REP. NO. 752, 79th Cong., 1st Sess. 12 (1945), *reprinted in* LEGISLATIVE HISTORY, ADMINISTRATIVE PROCEDURE ACT, 79TH CONG., 1944–46, at 198 (1946).

But see the Attorney General's Manual on the Administrative Procedure Act at 22 (1947):

> The term "public" would not seem to embrace states. For example, the Federal Security Agency sends interpretive guides to states to assist them in complying with the requirements of the Unemployed Compensation provisions of the Social Security laws. Such guides need not be published since they are not for the use of the "public" but only for the state governments.

The interpretation of the Attorney General implies that the term "public" is a substantive limitation.

[26] 5 U.S.C. § 552(a)(1) (1976).

[27] *Neighborhood Legal Services, Inc. v. Legal Services Corp.*, 466 F. Supp. 1148, 1153 (D. Conn. 1979); P. Luedtke, *supra* note 17, at 63, 64. Both refer to the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) at 10: "Deletion of the latter phrase at this point is designed to require agencies to disclose general policies which should be known to the public, whether or not they are adopted for public guidance."

[28] The court in *Neighborhood Legal Services, Inc. v. Legal Services Corp.*, 466 F. Supp. at 1153, asserts "that the policies required to be published in the original A.P.A. were those that . . . [regulated or supplied] 'guidance' to the public." No authority is cited.

[29] S. REP. NO. 813, 89th Cong., 1st Sess. 6 (1965), *reprinted in* SUBCOMM. ON ADM. PRAC. AND PROC. OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, at 41 (1974).

[30] *Neighborhood Legal Services, Inc., v. Legal Services Corp.*, 466 F. Supp. at 1153.

[31] *Compare* 5 U.S.C. § 551(a)(1)(D) *with* 5 U.S.C. § (a)(2)(B).

[32] 1 K. Davis, *Administrative Law Treatise* § 5:11, at 341. (2d ed. 1978).

[33] 44 U.S.C. §§ 1501–1511 (Supp. 1978).

[34] 1 C.F.R. § 1.1 (1980).

[35] 325 F.2d 307 (4th Cir. 1963).

[36] 428 F. Supp. 245 (E.D. Cal. 1975), *aff'd*, 550 F.2d 459 (9th Cir. 1977).

[37] 415 F. Supp. 652 (D. N.M. 1976).

[38] This conclusion finds support in the Supreme Court's opinion in *Morton v. Ruiz*, 415 U.S. 199 (1974). A Bureau of Indian Affairs regulatory restriction on Federal general assistance benefits to needy Indians living off reservations was invalidated for failure to publish in the Federal Register. Implicit in the holding is that an agency policy need not necessarily affect the general public. An identifiable segment of the public is sufficient.

However, a rule which is confined to a limited case of plaintiffs is not "generally applicable" and need not be published. *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 478 F. Supp. 192, 201 (D. D.C. 1979).

[39] 5 U.S.C. § 522(b)(1)–(9) (1976).

[40] *Chrysler Corp. v. Brown*, 411 U.S. 281 (1979).

[41] The introductory clause to the exemptions found at 5 U.S.C. § 552(b) provides that, "[t]his section [the Freedom of Information Act] does not apply to matters that are [exempt]—" This same view was expressed by the Supreme Court in *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 136–137 (1975):

> As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. . . . [T]he disclosure obligation 'does not apply' to those documents described in the nine enumerated exempt categories listed in § 552(b).

The same idea is restated at 421 U.S. 132, 154 n. 21 (1975).

[42] 5 U.S.C. § 552(b)(2).

[43] 397 F.2d 193 (4th Cir. 1968), *cert. denied*, 393 U.S. 1064 (1968).

[44] *Id.* at 196.

[45] 328 F. Supp. 649 (N.D. Cal. 1971).

[46] A publication requirement under both FOIA and the Federal Register Act, 44 U.S.C. §§ 1501–1511 (Supp. 1978), was asserted. The Federal Register Act identifies categories of documents required to be published in the Federal Register. One such category is documents required to be published by Act of Congress of which FOIA is an example. Another category is Presidential proclamations and Executive orders al-

though those not having general applicability and legal effect or effective only against federal employees are excepted. The court cited the latter ground as excusing nonpublication under the Federal Register Act.

[47] This conclusion was quoted with approval in *Ramirez Alvarado v. Saxby*, 337 F. Supp. 1324 (D.P.R. 1972), which held that an amendment to an Army regulation was not required to be published in the Federal Register. The conclusion was followed without explanation in *Nurnberg v. Froehlke*, 355 F. Supp. 1187 (S.D.N.Y. 1973).

[48] 44 C.M.R. 573 (A.F.C.M.R. 1971).

[49] Only the publication requirement of the Federal Register Act, 44 U.S.C. §§ 1501–1511 (Supp. 1978), was raised.

[50] 44 C.M.R. at 575.

[51] 432 F. Supp. 1226 (D. Idaho 1977).

[52] 425 U.S. 352 (1976).

[53] 432 F. Supp. at 1229.

[54] In *Jordan v. United States Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978), the court clearly recognized that FOIA provides for three different methods of making information available to the public. Whether Exemption 2 can relieve agencies from affirmative disclosures but not requests was not discussed.

[55] In the words of the Attorney General:

> The considerations involved in determining what documents should be published in the Federal Register for the guidance of the public under subsection (a) obviously are very different from the judgments required in determining whether a particular record appropriately can be disclosed to a person who requests access to it under subsection (c). Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at 5 (1967) [hereinafter cited as 1967 Attorney General's Memorandum].

[56] *See United States v. Hayes*, 325 F.2d 367 (4th Cir. 1963), where this exemption was used to excuse publishing of an order of the Comptroller General.

[57] S. REP. No. 1219, 88th Cong., 2d Cong., 2d Sess. 12 (1964).

[58] *Id.*

[59] S. REP. NO. 813, 89th Cong., 1st Sess. (1965), and H.R. REP. NO. 1457, 89th Cong., 2d Sess. (1966), both *reprinted in* SUBCOMM. ON ADM. PRAC. AND PROC. OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (1974).

[60] S. REP. NO. 813, 89th Cong., 1st Sess. 6 (1965), and H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966), both *reprinted in* SUBCOMM. ON ADM. PRAC. AND PROC. OF THE SENATE COMM. ON THE JUDICIARY 93D CONG., 2D SESS. at 41 AND 28 respectively, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (1974).

[61] "[Exemption 2's] derivation from the previous internal management exception makes it clear that it is intended to relieve from the Federal Register publication requirements all matters of personnel administration". 1967 Attorney General's Memorandum at 6.

[62] 421 U.S. 132 (1975).

[63] *See* note 41 *supra*.

[64] Exemption 5 protects those documents normally privileged in civil discovery. Among the privileges within the scope of Exemption 5 is the deliberative process privilege or "executive privilege." This privilege protects opinions, recommendations and deliberations used to formulate government decision or policy.

[65] 425 U.S. at 362–370.

[66] *Freedom of Information Case List*, Appendix E, p. 8, Department of Justice.

[67] *Onweiler v. United States*, 432 F. Supp. at 1229.

[68] *Cf. United States v. Jones*, 362 U.S. 257 (1960).

[69] 425 U.S. at 367–368.

[70] 425 U.S. at p. 368.

[71] *Benson v. Gen. Servs. Ad'm*, 289 F. Supp. 590 (W.D. Wash. 1968).

[72] The construction of the statute proffered by the court was bottomed on *Hicks v. Freeman*, 397 F.2d 193 (4th Cir. 1968), and *Cafeteria & Restaurant Workers Union v. McElroy*, 284 F.2d 173 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

[73] 5 U.S.C. § 553 (1976).

[74] *See* 1 C.F.R. 2.4(b).

[75] 5 U.S.C. § 552(a)(1) (1976).

[76] *See* 1 C.F.R. § 51.

[77] This defense has been raised recently before the U.S. Army Court of Military Review (*United States v. Sullivan*, A.C.M.R. 438590) and the U.S. Court of Military Appeals (*United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980)).

The Scope of the Alcohol and Drug Abuse Prevention and Control Program's Exemption Policy

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Introduction

During the late 1960's Congress was concerned with the large number of servicemembers who were heavily involved with drugs and alcohol. The problem was especially acute among those servicemembers assigned in the Republic of Vietnam and the Federal Republic of Germany, where drugs were of high quality, inexpensive, and easily obtainable. As a result, in 1971 Congress passed Public Law 92–192 which required the armed services to develop programs to identify, treat, and rehabilitate servicemembers who were drug and alcohol dependent.[1]

Pursuant to the congressional mandate, the Department of the Army has developed an ambitious program known as the Alcohol and Drug Abuse Prevention and Control Program (hereinafter referred to as the Program), to rectify the problem.[2] An instrumental aspect of this program, and one with which judge advocates are involved, is its exemption policy.[3] Judge advocates are to advise commanders who are contemplating taking adverse administrative or criminal action against servicemembers who have been in the Program, as to the applicability and extent of the exemption policy. The exemption policy is somewhat unclear, resulting in its being misunderstood and misapplied by commanders and judge advocates to the detriment of the morale and discipline of the Army forces.[4] Many believe that once a servicemember has entered the Program no adverse action can be taken against him. Others realize that adverse action can be taken, but cannot determine under which circumstances. The purpose of this article is to explain the exemption policy so that judge advocates will be able to make a rational analysis of the facts and render quality advice to their clients, whether they be commanders or servicemember participants of the Program.

The Exemption Policy

The first and most difficult step in problem-solving is determining whether there is a problem. In order to successfully identify, treat and rehabilitate those who are drug or alcohol dependent, it is necessary that they communicate their drug and alcohol involvement to their supervisors and to Program authorities. Servicemembers would be reluctant to discuss their involvement if the information revealed could be used against them. The obvious resolution of this barrier to communication is to grant immunity to those who enter the Program and relate their involvement with alcohol and drugs. The exemption policy provides for this immunity.[5]

There is a countervailing policy to that of granting immunity for the purpose of eliminating the barriers to communication. The exemption policy is not intended to protect the servicemember who enters the Program merely to seek protection from adverse action for his criminal activity.[6] Rather, it is intended to protect the servicemember who sincerely desires treatment. These two policies must be understood and considered since often a particular factual situation does not fall within the clear enunciations of the exemption policy. In those cases, the judge advocate should analyze the facts, consider the two policies and arrive at a decision which is consistent with the exemption policy's objectives.

Types of Immunity

The exemption policy confers two types of immunity; use immunity and transactional immunity.[7] Immunity is defined as freedom from punishment.[8] Use immunity prohibits the government from using evidence against the servicemember which is obtained as a result of his having been in the Program. It is not all-

encompassing since the government may use other independently discovered evidence to take adverse action against the abuser.[9] Transactional immunity provides greater protection. It prohibits the government from taking adverse action against the servicemember at all, regardless of the "independence" of the evidence.[10]

Transactional Immunity

Transactional immunity attaches to criminal offenses in two different factual settings. The first is upon entry into the Program and automatically attaches at the "effective time."[11] The second is upon disclosure of offenses to Program authorities after the "effective time."[12] Since transactional immunity gives such an extensive degree of protection, it is limited in its applicability to certain types of offenses and then only if the abuser has not been identified with the offenses prior to the effective time or disclosure of it. These limitations are consistent with the policies of the Program which give protection to those who need and desire assistance, but not to those who are entering the Program and are disclosing criminal offenses merely to escape criminal conviction or to avoid adverse administrative consequences (administrative discharge with less than honorable discharge).

Transactional immunity is applicable only if the offense is one of alcohol abuse, drug use, or drug possession incidental to personal use (hereinafter referred to as certain occurrences).[13] Because the Army Regulation does not list the specific offenses which fall within the purview of the exemption policy, the judge advocate must determine if transactional immunity attaches to a particular offense. A few examples may be helpful to better understand this concept. Transactional immunity would attach to drunk and disorderly, and drunk in public, since these are the offenses of alcohol abuse which would likely be committed by one who is dependent on alcohol. Sniffing cocaine and smoking marijuana would likewise fall within the transactional immunity provisions since one who is dependent on drugs would be likely to commit these offenses. On the contrary, transactional immunity would not attach to robbery since it is not an offense which is directly related to alcohol abuse, drug use, or drug possession incidental to personal use, even if it is committed while the servicemember is under the influence of drugs or alcohol. Nor would transactional immunity attach for the sale or distribution of marijuana since these are not offenses of drug use or possession incidental to personal use.[14] Possession of a "lid"[15] of marijuana would fall within the exemption policy's transactional immunity provisions since a servicemember who is dependent on drugs could be expected to possess that quality, but possession of a kilogram of marijuana would not since that is more than a mere possessor would be expected to have. A seller of marijuana would more likely possess that large an amount. The above discussion does not encompass all of the offenses in which transactional immunity may be applicable but is intended to illustrate a few common offenses. The judge advocate must use his own experience and logic to determine if an offense is one of alcohol abuse, drug use, or drug possession incidental to personal use.

Transactional immunity attaches to these certain occurrences in two instances. Upon entry into the Program and upon making disclosures after entry. With regards to the first instance, it attaches only to those certain occurrences which have taken place prior to the "effective time."[16] Note the significance of this provision. Once the effective time has been established, the servicemember automatically obtains transactional immunity for all those occurrences of alcohol abuse, drug use, and possession incidental to personal use which took place prior to the effective time.[17] Some major limitations will be addressed later. The servicemember need not do anything other than to get into the Program and establish the effective time.

The method by which the servicemember is identified as an abuser determines the effective time.[18] The judge advocate must establish the method of identification and then may determine the appropriate effective time. Table 3–1, AR 600–85, defines six means of identification with corresponding effective times.

The first means of identification the regulation addresses is when the servicemember volunteers to enter the Program through his unit commander, other officer or non-commissioned officer in his chain of command, Program personnel, medical treatment facility personnel, or a chaplain.[19] If the servicemember requests to enter the Program through one of these individuals, the effective time is at the time of volunteering.

The second means of identification occurs when the servicemember is identified as an abuser and is referred into the Program by his commander.[20] This is referred to as "command identification." The effective time is at the initial interview. The initial interview is a scheduled appointment of the servicemember by a member of the Program staff which is conducted to determine whether further treatment is necessary and, if so, to what extent.[21] This interview is to take place within two duty days of the servicemember's referral into the Program.[22] Common methods of command identification include referral based upon observance of deterioration of a servicemember's job performance or other conduct commonly associated with alcohol or drug abuse, discovery of use or possession of drugs or drug paraphernalia, or upon apprehension of the servicemember by one other than a law enforcement officer. For example, if the commander should be told by a squad leader that a member of the squad appears to be heavily involved with drugs, as evidenced by his poor appearance, failure to complete assigned tasks, and unauthorized absences; the commander may refer the servicemember into the Program and an initial interview will be scheduled. Transactional immunity will attach for those "certain occurrences" which took place prior to the initial interview. Since the immunity is automatic, the servicemember need not do anything other than co-operate and attend the initial scheduled interview.

A third means of identification occurs if the dependency is discovered as a result of urinalysis testing. A positive laboratory result determines the effective time.[23] Urinalysis testing occurs in two situations. The first, which is known as the "unit sweep," occurs when a commander who suspects drug use within his unit orders all members of his command to submit to urinalysis.[24] The second is referred to as "command directed" and occurs when a commander, believing that a servicemember is involved with drugs, orders a particular individual to submit to testing.[25] Biochemical testing of randomly selected individuals is not presently used since it is not cost effective.[26] It should be noted that an order to submit to urinalysis is a lawful order because no punitive action can be taken as a result of the test.[27]

A fourth means of identification is through emergency medical treatment, with an effective time upon receipt of that treatment.[28] The purpose of this provision is to encourage a servicemember's "buddy" to seek medical assistance for the servicemember who may have overdosed or who may be incapacitated due to drunkenness. Since the servicemember who has overindulged receives transactional immunity for the offenses which resulted in his incapacitation, there is no basis for reticence on the part of his "buddy" to bring the incapacitated servicemember to the medical facility.

Another method of medical identification addresses the situation where a physician diagnoses the drug or alcohol dependency during a physical examination, sick call, or other routine medical examination.[29] The time of diagnosis determines the effective time.

The final means of identification occurs when the servicemember's dependency is discovered as a result of being apprehended for a drug or alcohol offense, or as the result of an investigation by law enforcement officials.[30] For example, if the servicemember has overdosed and, while in a stupor, assaulted another individual resulting in his apprehension by the military police and ultimate referral into the Program, the effective time would be the initial scheduled interview.

If a servicemember has been "identified" with a certain occurrence offense prior to the effective time, transactional immunity will not automatically attach.[31] If he has been apprehended,

officially warned, charged under the UCMJ, offered nonjudicial punishment pursuant to Article 15, UCMJ, or the offense is being investigated; transactional immunity will not attach for that offense. In effect, if the government has knowledge of the offense prior to the effective time, transactional immunity will not attach for that particular offense. For example, assume a servicemember who has been smoking marijuana each evening for the last three months explains to his commander during the commander's open-door counseling period that he needs treatment and requests to enter the Program. The effective time is upon the servicemember's volunteering with the result that all prior use of marijuana would fall within the exemption policy's transactional immunity provisions. Now assume that three weeks prior to the time the servicemember asked to be admitted into the Program, his roommate confided to the commander that the servicemember had smoked marijuana in the barracks room the previous evening. Transactional immunity would not attach to that particular offense since he had been identified with it prior to the effective time although it would attach to the other offenses.

The second instance in which transactional immunity attaches relates to offenses committed after the effective time.[32] The exemption policy is retroactive, taking effect from a particular point in time and covering those certain occurrences which occurred prior to the effective time. It does not automatically protect continuing alcohol or drug abuse after the effective time. However, the servicemember may be so dependent upon drugs or alcohol that he cannot discontinue their use after the effective time. If he falls within this situation, he may obtain transactional immunity by relating his involvement with the offenses to a counselor at a scheduled interview. It is a quid pro quo. The servicemember obtains immunity and the counselor learns of his continued involvement so he can more effectively treat the servicemember. If he forgets to relate his continued involvement with drugs or alcohol or chooses not to, no immunity attaches.

There are three limiting factors to transactional immunity attaching in this second situation. The first two limitations have been previously discussed. The first is that the offense must be one of drug use, alcohol abuse, and drug possession incidental to personal use.[33] The second is that the servicemember must not have been identified with the offense prior to his disclosures.[34] The third is that the disclosures must have been made at a "scheduled interview."[35] Since "scheduled interview" is not defined, it should be given its common meaning, *e.g.*, an interview with a Program authority which has been prearranged. This restriction is intended to avoid the situation in which the servicemember makes the disclosures only to avoid prosecution. For example, the commander may be conducting a health and welfare inspection of the unit's barracks rooms and a servicemember who is in the Program may have a small quantity of drugs hidden within his locker. Desiring to avoid the adverse consequences upon the commander's discovery of the drugs, he "runs" to the Program center and discloses his drug possession to a counselor. Immunity would not attach since his disclosure was not made at a scheduled interview.[36] The exemption policy is intended to protect the servicemember who sincerely desires treatment but not the servicemember who is using the Program merely to avoid adverse action.

Use Immunity

Transactional immunity provides substantial protection for the servicemember but is not applicable in all instances. Perhaps the most significant limitation is that it is limited to offenses of drug use, alcohol abuse, or drug possession incidental to personal use. Most servicemembers cannot distinguish between these types of offenses and others. If they should disclose other types of offenses and if no immunity would attach, resulting in the counselors relating the disclosures to others, the counselors would soon lose their credibility. Servicemembers would refuse to discuss their problems with them. The use immunity provisions of the exemption policy address this situa-

tion. Use immunity attaches to information or evidence obtained directly or indirectly from the servicemember having been in the Program.[37] For example, Program administrators may not use against the servicemember those disclosures of offenses other than drug use, alcohol abuse and drug possession incidental to personal which have been made at a scheduled interview. If the servicemember should reveal at a scheduled interview that he smoked a joint of marijuana and robbed his roommate's friend the previous evening, transactional immunity would attach to the marijuana offense and use immunity would attach to the robbery offense. No adverse action could be taken for the marijuana offense and the counselor could not testify as to the robbery confession although adverse action could be taken using other independently discovered evidence.

One limitation to use immunity attaching to other than certain occurrence offenses discovered as a result of the servicemember's having been in the Program, is if the government has "identified" the servicemember with the particular offense before immunity attaches.[38] (Discussed previously in the transactional immunity analysis). A second limitation is if the government's evidence is obtained entirely independently of that which is discovered as a result of the servicemember's having been in the Program.[39] For instance, if the servicemember should reveal to a Program counselor at a scheduled interview that he has two kilograms of marijuana in his barracks room locker, use immunity would attach. If the counselor never disclosed this to anyone and the servicemember's commander discovered the marijuana pursuant to a lawful health and welfare inspection, the commander's discovery could be used as evidence against the servicemember. The commander's discovery was entirely independent of the servicemember's disclosures to the counselor.

There are also some derivative evidence implications which may have applicability in certain instances. Not only are disclosures of offenses protected but so also are all offenses which are discovered as a result of the servicemember's having been in the Program.[40] If the servicemember reveals to the counselor at a scheduled interview that he has a small quantity of marijuana in his barracks room locker, the counselor might inform the servicemember's commander of it and request to have it confiscated. If the commander should find not only the marijuana but also a large quantity of cocaine, use immunity would attach to the cocaine offense. Discovery is based upon the servicemember's having been in the Program. Transactional immunity would attach to the marijuana offense.

Summary

The exemption policy is not as complicated as one might imagine. The judge advocate must first determine if the offense is one of alcohol abuse, drug use, or drug possession incidental to personal use. If it is, transactional immunity will automatically attach if the offense occurred prior to the effective time. It also attaches if the servicemember discloses the offense at a scheduled interview after the effective time. If the offenses are other than alcohol abuse, drug use, or drug possession incidental to personal use; use immunity will attach to them if the evidence of the offense is obtained, either directly or indirectly, as a result of the servicemember's having been involved with the Program. A major limitation is when the government has "identified" the servicemember with the offenses prior to when transactional or use immunity attaches. Immunity also applies to those offenses which are discovered as a result of the servicemember's having been in the Program. With respect to use immunity, the government may use evidence of the offense against the servicemember if the government's evidence is obtained independently of the servicemember's having been in the Program.

The judge advocate should become knowledgeable of the exemption policy's rules and should familiarize himself with the policies underlying those specific rules. With a thorough understanding of the basics, he can analyze a factual situation and can draw the conclusions the drafters of the exemption policy envisioned.

Only with the proper application of the exemption policy can the Army and the individual servicemember be treated justly, and the Congressional mandate fulfilled.

FOOTNOTES

[1] Drug Abuse Prevention and Treatment, 21 U.S.C. § 1101, *et seq.* (1976).

[2] Army Regulation No. 600–85, Alcohol and Drug Prevention and Control Program (1 May 1976) (hereinafter cited as AR 600–85).

[3] AR 600–85, Section V, Chapter 3.

[4] ". . . 93% of Army members, discharged in FY 77 for drug abuse received an honorable discharge, compared to Navy (4 percent) Marine Corps (25 percent) and Air Force (49 percent)." DA Message, Subject: Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) Exemption Policy, para. 6 (310132Z Oct 78).

[5] AR 600–85, para. 1–5a.

[6] *Id.* para. 4–17b.

[7] *Id.* para. 3–16.

[8] Webster's Third New International Dictionary (1969).

[9] AR 600–85, Column D, Table 3–1.

[10] *Id.* paras. 3–17b and c.

[11] *Id.* Columns B and C, Table 3–1.

[12] *Id.* Column B, Table 3–1.

[13] *Id.* Column C, Table 3–1.

[14] *Id.* para. 3–17c; Columns B and C, Table 3–1.

[15] A "lid" is one ounce of marijuana. James C. Madison, Drug and Alcohol Abuse Disruptive Influences at 207.

[16] DAJA–AL 1978/3940, 11 Dec. 1978.

[17] AR 600–85, Column B, Table 3–1.

[18] *Id.* Section II, Chapter 3; and Column B, Table 3–1.

[19] *Id.* para. 3–3.

[20] *Id.* para. 3–4.

[21] *Id.* Appendix A.

[22] *Id.* para. 3–11a.

[23] *Id.* para. 3–5.

[24] *Id.* para. 3–20b(8).

[25] *Id.* para 3–20b(7).

[26] Department of the Army Message. SUBJECT: Level of Army Urinalysis Testing (180206Z Nov 78).

[27] Committee for GI Rights v. Calloway, 370 F. Supp. 934 (D.DC, 1974); United States v. Ruiz, 48 CMR 797 (1974). *See Also,* Army Regulation 635–200, Personnel Separations, Enlisted Personnel, Chapter 9 (21 November 1977).

[28] AR 600–25, para. 3–6.

[29] *Id.*

[30] *Id.* para. 3–7.

[31] *Id.* para. 3–17b.

[32] *Id.* Column C, Table 3–1.

[33] *Id.*

[34] *Id.* para. 3–17b.

[35] *Id.* Column C, Table 3–1.

[36] Dep't of Army Message. Subject: Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) Exemption Policy, para. 5E (310132Z Oct. 78).

[37] AR 600–85, para. 3–16b and Column D, Table 3–1.

[38] *Id.* paras. 3–7b and c.

[39] AR 600–85, para. 3–18d and Dep't of Army Message, Subject: Interim Change to AR 600–85, Alcohol and Drug Abuse Prevention and Control Program, para. 1 (132105Z Jun. 78).

[40] AR 600–85, para. 3–16a and Column D, Table 3–1.

OTJAG Senior Staff NCO Assumes Duties

Sergeant Major John Nolan assumed duties as Senior Staff NCO, OTJAG, on 26 May 1980. SGM Nolan has 27 years' service in the Army. His career has taken him through many CONUS assignments, two tours in Europe, as well as service in Alaska, Vietnam, Panama and Korea. From 1974 until 1978 he was chief legal clerk at the 7th Infantry Division and Fort Ord. He then served as chief legal clerk with UNC, USFK and Eighth US Army Korea until his assumption of duties as senior staff NCO at OTJAG. SGM Nolan is married to the former Arlene Benton of Monterey, CA. They have two

sons, one of whom is presently serving in the Eighth US Army, Korea.

The following article is the first in a series of updates on enlisted personnel matters which will come from the desk of the Corps' Sergeant Major.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

Since assuming my duties in the Office of The Judge Advocate General on 26 May 1980, I have already contacted many of our personnel, both in CONUS and overseas, and have visited Fort Meade, Fort Belvior, Fort Benjamin Harrison, the US Army Legal Services Agency, and The Judge Advocate General's School. I expect to meet many more of you during future visits, when we can personally discuss matters of wide-ranging and long-term concern. In this regard, as was indicated in the position description sent out by MG Harvey late last year, my duties are primarily of a planning and policy-making nature, and will not involve routine individual personnel matters. These will remain the responsibility of our Liaison NCO at MILPERCEN, SFC John Meehan, who replaced MSG Gunther Nothnagel in July (MSG Nothnagel is now en route to the Sergeants Major Academy at Fort Bliss). SFC Meehan can be contacted as follows:

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I've found that some of our legal clerks and court reporters feel that the Corps has no concern for their training or welfare. Although I believe this perception is generally limited to those who are not aware of or do not understand what is available to them in terms of educational opportunities and career enhancement, I also think the matter should be addressed at this time. Much has, in fact, been done to eradicate both problems, and I expect that much more will be done in the future. Since 1971 the Corps has gained the 71D MOS-producing course, expanded and revised existing MOS-related resident and nonresident courses, established courses for problems which are peculiar to USAREUR, obtained a liaison position at both MILPERCEN and USAREUR to improve personnel management, and created my position in OTJAG. In attempts to dispel or forestall such false perceptions, several articles have been printed in *The Army Lawyer* pointing out current educational opportunities, changes that were brought about in implementation of the Enlisted Personnel Management System (EPMS), status and impact of the Skill Qualification Test (SQT), and what enlisted selection boards look for in selecting personnel for promotion and advanced training. I expect that SFC Meehan will continue MSG Nothnagel's practice of writing or editing such articles periodically in the future, and I intend to make this column a regular feature of *The Army Lawyer*. By this medium, as well as during my visits to the field, I will pass on and explain new plans and programs that are being researched and studied for the Enlisted Corps. In brief, MG Harvey, MG Clausen, the other general officers, and the staff members here in OTJAG are concerned about our training and welfare, and are fully supportive of strengthening the Enlisted Corps.

Some other matters of concern also merit comment or update at this time.

Local Training: During my visits and conversations, I've found that a number of chief legal clerks have implemented training programs to improve the proficiency of our legal clerks and

court reporters, primarily by cross-training methods, to insure that all assigned legal clerks and court reporters are well versed in all aspects of the 71D/E field. I am sure there are other ongoing training programs at various installations. Where there are not, I encourage chief legal clerks to devise such a program.

Advanced Schooling: We continue to have a good selection rate for advanced schooling. BG Overholt and I attended the recent ANCOC graduation at Fort Benjamin Harrison on 1 July 1980.

Civilian Education: I encourage each of you who does not possess an associate degree or equivalent to pursue one.

SQT: Personnel at a number of installations have taken the hands-on and written test. However, the results are not yet available. At most installations, early feedback reveals that STUDYING is the key. Although this sounds simplistic, I am concerned that some of our personnel do not consider this important.

Assignments: June, July, and August are the peak turnover months, with resultant personnel turbulence problems, such as shortages, at some installations and commands. The situation should smooth out by September.

Promotions: Overall, we are doing well in all grades except E6, which fell somewhat short of the selection rate average. Detailed breakouts will be furnished later. Also with regard to promotions, the president of the most recent E7 selection board, BG Richard A. Scholtes, published an excellent article on promotions ("Why Didn't I Get Promoted?") in the 9 May 1980 issue of FOCUS, the MILPERCEN newsletter. This article has since been reprinted in *Army Times* and various local publications. If you do not have a copy of the article, contact me and I will send you one.

Should you have suggestions or comments concerning personnel management policies or other matters which affect all legal clerks and/or court reporters, please feel free to contact me. My address and telephone number are:

Mailing Address:
HQDA(DAJA-SM)
WASH DC 20310

Telephone:
AUTOVON—225-1036
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I look forward to the challenges and potential rewards for all of us offered by this new position, and hope that, with your support and assistance, we can achieve some progress toward resolving many of the major issues of common concern.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Line Of Duty) **Injuries Sustained by Reservists 2½ Hours After Returning Home From Annual Training Were Incurred Not Line Of Duty—Not Due To Own Misconduct.** DAJA-AL 1980/1222 (5 March 1980).

The Adjutant General requested an opinion of The Judge Advocate General as to whether injuries sustained by a reservist some 2½ hours after returning home from scheduled annual training were incurred line of duty. The reservist had completed two weeks of annual training and on the day involved had departed the local Army Reserve Center at 1900 hours, and arrived home at 1930 hours. The reservist's orders specified that "upon completion of annual training, return to home station and revert to inactive status".

At approximately 2200 hours, the reservist was accosted and shot near his home by another

member of his Reserve unit. Following a formal line of duty investigation a determination of Not Line Of Duty—Not Due To Own Misconduct was rendered. The Judge Advocate General found that this determination was correct because once a member returns home from annual training he or she is no longer in an active status. Further, this member's orders specifically stated he would revert to inactive status upon returning home.

(Prohibited Activities And Standards Of Conduct-General) **No Exception To AR 600–50 May Be Granted To Allow A Fund-Raising Raffle In Contravention Of Local Law Unless There Will Be Special Benefit To The Department Of The Army.** DAJA–AL 1980/1243 (28 February 1980).

A morale support activity at a major U.S. installation requested an exception to the policy in para. 2–7, AR 600–50, to allow a post Boy Scout Troop to sell raffle tickets on post from a private nonprofit organization. The post operates under exclusive Federal legislative jurisdiction, but the conduct of a raffle is a misdemeanor offense (rarely enforced against nonprofit organizations) under state law. The Boy Scout Troop would receive 50% of the price of the raffle tickets sold with the remainder benefiting the private nonprofit organization.

The opinion points out that as a general rule, the conduct of a lottery or the sale of lottery tickets on Government-owned, leased or controlled property is prohibited by para. 2–7, AR 600–50, except when specifically approved by HQDA.

Although the fact that the raffle would be illegal under local law is not controlling, it is DA policy to grant an exception to allow a fund-raising raffle in contravention of local law only when the activity will be of special benefit to the Department of the Army. In this case, the raffle would primarily benefit the private organization operating off post. Although there is some benefit to DA through additional funds being made available to the local Boy Scout Troop, this benefit does not rise to the level of "special benefit to DA" which is required for an exception to be granted.

(Military Installations, Law Enforcement) **GSA Authority to Promulgate Regulations Permitting Enforcement of Traffic Laws on Military Installations located in a State in Which Traffic Offenses Have Been "Decriminalized."** DAJA–AL 1980/1334 (20 March 1980)

A Staff Judge Advocate requested an opinion of The Judge Advocate General as to whether the General Services Administration has the authority to promulgate a regulation permitting enforcement of traffic laws on military installations located in a state in which traffic offenses have been "decriminalized" by legislative action. (Chapter 136, 1979 Wash. Laws, 1979 Wash. Leg. Svc. 1329 (West), effective 1 July 1980).

The Judge Advocate General affirmed the SJA Office determination that in the situation presented the "Assimilative Crimes Act" (18 USC 13) does not appear to provide an adequate basis for the prosecution of traffic violations before a U.S. Magistrate as the statutory language of 18 USC 13 emphasizes that only criminal laws are assimilated. Further, all case law where the assimilation of laws was at issue involved laws which were clearly described as intending criminal consequences. Therefore, The Judge Advocate General recommended that alternative means of ensuring traffic enforcement on Army installations in the state of Washington be utilized.

The Judge Advocate General advised that GSA be requested to promulgate a regulation controlling traffic on military installations in the state of Washington. GSA authority to enact such a regulation is based on 40 USC 318 a–d which empowers the GSA to enact rules and regulations for the protection of federal property under the control of any other agency, at the request of the head of the other agency. Because the Washington law has equal impact on all military installations in the state, The Judge Advocate General further advised that the requesting "agency head" under 40 USC 318b be the Secretary of Defense rather than

the Secretary of the Army so the regulation would be applicable to all DOD installations in the state of Washington.

(Contributions And Gifts) **An Individual Who Accepts A Valuable Gift From Subordinates In Violation Of Paragraph 2–3, AR 600–50, May Dispose Of It By Returning It To The Donors Or Donating It To A Local Morale, Welfare, Or Recreation Organization, As Appropriate, But Such Disposition Does Not Rectify His Or Her Initial Wrongdoing In Accepting The Gift.** DAJA–AL 1980/1354 (13 March 1980)

Upon the occasion of his departure, an officer received a 12 gauge shotgun with an approximate value of $200 from some noncommissioned officers in his command. The gift became known as a result of an official IG investigation, and the individual became concerned that his acceptance of the gift may have been inappropriate. The officer requested disposition instructions for the shotgun from the General Counsel of the Army. The request was forwarded to The Judge Advocate General, the proponent of AR 600–50.

The opinion begins by pointing out that the provisions of paragraph 2–3, AR 600–50, which prohibit DA personnel from accepting gifts from subordinates, unless the gift is for a special occasion and is of nominal value is designed to prevent the evil of superiors improperly using their influence over subordinates for their own gain as well as the appearance of impropriety that results from their receiving and accepting valuable gifts from subordinates. Consequently, the subsequent disposition of a gift which may have been improperly received would be unlikely to rectify either of these wrongs.

According to the opinion, disposition of the shotgun in this case could be made by returning it to the donors. But, if that is impractical, it could be donated to an appropriate morale, welfare, or recreation organization at the local installation, such as the local rod and gun club. Additional guidance in this matter could be sought from the local Deputy Standards of Conduct Counselor.

(Line of Duty) **Evidence Purporting to Show Servicemember's Misconduct Insufficient to Overcome the Presumption that Injury Occurred in Line of Duty.** DAJA–AL 1980/1454,, 8 April 1980.

A servicemember suffered a compression fracture in the lumbar portion of his spine in a fall; however, the cause of the injury is in dispute. The servicemember claims the injury was sustained when he fell down the barrack stairs. The investigating officer's report stated that the injury resulted when he fell from a second story window while attempting to retrieve a bag of contraband material which he had "cached" outside the window prior to a search conducted by the Battallion SDO. There were no witnesses to actual event causing the injury.

The servicemember appealed the finding that the injury occurred Not Line of Duty—Due to Own Misconduct, alleging that the IO failed to produce substantial evidence that the injury was proximately caused by his intentional misconduct or willful neglect. Unless such evidence is produced, the presumption that the injury occurred in the Line Of Duty is not overcome (para. 2–3a(1), AR 60033). The Judge Advocate General emphasized the strength of the presumption of LOD in a line of opinions regarding servicemembers injured in falls. Where a fall is not witnessed and the surrounding circumstances are unknown, the presumption of LOD must prevail, even in cases where the servicemember was intoxicated at the time. However, when it can be established that the member placed himself in a position of great danger without regard for personal safety and was injured as a result (e.g., falling from a window on a bet, performing a headstand on a railing over an open stairwell, or urinating from a rooftop), then he is guilty of gross negligence and the injury is due to his own misconduct.

The Judge Advocate General, upon review of the evidence, found that the evidence was insufficient to overcome the LOD presumption. There was no evidence that the servicemember had been using or was under the influence of drugs at the time of the injury. Further, the testimony offered by two individuals who had

been in the area was imprecise and replete with hearsay. The CQ runner testified that no one had used the stairs during the CQ's absence, but was unable to specify a time for his observations. The most damaging statement related that the servicemember was seen on the ground below his window, but this testimony was considered unreliable because it was made by the member's roommate who had a personal interest in not having any connection with drugs in the room.

Additionally, The Judge Advocate General opined that even assuming that the member fell out the window, there is no evidence that he placed himself in a precarious position prior to the fall, nor was there any evidence that a cache of marijuana was found anywhere in the vicinity.

(Information and Records, Release and Access) **Disclosure of an Individual's Home Telephone Number For Inclusion in Unit Alert Roster is Mandatory.** DAJA–AL 1980/1504, 10 April 1980.

The Adjutant General's Office requested an opinion from The Judge Advocate General as to whether the disclosure of an individual's home telephone number for inclusion in an alert roster is mandatory under the Privacy Act, and whether disciplinary sanctions can be imposed for refusal to disclose this information.

The Judge Advocate General opined that if the information is required to meet a bona fide need of the Government, or, in the case of the Army, a military necessity, disclosure of an individual's home telephone number is mandatory. Further, The Judge Advocate General stated that if after being advised through a privacy act statement that disclosure is mandatory the individual refuses to disclose the information, the commander is authorized to impose penalties for failing to respond. Military personnel who disobey an order to provide their home telephone number are subject to any of the prescribed disciplinary actions for failure to obey a lawful order. Disciplinary action may be taken against civilian personnel under Chapter 751, Federal Personnel Manual, for failure to disclose mandatory information.

(Line of Duty) **Injuries Sustained in Accident With Misappropriated Army Vehicle by Servicemember Who Failed to Sign Out On Pass Were Incurred In Line of Duty, But Were Not Proximate Result of ADT/IDT For Disability Retirement.** DAJA–AL 1980/1560, 14 April 1980.

The Adjutant General requested an opinion from The Judge Advocate General as to whether a servicemember's injured had properly been determined to have been in the Line of Duty in response to USA Physical Disability Agency request for reconsideration in light of new evidence provided by the National Guard Bureau (NGB).

The servicemember was one of a group of guardsmen having no weekend duty who were issued a pass for the 4th of July weekend. The members were told that they could go to two specific cities on the passes. The servicemember in question and several others misappropriated a 2½ ton truck and drove it to a point far outside the geographic boundaries of their instructions. On the return trip, the vehicle left the road and overturned, resulting in injury to the servicemember, who was a passenger in the vehicle at that time.

In a formal LOD investigation, the commander, with full knowledge of the circumstances of the injury, determined that the servicemember was in an "absent with authority" status. The Judge Advocate General opined that such a determination by the immediate commander is final and constitutes substantial evidence of the member's status at the time of injury, unless shown to be manifestly erroneous by clear and convincing evidence (para. 2–7d, AR 600–33). Failure to sign out on a pass does not constitute a period of unauthorized absence for LOD purposes (para. 2–7f, AR 600–33), and passes with geographical limits are not provided for by AR 630–5. Therefore, The Judge Advocate General concluded that a statement of the unit 1SG, obtained by NGB 3½ years after the accident, which contested the commander's determination under these circumstances, did not show that the commander's decision that the injury occurred in "Line of Duty" was manifestly erroneous. The LOD IO

further determined that the misappropriation of the truck was not the proximate cause of his injury, and that his injury was, therefore, incurred in the Line of Duty.

Further, The Judge Advocate General stated that resolution of whether the servicemember is entitled to disability retirement UP 10 U.S.C. 1204 requires an evaluation of whether "the disability is the proximate result of performing active duty or inactive-duty training" (10 U.S.C. 1204(2)). To determine proximate cause, The Judge Advocate General applied the following test: (1) where a member is injured while engaged in some form of "outside activity" not related to military service, then he should not be entitled to benefits; (2) where a member is injured while proceeding under military orders (even on leave or pass) then he should be entitled to benefits. Based thereon, The Judge Advocate General opined that the servicemember's conduct in this case placed him in the category of one engaging in "outside activity" for the purposes of 10 U.S.C. 1204. However, the need for submitting doubtful claims concerning duty status to the Comptroller General was recognized, and referral to that official was recommended.

(Article 138, UCMJ) **Appeal Procedure For Bar To Reenlistment Proper Alternate Channel.** DAJA–AL 1980/1637 (5 February 1980). The respondent company commander initiated a bar to reenlistment of the complainant Sergeant First Class. The complainant, without a precedent request for redress, initiated an Article 138 complaint to the GCMCA and stated that the bar to reenlistment were initiated in a vindictive and unfair manner, and was a paper drill to eliminate the complainant from the Army The GCMCA, after waiving the complainant's initial failure to request redress of the respondent, determined the provisions of paragraph 1–35, AR 601–280, provided a suitable alternate channel for disposition of the considered wrong. TJAG determined that the appeal procedures provided by para. 1–35, C3, AR 601–280 were a more efficient means of resolving the complaint and an appeal channel preferred over AR 27–14 for the resolution of complaints regarding bars to reenlistment. Para. 1–5*a*(3), AR 27–14, states an action is inappropriate for resolution under Article 138 procedures when Army Regulations specifically authorize such an appeal channel. Accordingly, TJAG determined the GCMCA's referral to that appeal procedure was proper.

(Article 138, UCMJ) **Determination By GCMCA That Complained Wrong Was Not A Discretionary Act By The Commander Need Not Be Forwarded To TJAG For Review.** DAJA–AL 1980/1419 (20 February 1980). Complainant, while assigned in Europe, was pending court-martial charges. Since the situs of the court-martial was at a distant location from the duty station, the complainant was placed on TDY orders for his court-martial. His orders stated that Government rations were available. At the court-martial, all charges except one were dismissed due to evidentiary problems and the remaining charge resulted in a mistrial. The complainant thereafter requested redress from the respondent commander alleging that the respondent failed to allow him to move or store his furniture at Government expense, to provide him a meal card, and since his ETS had passed, to be released from active duty. The respondent denied the redress stating that he offered the complainant storage space in the billets and that the complainant could request advance shipment of his household goods, that the complainant should have used Government mess facilities during his TDY, and his retention on active duty was required since court-martial charges were still pending against him. The complainant complained UP Article 138, UCMJ, to the GCMCA basically alleging the same wrongs and requesting the same redress. The complainant subsequently refused punishment UP Article 15, UCMJ, on the remaining charge and the battalion commander, after consultation with the servicing judge advocate, withdrew all charges. The GCMCA determined that the wrongs complained of were not discretionary acts of the respondent commander as required by para. 3–2*b*(3)(b), AR 27–14. He denied the requested redress and forwarded the case to TJAG for review. TJAG determined that the action by the GCMCA was proper as the wrongs complained

of were not discretionary acts of the commander and therefore were not subject matter for resolution UP AR 27–14. There was no statutory or regulatory authority to store household goods during the travel the complainant was performing, the JTR's require the use of Government mess when available and set forth the permissible amount of TDY pay, and as long as court-martial charges were pending against the complainant, all favorable personnel actions were suspended UP para. 3, AR 600–31. TJAG went further to state that para. 3–3*d*, AR 27–14 only requires forwarding an Article 138 complaint to HQDA upon completion of action on the complaint. The determination by the GCMCA that the matters complained of are not discretionary acts were not action under Article 138 and need not be forwarded to HQDA for review.

(AR 15–6, Informal Investigation) **TJAG Clarifies Requirement To Designate A Respondent In Investigations Utilizing Provisions Of AR 15–6.** DAJA–AL 1980/1438 (3 April 1980). A SJA, though his major command SJA, submitted an information copy of an officer's appeal on two OER's to TJAG. Copies of two informal investigations were attached. TJAG took this opportunity to clarify the requirements for designating a respondent under AR 15–16. Except where the provisions of AR 15–6 are subordinate to another directive, a need to designate an interested person as a respondent will arise only where a formal board has been appointed and (a) the appointing authority desires to afford an interested person a hearing *or* (b) the "primary purpose" of the board is to determine whether some adverse action should be taken against an individual. Respondents *may not* be designated in an informal investigation regardless of the purpose of the proceeding. The purpose of the proceeding is only one of many factors which may be considered by an appointing authority in determining whether to direct formal or informal procedures. Even if the primary purpose of an inquiry is to determine whether some adverse action should be taken, resort to formal procedures is not required. However, where a formal board has been appointed and its primary purpose is to determine whether some adverse action should be taken, such a purpose does compel the designation of the person concerned as a respondent. TJAG went on to point out that before information gathered by either an informal investigation or board or formal board may be used as the basis for an adverse personnel action against a person who was not a respondent, certain procedural safeguards must be provided. Where safeguards are not specified by statute, or a directive pertaining to the particular adverse action contemplated, the authority who intends to take the adverse action must comply with the procedures specified in paragraph 1–4, AR 15–6. A failure to provide such safeguards in a timely manner may constitute a denial of due process and, not insignificantly, a failure to comply with a Departmental regulation, and may be difficult to defend against in litigation.

(Line Of Duty) **Injuries Sustained By Servicemember In Accident Are Not Line Of Duty-Due To Own Misconduct Where Servicemember Was Driving Under The Influence.** DAJA–AL 1979/4073 (4 January 1980).

The Army Board for Correction of Military Records requested an opinion of The Judge Advocate General as to whether injuries sustained by a service-member were Not Line Of Duty-Due To Own Misconduct where the servicemember pleaded guilty to DUI. Citing Rule 8, Appendix C, AR 600–33, The Judge Advocate General advised that where a servicemember incurs injuries as a result of driving a vehicle while in an unfit condition to drive, i.e., while intoxicated, with which condition the member has or is charged with knowledge, the proper finding is Not Line Of Duty-Due To Own Misconduct. The evidence, including a BAT reading of .27, supported such a finding in this case. The fact that block 9c, DD Form 261 was checked to indicate that intentional misconduct or neglect was not the proximate cause of the member's injuries was deemed to be a clerical error in light of the Investigating Officer's express written findings and reliance on Rules 3 and 8, Appendix C, AR 600–33.

Legal Assistance Items

Major Joel R. Alvarey, Major Joseph C. Fowler, and Major Walter B. Huffman Administrative and Civil Law Division, TJAGSA

Alimony—Uniform Acts—URESA

The availability of a URESA action is an additional means of enforcing a foreign decree, and does not preclude the pursuit of other available remedies. 5 Fam. L. Rep. 2959, October 16, 1979.

The Maryland Court of Special Appeals held that a lower court erred in dismissing a wife's complaint for enforcement of a Georgia decree for her failure to comply precisely with URESA registration provisions. The Court held that URESA is not the exclusive means of enforcing foreign decrees and that a proceeding under the Court's general equity powers was proper. The Court relied on *McCabe v. McCabe,* 123 A.2d 447 (1956), in stating that a Maryland equity court can enforce an alimony decree of another state using the same equitable remedies and sanctions it would use to enforce a decree it had entered in the first instance.

Property and Divorce—Retirement Benefits as Divisible Assets

The Oregon Court of Appeals, in a recent decision, declined to hold that retirement benefits are per se marital property to be divided at the time of divorce. Because the details of various retirement plans and programs are almost infinite, the court determined that the portion of retirement benefits that should be awarded to the non-employee spouse should be calculated on a case by case basis. As a guideline, the court declared that retirement benefits should be regarded as "a marital asset to be considered in formulating the financial aspects of a dissolution decree." *In re Rogers,* 6 Fam. L. Rep. 3037, May 20, 1980.

In the instant case, the husband's U.S. Foreign Service retirement benefits were the major asset of the parties, and there was no other property which could be awarded to the wife as an offset for her interest in the retirement plan. On these facts, the court concluded that the most equitable method of computing the wife's award is to allow her one-half the benefits the husband was eligible to receive at the time of dissolution had he also terminated his employment as of that date, recognizing that the payments would not commence until four years after the divorce, when he reached the age of 50. The wife will be awarded her interest as and when the husband receives the benefits.

Divorce—Pennsylvania Divorce Law Reformed

On July 1, 1980, a new divorce code encompassing the first major reform of Pennsylvania's divorce laws in 165 years became effective. For the first time in Pennsylvania, divorce may be granted without proof of fault or finding of marital misconduct and the courts are empowered to award alimony.

The new law provides for a non-contested no-fault divorce within 90 days after filing. Unilateral divorces may be granted within three years of the filing date if the court finds "estrangement due to marital difficulties with no reasonable prospect of reconciliation." If a court determines in a unilateral proceeding that there has not been an "irretrievable breakdown" of the marriage, the court may impose a minimum of three counseling sessions before dissolution.

Under the new code, the courts of Pennsylvania are for the first time empowered to award alimony. Determination of the amount of alimony is based on the requesting spouse's needs, assets, and ability to be self-supporting through employment. The new law also directs the courts to divide the spouses' property equitably, "without regard to marital misconduct between the parties."

Divorce—Wife Entitled to Restitution for Financing Spouses Education

To allow a student spouse to leave the marriage with all the benefits of additional education without compensating the spouse who primarily financed that education is patently unfair. *In re Cropp*, 5 Fam. L. Rep. 2957, October 16, 1979.

A Minnesota Court awarded a spouse $24,624 as restitution for her contributions to her husband's medical education. The wife's small salary was the primary source of marital income, and the medical degree was the only significant "asset" accumulated during the marriage. The court found that failure to provide the working spouse a remedy would result in the student spouse's receiving an "unconscionable windfall contribution" to his increased earning capacity.

Furthermore, in consideration of the fact that she had supported her husband while he completed medical school, the Court awarded the wife an additional $8,000 should she choose to pursue a graduate degree.

Divorce—Mutuality of Incompatability

The Delaware Supreme Court found that procedural due process had been denied a wife when she was prohibited from presenting evidence showing that the alleged incompatability upon which a divorce was granted to her husband was not mutual. *Wife v. Husband S.*, 6 Fam. L. Rep. 2450, May 6, 1980.

An amendment to the Delaware Code added "irretrievable breakdown" as a grounds for divorce. The statute lists, as one characteristic of an irretrievably broken marriage, "separation caused by incompatability". 13 Del. C. § 1505(b). Construing the new statute, the court found that although the addition of "irretrievable breakdown" as a grounds for divorce now allows dissolution of a marriage without a showing of mutual fault, the requirement of mutuality as to incompatability in the marriage relationship has not been eliminated. In short, the court concluded that the meaning of "incompatability" under Delaware law had not been changed by the new statute. The only significant difference is that a divorce based upon incompatability can now be granted without regard to who is to blame for the discord.

Paternity—HLA Blood Test Admissible to Prove Paternity in New Jersey

The New Jersey Juvenile and Domestic Relations Court of Camden County has declared that the results of a competently performed Human Leucocyte Antigen (HLA) test are admissible to establish paternity of a putative father. *Camden County Board of Social Services v. Kellner*, 24 Fam. L. Rep. 2412, April 22, 1980.

Previously, the language on N.J.S.A. 2A:83–3 and the applicable case law permitted that results of blood tests be admitted only to disprove paternity. This court held that the prior law should be reexamined in light of scientific advancements. When the statute was enacted, only the ABO method of blood group testing was available as evidence of paternity. This test could provide conclusive evidence of nonparentage, and then only to an accuracy of 50%—60%. The HLA test, however, has been accepted in the scientific community as a reliable and accurate serologic test, and, in addition has been accepted by the A.M.A.-A.B.A. Therefore, the court concluded that the admission of a positive finding of paternity resulting from a properly conducted HLA test was admissible, as its probative value outweighed any possible prejudicial effect.

Divorce—Division of Military Retirement Pension Before Actual Retirement

The California Court of Appeal, Fifth District, held that a lower court abused its discretion in refusing to allow a wife to receive her community property share of a military retirement pension before the servicemember's actual retirement date. *Luciano v. Luciano*, 6 Fam. L. Rep. 2513, May 27, 1980.

The court concluded that the proper procedure in such cases is for the trial court to retain jurisdiction and provide that the non-employee spouse may elect to begin receiving her community property share at any time after the

servicemember becomes eligible for retirement. The non-employee spouse's right to receive her portion of the pension should not rest solely within the employee spouse's control. However, the court stated that if the non-employee spouse elects to receive her share of the pension at maturity rather than waiting until the servicemember has actually retired, this will constitute an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service, and a higher salary.

Divorce—Military Pay Is Asset Divisible Upon Divorce

Military retirement pay may be deemed a marital asset under state law, and the federal statute authorizing payment of such pension does not preempt the state's division of property laws. *In re Miller*, 6 Fam. L. Rep. 2433, April 29, 1980.

The Montana Supreme Court rejected a servicemember's contention that his right to receive military pension is not a vested right which can be included in a marital property division. The Court held that military retirement pay resembles an ordinary private pension, and should, like a private pension, be treated as a vested property right subject to distribution under Montana's Uniform Marriage and Divorce Act.

The servicemember next argued that 10 U.S.C.A. § 1401 *et seq.*, preempts the Montana law so far as it permits distribution of a property interest in his pension. He relied on *Hisquierdo v. Hisquierdo*, where the Supreme Court found that distribution of a pension receivable under the Railroad Retirement Act, 45 U.S.C. § 1231 *et seq.*, violated the purpose of the Act and was prohibited by the supremacy clause. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). The Montana Court distinguishes *Hisquierdo* because that decision is based on the fact that the Railroad Retirement Act explicitly terminates a spouse's benefits upon absolute divorce and further protects the pensioner's benefits from "legal process under any circumstances whatsoever." The statute governing the servicemember's military pension does not contain any section similar to the controlling provisions in the *Hisquierdo* decision. Chapter 71, 10 U.S.C.A. § 1401 *et seq.* The Montana Court further found that distribution of military retirement payments upon divorce does not contravene congressional intent in that Congress anticipated that servicemembers would assume the duties and obligations of marriage.

New Legislation

Hawaii–Support—Enforcement—SB 664, providing for mandatory wage assignment upon a showing that a parent is over three months in arrears, is now law.

Louisiana—Custody—HB 921 adopts the "best interest of the child" standard. The new law applies this standard to both parents, rather than applying a presumption in favor of the mother. A similar bill was recently signed into law in North Dakota.

Oklahoma—Alimony—Cohabitation—HB 1038, effective 1 October 1979, provides that voluntary cohabitation of a former spouse with a member of the opposite sex is grounds for modifying alimony.

United States—Uniform Acts—Custody—As of 6 May 1980, forty-four (44) states have adopted Uniform Child Custody Jurisdiction Act (UCCJA). Among the states which have recently adopted the UCCJA are Alabama, Tennessee and Kentucky.

Judiciary Notes

US Army Legal Services Agency

Digests—Article 69, UCMJ, Applications

In *Smith*, SPCM 1980/4650, the accused was charged with dereliction in the performance of his duties by willfully failing to render a proper salute to the flag of the United States, by raising his partially clinched fist with extended

middle finger toward the flag during the sounding of retreat, in violation of Article 92, UCMJ. He requested relief on the basis that there was no regulation which requires the rendering of a salute as a duty.

A duty can be imposed on a soldier by either orders, regulations or custom. US v. Haracivet, 45 CMR 674 (ACMR 1972). Punishment for derelict performance of duty was derived from the Articles for the Government of the Navy, incorporated into the Uniform Code of Military Justice, and explained by paragraph 171(c), MCM 1969 (Rev.). It has long been the custom in the U.S. Army to render a salute to the national colors during the afternoon retreat. *See* FM 22-5. Therefore, a duty existed for the accused to render a salute. The accused recognized that "duty to salute at the colors" and said so in his testimony. The performance of a military duty in a manner as to be blameworthy is a proper basis for an offense under Article 92, UCMJ. *See* US v. Garrison, 14 CMR 359 (ACMR 1954). Relief was denied.

In *Woodson,* SPCM 1980/4701, The Judge Advocate General granted partial relief because the prosecution failed to show sufficient probable cause to seize the suspected marihuana which formed the basis for the additional charge. The incident in question arose at the gate to an installation in Germany. After having stopped the accused's automobile for an unrelated matter, a military policeman observed a handrolled cigarette tucked behind the accused's ear. When the accused rolled down the window, as he was told to do, the military policeman snatched the cigarette from behind the accused's ear. The accused was apprehended for suspicion of possession of marihuana. Laboratory analysis showed that the cigarette contained marihuana.

At trial, the accused moved to suppress the seized contraband and other derivative evidence. The military judge denied the motion.

Without more, a handrolled cigarette is not sufficient to convince a reasonable person that the seized cigarette probably contained marihuana. US v. Guzman, 3 MJ 740 (NCMR 1977). Without evidence that handrolled tobacco cigarettes were not used in Germany, there was not enough evidence to support the seizure. The evidence as to the cigarette should have been suppressed. Also, the evidence of a partially burned cigarette, obtained in a subsequent search of the accused's automobile, was tainted by the initial illegal seizure and should also have been suppressed. *See* US v. McCaleb, 552 F.2d 717 (6th Cir. 1977).

In *Levasseur,* SPCM 1980/4696, the accused was charged with assault and battery, conspiracy, and housebreaking. The facts showed that the accused agreed with an SP4 J to assault SP4 J's roommate. To facilitate the assault, SP4 J departed the room and left the door to the room unlocked so that the accused could attack SP4 J's roommate.

During the trial, the military judge informed the defense that it would not be allowed to argue that SP4 J's leaving the door of his room unlocked constituted lawful entry. Presumably, the court members were not instructed that consent could be given by a co-occupant of a room to an entry to commit a crime.

The accused conspired with SP4 J to commit an assault. The question raised by the defense was whether a conspirator who is an occupant of a room can consent to the admission of another conspirator to perpetrate a crime.

To establish the crime of housebreaking, the government must prove an unlawful entry and an intent to commit a crime in the premises broken. Both of the elements must be proven separately. US v. Doskocil, 2 CMR 802, (AFBR 1952). Intent to commit a crime does not make an otherwise lawful entry unlawful. US v. Macias, 19 CMR 924 (ABR 1955); US v Cox, 14 CMR 706 (AFBR 1954). A co-occupant of a room may invite a person into his room, even though the intent is to commit a crime therein. US v. Browder, 15 USCMA 466, 35 CMR 438 (1968). Thus, the accused was the guest of a person who could give consent.

However, assuming there was a factual question as to the authorization, the court members should have been instructed on the issue of law-

fulness of the entry of the accused. Failure to instruct the court and denial of the accused's right to argue the issue was prejudicial error. Partial relief was granted. The charge of housebreaking was dismissed. On reassessment, the sentence was not changed.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Argument:

Trial counsel should not misstate the facts of the case during argument. Evidence was introduced in a recent case that the accused had made a statement that he might be leaving the unit since he had "supposedly sold heroin to a CID agent." During argument trial counsel summarized this statement as "I sold heroin." Trial counsel should be careful to accurately summarize the evidence of record. Failure to do so may result in the raising of needless appellate errors.

2. Military Judge—Advising Accused:

Trial counsel should monitor the judge's advice to accused to insure that it is complete and accurate. The accused in a recent case was pending trial on 15 specifications of possession, sale, and transfer of heroin and marijuana. He was convicted and his sentence included a dishonorable discharge and 4 years confinement at hard labor. The only error raised on appeal was that the judge improperly advised the accused (who was represented by civilian counsel) of his rights to counsel. The judge advised only that the accused could be represented by civilian counsel and/or detailed counsel; he neglected to advise that the accused also had a right to request individual military counsel. The judge should advise about all three counsel rights. *United States v. Donohew*, 18 USCMA 149, 39 CMR 149 (1969). Failure to do so may result in reversal. *United States v. Fellows*, 5 M.J. 674 (ACMR 1978). While the accused should have received advice on counsel from his attorney, advice on the matter should be included on the record. Trial counsel can insure the adequacy of the record by tactfully reminding the judge upon omission of material from the boilerplate. Maintaining a checklist of such matters in his *trial notebook* may aid this endeavor also.

3. Self-Incrimination:

a. Trial counsel should advance and represent evidence on all theories supporting the admissibility of evidence offered at trial. The accused at a recent case made an unwarned statement to a CID agent and subsequently made a fully warned confession to another agent. At trial the trial counsel argued only that the first statement was admissible, and he conceded that if it were inadmissible that taint would preclude admission of the second confession. In fact, there were a number of factors which may have attenuated any possible taint: there was significant time lapse between the first and second statements; different agents were involved; motivation to speak was different. *See United States v. Seay*, 2 M.J. 201 (CMA 1975). Such facts were not developed due to trial counsel's concession. Trial counsel should avoid conceding issues at trial. Instead he should advance all reasonable theories for admissibility and insure that the supporting evidence is presented.

b. If the accused testifies on the merits after litigating a confession issue, trial counsel should show that the in-court testimony was not compelled by the admission of the confession. The accused in a recent case challenged the voluntariness of his confession as to the sale of heroin. He subsequently testified on the merits in order to establish an entrapment defense. Trial counsel cross-examined the accused as to the content of his statement but not as to the motivation for his testimony. Trial counsel later argued that the members could convict the accused based on his in-court testimony

even if they decided that the pretrial confession was inadmissible. The judge properly instructed, to the contrary, that if the members found the prior conviction involuntary they must find independent motivation before they could consider the in-court testimony. *See United States v. Bearchild*, 17 USCMA 598, 38 CMR 396 (1968). Trial counsel should lay the foundation of the independent basis for any in-court testimony.

4. Trial Tactics:

Trial counsel should not rely solely on one means of proving an element of the case if other means are also available. In a recent case trial counsel relied only on the accused's confession to establish the substance as heroin. The accused challenged the voluntariness of this confession. Where the confession is attacked at trial, counsel runs the risk of losing the entire case if the confession is subsequently held inadmissible. Trial counsel should have offered independent evidence as to the nature of the substance. In this case the lab report would have corroborated the confession and resulted in independent evidence of an element should the confession be held inadmissible on appeal.

5. Witnesses—Cross-Examination:

Trial counsel should not cross-examine by questions which create an impression which cannot be supported. In a recent case the trial counsel initiated cross-examination of one witness with the question, "Do you know what perjury is?". Thereafter, no further questions were asked to support this line of questioning, and trial counsel never offered any proof that the witness had committed perjury. Asking such a question in a vacuum will only confuse the jury. If this type of a question is to be asked the trial counsel should first establish a proper foundation showing the existence of a perjury. This can be either through an overall impression of the witness' testimony, or through a prior inconsistent statement of the witness. An example of the foundation for a prior inconsistent statement may be found in Appendix X(a), DA Pam 27-10, Military Justice Handbook (1 August 1969).

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

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	06	04	04	Asst SJA	USA Health Svcs Cmd	Ft Sam Houston, TX
MAJ	01A	01A	01	Dep Ch Atty (Proc Background)	Def Supply Svc	Washington, DC
CPT	01A	02A	01	Dep Ch Atty (Proc Background)	Def Supply Svc	Washington, DC

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
LTC	06	04	09	Mil Judge	USALSA	Falls Church, VA
CPT	07	06	02	Judge Advocate	USALSA	Falls Church, VA
CPT	08	07	01	Judge Advocate	USALSA	Falls Church, VA
LTC	09C	03	01	Intl Affairs	OTJAG	Washington, DC
MAJ	10D	03	01	Admin Law	OTJAG	Washington, DC
LTC	11A	04	01	JA Opinions Br	OTJAG	Washington, DC
MAJ	15	03	02	JAG Leg Asst Of	OTJAG	Washington, DC
LTC	14	02	01	Admin Law	OTJAG	Washington, DC
LTC	05A	02	01	Dep Chief	USA Clms Svc	Ft Meade, MD
LTC	48	02M	01	Dep SJA	US Mil Academy	West Point, NY
CPT	48	08M	02	Asst SJA	US Mil Academy	West Point, NY
MAJ	09	0/A	01	JA	USA Dep Newcumberland	Newcumberland, PA
MAJ	78B	02	01	Cmd JA	USA Depot	Corpus Christi, TX
MAJ	07	02	01	Judge Advocate	USAR Sch Tech Lab	Moffett Field, CA
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	10A	02	01	Asst SJA	Sixth US Army	Presidio SF, CA
CPT	03B	01B	03	Trial Counsel	USA Garrison	Ft Devens, MA
CPT	03C	01A	03	Defense Counsel	USA Garrison	Ft Devens, MA
MAJ	05A	03	01	Contract Law Off	USA Garrison	Ft Bragg, NC
MAJ	05A	04	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
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	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
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 Off	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	02	Trial 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	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
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

GRD	PARA	LINE	SEQ	POSITION	AGENCY	CITY
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
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	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
CPT	22D	22	02	Instr OCS Tng DI	USA Signal Cen	Ft Gordon, GA
CPT	07A	04	01	JA	Avn Center	Ft Rucker, AL
MAJ	38A	03	01	Asst SJA	USA Garrison	Ft Chaffee, AR
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	02	Trial Counsel	USA FA Cen	Ft Sill, OK
CPT	05A	07	01	Defense Counsel	USA FA Cen	Ft Sill, OK

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
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	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
CW4	38	03	01	Legal Admin Tech	USA Garrison	Ft Chaffee, AR
CW4	05	05A	01	Legal Admin Tech	USA Garrison	Ft B Harrison, IN
CW4	03A	01	01	Legal Admin Tech	USA Garrison	Ft Carson, CO

CLE News

1. TJAGSA CLE Courses

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

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

October 14–17: World Wide JAG Conference.

October 20–December 19: 94th Basic Course (5–27–C20).

November 4–7: 12th Fiscal Law (5F–F12).

November 17–21: 57th Senior Officer Legal Orientation (5F–F1).

November 17–21: 15th Law of War Workshop (5F–F42).

December 4–6: USAR JAGC Conference.

December 8–12: 8th Advanced Administrative Law (5F–F25).

December 8–19: 86th Contract Attorneys Course (5F–F10).

December 15–17: 5th Government Information Practices (5F–F28).

January 5–9: 16th Law of War Workshop (5F–F42).

January 5–9: 11th Contract Attorneys Advanced (5F–F11).

January 12–16: 2nd Negotiations, Changes, and Terminations (5F–F14).

January 15–17: JAGC NG Conference.

January 19–23: 8th Legal Assistance (5F–F23).

January 26–30: 58th Senior Officer Legal Orientation (5F–F1).

February 2–5: 10th Environmental Law (5F–F27).

February 2–Apr 3: 95th Basic Course (5–27–C20).

February 9–13: 9th Defense Trial Advocacy (5F–F34).

February 18–20: 3d CITA Workshop (TBD).

February 23–27: 2nd Prosecution Trial Advocacy (5F–F32).

March 2–6: 20th Federal Labor Relations (5F–F22).

March 9–20: 87th Contract Attorneys (5F–F10).

April 6–10: 59th Senior Officer Legal Orientation (5F–F1).

April 13–14: 3d U.S. Magistrate Workshop (5F–F53).

April 27–May 1: 11th Staff Judge Advocate Orientation (5F–F52).

May 4–8: 60th Senior Officer Legal Orientation (Army War College) (5F–F1).

May 4–8: 3d Military Lawyer's Assistant (512–71D20/50).

May 11–15: 1st Administrative Law for Military Installations (TBD).

May 18–June 5: 22nd Military Judge (5F–F33).

June 1–12: 88th Contract Attorneys (5F–F10).

June 8–12: 61st Senior Officer Legal Orientation (5F–F1).

June 15–26: JAGSO Reserve Training.

July 6–17: JAGC RC CGSC.

July 6–17: JAGC BOAC (Phase IV).

July 20–31: 89th Contract Attorneys (5F–F10).

July 20–August 7: 23d Military Judge Course (5F–F33).

August 3–October 2: 96th Basic Course (5–27–C20).

August 10–14: 62nd Senior Officer Legal Orientation (5F–F1).

August 17–May 22, 1982: 30th Graduate Course (5–27–C22).

August 24–26: 5th Criminal Law New Developments (5F–F35).

September 8–11: 13th Fiscal Law (5F–F12).

September 21–25: 17th Law of War Workshop (5F–F42).

September 28–October 2: 63d Senior Officer Legal Orientation (5F–F1).

2. Legal Aspects of Terrorism

The 2d Legal Aspects of Terrorism Course (5F–F43) will be held 10–12 September 1980. This course is designed to provide knowledge of the legal aspects of terrorism and counterterrorism, focusing on the questions confronting military commanders both in the United States and overseas concerning terrorism and the legality of counterterrorism measures. Active duty military or appropriate civilian attorney employed by the U.S. Government whose present or immediately impending major duties include advice to staff or command on the legal aspects of counterterrorism are eligible to attend. Guest speakers will include representatives from the FBI, State Department, and DA Law Enforce-

ment Branch. A practical exercise will be conducted so that attendees may apply principles learned to realistic terrorism scenario. Staff Judge Advocates or their representatives are encouraged to attend.

3. Civilian Sponsored CLE Courses

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

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

AAJE: American Academy of Judicial Education, Suite 437, 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.

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

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

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.

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

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

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

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

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

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

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

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.

November

5–7: FPI, Construction Contract Litigation, Williamsburg, VA.

5–7: FPI, Inspection, Acceptance, & Warranties, Washington, DC.

5–7: ABA New Federal Criminal Code, Washington, DC.

5–7: PLI, Basic Real Estate Transactions, San Francisco, CA.

5–7: IPT, Law Office Administration, Philadelphia, PA.

6–7: PLI, Computer Contracts, New York City, NY.

6–7: ALIABA/ELI, Toxic Substances & Solid Waste Management, Washington, DC.

6–8: ALIABA, Trial Evidence in Federal & State Courts, St. Thomas, VI.

6–7: SCB, Basic Skills—Part I, Columbia, SC.

6–8: VACLE, Advance Business Law Seminar, Irvington, VA.

6–7: PLI, Post Mortem Estate Planning, New York City, NY.

7–9: NCCDL, Drug Defenses, San Diego, CA.

7: KCLE, Bankruptcy Law & Regulations, Lexington, KY.

7: VACLE, Family Law, Roanoke, VA.

7: GICLE, Environmental Law, Atlanta, GA.

8–15: NYULT, Federal Taxation, New York City, NY.

9–14: NJC, Evidence, Reno, NV.

10–12: FPI, Changes in Government Contracts, Washington, DC.

10–12: FPI, Procurement for Lawyers, Las Vegas, NV.

13–14: PLI, Basic Will Drafting Techniques, San Francisco, CA.

13–14: PLI, Current Developments in Bankruptcy, San Francisco, CA.

14–15: KCLE, Environmental Product Liability Litigation, Lexington, KY.

14: VACLE, Family Law, Tysons Corner, VA.

14–15: PLI, Direct & Cross Examination of Experts, San Francisco, CA.

16–21: NJC, Sentencing Misdemeanants, Reno, NV.

16-21: NCDA, Trial Advocacy, West Palm Beach, FL.

17-19: FPI, Government Contracting Costs, Denver, CO.

17-19: FPI, Practical Negotiation of Government Contracts, Washington, DC.

17-21: SNFRAN, Government Contracts, Washington, DC.

17-21: FPI, The Masters Institute in Construction Contracting, Atlanta, GA.

20-21: SCB, Basic Skills—Part II, Columbia, SC.

20: VACLE, Family Law, Norfolk, VA.

20-21: GICLE, Banking Law, Atlanta, GA.

21-22: NDCLE, Probate & Estates in ND, Fargo, ND.

21: VACLE, Family Law, Richmond, VA.

30-12/6: NYULT, Federal Taxation, Phoenix, AZ.

JAGC Personnel Section

PP&TO, OTJAG

School Attendees

The following officers have been selected for the U.S. Army War College Corresponding Studies Course for AY 80-82:

LTC Roger G. Darley

LTC Oliver Kelley

Current Materials of Interest

1. Articles

Moran, Felix F., Major, USAF, *Free Speech, the Military and the National Interest,* Vol XXXI, No. 4 Air University Review 106 (May-June 1980).

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*
211430Z May 80	Report for Suspension of Unfavorable Personnel Action	DAPC-MSS-RF
121030Z Jun 80	Interim Revised Regulations—EEO Complaints	SFGR-SAMR
121500Z Jun 80	ADP Acquisition Seminar	DAAC-ZK
271400Z Jun 80	Applicability of New Military Rules of Evidence	DAJA-CL

b. Changes to Regulations

NUMBER	*TITLE*	*CHANGE*	*DATE*
AR 230–1	The Nonappropriated Fund System (Supersedes Interim Changes I02 and I03 to AR 230–1)	4	1 Jun 80
AR 340–18–1	Office Management: The Army Functional Files System General Provisions	15	1 May 80
AR 640–3	Identification Cards, Tags, and Badges (Supersedes AR 606–5 dated 15 Feb 67)		15 May 80
AR 635–200	Enlisted Personnel	3	1 May 80
DA Pam 550–22	Area Handbook—Cyprus		Jul 79
DA Pam 550–80	Area Handbook—Turkey		Jul 79