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## 1975 Army JAG Conference Features Secretary Hoffmann

*Adapted From the Remarks of: The Honorable Martin R. Hoffmann, Secretary of the Army, Delivered to the 1975 Army JAG Conference in Charlottesville, Virginia, on October 16, 1975.*

I would like to talk to you basically about what I see to be the three main circumstances that affect your client—the US Army—in the present climate.

The first of these elements is pretty obvious—it is the fact that we are now a standing Army in a peacetime mode of operation. You are all familiar with the saying: "God and the soldier we adore in times of conflict and no times more." I think that summarizes fairly well the essence of what we have to contend with as a peacetime force. I will come back to this general subject, but I would underscore the increased need to get our story to the public at all levels. We should have clearly in mind as a conscious part of our management approach the implications of a ready Army in peacetime. It has probably never been as important as it is now.

The second circumstance which has a tremendous bearing on everything we do is the institution of the all-volunteer Army. The Army is becoming an employer of individuals rather than a user of undifferentiated conscripted numbers of various talents. It has various implications—some immediate, some subtle and some of which apply directly to your legal business with respect to the Uniform Code of Military Justice.

The third phenomenon which we need to recognize and deal with involves the Middle East War. This is interesting to us on several levels. The first is that the Middle East War is a prominent engagement of arms that intervenes between the present time and Vietnam. This has a number of pluses. I think the statement should be made and repeated that following Vietnam it was still true that the military arms of the United States had never failed a task assigned it by its civilian and political leadership. That remains true today. Whatever may be the public's perception of a failure of national purpose or policy does not detract from the statement that the

objectives of the military as they were assigned have not failed.

The intervention of the Middle East War on the political and the perceptive level is an important one for us to keep in mind. It says a lot to us about such things as winning when you are both outgunned and outnumbered. But the fact is, it was a victory to which we can be very properly associated and it has had a very profound effect on what the Army is doing in other respects. In addition to being a counterweight to Southeast Asia, it has had a profound impact on the doctrinal aspects of how we will fight the next war. The "lessons learned" from the Middle East are quite graphic. They give us an almost unique perspective on the war that we may have to fight in the future. The implications for readiness, the need to fight the first battle, is a universal recognition within the Army. The implications of that need to win decisively the first battle on training, on how we train, on how we utilize our forces is inextricably bound up in this. But the drive from the perceptions of the Middle East War as a preview of the future has rapidly permeated the entire force. Anyone who has a chance to study the new training and readiness doctrines will quickly perceive that this is a great plus as far as the US Army is presently concerned.

Let me skip back to our first circumstance, the peacetime mode of operation. To generalize, in time of war, the report card for the military forces is usually combat success. We saw it in Vietnam and throughout the Middle East War. Other things tend to fall far into second place, depending on the intensity or identification with the national purpose behind the objectives of a war. In peacetime, however, past victories are forgotten. Prior accomplishments do not count for much; present management and management ability become the score card. This results in an increased emphasis on such things as logistics

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and those obvious management imperatives such as money. Monetary concerns bring into play the fine art of comptrollership. During the Vietnam War we invented a whole school of what one would call imaginative and constructive comptrollership. Some of the results of this were just announced in Washington to the tune of a \$150 million potential violation of the Anti-Deficiency Act. That is simply bad management. It results from sloppy practices by people not keeping their heads on their shoulders and thinking about what they are doing. Those sorts of incidents, not only from past eras, but those we commit at the present time, flash up in the public mind. They are the stuff with which politicians attempt to form the public's impression of the military and these oversights are extremely costly.

In addition to the affirmative steps we can take to improve the proper allocation of those resources of which we are trustees for the taxpayer, there are other examples. One I might mention to you I have noticed since "joining" the Army involves our response to outside stimuli. I am talking about the Army being sensitive and responsive—not to outside pressures, but to outside institutions and conventions which do not necessarily exert pressure but with which we need to be in line if we are going to be successful in commanding the high public regard that we need. Examples in the legal area are somewhat disturbing. One had to do with the Berlin Democratic Club case in which we had represented to the court that the Army had impounded certain sets of records. Whether or not the judge had ordered such action or we had made that representation to him makes little difference. It subsequently turned out, however, that the sealing of those records was quite blithely ignored. In fact, people were prowling through the records and withdrawing things for all we knew. It was absolutely unprofessional for lawyers and for the Army. That, in itself, was not significant until you look at the context in which that litigation was being carried out against the backdrop of the Church and Pike investigations and the various pressures in Europe. This is the sort of thing that, given the appropriate degree of sensitivity, never would have happened. On the other hand, because of distractions or failure to keep one's

eye on the ball, it did happen and I think it is going to be extremely costly to us.

The imperative in mounting a peacetime force, is good management, both sensitive and forward-thinking. We must conscientiously manage on the basis that the Army has a burden of proof to carry with the public. We have always had that burden of proof—we will have it to carry again. At the moment, the leadership of the Army is totally dedicated to the proposition that the Army and the armed forces will not fall into the sorry times they fell into after World War I, World War II and Korea. We have a very realistic perspective of that, and we cannot afford the loss of public confidence that is incurred by the sorts of oversights I mentioned.

With regard to the second imperative, the all-volunteer force and its impact, I have been very impressed with how the Army has responded institutionally to what is perhaps one of the great challenges of its entire history. Basically, the process involves the Army becoming an employer. I recently had the opportunity to take Senator Charles Percy, a businessman, employer, and a super salesman, out to USAREC. He was impressed, if not awed, with the rapidity with which the Army had begun the business of recruiting good people in much the same manner that any other large private institution would do. It was a very exciting trip for Senator Percy.

He asked me as I left, "Where did you get the people who run that program?" I said, "Sir, those are Army officers who have come in and taken on that job as part of their mission."

This sort of performance speaks extremely well for the attitude with which we have gone about of putting together an all-volunteer force. The feedback I receive during my tours in the field indicates the Army's receptivity to the quality of recruit we are now getting is uniformly high. There are those who may say it is not like "the old Army." But I think everybody will agree that there is nothing like "the old Army"—and it is doubtful that the old Army was like "the old Army." In any case "the new Army" is an excellent force. The personnel are probably better than during the draft—and certainly from the

point of view of motivation, given a reasonable level of expectation on the part of the recruit coming in, we have the best soldier that we have ever had in the Army.

We are dealing with a different sort of a soldier now, and there is a profoundly altered basis for his service. He is here because he wants to be here. The polls indicate that today's soldier comes to us because he wants a challenge whereby he can develop and mature. He wants leadership experience. And he views the Army—before he comes in and after—as a first-rate organization that can give him these sorts of things and more.

In a mid-west survey of the factors that led people into the Army, self-improvement and self-development topped the list at about 84 percent. Employment followed at about 79 percent; travel opportunities and education were around 70 percent. At 65 percent was a desire for public service and recognition of some obligation to serve the country, which, I think, is tremendously healthy. We have the emergence of a volunteer soldier who wants to be where he is. We are therefore challenged in our leadership to provide that which he has a right to expect, which is certainly *not* the draft Army. My observations at the unit level indicate that the Army is increasingly showing a great response to that challenge.

Let me speak now with some particularity about the role of the lawyer with respect to the new employer-oriented status of the Army. First, it should go without saying that it is a good time to take a hard look at the Uniform Code of Military Justice. As we have been doing over the past two years, we should keep the process going to, first, update the institution with those things we think it needs now and, second to let the Congress and the Executive know that we are not just going to come up every eight or nine years with some cataclysmic changes to the Code. We have got to establish a dialogue and a methodology wherewith, when we have good, new ideas and see a place the Code should be changed, we can go up with a change that year rather than sitting around and collecting a whole lot of things.

I think we are nearly in position to take a legislative package of Code revisions up, hopefully as early as next year, and start this business of broadening and modernizing our military legal institution.

Again, with a volunteer force, remember that we are not taking the citizen out of his comfortable civilian life and putting him under military control. He is volunteering to come over here. The difference in soldier attitudes and expectations of what the system should yield allows us to pick up the words of the Supreme Court in its recent decisions and assure the public that a Uniform Code and our system of military justice is, in fact, responsive to the objectives for which it was instituted—to help maintain the discipline of this force that we need to defend our country.

A new and very positive concomitant of the Army's employer status and the all-volunteer force are the early out procedures. Most, if not all, commanders that I have talked to, have been pleased with the flexibility they have through these procedures to move a man out of the service if he is not for the Army, and these commanders are delighted with the effectiveness of these procedures in running and training their units. The early out is a very important new dimension in our overall personnel structure within the Army. It is not without problems. Most of the E-3's and below I have met agree that we are getting the right people out through these procedures. There is, however, an undercurrent of thought that, in some cases, we are putting a person out too early. They feel that we are not giving him a chance—we are not discharging our responsibility to him by helping him become a valued employee and member of the team. I think it is a bit early for me to conclude where this comes down. There is no question that this problem is somewhat exacerbated at the troop level because of our shortage of middle grade NCo's. As a practical matter, in many units we do not have the experienced NCo who can sit down and work with the problem soldier and help him get himself shaped up so he does not suffer the consequences of an early discharge. By the same token, I think it is incumbent upon you as SJA's and JAG officers to play a role in this process so that we keep a sensitive rein on our early out procedure. The

misfit—the guy who does not want to do the job and could not be employed anywhere else—we still want him out. But the guy who with a little training could get back in the right direction—we have some obligation to help, because we *are* an employer in present-day America. And the ethic of employers to do that sort of thing is increasing, as must our own ethics. This is a developing area and I think it is one where some discussion among JAG officers as to how it is working would be very helpful.

Another point I would like to make concerns a theme that I hit at last year's JAG Conference. It involves our need as lawyers to stress to the commander those administrative approaches and remedies he has as alternatives or as measures he can take before he turns to the Uniform Code. Again, we have comfortable words from the Supreme Court regarding the nature of our military legal system and what its objectives are. We should operate the system to assure that we retain the confidence the Court has in us at this point. There is no question that the procedures under the Code will continue to be judicialized and made more visible. That is as it should be. It again reflects the progress of our society as a whole.

The key thing for attorneys is to keep our focus on the commander and what is necessary for him. He has a number of options that I know you are all familiar with: extra training, the withholding of privileges, administrative adjustments to rank, efficiency ratings, letters of commendation, written admonitions, and those actions which can impede one's opportunity for reenlistment. As we are becoming more selective in the number of people we let reenlist and the increasing standards we impose to get better reenlistees, these optional measures available to the commander, short of Article 15 and short of invocation of the Code, become increasingly important.

To the extent you are getting criticism from your commander that "you lawyers are judicializing and proceduralizing everything, and we aren't for it," you can hit him with a list of these alternatives and help him use them well. They all have safeguards. They all have certain procedural niceties with which you can be very help-

ful in assuring that the commander applies them correctly. But I think, even in the absence of command criticism, it is imperative that we keep presenting to the commander these alternative remedies to help him assume the discipline of his unit. That discipline and readiness will be an increasing premium throughout the years to come, I can assure you.

Now, for a few words between us military lawyers. I am aware of your concern over professional pay. I am keeping an eye on this issue through contacts in the DOD General Counsel's Office. We are coming up to a crunch point with the OSD on releasing our views regarding the various pro-pay bills now pending in the Congress to the Office of Management and Budget. I am hopeful that we will get something positive out of OSD which will allow us to positively go forward to OMB and have a constructive picture to present to the Congress. I personally favor some form of pro-pay—ideally applying across

the board. But, I do not know what we will wind up with. I am hopeful that we will, in fact, wind up with something.

Finally, with respect to JAG physical facilities, we are attempting to move out on that issue. In my discussions with you SJA's and many of your judges, I have come to share your concern over facilities: first, as they reflect the regard of your client—the Army—for you and, secondly, as they promote our ability as lawyers to accomplish our legal mission in the courtroom, the offices, and the waiting rooms of JAG shops throughout the Army. We are going to, I hope, come up with some procedures that will get some command attention and, hopefully, some budget priorities so we can begin progress in an area which I think is tremendously important to you in getting your job done and retaining for the JAG Corps the kind of young officers the Army wants and needs.

## THE CONTINUING JURISDICTION TRIAL COURT

*Remarks of Chief Judge A.B. Fletcher, Jr., Delivered to the Military Judicial Seminar in Monterey, California, on December 6, 1975.*

Every seminar for military legal personnel that I have attended has included a session devoted to recent decisions of the Court of Military Appeals and where the Court is going. Gentlemen, I would suggest to you that your initial decision as a trial judge as to any matter reviewable by the U.S. Court of Military Appeals places us on the map and on a specific road. I suggest further that close reading of the present Court's decisions, both the written word and what is left unsaid, gives direction more than ever before.

There are four areas of which I can speak for the total Court without dissent.

First, we will be a court of law with our decisions built upon the foundation of legal concepts. We will not promulgate a potpourri of factual decisions. You should read us primarily for the law announced. Don't interpret the law by placing undue leverage on the facts. Second, we will exercise the all writs power given us by the

United States Code. Third, we expect lawyers to act within the Code of Professional Responsibility, and we will enforce the Code. And finally, we, the Court, believe that the judges in the military, as well as ourselves, are subject to the Canons of Judicial Ethics not unsimilar to those proposed by the American Bar Association.

I have stated the unanimous thinking of the Court. I would now move to an area where the concepts expressed are unanimous, but the implementation is subject to debate by the individual judges. This is not to say that we differ in direction, but only in how to get there. I am speaking of changes in the Uniform Code of Military Justice. The total Court believes that now is the time for a look at the entire Code both to survey the overall direction of military justice to meet the needs of our dynamic military society and to select, by priority of necessity, reforms to be presented to Congress for consideration. At present, this is not happening.

Let me briefly outline for you the status of Code changes today. The Judge Advocates General, through their able Joint Services Committee, have a legislative package on changes to the Code ready in form to be considered by the Congress. A majority of the judges of the U.S. Court of Military Appeals do not support these changes. The judges have submitted for consideration by the Judge Advocates General and their joint committee which now includes a member of the Court's staff, areas that should be scrutinized for possible changes. The Judge Advocates General and the Judges of the Court are communicating through the Code Committee to an extent that finds no precedence in the history of the Court. I believe this is for the betterment of military justice.

From this background, I would like to go to a specific suggestion made by me for a change in the Uniform Code of Military Justice. I call it the continuing jurisdiction trial court to replace the present on-call trial court. What exactly do I mean when I speak of continuing jurisdiction of the trial bench. First, let me make it clear that I do not believe today that any trial judge in the military has any statutory authority to act until a court-martial is convened. I would advise you not to look at the majority opinions in the writ cases where we ordered the trial judge to hold a hearing on pretrial restraint as authority to exceed the Code. We merely called on the trial judge to meet the standard of a neutral and detached magistrate.

I am impelled by the stated purpose of the military society we serve to conclude that the commander's primary responsibility lies in fielding a force to carry out his stated objective. Only he and his superiors can decide who is necessary to accomplish this mission. No judicial system or officer thereof should or can be allowed to deter this objective. Similarly, the commander's role must not be cluttered with judicial decision-making for he has more important determinations. By these statements, I do not mean to relieve the commander of the authority conveyed to him in trust by the Code under the section concerned with non-judicial punishment. This is a provision affecting discipline.

To this judge, when we say that commanders are acting in a judicial capacity, we are prolonging a fiction. On trips to the field, I have discovered that what we really are talking about is judicial action taken by the staff judge advocate, said action later being approved by a command person. In this vein, let me add that the judgment of a trial court should be set aside only by an appellate tribunal consisting of judges trained in the law.

Let me return to the concept of a continuing jurisdiction trial bench. A judicial system should not create its society. In truth, the society brings into being a forum for justice to underprop that society's aim and purpose. The design for a continuing jurisdiction trial court cannot at any stage of the proceedings place any person in the military outside the jurisdiction of the command. Caveat, the *O'Callahan* decision of the Supreme Court. There are three areas in the present Uniform Code of Military Justice that provide these safeguards, and they must remain intact. First, the command function must be paramount at the time of initial apprehension, initial arrest, or initial confinement. Second, the command must have an opportunity after an Article 32 investigation to determine its needs without judicial interference. If the commander's need for an individual servicemember exceeds the merit for trial, he could foreclose further judicial proceedings. His acting time would require a specific limit. Third, when the findings are completed including a hearing on a motion for a new trial heard by the same judge that heard the case, then the command structure may suspend the execution of any sentence except the death penalty. At all other times and for all other purposes, commencing immediately subsequent to apprehension, the accused would be under the jurisdiction of the trial court. This places the responsibility solely upon the trial judge. Note, I say responsibility. This does not mean that he must do it all himself. I would not propose a specific plan mandatory for each branch of the service. Their uniqueness may require some differences.

Some of the responsibilities of the proposed trial court are such matters as a *Gerstein v. Pugh* hearing, a probable cause hearing to determine

whether a person should be detained and, if so, to additionally resolve what form of detention is appropriate. This must be decided by a neutral and detached magistrate. Note, I did not say the trial judge. Let me stop here for a moment to laud the Judge Advocate General of the U.S. Army for his foresight in promulgating a new Chapter 16 to AR 27-10, the Military Magistrates Program under a supervising military judge. This is a giant step forward.

Under my concept, the judge also would be responsible for calling, but not necessarily presiding over, an Article 32-type hearing. The judge also would be responsible for a random selection of a court, *i.e.*, a jury to try the accused. A valid excuse of a member to fulfill his military obligations would be binding upon the trial court. The trial bench also would have the responsibility for issuing subpoenas for witnesses. There are other judicial functions necessary for a continuing jurisdiction trial bench, and many would require individual adaptation to a particular branch of the service.

Let me turn to areas generally considered judicial that I presently do not favor bringing within the ambit of the proposed trial bench. I will recount only three; there are others.

The trial bench need not have sole authority to hold probable cause hearings and issue search warrants. The area of inspection, *vis-a-vis*, search is unique in the military. Commanders must be given great leeway in the area of inspections. In the search situation, however, the command must girder itself in the law if it wishes to proceed in the judicial process. Judicial process will provide judicial review. If I were speaking to staff judge advocates, I would remind them that bad practice in the search area gives rise to factual situations that lead appellate courts to extend or to create exclusionary rules.

But since I am talking to trial judges, I will remind you that you have the first swing at the question, and if you miss, you, not the staff judge advocate, will be reversed.

Let me turn to the sentencing process. I personally do not favor jury sentencing. One of my reasons being that it gives rise to an inequality of sentences for a particular crime. I recognize that it is and has been an accepted system in this country. We in the military judicial system do have one advantage over other systems. We have Article 66 which vests the Court of Military Review with power to review the appropriateness of adjudged sentences. This is a plus.

Under my concept, the trial bench would not have jurisdiction over any civil matters, *i.e.*, habeas corpus, mandamus, injunctions, or prohibition. The Court could not order command to cease to function or order action in any area outside the judicial process. The writ of *coram nobis*, however, is essential to correct in-house injustices and must be available at all levels.

Let me comment in one sentence as to the contempt powers of the trial judge. The trial bench must have the power to punish for contempt committed in the presence of the Court in judicial proceedings.

In a broad spectrum, that is it—a continuing jurisdiction trial court. An independent court of this nature coupled with an independent prosecutorial section and an independent defense section, I believe, would provide our society with a trial forum second to none which meets the society's need for justice at the trial level. More importantly, I believe it leaves those in command with the tools needed to carry out their mission without burdening them with judicial responsibilities for which they have neither the time nor the appropriate training.

### The First Amendment—Revisited

*By: Major Dennis M. Corrigan, Instructor, Civil & Administrative Law Division, TJAGSA, and Lieutenant Steven Rose, Excess Leave Officer, USN*

The era of anti-war, anti-defense protest appears, at least according to a casual glance at

newspapers, magazines and television, to have gone the way of Edsels, hula hoops and manual

typewriters. The public's attention has been turned to honesty, morality and unresponsive government on both the state and national scene.

Yet to the military commander, the regulation of soldier conduct and civilian behavior on military installations is still complicated by judicially imposed constraints on his otherwise broad powers to maintain law, order and discipline. Badgered by requests for use of facilities to promote this or that cause, harangued by groups to permit their access to soldiers for political purposes, and threatened by unionization of the soldiers under his charge, the commander turns to his judge advocate for advice on the scope of his authority to limit the exercise of First Amendment freedoms of speech, assembly and association.

This article is intended to provide judge advocates with a brief description of significant developments in the area of the exercise of First Amendment rights by soldier and civilian on military installations.<sup>1</sup>

The First Amendment rights of speech, association and peaceful assembly although secured to soldier and civilian alike by federal laws and the Constitution, are not absolute.<sup>2</sup> The need for an effective and disciplined Army justifies certain restraints on soldiers and civilians.<sup>3</sup> However, the proper scope of such restraints is a complex and delicate issue, subject to much litigation in the federal courts. In determining the scope of a commander's authority to regulate or prohibit First Amendment activities, a commander must reckon with a host of judicial decisions as well as with guidelines set forth in Departmental directives and regulations.<sup>4</sup>

(1) **Military Demonstrations.** The commander's authority to control *off*-post demonstrations is limited to military personnel. Army Regulation 600-20 provides that soldiers may not participate in picket lines or any other public demonstration while in uniform, on duty, or in a foreign country. The rationale of these restrictions is that an appearance by military personnel in the above situations would imply Army approval of the demonstration. Demonstrating is also prohibited when the activity constitutes a

breach of law and order, or when violence is reasonably likely to result.<sup>5</sup>

Commanders have much broader authority to control *on*-post activities, whether involving soldiers or civilians. Regulations explicitly prohibit participation by Army members in all *on*-post demonstrations.<sup>6</sup>

Also, broad standards established by the Department of Defense allow the commander to prohibit any activity on the installation which could interfere with or prevent the orderly accomplishment of the installation's mission or which presents a clear danger to the loyalty, discipline, or morale of the troops.<sup>7</sup> Exactly what constitutes "mission interference" or "clear danger" in a particular situation is largely left to the commander's judgment, although courts stand ready to review the reasonableness of his decision. In *Dash v. Commanding General, Fort Jackson, South Carolina*,<sup>8</sup> a federal district court indorsed the "clear danger" test and upheld the authority of the commander to deny a group of noncommissioned officers the use of military facilities for an open meeting to discuss the Vietnam War. In resolving this case, however, the court scrutinized with great care all the facts and circumstances surrounding the commander's decision. The court balanced the rights of the individuals against the needs of the military—a judicial technique used in resolving many First Amendment cases.

With one exception, courts have upheld the constitutionality of the "clear danger" test.<sup>9</sup> However, commanders who invoke its broad authority should be ready to support their judgment with specific, cogent reasons.

(2) **Dissident Literature.** Military directives state clearly that the First Amendment freedoms of speech and press apply to so-called "underground newspapers" and protect them from any blanket prohibition.<sup>10</sup> Generally, attempted control over underground newspapers and other dissident literature may occur in three circumstances—possession, publication, and distribution.

(a) *Possession.* Mere possession by a service member may not be prohibited, nor may the owner be disciplined.<sup>11</sup>

(b) *Publication.* As long as a service member participates off-post, on his own time, and with his own money and equipment, publication may not be prohibited. However, if the content of such literature violates Federal law(s), the author becomes subject to criminal charges.<sup>12</sup>

(c) *Distribution.* The commander's authority to regulate distribution of literature on a military installation is extensive. As a general rule, troops have a right of free access to news and publications available to other citizens. But the commander also has a responsibility to maintain loyalty, discipline and morale within his command. Para. III AI, DOD Dir. No. 1325.6 (12 September 1969) dealing with distribution of printed materials, seeks to accommodate these competing interests.

A commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as the post exchange and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that *prior approval* be obtained. . . in order that he may determine whether there is a *clear danger* to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would *materially interfere* with the accomplishment of a military mission.<sup>13</sup>

Only the clear danger to loyalty, discipline and morale test appears in Army regulations,<sup>14</sup> but the current Circular on dissent also includes the material interference test.<sup>15</sup> However, the real cornerstone of a commander's control over unofficial distribution is his power to require prior approval. Most installations now have a local regulation similar to the following:

Distribution on the reservation of publications, including pamphlets, newspapers, magazines, handbills, flyers, and other printed material, may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the post commander [or his authorized representative].<sup>16</sup>

This requirement for prior permission has sparked several lawsuits. In *Dash v. Commanding General, Fort Jackson, South Carolina, supra*, a group of servicemen asked a federal district judge to strike down a local regulation similar to the above example as an unconstitutional prior restraint on their First Amendment rights. The court held that while First Amendment rights are fundamental, the military establishment does have the right to limit the distribution of printed material on the military installation, and that the local regulation was constitutional.<sup>17</sup> The court noted that the right to restrict the distribution of printed materials is not a limitless power and any exercise of command to restrict distribution of literature of any sort must be reasonable.<sup>18</sup> The Army Circular on dissent echoes this need for reasonableness, stressing that a commander may not prevent distribution of a publication simply because he does not approve of its contents or because the publication is critical—even unfairly critical—of government policies or officials. In any event, continues the Circular, a commander must have “cogent reasons, with supporting evidence, for any denial of distribution privileges.”<sup>19</sup>

Even when, in the commander's judgment, a publication breaches the “clear danger” or “material interference” tests, the installation Commander may not actually prohibit the distribution of the literature; but he may *delay* its dissemination in appropriate cases pending final determination by the Department of the Army.<sup>20</sup> In *Schneider v. Laird*,<sup>21</sup> a post commander delayed distribution of the first two issues of an underground newspaper called “The Daisy,” but the Department of the Army overruled this decision and permitted distribution. Later the same installation commander delayed issue number four, and the Department subsequently prohibited distribution. Schneider, a serviceman who prepared and printed “The Daisy,” sued for declaratory and injunctive relief in the federal district court. He asserted that he was entitled to a hearing prior to any military denial of his request to distribute “The Daisy.” The Tenth Circuit Court of Appeals affirmed the district court's decision, upholding the right of the commander to ban distribution, and stated:

The unique posture and ability of a commanding officer to comprehend internal threats to his troops must augur against Schneider's position that the military's failure to hold a hearing before final determination deprived him of due process.<sup>22</sup>

Here again, courts are determining the reasonableness of the commander's actions. In sum, military authority to regulate distribution of literature has withstood all constitutional challenges. The continued viability of such restrictions, however, may ultimately depend not only upon the reasonableness of the commander's use of the "clear danger" and "material interference" tests, but also upon the promptness and procedural fairness used in making such determinations. Army regulations underscore this point by requiring a commander who delays distribution to inform superior commands of this action by telephone and also to submit a written report justifying his action to Headquarters, Department of the Army, within five days.<sup>23</sup>

(3) **Loss of Control over Base Access.** A commander's power to control on-post demonstrations by civilians hinges largely on his ability to control access to the military installation. In 1961, the Supreme Court in *Cafeteria and Restaurant Workers v. McElroy*,<sup>24</sup> reaffirmed a commander's broad power to exclude civilians from military bases.

It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline.

Paragraph III E, DOD Directive 1325.6 (12 September 1969) reflects this broad grant of authority.

The Commander of a military installation shall prohibit any demonstration or activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops. It is a crime for any person to enter a military

reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or re-enter an installation after having been barred by order of the Commander (18 U.S.C. 1382).

In 1972, however, the Supreme Court retreated from this broad view in the bellwether case of *Flower v. United States*.<sup>26</sup>

In *Flower*, the Supreme Court in a *per curiam* decision reversed appellant's conviction for reentering Fort Sam Houston in violation of a bar order.<sup>27</sup> Flower was originally barred for distributing leaflets within the installation on New Braunfels Avenue, Fort Sam Houston, a thoroughfare, and main traffic artery, in San Antonio, Texas.<sup>28</sup> When he reentered and again began distributing leaflets, he was apprehended and subsequently convicted. The Supreme Court held that because New Braunfels Avenue was a main traffic artery of the community and a "public street" the military had abandoned any claim to determine who walked, talked or leafleted on the Avenue.

This theory of abandonment of control advanced without debate in *Flower* has undergone various interpretations in lower federal courts. Responses have run the gamut from a limitation of *Flower* to its facts,<sup>29</sup> as suggested by the Solicitor General,<sup>30</sup> to a holding that after *Flower* a commander's approval of distribution of literature in "open" areas of the post is merely a ministerial act, the failure of which will justify a writ of mandamus.<sup>31</sup> One common denominator in all court decisions, whether supporting or limiting a commander's authority, is the courts' acceptance of the "open-closed" distinction enunciated in *Flower*. Courts have tended to apply the *Flower* rationale to an entire post, and not just to main traffic arteries like New Braunfels Avenue. Generally, courts now hold that if a base is "closed" to the public, then a commander retains his broad authority under *McElroy*; but if any portion of an installation is "open" to the public, then civilians have a constitutionally protected right in these areas to exercise their freedom of expression.<sup>32</sup>

Whether a base is "open" or "closed" in the *Flower* sense is largely a question of fact. In the

past, courts have considered such factors as the number of roadways and other facilities open to civilian use, the presence of gate guards and military police on patrol, and the existence of a perimeter fence or wall enclosing the installation. However, successful efforts to control and limit access must be more than *pro forma*.<sup>33</sup> Moreover, even on a "closed" installation, where a Commander would appear to have a wider discretion to exclude civilians, he cannot act arbitrarily.<sup>34</sup>

Despite these inroads and constraints, a commander still retains considerable authority over even the "open" areas of his installation. First, he maintains the right to evict persons and issue bar notices for all unlawful activities which do not merit constitutional protection.<sup>35</sup> Secondly, even if civilians gain access to the post for leafleting, demonstrations or political rallies, a commander may prescribe appropriate time, place and manner restrictions so that the activity will not disrupt military functions.<sup>36</sup> In so doing, a commander may probably require that prospective demonstrators obtain permission, similar to a civilian community's licensing or permit programs;<sup>37</sup> however, this exact point has not yet been litigated and is the subject of argument before the Supreme Court this term in the *Spock* case.

(4) **Petitions.** Soldiers, as well as civilians, may exercise their constitutional right to "petition the Government for a redress of grievances." However, as with other First Amendment freedoms, this right is not absolute.<sup>38</sup> Military directives, federal statutes and judicial decisions permit the installation commander to impose reasonable restrictions on the exercise of this right on the installation.

Department of Defense Directive 1325.6 establishes guidelines for dealing with dissident activities, including, by implication, petitions. This directive instructs a commander to

... prohibit any demonstration or activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops.<sup>39</sup>

Also, if the petition involves distribution of printed materials, a commander appears to have the authority to require that the petitioner obtain permission to solicit signatures on base.<sup>40</sup> Army Regulations echo both of these rules.<sup>41</sup>

Department of Defense Directive 1344.10, which deals with military participation in political activities, specifically permits a service member to

... sign a petition for specific legislative action or a petition to place a candidate's name on an election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces.<sup>42</sup>

Although no mention of either writing or circulating a petition is made in the Directive, it would prohibit a member of the Armed Forces from taking part in any petition-related activity involving partisan politics.

While none of these regulations or directives controls petitioning directly, their potential reach is extensive because petitions often involve elements of a demonstration, distribution of literature or partisan politics.<sup>43</sup>

Note must also be made of 10 U.S.C. §1034 (1970) which provides:

[no] person may restrict any member of the armed force in communicating with a Member of Congress unless the communication is unlawful or violates a regulation necessary to the security of the United States.<sup>44</sup>

Military directives refer to this statute, but none provide any guidance on how it relates to any petitioning limitations. This ambiguity poses a troublesome question. If a soldier wishes to circulate a petition ultimately headed for Congress, but the language of the petition represents in the commander's judgment a clear danger to discipline and morale, what rule governs the situation—the federal statute or the military directives?

In response to this question, courts have hammered out a compromise. The leading cases generally protected a service member's right to petition, while allowing the commander to prescribe time, manner and place restrictions appropriate to the situation.

In *Carlson v. Schlesinger*,<sup>45</sup> the Court of Appeals for the District of Columbia ruled that a commander could prohibit the public circulation for the purpose of obtaining signatures, of an anti-war petition on a base in the Vietnam war zone. The Court was quick to add, however, that although war conditions justified the exercise of the commander's discretion in this case, service members retain both a statutory and a First Amendment right to petition Congress:

We must point out that the commanders' decisions did not totally eradicate the first amendment rights of the servicemen involved. Permission to solicit signatures was denied under authority of a regulation dealing only with the distribution or posting of material. The petition could have been read aloud or its contents discussed at informal group sessions. In fact, each serviceman who signed the petition was perfectly free to communicate the exact sentiments by letter to Congress. This right of petition is protected both by statute, 10 U.S.C. § 1034 (1970), and by [military regulation]. What has happened here is that in a combat zone context the military has reasonably regulated the time and manner of protected first amendment activity.<sup>46</sup>

*Allen v. Monger*<sup>47</sup> posed similar issues, except that the setting for this case was a Navy ship rather than a base in Vietnam. The court held that a commanding officer's complete ban on shipboard solicitation of signatures for petitions constitutes an abuse of discretion and a violation of 10 U.S.C. § 1034. However, the court noted that cramped quarters and mission accomplishment may render the shipboard environment unsuitable for uncontrolled petitioning. In balancing military necessity against individual rights, the *Allen* court suggested that petitions aboard ship should be posted in a readily accessible public place rather than actually circulated.

Both the *Carlson* and *Allen* decisions permit time, place and manner controls,<sup>48</sup> while preserving the fundamental right to petition. Courts have suggested that the greater the military's legitimate interests, the greater must be the military's latitude to prescribe reasonable limitations on the exercise of First Amendment freedoms.<sup>49</sup> Thus, in a war zone, regulation of petitioning may be greater than aboard ship; and presumably, shipboard conditions permit greater control than would be permissible in the peacetime environment of an installation open to the public.<sup>50</sup>

Unfortunately, no cases deal with the permissible limitations a commander may impose upon petitioning on an installation, in the definitive way that *Carlson* and *Allen* spell out the rules for war zones and ships. It is suggested that in deciding whether to ban, partially control, or allow petitioning on post, a commander should consider the following factors:

- (1) whether the petition involves solicitation of signatures, other proselytizing, and/or disruptive conduct;
- (2) whether the installation is "open" or "closed" to civilians;
- (3) whether the petition involves partisan;<sup>51</sup> and
- (4) whether the petition is directed toward Congress or other public officials.

The precise weight due each of these factors must await further litigation. For the present, however, installation commanders may properly expect to exert more control over petitioning involving disruptive conduct and partisan politics than over one that is quietly and unobtrusively posted and which has Congress as its ultimate destination.

(5) **Grooming Standards.** Do individuals have a constitutional right to control their own appearance? Thus far, the Supreme Court has declined to settle this issue, and the federal circuits have split on the question, although the majority does recognize such a right.<sup>52</sup> Even courts favoring this right, however, agree that the right is not absolute and may be subject to limitations. The authority of an installation

commander to enforce grooming standards on his post would seem to depend on whether the individual is active duty military, a reservist, or a civilian.

(a) *Military.* Paragraph 5-39, Army Regulation 600-20 (23 March 1973) contains basic guidelines on personal appearance for both active-duty soldiers and reservists.<sup>53</sup> Courts have unanimously upheld the military's right to impose grooming standards,<sup>54</sup> although splitting sharply on the issue of whether or not a reservist may legitimately comply with these standards during drills or summer training by wearing a shorthair wig.<sup>55</sup> With respect to the Army, a change in regulations has mooted this question. Male reservists may now wear wigs during active duty periods of 30 days or less, as long as the wig conforms to standard haircut rules and does not interfere with performance of duty.<sup>56</sup>

(b) *Civilians.* There is no statute or Army regulation which specifically authorizes an installation commander to issue grooming standards for civilians who visit, work at, or reside on Army property. However, as part of his general authority to maintain installation welfare, a commander may issue appropriate grooming rules. The validity of such rules depends on two factors. First, they must be clearly understandable and not vague.<sup>57</sup> Secondly, the rules must relate to the maintenance of installation health, safety, morale, or welfare.<sup>58</sup>

Also, application of such grooming rules depends on the status of the civilian—that is, whether the person is a federal employee, dependent, retiree, or casual visitor. With respect to federal employees working at an installation, the commander in concert with the Civil Service Commission, may establish local regulations, including grooming standards, violations of which subjects civilian employees to disciplinary action.<sup>59</sup> Thus far, no cases have raised the grooming issue in this specific context. Closely, analogous, though, are cases challenging dress codes set up by private and municipal employers. Federal circuits handling these cases have cited such factors as public interaction,<sup>60</sup> safety,<sup>61</sup> and job requirements<sup>62</sup> as sufficient to justify limited employer control over an employee's appearance.

With respect to dependents, retirees, and casual visitors, an installation commander assumes a role similar to that of city mayor. As such, he may issue general welfare regulations which, if reasonable and not vague, are legally enforceable by barring violators from the installation<sup>63</sup> or by denying use of a particular facility.<sup>64</sup>

However, in enforcing a welfare regulation such as a grooming code, the commander may not deny benefits provided by statute, such as medical care (routine as well as emergency) and dependent education.<sup>65</sup>

In sum, grooming codes for civilians are subject to an overall requirement of reasonableness. No cases have arisen which directly challenge an installation commander's right to enforce such a code. However, in view of the expanding constitutional right to control personal appearance, as set against the considerable value of the privileges and rights which may be lost, commanders should anticipate future litigation in this area. Installation commanders should tailor their local grooming regulations to maintain health, safety, morale and welfare while at the same time eliminating any unnecessary impact on personal tastes.<sup>66</sup> Also, until the Supreme Court decides to issue firm guidelines in this legally turbulent area, it is important that judge advocates keep abreast of federal district and circuit court decisions applicable in their own locale.

#### FOOTNOTES

1. It is suggested that this Article be filed with paragraph 6-13d, Chapter 6, DA Pam 27-21, *Military Administrative Law Handbook* (Oct 1973, with Change 1) until publication of a revised Chapter 6 in FY 76.

2. *Dash v. Commanding General, Fort Jackson, South Carolina*, 307 F. Supp. 849 (D.S.C. 1969), *aff'd per curiam*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971); *Cox v. Louisiana*, 379 U.S. 536 (1965).

3. In *Parker v. Levy*, 417 U.S. 733 (1974), the Supreme Court supported a difference in treatment between soldier and civilian, holding that soldiers have more limited First Amendment rights than do civilians.

4. Dep't of Defense Directive No. 1325.6 (12 September 1969) (see Appendix 6-A); Dep't of Army Circular No. 632-1, Guidance on Dissent (1 May 1974).

5. Paragraph 5-16, Army Reg. No. 600-20, Army Command Policy and Procedure (C5 25 October 1974), implements Dep't of Defense Directive No. 1325.6 (12 September 1969). In *Locks v. Laird*, 441 F.2d 479 (9th Cir. 1971), *cert. denied*, 404 U.S. 986 (1972), an airman pending court-martial charges was denied injunctive relief against an Air Force regulation prohibiting the wearing of the uniform at a public demonstration. In *Culver v. Secretary of Air Force*, 389 F. Supp. 331 (D.D.C. 1975), the court upheld the constitutionality of, and sustained a conviction under, Air Force Regulation 35-15(b) which prohibits USAF members from demonstrating in a foreign country.

6. Para. 5-16c, Army Reg. No. 600-20, Army Command Policy and Procedure (C5 25 October 1974); See, Dep't of Army Circular No. 632-1, Guidance on Dissent (1 May 1974).

7. Para. IIIE, Dep't of Defense Directive No. 1325.6, (12 September 1969).

8. 307 F. Supp. 849 (D.S.C. 1969) *aff'd mem.*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

9. Committee for *G.I. Rights v. Calloway*, 518 F.2d 466 (D.C. Cir. 1975). Upholding, *inter alia*, a regulation which authorized commanders to prohibit display on barracks walls of any posters constituting a clear danger to military loyalty, discipline or morale; *Carlson v. Schlesinger*, 364 F. Supp. 626 (D.D.C. 1973) (voiding Air Force regulation requiring command authorization to circulate petitions on base, in uniform, or in a foreign country where the Base Commander determines such activity presents a clear danger to loyalty, discipline or morale, *reversed* 511 F. 2d 1327 (D.C. Cir. 1975) (upholding AF regulation as constitutionally sound).

10. Dep't of Defense Directive No. 1325.6 (12 September 1969); Dep't of Army Circular No. 632-1, Guidance on Dissent (1 May 1974).

11. Para. III A2, Dep't of Defense Directive No. 1325.6 (12 September 1969) and para. 5a(4) Dep't of Army Circular No. 632-1, Guidance on Dissent (1 May 1974). *Accord, Stanley v. Georgia*, 394 U.S. 557 (1969) (mere private possession of obscene movie film not punishable). In *Stanley*, the Supreme Court ruled that the First Amendment protects a person's right to "read or observe what he pleases" and "the right to satisfy his intellectual and emotional needs in the privacy of his own home."

12. See, e.g., *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972) (serviceman editor of underground newspaper convicted of uttering disloyal statements with intent to promote disloyalty, in violation of article 134, UCMJ). Content violations are chargeable under any of the following UCMJ articles:

- Art. 82, soliciting desertion, mutiny, or sedition;
- Art. 88, contemptuous words against officials;
- Art. 89, disrespect toward a superior commissioned officer;
- Art. 92, failure to obey a lawful order or regulation (incorporating various service regulations on clearance, dissent, political activities);

Art. 134, disloyal statements, with intent to promote disloyalty;

Art. 134, clause three, which may incorporate:

18 U.S.C. § 1381, enticing desertion;

18 U.S.C. § 2387, counseling insubordination, disloyalty, mutiny, or refusal of duty;

18 U.S.C. § 2388, causing or attempting to cause insubordination.

13. Emphasis added.

14. Para. 5-5b, Army Reg. No. 210-10, Installations (C8 16 September 1974).

15. Para. 5a(3), Dep't of Army Cir. No. 632-1, Guidance on Dissent, (1 May 1974) (see Appendix 6-B). The Circular lists interference with training or a troop formation as situations where a commander could invoke this test.

16. The Judge Advocate General recommended this language for use in local implementing regulations. 70-1 JALS 27 (1970); 69-9 JALS 15 (1969).

17. 307 F. Supp. 849 (D.S.C. 1969), *aff'd mem.*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

18. *Id.*, at 854.

19. Para. 5a(3), Department of Army Circular No. 632-1, Guidance on Dissent, (1 May 1974) (see Appendix 6-B).

20. Para. 5-5d, Army Reg. No. 210-10, Installations (C8 16 September 1974), DAJA-AL 1974/4188, 17 May 1974.

21. 453 F.2d 345 (10th Cir. 1972).

22. *Id.*, at 347. The court relied heavily on *Dash v. Commanding General, Fort Jackson, South Carolina*, 307 F. Supp. 849 (D.S.C. 1969), *aff'd mem.*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971) and *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), *cert. denied*, 401 U.S. 982 (1971). In *Yahr*, the court refused to grant a preliminary injunction against the commanding general of Fort Bragg, North Carolina, who would not allow distribution of an underground newspaper ("The Bragg Briefs") on post. The court commented that:

Within the military establishment, and under the regulation in question the commanding officer has primary responsibility for determining the impact of the newspaper on the men in the command.

*Id.*, at 691. See also *Noland v. Irby*, 341 F. Supp. 818 (D. Ky. 1971), *aff'd*. No. 71-1661, 6th Cir., April 24, 1972, *cert. denied sub nom. Noland v. Desobry*, 409 U.S. 934 (1972).

23. Para. 5-5d, Army Reg. No. 210-10, Installations (C8 16 September 1974).

24. 367 U.S. 886 (1961).

25. *Id.*, at 893.

26. 407 U.S. 197 (1972), *rev'g* 452 F.2d 80 (5th Cir. 1971).

27. The Court acted without granting *certiorari* or having the benefit of briefs and argument on the merits.

28. The United States had granted an easement of "unobstructed civilian passage" on New Braunfels Avenue to the City of San Antonio.
29. *Spock v. David*, 349 F. Supp. 181 (D.N.J. 1972), *rev'd* by 469 F.2d 1047 (3d Cir. 1972).
30. Letter from the Solicitor General to the Acting Judge Advocate General of the Army, dated 28 June 1972.
31. *Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1973) (leafletting permissible on public highway and adjacent areas at Fort Bragg).
32. *CCCO Western Region v. Fellows*, 359 F. Supp. 644 (D. Cal. 1973) (leafletting not subject to a bar order on the public portions of San Francisco Presidio); *Spock v. David*, 469 F.2d 1047 (3d Cir. 1972), *aff'd after remand* 502 F.2d 953, *cert. granted* 74-848 *sub nom. Schlesinger v. Spock* (political candidate must be permitted to campaign on unrestricted portions of Fort Dix despite the military's long tradition of political neutrality); *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973) (commander may deny use of camp chapel for a Vietnam protest/memorial service, when chapel had been used exclusively for religious service conducted under the supervision of camp chaplains for the sole benefit of military personnel); *Burnett v. Tolson*, note 31, *supra*; *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1974) (protest activities at areas of Air Force Academy held open to the public not subject to bar letters and subsequent 18 U.S.C. § 1382 conviction); *New Mexico ex rel. Norvell v. Callaway*, 389 F. Supp. 821 (D.N.M. 1975) (commander of White Sands missile range, a "closed" base, may deny a state-sponsored group permission to enter the range to search for treasure trove). Department of Army Circular 632-1, Guidance on Dissent, (1 May 1974), does not reflect this inroad which civilian courts have made into base access. Para. 5e, dealing with on-post demonstrations by civilians, asserts only that a commander may not "arbitrarily" deny access to public areas.
33. *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1974) (actions taken by Commandant of the Air Force Academy to "close" the post were *pro forma* where football games and the Academy chapel were open to the public and air police only selectively stopped persons who sought entry).
34. Para. 5e, Dep't of Army Cir. 632-1, Guidance on Dissent (1 May 1974). In *Jenness v. Forbes*, 351 F. Supp. 88 (D.R.I. 1972), the district court originally sustained a commander's exclusion of political campaigners from his "closed" post. Shortly afterwards, however, the Vice-President was admitted to the base in his capacity as a political candidate. The court then issued a supplemental opinion which characterized the base commander's prior refusal as arbitrary and capricious. The rule of *Jenness* seems to be that once the commander of a closed post admits one political speaker, he incurs a constitutional obligation to admit all other candidates on equal terms.
35. *Spock v. David*, 502 F.2d 953, at 957.
36. *Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1973); *Spock v. David*, 469 F.2d 1097 (3d Cir. 1972); *see, generally, Cox v. Louisiana*, 379 U.S. 550 (1965).
37. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).
38. *See* text accompanying notes 3 and 4, *supra*.
39. Para. IIIE, Dep't of Defense Directive 1325.6, (12 September 1969) (emphasis added).
40. Para. IIIA, Dep't of Defense Directive 1325.6, (12 September 1969). *See* text accompanying notes 10 through 23, *supra*.
41. Para. 5-5, Army Reg. No. 210-10, Installations (C8 16 September 1974) which deals with a commander's authority to control distributions of literature, mentions only the "clear danger" test; however, Dep't of Army Circular 632-1, Guidance on Dissent (1 May 1974) includes the "material interference" as well as the "clear danger" test (para. 5a for distribution of literature and para. 5e for demonstrations).
42. Enclosure (1), para. 2, Dep't of Defense Directive 1344.10, Political Activities by Members of the Armed Forces (23 September 1969).
43. Article 138 of the Uniform Code of Military Justice also protects a service member's right to submit grievances against his military commanders.
44. Para. IIIG, Dep't of Defense Directive 1325.6 (12 September 1969) specifically reminds commanders that "a [service] member may petition or present any grievance to any member of Congress . . ." Para. 5h, Dep't of Army Circular 632-1, Guidance on Dissent (1 May 1974) repeats this statement *verbatim*. *See also* Dep't of Army Field Manual 27-1, Legal Guide for Commanders, para. 9-7 (20 September 1974), which counsels the commander that "a soldier may write or petition any member of Congress about any complaint. Commanders should not interfere with or attempt to dissuade a soldier from the exercise of this right."
45. 511 F.2d 1327 (D.C. Cir. 1975), *reversing*, 364 F. Supp. 626 (D.D.C. 1973) (the district court had held as unconstitutional vague an Air Force regulation which authorized prior restraint of petitions based on the "clear danger" test). Petitions fall into the gray area between demonstrative conduct and pure speech. In *Carlson I* (D.D.C. 1973), the court emphasized the "speech" aspects of the case, characterizing the petition in question as a passive exercise of first amendment rights, lacking all traces of inflammatory rhetoric and unlawful or disruptive conduct. Such a pure form of expression, concluded the district court, is relatively innocuous and could not be banned on the basis of either the "clear danger" or the "material interference" test. Conversely, *Carlson II* (D.C. Cir. 1975) stresses the demonstrative side of the case, calling attention to the war zone setting, the public nature of the forum requested by petitioners, and the fact that the regulation under constitutional attack dealt only with the distribution or posting of material and not with expression in general. This emphasis on the "conduct" aspects of the case is a prime factor in the Court of Appeals' decision to uphold the military commander's judgment and sustain the "clear danger" test as constitutional.
46. 511 F.2d at 1333.

47. No. 73-745 RFP (N.D. Cal. August 23, 1974).

48. *Grayned v. City of Rockford*, 408 U.S. 104 (1972) discusses the government's right to regulate the time, manner and place of first amendment activity. See also JAGA 1969/4746, 21 November 1969 (commanders may impose reasonable restrictions on the "circulation of petitions for signature" on the installation).

49. *Carlson v. Schlesinger*, 511 F.2d 1327, 1331 (D.C. Cir. 1975). In *Callison v. United States*, 413 F.2d 133 (9th Cir. 1969) (sustaining conviction for disorderly conduct after military inductee disobeyed order to stop soliciting signatures for an anti-war petition at an induction center), the court stated that

[i]n judging the reasonableness of restrictive regulations the extent to which the restriction imposes a burden on free exercise of the rights must be taken into balance with the public interest involved . . . . The order was directly related to a valid important governmental purpose, that of maintaining an orderly process of induction—one free from disruption or disruptive potential. (413 F.2d at 136)

50. Courts appear to be more willing to allow time, manner and place restrictions on conduct than on speech. See, *Grayned v. City of Rockford*, 4-8 U.S. 104 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Cox v. Louisiana*, 379 U.S. 550 (1965).

51. By law and tradition, the military maintains a strict political neutrality. DOD Directive 1344.10 explicitly and strongly reinforces this neutral stance, allowing a commander to bar circulation of all petitions where a soldier uses his service affiliation to aid in proselytizing a cause. Thus, historically, the military base has been politically neutral grand for both soldiers and civilians. However, the *Spock* case suggests that political candidates may now be entitled to campaign on bases held "open" to the public.

52. The following circuits recognize an adult's constitutional right to control his/her own appearance: First, *Friedman v. Froehlke*, 470 F.2d 135 (1st Cir. 1972); Second, *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973); Third, *Stull v. School Board*, 459 F.2d 339 (3d Cir. 1972); Fourth, *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972); Fifth, *Landsdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972); Seventh, *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972); and Eighth, *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971).

53. See also Army Reg. No. 670-30, Female Personnel (13 May 1969) including changes promulgated by DA msg 11133oz APR 74), which establishes grooming standards for female service members with respect to hairstyles, makeup, jewelry, scarves, skirts, and maternity attire. Also, paragraphs 5-40 through 5-47 of Army Reg. No. 600-20, Army Command Policy and Procedure (C4 12 June 1974) establish certain grooming exceptions for members of the Sikh religion.

54. *Hall v. Fry*, 509 F.2d 1105 (10th Cir. 1975) (national guard); *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971)

(reservist); *Agrati v. Laird*, 440 F.2d 683 (9th Cir. 1971) (reservist); *Doyle v. Koelbl*, 434 F.2d 1014 (5th Cir. 1970), cert. denied, 402 U.S. 908 (1971) (active-duty regular); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969) (reservist); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969) (reservist).

55. The following cases uphold the ban on wigs: *Smith v. Commanding Officer, 1st Battalion 23d Marines, 4th Marine Division, U.S. Marine Corps Reserve*, 380 F. Supp. 588 (S.D. Tex. 1974); *Martin v. Schlesinger*, 371 F. Supp. 637 (N.D. Ala. 1974); *Whitis v. United States*, 368 F. Supp. 822 (M.D. Fla. 1974); *Hipple v. Warner*, 368 F. Supp. 301 (N.D. Ga. 1973); *Talley v. McLucas*, 366 F. Supp. 1241 (N.D. Tex. 1973); *McWhirter v. Froehlke*, 351 F. Supp. 1098 (D.S.C. 1972); *Cossey v. Seaman*, 344 F. Supp. 1368 (W.D. Okla. 1972).

The following cases have granted reservists the right to wear wigs: *Hough v. Seaman*, 493 F. 2d 298 (4th Cir. 1974); *Hennig v. United States*, 385 F. Supp. 1138 (N.D. Ill. 1974); *Cullen v. United States*, 372 F. Supp. 441 (N.D. Ill. 1974); *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973); *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973); *Good v. Mauriello*, 358 F. Supp. 1140 (W.D. N. Y. 1973); *Garmon v. Warner*, 358 F. Supp. 206 (W.D. N. C. 1973); and *Friedman v. Froehlke*, 470 F.2d 1351 (1st Cir. 1972). Courts allowing the use of wigs have often emphasized that reservists spend far more time as civilians than as soldiers.

56. Para. 5-39d, Army Reg. 600-20, Army Command Policy and Procedure (C5 25 October 1974). Male active-duty personnel may wear wigs (while in uniform or on duty) *only* to cover natural baldness or physical disfiguration. This difference in treatment of regular and reserve soldiers, although justified by the "disparity of time" argument (see note 55, *supra*) and growing judicial pressure, may run afoul of 10 U.S.C. § 277 (1970), which states:

"Regular and reserve Components: Discrimination Prohibited.

Laws applying to both Regulars and Reserves shall be administered without discrimination—

- (1) among Regulars;
- (2) among Reserves; and
- (3) between Regulars and Reserves."

Courts have not yet ruled on this apparent conflict.

57. For example, a grooming regulation prohibiting "extreme hairstyles," "exaggerated sideburns," while enforcing "conservative styles that permit ready identification as males" or "traditional standards of good taste," is vulnerable to a vagueness challenge. JAGA 1969/3906, 9 May 1969.

58. For example, the regulation might require both males and females with hair over a certain length to wear a hair net before entering a swimming pool (health) or before working around a craft shop equipped with power machines (safety).

59. 5 U.S.C. § 1300 *et seq.* (1970).

60. *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C.Cir. 1973) (employer justified in regulating appearance of employees who deal with the public).

61. *Stull v. School Board*, 459 F.2d 339 (3d Cir. 1972) (invalidating high school hair regulation except as applied to students attending shop classes because of safety consideration).

62. *Stradley v. Anderson*, 478 F.2d 188 (8th Cir. 1973) (upholding appearance regulation of police department because police job description requires discipline and public confidence, both of which the court thought to be affected by appearance). *But see Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973) (rejecting argument that grooming standards necessary for the purpose of maintaining police discipline).

63. 18 U.S.C. § 1382.

64. Para. 5-2d, Army Reg. No. 210-10, Installations (C8 16 September 1974), instructs the installation commander to

"set aside suitable facilities . . . for use as day-rooms, . . . and [the installation commander] will prescribe rules governing their use." (Emphasis added). Paragraph 5-8 states that the installation commander "is responsible for the granting of privileges at facilities under his jurisdiction. See Army Reg. No. 28-1, Army Recreation Services (15 October 1973); Army Reg. No. 28-62, Army and Air Force Motion Picture Service (3 April 1972); Army Reg. No. 31-200, Army Commissary Operating Procedures (13 February 1968); Army Reg. No. 60-10, Exchange Service General Policies (21 March 1973); Army Reg. No. 210-55, Financial Support for Morale, Welfare, and Recreational Programs and Facilities (5 December 1973); and Army Reg. No. 230-60, The Management and Administration of the U.S. Army Club System (30 April 1975).

65. See generally JAGJ 1960/8346, 6 May 1960, and attached cases.

66. DAJA-AL 1973/5207, 30 Nov 1973; JAGA 1969/3906, 9 May 1969.

## MOTIONS IN LIMINE

### An Often Neglected Common Law Motion

By: CPT Anthony J. Siano, JAGC Defense Appellate Division

Rare, if not nonexistent, is the trial defense counsel who has not been a party to the following scenario: Defending an accused in a contested case before a court with members, one anticipates inadmissible but clearly prejudicial information coming before the members, either in evidence or by argument. Knowing an anticipatory objection to be untimely<sup>1</sup>, counsel poises himself for the critical synaptic pause between the ultimate question and the damaging answer. Trial counsel, through an excess of zeal or a misapprehension of the law, reaches the impermissible matter and the objection, which may or may not be sufficiently quick to block a damaging answer, is made.

In this situation, triumph on the objection is as costly as defeat. In many cases, inadmissible matter is logically relevant to the laymen on a jury. They perceive the defense objection, if it precedes the answer, to be an attempt to hide something from them and allows them to assume the worst. If the answer is given, the defense counsel is left with the exercise in futility known as the "curative instruction"<sup>2</sup> as his only remedy. A failure to object<sup>3</sup> or to accept the military

judge's offer of an instruction<sup>4</sup> may result in a waiver of the issue on appeal. Yet, the instruction itself, not to mention the objection and the ensuing colloquy, only repeats and reinforces the damaging matter for the court members.

Defense counsel need not always allow themselves to be drawn into this Hobbsian Choice. The common law has provided an excellent, albeit little known, weapon with which to effect the total exclusion of such prejudicial matter from the consideration of court members<sup>5</sup>. That weapon is the motion *in limine*.

*In limine* is defined by Black's Law Dictionary to be "[o]n or at the threshold; at the very beginning; preliminarily".<sup>6</sup>

The motion has been aptly described as:

. . . a procedural device which requests a pretrial order enjoining opposing counsel from using certain prejudicial evidence in front of the jury at a later trial . . . The true motion in limine requests only an evidentiary ruling that characteristics of a particular piece of evidence give it potentially in-

flamatory aspects which appear to outweigh whatever materiality it could have at trial. Because of the existence of the severe possibility of irreparable prejudice, the court is generally requested to order that the evidence should not be offered at trial in the presence of the jury, without first obtaining the judge's permission. The motion therefore becomes a procedural device for insulating the jury from the very mention of prejudicial topics.<sup>7</sup>

The motion *in limine* differs from the suppression motions in that, while the former are grounded in constitutional doctrines, the motion *in limine* is based upon principles of legal relevance and materiality.<sup>8</sup>

The earliest reported case dealing with a motion *in limine* is *Bradford v. Birmingham Electric Company*<sup>9</sup>, a personal injury action wherein the denial of such a motion was upheld on appeal. The decision rests primarily on the court's dissatisfaction with the generality of counsel's motion and its placing on the trial judge the burden of investigating the sources as well as the legality of the matter to which objection was made.<sup>10</sup> Following closely in time but standing in contrast is *State v. Smith*<sup>11</sup>, the earliest criminal case dealing with a motion *in limine*. In *Smith* appellant's counsel at trial had, in the absence of the jury and prior to the prosecution's cross-examination of appellant, brought to the judge's attention the fact of appellant's less-than-honorable discharge from the Marine Corps. Counsel argued that he believed that the prosecution would cross-examine appellant on the matter, that such cross-examination was improper and asked the court to direct the prosecution, if they pursued the matter on cross-examination, to first make an offer of proof in the absence of the jury in order that the admissibility could be determined. Despite the grant of the motion, the prosecutor questioned the appellant about the objectionable matter. Neither an objection nor a motion to strike was thereafter made. On appeal, the Supreme Court of Washington reversed, approving of the use of a motion *in limine* and holding unnecessary any further objections. In *State v. Morgan*<sup>12</sup>, the motion *in limine* related to defendant's record of prior arrests which had

not resulted in convictions. The defense lost its motion, the prosecutor asked the questions and the conviction was affirmed. The Supreme Court of Washington, while continuing to endorse the motion, sustained the trial judge's exercise of judicial discretion. The Court made particular reference to the lack of specifics in the defense motion in *Morgan* as distinguishing it from *Smith*.<sup>13</sup>

Since these early cases, many state jurisdictions have accepted the motion *in limine* as a matter within the inherent powers of a court to accept or reject evidence.<sup>14</sup> This acceptance of motions *in limine* has occurred despite an acknowledged lack of a statutory basis for such motions.<sup>15</sup>

The reported decisions often turn against appellants not on the vitality of the motion itself<sup>16</sup> but rather on the specificity of the motion<sup>17</sup> or the correctness of the trial judge's ruling denying it.<sup>18</sup>

On the federal level, Mr. Justice Harlan, in a concurring opinion in *Eichel v. New York Central Railroad Company*<sup>19</sup> endorses the trial judge's balancing of probative value against prejudicial effects in making pretrial admissibility decisions. Also Rule 403 of the New Federal Rules of Evidence<sup>20</sup> provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.<sup>21</sup>

Taken together these authorities offer some support for the use of motions *in limine* as the vehicle by which a trial judge can, under rule 403, be asked to make the balancing judgement called for in *Eichel*.

In the military, paragraph 53.d(1)<sup>22</sup> provides for the calling of an Article 39(a) session "for the purpose of . . . hearing and ruling on any matter which may be ruled upon by the military judge, whether or not the matter is appropriate for later consideration by the members".<sup>23</sup> This paragraph urges the use of such sessions in courts

with members "for the purpose of . . . hearing defenses and objections [and] ruling upon other matters that may legally be ruled upon by the military judge, such as admitting evidence. . ."<sup>24</sup>

The *Manual* further provides for the making of a motion to grant appropriate relief to cure defects in substance which impair the accused conducting his defense.<sup>25</sup> *The Analysis of Contents, Manual for Courts-Martial, United States 1969, (Revised Edition)*<sup>26</sup> states that Article 39 is a broad provision and that the examples listed in the *Manual* are not intended to limit in any way the matter which may be considered at an Article 39(a) session.<sup>27</sup>

The Article 39(a) session is analagous to the pretrial conference under Federal Rule of Criminal Procedure 17.1<sup>28</sup> and can be used by judge and counsel to "dispose of matters which do not require the jurors presence" in order to "greatly simplify the trial."<sup>29</sup> One of the "vital functions" of such sessions is:

. . . the military judge entertains motions and objections. Counsel may move to dismiss or for appropriate relief, such as a change of venue, production of witnesses, a new pretrial advice, a new Article 32 investigation, amendment of the pleadings, and the suppression of evidence. *If counsel believes that opposing counsel probably will attempt to introduce inadmissible evidence at trial, he should inform the judge that he believes opposing counsel has such evidence in his possession and request a ruling as to its admissibility.*<sup>30</sup>

Paragraph 57.g of the *Manual* further provides:

. . . if it appears to the military judge that an offer of proof (154c), preliminary evidence or argument with respect to the admissibility of offered evidence, or any other proceeding not requiring the presence of the members may contain matters prejudicial to the rights of the accused or the Government, he should, upon his own motion or upon motion of counsel, direct that the members of the court be excluded during these proceedings.<sup>31</sup>

Thus the military law clearly invites the motion for appropriate relief in the form of a motion *in limine* by the trial defense counsel in the appropriate situation.

Motions *in limine* can be used to exclude matters which are: a) clearly inadmissible on a technical ground<sup>32</sup>; b) prejudicial *per se*<sup>33</sup>; or c) nominally admissible but which have a prejudicial effect outweighing their probative value.<sup>34</sup> Some specific examples of the areas of use of the motion are: expunging of unnecessary matters from the charge sheets<sup>35</sup>; limitations on testimony as to an accused's status<sup>36</sup>; arrests not resulting in convictions<sup>37</sup>; certain types of prior misconduct<sup>38</sup>; unrelated contemporaneous acts of an accused<sup>39</sup>; hearsay<sup>40</sup> and certain comments by trial counsel.<sup>41</sup> These examples are, of course, by no means an exhaustive list.<sup>42</sup>

The primary motive for the use of the motion is to isolate and exclude the prejudicial evidence. In addition, use of the motion can place the trial counsel on the horns of a dilemma of proof. Confronted with an adverse ruling, the trial counsel can acquiesce, weakening his case. He can challenge the ruling by transgressing its limitations (either through tactics or inadvertance), thereby fixing reversible error in the record. Lastly, the trial counsel may, in order to avoid or limit an adverse ruling commit himself to forbear use of the objectionable matter or to limit its scope. Another purpose of the motion *in limine* is to perfect the record for appeal. If the ruling is favorable but violated, the appellate tribunal has a clear indication that the trial judge concurred with the trial defense counsel's perception of prejudice. If the ruling is unfavorable and the matter is admitted, then a reversal of that ruling on appeal will taint the entire proceeding. Finally the motion *in limine* can be a useful discovery tool to probe the prosecution's case in certain areas.

Like all trial tactics, the motion *in limine* is not without its costs.<sup>43</sup> It is a difficult motion to prepare properly, demanding much energy to be adequately presented. It is still a novel motion and as such may be less attractive to a hesitant or purposeful trial judge. Also the presentations on such motions may not be totally accurate in balancing probative value against prejudice. The

opposition may complain of the motion making him "prosecute in pieces." Consideration must be given to the temptation in some quarters to use the knowledge gained in a *limine* hearing to fabricate evidence or testimony. Lastly, and perhaps most painful, there is the possibility that a motion *in limine* may alert an unenlightened adversary to potential areas of evidence previously unconsidered.<sup>44</sup>

Against these drawbacks stand a myriad of cogent and, it is felt, controlling advantages. The pretrial conference is generally accepted as a proper tool for narrowing issues for trial despite its potential for breakup of the prosecution's case.<sup>45</sup> Careful use of the motion *in limine* can prevent future delays in each party's presentation on the merits thereby bringing about speedier and more error-free trials. The motion *in limine* eliminates sources of prejudicial error and can prevent unnecessary distractions of the judge and the jury. Reducing the chances for reversal reduces the costly aftereffects of such reversals. The most fundamental advantage of the motion *in limine* is its salutary replacement of futile "curative" instructions and mental gymnastics by juries with a process that can really keep the factfinder untainted and focused on the real issues in each case.

Counsel for accused should give consideration to several factors prior to making the motion *in limine* in order to put it to most effective use.

First, counsel should consider the appropriateness of the motion. The relative judicial unfamiliarity with such motions (at least in reported cases) counsels caution in its future use.<sup>46</sup> Motions *in limine* should be reserved for a few, if not a single, key issues which cannot without prejudicial effect be treated by other motions<sup>47</sup> or objections at trial.

Second, consideration must be given to the forms the motion and the sought for relief should take. Counsel may move for an absolute prohibition<sup>48</sup> where the matter is clearly inadmissible.<sup>49</sup> Where a strong but not absolute showing of inadmissibility can be shown<sup>50</sup>, a preliminary prohibition<sup>51</sup> can require the trial counsel to offer his proof at an Article 39(a) session before going to the jury with a prohibited line of inquiry. Where

the area of inquiry is not clearly impermissible or where the theory of prejudice is novel, a permissive motion<sup>52</sup> can allow defense counsel to avoid prejudice by obtaining a ruling outside the hearing of the jury.<sup>53</sup>

Of these three forms of motions *in limine*, the second is perhaps the least perilous for use before the hesitant trial judge. It allows the prosecution an opportunity to be reheard (but outside of earshot of the jury) while preserving the protective effect of the favorable ruling should trial counsel forge ahead without seeking release from the prohibition.

Finally, counsel must consider the matters of draftmanship. The motion must be clearly defined and carefully drafted. It must make distinct reference to the objectionable matter in the prosecution's case and offer authority for the conclusions drawn. The motion must also be timely.<sup>54</sup> Counsel should, where possible, offer the trial judge alternative remedies.<sup>55</sup>

The strongest arguments for motions *in limine* can be made in situations where a closely contested case has certain areas into which even mention is prejudicial. Also such motions can be useful where calendar congestion or unit operational demands make efficient use of court time a clear priority.<sup>56</sup> Too broad a usage of the motion *in limine* can only drive it into disfavor. Curative instructions should continue to be used as a vehicle for correcting minor (or unanticipated major) errors of commission before court members.

In conclusion one need only note the following succinct statement of this potent weapon's use:

Motions *in limine* allow for more deliberate evidentiary rulings, a greater degree of fairness due to the exclusion of collateral, prejudicial evidence, and a more expeditious use of judicial time by reducing the possibility of the need for new trials due to the introduction of prejudicial evidence.<sup>57</sup>

The Following Appendices are possible formats for various motions *in limine*.<sup>58</sup>

**APPENDIX A. Prohibitive Absolute Motion in Limine**

COMES NOW THE UNDERSIGNED ACCUSED IN THE ABOVE ENTITLED CASE AND MOVES THE COURT *IN LIMINE* for an order instructing the Government to refrain absolutely from making any direct or indirect reference whatsoever in person, by counsel, or through witnesses, to [the specified evidence or events] on the following grounds:

1. The case has now been referred to trial.
2. According to the charges the trial will involve a determination of these basic issues: [delineate issues].
3. The Defense is informed, believes and hence alleges that at said trial the Government will attempt to introduce evidence, make reference to, or otherwise leave the jury with the impression that. . . [specify].
4. It is immaterial and unnecessary to the disposition of this case and contrary to recognized law to permit such evidence or inference and would be highly prejudicial to the accused in the minds of the jury in that. . . [authority].
5. An ordinary objection during the course of trial even if sustained with proper instructions to the jury will not remove such effect in view of. . . [prejudice to be avoided].

WHEREFORE, the accused prays this Court to exercise its discretion and make an order absolutely prohibiting said offer, or reference.

**APPENDIX B. Preliminary Prohibitive Motion in Limine**

COMES NOW THE ACCUSED IN THE ABOVE ENTITLED CASE AND MOVES THE COURT *IN LIMINE* for an order instructing the Government, his representatives and witnesses to refrain from making any direct or indirect mention whatsoever at trial before the jury of the matters hereinafter set forth without first obtaining permission from the Court outside the presence and hearing of the jury.

This Motion is made upon the following grounds:

1. The case has now been referred to trial.
2. According to the charges the trial will involve a determination of these basic issues: [delineate issues].
3. The accused in informed, believes and hence alleges that at said trial the Government will attempt to introduce evidence, make reference to, or otherwise leave the jury with the impression that. . . [specify].
4. It is immaterial and unnecessary to the disposition of this case and contrary to the law to permit such evidence or inference and would be highly prejudicial to the accused in the minds of the jury in that. . . [authority].
5. An ordinary objection during the course of trial even if sustained with proper instructions to the jury will not remove such effect in view of. . . [prejudice to be avoided].

WHEREFORE, the accused prays that the Court exercise inherent power over the conduct of trials and order the Government not to elicit testimony respecting, mentioning, or referring to the above matters without securing prior clearance from the Court.

**APPENDIX C. Permissive Motion in Limine**

COMES NOW THE ACCUSED IN THE ABOVE ENTITLED CASE AND MOVES THE COURT FOR AN ORDER *IN LIMINE* OR IN THE ALTERNATIVE [other remedy].

This Motion is made upon the following grounds:

1. The case has now been referred to trial.
2. [State specifics of motion with authority for remedy sought].
3. [State action to be taken].

WHEREFORE, the Court is requested to rule in limine if the accused will be permitted to [action as requested] and under what conditions, OR in the alternative [any alternative remedy].

## FOOTNOTES

1. I Wigmore, Evidence § 18 at 323 (Third Edition).
2. See *United States v. Justice*, 13 USCMA 31, 32 CMR 31 (1962).
3. *United States v. Griggs*, 13 USCMA 57, 32 CMR 57 (1962).
4. Cf. *United States v. Haimson*, 5 USCMA 208, 17 CMR 208 (1954).
5. The trained and disciplined intellects of military judges as fact finders ordinarily obviates the need for such motions in trials by judge alone.
6. *Black's Law Dictionary* at 896 (Revised Fourth Edition).
7. H. Rothblatt, and Leroy, *The Motion in Limine In Criminal Trials*, 60 Ky.L.J. 611 (1972) [hereinafter cited as Rothblatt].
8. Davis, *Motions in Limine*, 15 CLEV.—MAR.L.Rev. 255 (1966) [hereinafter cited as Davis].
9. 227 Ala. 285, 149 So. 729 (1933).
10. *Id.*
11. 189 Wash. 442, 65 P.2d 1075 (1937).
12. 192 Wash. 425, 73 P.2d 745 (1937).
13. *Id.* at 427, 73 P.3d at 747.
14. *Burris v. Silhavy*, —Ind.—, 293 N.E. 2d 794 (1973); *Wagner v. Larson*, 257 Iowa 1202, 136 N.W. 2d 312 (1965); *Kipp v. Wong*, —Mont.—, 517 P.2d 897 (1974); *Bridges v. City of Richardson*, 163 Tex. 292, 354 S.W. 366 (1962). Also suggested by the courts in *Liska v. Merit Dress Delivery*, 250 N.Y.S. 691 (Sup. Ct. 1964); *Cook v. Philadelphia Transit Company*, 414 Pa. 154, 199 A.2d 446 (1964); *Crawford v. Hite*, 176 Va. 69, 10 S.E. 2d 561 (1940); *Contra. State v. Flett*, 234 Ore. 124, 380 P.2d 634 (1963).
15. Note, *Pretrial Exclusionary Evidentiary Rulings*, 1967 Wisc. L. Rev. 738 (1967).
16. Note 14, *supra*.
17. *Morgan*, note 12, *supra*.
18. *E.G.*, *Liska v. Merit Dress Delivery*, note 14, *supra*.
19. 375 U.S. 253 (1963).
20. Rule 403, Fed. R. of Evid; 56 F.R.D. 183, 218.
21. *Id.*
22. *Manual for Courts-Martial, United States 1969 (Revised edition)* [hereinafter cited as *Manual*].
23. *Manual* at 10-2.
24. *Id.*
25. Para. 69.a., *Manual*.
26. D.A. Pam 27-2.
27. *Id.* at 10-1.
28. D.A. Pam 27-173, *Military Justice Trial Procedure* at 11-1 (October 1973).
29. *Id.*
30. D.A. Pam 27-173 at 11-2.
31. *Manual* at 10-12.
32. *E.g.*, violations of the Best Evidence Rule, para 143.a., *Manual*.
33. *E.g.*, assertion of Article 31 rights by an accused prior to trial.
34. *E.g.*, certain photographs of a victim.
35. See, DA Pam 27-50-27, *The Army Lawyer*, at 30 (March 1975).
36. *State v. Smith*, note 11, *supra*.
37. Paragraph 153.b(2)(b), *Manual*.
38. See *United States v. Johnson*, 23 USCMA —, 50 CMR — (August 29, 1975).
39. See generally paragraphs 137 and 138.b., *Manual*.
40. Paragraphs 139-146, *Manual*.
41. *E.g.*, *United States v. Blake*, SPCM 10340 (ACMR 10 October 1975).
42. See Rothblatt, note 7, *supra* at 624-31.
43. See Rothblatt and Davis, *supra*.
44. Notes 35-42, *supra*.
45. Chapter 11, DA Pam 27-173, *supra*.
46. Kromzier, *Advantages to be Gained by Trial Motions for Plaintiff*, 6 So. Tex. L., J. at 185 (1963).
47. *E.g.*, motions for appropriate relief in the nature of suppression motions.
48. See Appendix A, *infra*.
49. Notes 33 and 41, *supra*.
50. *E.g.*, notes 39 and 40, *supra*.
51. See Appendix B, *infra*.
52. See Appendix C, *infra*.
53. See example in Rothblatt at 637.
54. Rule 34, *Uniform Rules of Practice Before Army Courts-Martials*, DA Pam 27-9, *Military Judge's Guide*, Appendix H.
55. *E.g.*, denial with leave to renew at a later time; require trial counsel to submit questions in writing before inquiry before the members; or deferral of a ruling until an out-of-court hearing at the time of testimony.

56. Cf. *United States v. Wolzok*, 23 USCMA 492, 50 CMR 572 (1975).

57. Carter, *Motions In Limine in Washington*, 9 Gonzaga L.

Rev. 780-790 (1974).

58. Adapted from *Rothblatt*, note 7, *supra* at 635-637.

## JUDICIARY NOTES

*From: U.S. Army Judiciary*

### 1. RECURRING ERRORS AND IRREGULARITIES.

a. *November 1975 Corrections by ACOMR of Initial Promulgating Orders:*

(1) Failing to set forth the correct social security number of the accused—two cases.

(2) Failing to indicate that trial was by military judge alone by adding the words "By Military Judge" after the word sentence.

b. *SJA Offices in the field should:*

Insure that the final promulgating orders in all special (non BCD) and summary courts-martial cases are stamped to indicate review has been completed pursuant to Article 65(c), Uniform Code of Military Justice.

### 2. SELECTION OF MILITARY JUDGES.

a. To be a military judge, a JAGC officer must have a broad background of military criminal law experience. He must have impeccable moral character, an even temperament, good judgment, common sense, learning, sound reasoning ability, patience, integrity, courage, a nonabrasive personality and a high degree of maturity. He must be able to express himself, orally and in writing, in a clear, concise manner. It is also important for him to have an understanding of, and experience in, the principles and problems of leadership and exhibit a neat and military appearance.

b. Application procedures are prescribed by the Chief Trial Judge, U.S. Army Judiciary, who makes a comparative evaluation of applicants' qualifications. The Judge Advocate General then personally selects and certifies the officers to be trained or assigned as military judges. The number and type of selections will be upon consideration of individual qualifications and world-wide requirements.

c. (1) Special Court-Martial military judges to be assigned to the Trial Judiciary and other officers authorized to attend the Military Judge Course are selected from applicants experienced in military criminal law who are majors, promotable captains, captains who have completed their obligated tours of service and are in a Regular Army or voluntary-indefinite status, or other highly-qualified company grade officers who have at least two and one-half years of JAGC service and more than one year's service obligation remaining.

(2) General Court-Martial military judges are selected from field grade officers who have at least eight years' active judge advocate service. Officers may be selected for GCM certification by three processes:

(a) The Judge Advocate General may directly select field grade judge advocates not then assigned in the Trial Judiciary who possess exceptional qualifications and competence in military criminal law.

(b) Colonels or Lieutenant Colonels not assigned to the Trial Judiciary may apply for selection by letter through the Chief Trial Judge, and Chief U.S. Army Judiciary, to The Judge Advocate General.

(c) Majors not currently assigned to the Trial Judiciary but certified as special court-martial military judges and with at least two years full-time duty as a military judge upon application will also be considered for GCM certification and assignment to the Trial Judiciary as general court-martial judges. Selection will be made only of those who have demonstrated the personal qualities and professional competence expected of judges who preside over the most complex and important trials. Officers in the grades of major and captain who are currently

assigned to the Trial Judiciary as special court-martial judges will not be considered for certification and assignment as general court-martial judges without an intervening assignment other than for schooling outside the Trial Judiciary.

d. Officers selected for assignment to the Trial Judiciary will be sent to the Military Judge Course if they have not previously completed it. Applicants who are not selected for assignment to the Trial Judiciary may be authorized with the use of local command funds to attend the Military Judge Course for certification upon completion and possible future assignment to the Trial Judiciary. No officer who fails to complete successfully the Military Judge Course or its equivalent will be certified.

e. Officers interested in applying for certification or assignment as military judges should make their desires known to the Chief Trial Judge (HQDA (DAAJ-TJ) ), Nassif Building, Falls Church, Va. 22041, and the Chief, Personnel, Plans and Training Office, Office of The Judge Advocate General.

### 3. Notes from Examination and New Trials Division:

#### a. Clemency Power

Attention is invited to AR 190-47, dated 15 December 1975 but effective 15 January 1976. Changes may occur prior to the effective date. For example, paragraph 6-21 (Authority to mitigate, remit, and suspend sentences) will be amended to state that the provisions thereof apply to Army personnel and not merely to "prisoners."

#### b. Forfeitures

The policy on forfeitures, mentioned in December's *The Army Lawyer*, is now set forth in paragraph 6-22b, AR 190-47, effective 15 January 1976.

#### c. Designating Places of Confinement

Paragraph 4-2d, AR 190-47, effective 15 January 1976, once again mandates the use of the following statements:

(1) When a sentence to confinement is approved and ordered into execution: "The accused

will be confined in (name of facility) and the confinement will be served therein or elsewhere as competent authority may direct."

(2) When a sentence to confinement is approved but not ordered executed pending completion of appellate review: "Pending completion of appellate review, the accused will be confined in (name of facility) or elsewhere as competent authority may direct."

#### d. Supervisory Review

Records of trial in summary courts-martial and in special courts-martial which do not include an approved bad-conduct discharge must be reviewed as required by Article 65(c), UCMJ, paragraph 94, MCM 1969 (Rev.), and paragraph 2-24b(4), AR 27-10. The stamped notation and signature on the promulgating court-martial order in these cases is evidence that review is complete and that the case is final in law. Thereafter, the convening authority may not withdraw his action nor may the officer having supervisory authority under Article 65(c) take corrective action *sua sponte*. Article 69, UCMJ, does permit TJAG to vacate or modify the findings and/or sentence of a court-martial case which has become final in law but has not been reviewed by the Court of Military Review. Relief is granted only on the grounds specified in Article 69 (newly discovered evidence; fraud on the court; lack of jurisdiction; error prejudicial to accused's substantial rights) and not on clemency considerations.

#### e. Rehearings-New Reviews/Actions

In special court-martial cases, returned for rehearing or new review and actions, if a rehearing is deemed impracticable or the approved sentence does not include a bad-conduct discharge, review of the record must be accomplished in accordance with Article 65(c), UCMJ. Two copies of the new special court-martial order should be stamped to show that review has been completed pursuant to Article 65(c) and returned with the record of trial (original) to the U.S. Army Judiciary.

#### f. Court-Martial Orders

(1) When a new review and action is accomplished with respect to findings and sentence,

the new court-martial promulgating order should set forth the charges and specifications, the pleas, findings, sentence, and the date that the sentence was adjudged.

(2) When reflecting an action of the U.S. Court of Military Appeals, the date of its mandate or order, not the date of its opinion, should be used.

## REPRESENTING CO-ACCUSED—A NEW PROSPECTIVE ON CONFLICTS OF INTEREST

*By: Captain Gary F. Thorne, Government Appellate Division, OTJAG*

All those involved in the military criminal process should take heed of the Court of Military Appeals recent decision in *United States v. Evans*, No. 29,984 (7 Nov 1975), for the Court may have set a new course in insuring that representation of co-accused by one attorney does not result in a conflict of interest between attorney and client. The Court emphatically stated that all persons involved in the military criminal process bear a burden in preventing such conflict. The issue is how to satisfy that burden as a case develops and progresses. The answer is in understanding the new direction taken by the Court, in *Evans*.

In *Evans*, one counsel was appointed to represent five codefendants accused of numerous violations of the Code, including rape. Affidavits presented on appeal from three co-defendants, and from the trial defense counsel in rebuttal, raised the issue of whether defendant Evans, during his trial, suffered due to tactical decisions by his counsel which involved weighing the positions of each defendant. The Court so found. Citing subordination of advantages to Evans to the interest of the others, such as rejecting codefendants as witnesses because he feared possible disadvantage to them, the Court found counsel was unable to give his "undivided loyalty" to Evans.

In so doing, the Court initiated important precedences to weigh conflict situations. First, the Court recognized the ABA Standard on the Defense Function.

The American Bar Association standards relating to the administration of criminal justice correctly observe that the "potential for conflict of interest in representing multiple defendants is so grave" that a lawyer

should refuse to act for more than one of several accused unless "after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation." ABA Standards, The Defense Function Section 3.5(b); see also ABA Code of Professional Responsibility, DR 5-105.

Secondly, the Court refused to lay the total burden on the defense counsel in avoiding conflict situations.

In focusing, as we have, on the failure of defense counsel to discern his own disability to represent the conflicting interests of his several clients, we are not to be understood as exonerating others from all responsibility in a matter of kind. Here, the conflict of interest became apparent only in the discussion between counsel and the accused, but everyone concerned with the appointment and efficacy of counsel must be alert to the actuality, or potentiality, of a disabling conflict of interest whenever a single lawyer is considered for assignment to, or already represents, multiple accused. Those responsible for appointing counsel for multiple accused should initially determine, on the basis of the evidence then available, whether there is a possibility of conflicting interests. When such a possibility exists, a different lawyer should be appointed for each accused. Later, the several accused and their counsel might conclude that no conflict exists; in that event, they may agree on the apportionment of responsibility of the conduct of the defense or in the withdrawal of one or more of the as-

signed lawyers. See ABA Code of Professional Responsibility, EC 5-14 to -16; ABA Standards, the Defense Function Section 3.5; ABA Standards, the Function of the Trial Judge Section 3.4(b).

The watershed case focusing on the conflict issue instigated by multiple representation was the Supreme Court's decision in *Glasser v. United States*, 315 U.S. 60 (1942). The defendant in that case, a lawyer in fact, had an attorney foisted on him by the judge who took no action to ensure the absence of a conflict despite on the record advisements from defense counsel that a possible conflict existed. The Supreme Court rejected this action and reviewed the necessity for the trial judge to protect a defendant's counsel rights, ruling that the judge failed that duty by allowing a counsel with a possibility of conflict, known to the judge, to represent the accused.

The majority position of federal courts subsequent to *Glasser* is "that a trial court does not need to advise a defendant of the right to separate counsel in the event of a conflict of interest between co-defendants, where there was neither objection, claim, nor notice to the court of any alleged conflict.<sup>1</sup> These courts recognize that joint representation is permissible and leave the defendant and his counsel to determine when conflict exists in fact.<sup>2</sup> One court went so far as to say:

No facts have thus far been presented that the Bar of this country is so unmindful of the canons of ethics and its obligation to avoid positions of conflict as to call for a pretrial cross-examination of defendant and their counsel on the theory, or even presumptuous presumption, that counsel will not be faithful to the best interests of their clients and when aware of any conflict of interest between clients jointly represented whether before or during trial will not disclose it to the court and seek appropriate relief.<sup>3</sup>

The placing of such a burden on a defendant has not met uniform support. The contrary, and minority position, has required a trial court to affirmatively establish, on the record: (1) that a defendant was fully advised of his right to a pri-

vate counsel; (2) of any potential conflicts or just the potential for conflict; (3) that the defendant waived his right to private counsel; and (4) that the court considered whether any prejudice would result if multiple representation was allowed.<sup>4</sup> Furthermore, on appeal, courts have tested for prejudice, using hindsight and requiring that the negative be established beyond a reasonable doubt.<sup>5</sup>

The Court of Military Appeals, in line with majority federal decisions, has in the past required an appellant alleging a conflict of interest to come forward and establish that conflict and how it denied him effective assistance before the Court would find reversible error.<sup>6</sup> A conflict of interest has been defined by the Court:

[I]t means that defense counsel cannot adequately represent one accused without prejudice to another. That is, he is not entirely free to exploit avenues of strength for one client because he may harm the other. It does not mean that counsel cannot acknowledge and argue the weight of the evidence as it affects different individuals being tried at the same time. *United States v. Young*, 10 USCMA 97, 99, 27 CMR 171, 173 (1959).

There has never been a requirement that an affirmative record be made to establish a defendant's awareness of the potential conflicts resulting from multiple representation, the burden of raising and establishing that error has rested with the defendant. *Evans* signals a new beginning in this area.

*Evans* has implications for all involved in the court-martial process. The first and greatest responsibility rests with the defense counsel. When appointed to represent co-accused, the possibility of conflict will probably always exist and requires affirmative action by the counsel to refuse to act for more than one accused until the careful investigation required by the ABA Standards is completed.

This investigation will actually begin with that person who appointed defense counsel. Any possibility of conflict requires each accused be appointed counsel separately. At a later point,

when the cases have been examined and trial strategy begins to form, the accused and his counsel may decide to consolidate cases and counsel. The appointing official and the counsel are not the only parties bearing a burden, however.

While not specifically spoken to in *Evans*, there seems little doubt that the military judge is included as one of those parties concerned "with the efficiency of counsel." How can the military judge fulfill his obligation to examine for conflict?

The minority position of the federal circuits has set forth that procedure. The previously outlined inquiry on the record by the judges in those circuits following the minority course, should be adhered to by the military judge who faces co-accused and one counsel. Having conducted such an inquiry of the *defendant and attorney* and determined a defendant's continued desire to abide by the counsel arrangement; and having found no conflict to exist beyond a reasonable doubt, any later claim of conflict will place a heavy burden on the defendant to both come forward with evidence and persuade.<sup>7</sup> In those cases where a military judge feels obligated, he may convene *in camera* session as a fail-safe precaution to consider any matter he determines not to be fully developed and incapable of development on the record.<sup>8</sup>

The Court of Military Review in *United States v. Piggee*, No. 432601 (15 Dec 1971), approved of such an inquiry by a military judge, but with an interesting twist. Relying on *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), the court found that despite a conflict problem, a defendant can knowingly waive representation free of conflict and choose to be represented by a lawyer laboring under a potential conflict. The burden of the military judge is to insure that the defendant understands his right to effective representation, that he understands the potential conflict, that the defendant has discussed the matter with the attorney and/or an outside counsel if he so desires, and that he nevertheless desires representation by the attorney involved with the potential conflict. In *Piggee* the court found error when the military judge *refused* to allow that counsel to represent the defendant when the record evinced a voluntary, knowing and intelligent

waiver of the right to representation free from conflict.

There are questions raised by the *Evans* decision which are not answered therein. What is the responsibility of the staff judge advocate to review the decision by the defendant to be represented as a co-accused by one counsel? In such situations must the staff judge advocate review contain a total description of the matters considered by the counsel and the military judge in determining no conflict existed? Is it the convening authority's responsibility to once again review the issue of conflict and determine anew whether representation was proper? The answers to these questions must await a later date, but for now those in the field must decide how to handle such cases. The obvious safe route is to go the extra step and include advise in a review on the conflict decisions made at trial for the convening authority to review.

All parties should beware of the Supreme Court's consideration of the conflict issue presently before it in *Mandell v. United States*.<sup>9</sup> The Supreme Court in *Mandell* has been asked to review the split in the circuits on how courts are to deal with co-representation cases and the conflict issue. Whatever the result of that case is, it will probably not affect the mandate of *Evans*, unless an even stricter standard is imposed.

For now, representation of co-accused should raise a red flag in the military justice system, necessitating immediate inquiry into the potential conflict area at the level of the appointing authority and/or at trial.

#### FOOTNOTES

1. *United States v. Boudreaux*, 502 F.2d 557 (5th Cir. 1974); *Mandell v. United States*, 17 Cr.L. 2398 (7th Cir. 1975); *cert. granted*, 75-440, 75-441, 18 Cr.L. 4067.
2. *Davidson v. Culp*, 446 F.2d 642 (9th Cir. 1974).
3. *United States v. Paz-Sierra*, 367 F.2d 930, 932 (2nd Cir. 1966); *cert. denied*, 386 U.S. 935 (1967).
4. *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967).
5. *Id.*
6. *United States v. Lovett*, 7 USCMA 704, 23 CMR 168 (1957); *United States v. Christopher*, 488 F.2d 849 (9th Cir. 1973).

7. *United States v. Foster*, 469 F.2d 1 (1st Cir. 1971); *United States v. Armado-Sarmiento*, 18 Cr.L. 2141 (2nd Cir. 1975).

8. *United v. Vowteras*, 500 F.2d 1210 (2nd Cir. 1974).

9. See, Note 1, *supra*.

**MONTHLY AVERAGE COURT-MARTIAL RATES PER 100 AVERAGE STRENGTH JULY-SEPTEMBER 1975**

	General CM		Special CM		Summary CM
		BCD	NON-BCD		
ARMY-WIDE	.16	.11	.71	.29	
CONUS Army commands	.14	.11	.77	.31	
OVERSEAS Army Commands	.21	.12	.61	.25	
USAREUR and Seventh Army Commands	.27	.15	.63	.29	
Eighth U.S. Army	.10	.05	.67	—	
U.S. Army Japan	—	—	—	—	
Units in Okinawa	—	—	.17	.17	
Units in Hawaii	—	.07	.40	.24	
Units in Thailand	—	—	.34	.11	
Units in Alaska	.03	.03	.39	.11	
Units in Panama/Canal Zone	.14	—	1.31	.77	

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

**NON-JUDICIAL PUNISHMENT MONTHLY AVERAGE AND QUARTERLY RATES PER 1,000 AVERAGE STRENGTH JULY-SEPTEMBER 1975**

	Monthly Average Rates	Quarterly Rates
ARMY-WIDE	17.41	52.24
CONUS Army Commands	18.06	54.18
OVERSEAS Army Commands	16.24	48.71
USAREUR and Seventh Army Commands	16.50	49.50
Eighth U.S. Army	19.89	59.68
U.S. Army Japan	2.39	7.17
Units in Okinawa	3.63	10.89
Units in Hawaii	18.18	54.53
Units in Thailand	7.04	21.11
Units in Alaska	11.38	34.15
Units in Panama/Canal Zone	10.68	32.03

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

**PRESIDENTIAL NOMINATIONS**

**1. Announcement of Nomination of Matthew J. Perry, Jr. December 10, 1975.**

The President nominated Matthew J. Perry, Jr., of Columbia, SC to be a Judge of the United States Court of Military Appeals for the remainder of the term expiring May 1, 1981. He will succeed Robert Emmett Quinn, who retired effective April 25, 1975.

Since 1951, Mr. Perry has been a partner in the law firm of Jenkins, Perry & Pride of Columbia, S.C. He was a lecturer at the University of South Carolina School of Law during 1972-73.

Born on August 3, 1921, in Columbia, S.C., Mr. Perry received his B.S. degree in 1948 and his J.D. in 1951 from South Carolina State College. He served in the United States Army from 1942 to 1946.

Mr. Perry is married to the former Hallie Bacote, and they have one son.

**2. Announcement of Nomination of Richard A. Wiley. November 21, 1975.**

The President nominated Richard A. Wiley, of Wellesley Hills, MA, to be General Counsel of

the Department of Defense. He will succeed Martin R. Hoffmann, who became Secretary of the Army on August 5, 1975.

Since 1959, Mr. Wiley has been a partner in the firm of Bingham, Dana & Gould. From 1956 to 1958, he was an attorney for the John Hancock Mutual Life Insurance Co. He was Assistant Staff Advocate for the United States Air Force from 1953 to 1956.

Mr. Wiley was born on July 18, 1928, in Brooklyn, N.Y. He received his A.B. degree from Bowdoin College in 1948. He attended Oxford

University in England and received his B.C.L. in 1951. He joined the United States Air Force in 1952. He received his LL.M. degree in 1959 from Harvard University School of Law.

Mr. Wiley is married to the former Carole Smith, and they have three children.

**3. Senate Confirmations.** The United States Senate confirmed the nomination of Matthew J. Perry, Jr., on December 19, 1975. The Senate confirmed the nomination of Richard A. Wiley on December 15, 1975.

## Reserve Affairs Items

*From: Reserve Affairs, TJAGSA*

### 1. SEVENTH ANNUAL JUDGE ADVOCATE GENERAL'S RESERVE CONFERENCE.

The Judge Advocate General's School was the site of The Judge Advocate General's Reserve Conference 4-6 December for the seventh consecutive year.

Eighty-five senior Reserve judge advocates representing JAGSO Headquarters Detachments, Army Reserve Commands, Training Divisions, Garrisons, Civil Affairs Units and Support Commands convened at the School for the three-day training session. Command Judge Advocates of the Active Army from FORSCOM, TRADOC, and the CONUS Armies joined the Reserve judge advocates in identifying ways of "Improving Legal Services to Command," the theme of the Conference. In addition, the JAG Readiness Coordinators from four of the nine Army Readiness Regions were in attendance.

Brigadier General Evan L. Hultman (MOB DES AJAG for Special Assignments) set the theme of the conference in his remarks to the conferees. He stated that under the Total Force Policy all members of the Reserve Components must be mobilization ready which includes having their legal affairs in order and that all Reserve Judge Advocates should be continuously seeking new ways to provide this preparation.

Teaching demonstrations on the administration of nonjudicial punishment and on adminis-

trative board proceedings were presented to the conferees by members of the faculty. Classroom sessions included an update on Claims Administration and a two hour session on the Freedom of Information Act and the Privacy Act.

Representatives of the Naval and Air Reserve provided the conferees with a short briefing on their respective judge advocate operations and training. Noteworthy was the presentations made by Rear Admiral Hugh H. Howell, Director Naval Reserve Law Program, and Brigadier General Robert M. Martin, Jr., Mobilization Assistant to TJAG, Air Force.

Brigadier General Demetri M. (Jim) Spiro, (MOB DES, Chief Judge USALSA) was the Chairman of the day and commented that Reserve Component members are and will play a major role in the defense of our nation and it is each officer's responsibility to remain mobilization ready.

The highlight of the conference was the straight-from-the-shoulder talk by Major General Henry Mohr, Chief, Army Reserve, at the conference banquet. General Mohr emphasized the important mission of Reserve judge advocates is to assure that legal problems associated with a partial or full mobilization should be prepared for in advance in order to minimize the personal turbulence which adversely affects morale.

The closing remarks offered by Major General Lawrence H. Williams, The Assistant Judge Advocate General, were short and to the point. General Williams urged the judge advocates not to sit in their offices and wait for business to come to them. They should, he suggested, become an integral part of command and be aware of its entire plans and operation and, thereby, be ready to provide the legal advice necessary.

**2. Minnesota Seminar.** Members of the 214 JAG Detachment (HQ) Fort Snelling, Minnesota, participated in a first-of-a-kind continuing legal education seminar dealing with administrative due process in labor management relations in government employment and military services during November at the Marriott Inn in Bloomington, Minnesota.

Detachment Commander, Colonel Edward Clapp (JAGC-USAR) served as a co-chairman of the presentation which was sponsored by the Minnesota Chapter of the Federal Bar Association in cooperation with military reserve and national guard units in Minnesota.

The seminar was geared to the needs of the lawyers representing the government or the individual before administrative tribunals both within the military and outside the military sectors of governmental agencies.

CPTS Thomas Larson and Edward Zimmerman presented topical reviews which borrowed heavily from their four year active duty tours as JAG officers. Captain Zimmerman is currently Commander of the 128th JAG Detachment stationed at Fort Snelling and Larson is a member of the 117th JAG Detachment.

The presentations of the speakers, which represented a sampling of private practice, government service, military lawyers and state legal

personnel, discussed the procedural and practical applications of due process requirements before administrative tribunals, both civilian and military, as well as the practical working knowledge needed in the areas of labor management relations and issued concerning discrimination in the government and military service.

Minnesota, the first state to adopt a continuing legal education requirement as requisite to holding a license to practice the profession, through its board of continuing legal education granted 5.7 hours of credit toward the requirement for 45 credit hours triennially to sustain membership in the bar of Minnesota.

Of the eighty five lawyers in attendance, fifty were military lawyers representing Army, Air Force and Navy units both active and reserve. The private sector was represented by Hennepin County officials, judges of the Minnesota district courts as well as administrative judges of federal agencies and the U.S. Attorneys' Office in Minneapolis.

The State Attorney General, Warren Spanus, participated in the panel discussions which were well received practical exercises in governmental administrative law.

The speakers and participants came from several states including Alabama, Illinois, and Washington, D.C. The overwhelming success of the first such jointly sponsored seminar has engendered a second attempt at delivering meaningful continuing legal education in Minnesota by the Federal Bar Association presently scheduled for February 19, 1976. The next educational seminar will coincide with a visit from General Lawrence Williams, The Deputy Judge Advocate General, U.S. Army, who will participate as the featured speaker.

### Law Day 1976

**LAW DAY 1976 OBSERVANCE.** In recognition of the Bicentennial year, the 1976 Law Day Observance should be accorded increased attention. In the American Bar Association Law Day Bulletin

Number 1, the theme selected by the ABA's Standing Committee on Association Communications to Commemorate America's Bicentennial and Law Day '76 was announced:

## 200 YEARS OF LIBERTY AND LAW

In addition to announcing this year's theme, the bulletin goes on to make the following comments concerning the 1976 Observance.

"In all previous years, Law Day programs have centered on events held on or near May 1. In this Bicentennial year, local and state bar associations might wish to consider law-related educational programs which could be presented during the school year.

"Bar Associations choosing to present programs on more than a single day or week, could begin commemorative activities in January and gradually build up their activities to a peak on May 1."

The Judge Advocate General has approved this concept of expanded celebration for the Corps. Accordingly, this year installations throughout the world are encouraged to organize activities reaching an even wider audience.

In support of the Bicentennial theme programs should point out the particular interdependence of liberty and law that has marked the two centuries of our nation's existence; should convey the value and necessity of achieving liberty through law; should examine those areas in which the law has properly or improperly curtailed the enjoyment of liberty; and should explore avenues by which the legal system can be improved. This year's theme provides an excellent opportunity not only to communicate with citizens of the United States but also to display the American legal system to other members of the world community. This opportunity should be accorded the most serious attention.

The *Army Lawyer* will provide a monthly review of any recent Law Day related activities reported to the School. It is therefore requested that a description of such events be forwarded to: TJAGSA, ATTN: JAGS-RA, Charlottesville, Virginia 22901.

## BACKGROUND

On the occasion of the first observance of Law Day in 1958, President Dwight D. Eisenhower stated:

It is fitting that the American people should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law. . . . It is our moral and civic obligation as free men and as Americans to preserve and strengthen that great heritage.

In recognition of this obligation, the 87th Congress, by joint resolution, set aside the first day of May as a special day of annual celebration by the American people in appreciation of their liberties and reaffirmation of their loyalty to the United States of America; of their rededication to the ideals of equality and justice under law in their relations with each other as well as with other nations; and for the cultivation of that respect for law that is so vital to the democratic way of life.

It is the responsibility of the legal profession to take full advantage of this opportunity to encourage every citizen to reflect on our great tradition of liberty and law and to consider methods by which the legal system can be improved. It behooves all lawyers to devote considerable time and energy to the essential tasks of identifying the critical role of law in our society and reminding the citizenry of their rights and the role of law in the preservation of those rights. Law Day affords the valuable occasion to actively seek and jealously guard the citizens' support of the law. For without that support our legal system cannot survive.

## 1975 LAW DAY OBSERVANCE

For its ever increasing role in Law Day observances throughout the world the Judge Advocate General's Corps has been awarded, during the past four years, Certificates of Merit by the American Bar Association. The 1975 award was in recognition of Law Day activities conducted at 59 installations in 24 states, Puerto Rico, the District of Columbia and four foreign countries. News of these celebrations appeared in 64 newspapers, including one German language daily. At the request of Army Law Day Chairmen, 20 radio stations broadcast ABA spot announcements while 13 television stations covered activities relating to the 1975 Law Day Observance. Forty-one installations made use of dis-

plays and billboards to alert the public to the Law Day message. In addition, ABA and locally developed posters, stickers, and pamphlets carrying the 1975 theme were distributed at schools, commissaries, post exchanges, service clubs, theaters and other frequently visited locations.

June 7-11: 26th Senior Officer Legal Orientation Course (5F-F22).

June 21-July 1: 1st Military Justice II Course (5F-F31).

June 21-July 2: 1st Military Administrative Law Course (5F-F20).

June 28-July 2: 2d Criminal Trial Advocacy (5F-F32).

July 12-16: USA Reserve School BOAC and CGSC Procurement Law Phase VI Resident/Nonresident Instruction (5-27-G23).

July 12-16: 25th Senior Officer Legal Orientation Course (5F-F1).

July 19-23: USA Reserve School BOAC and CGSC International Law Phase VI Resident/Nonresident Instruction (5-27-C23).

July 19-August 6: 15th Military Judge Course (5F-F33).

August 9-13: 3d Management for Military Lawyers (5F-F51).

### CLE News

#### 1. TJAGSA Courses (Active Duty Personnel).

January 5-16: 6th Procurement Attorneys' Advance Course (5F-F11).

January 12-15: 3d Environmental Law Course (5F-F27).

January 19-23: 4th Military Lawyer's Assistant Course (Criminal Law) (512-71D20/50).

January 19-23: 5th Military Lawyer's Assistant Course (Legal Assistance) 512-71D20/50).

January 26-30: 23d Senior Officer Legal Orientation Course (5F-F1).

March 8-19: 65th Procurement Attorneys' Course (5F-F10).

April 5-9: 24th Senior Officer Legal Orientation Course (5F-F1).

April 26-May 7: 66th Procurement Attorneys' Course (5F-F10).

May 10-14: 6th Staff Judge Advocate Orientation Course (5F-F52).

May 17-20: 1st Civil Rights Course (5F-F24).

May 24-28: 13th Federal Labor Relations Course (5F-F22).

#### 2. TJAGSA Courses (Reserve Component Personnel).

January 5-16: 6th Procurement Attorneys' Advanced Course (5F-F11).

January 19-23: 4th Military Lawyer's Assistant Course (Criminal Law) (512-71D20/50).

January 19-23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512-71D20/50).

March 8-19: 65th Procurement Attorneys' Course (5F-F10).

April 26-May 7: 66th Procurement Attorneys' Course (5F-F10).

June 21-July 2: 1st Military Justice II Course (5F-F31).

June 21-July 2: 1st Military Administrative Law Course (5F-F20).

July 12-16: USA Reserve School BOAC and CGSC Procurement Law Phase VI Resident/Nonresident Instruction (5-27-C23).

July 19-23: USA Reserve School BOAC and CGSC International Law Phase VI Resident/Nonresident Instruction (5-27-C23).

### 3. Selected Civilian Sponsored CLE Programs (this Quarter).

#### JANUARY

4-11: National Institute for Trial Advocacy, Southeast Regional Session, Part Two, University of North Carolina, Chapel Hill, NC.

6-8: US Civil Service Commission CLE Program, Paralegal Training Seminar, Washington, DC.

7-9: Federal Publications Inc, Government Contract Program, Changes in Government Contracts, Holiday Inn/Golden Gateway, San Francisco, CA.

9-10: Practising Law Institute, Eighth Annual Criminal Advocacy Institute, "Acquiring, Preparing and Utilizing Forensic Experts," Le Pavillon Hotel, New Orleans, LA.

10-17: National Institute for Trial Advocacy, Northeast Regional Session, Part Two, Cornell Law School, Ithaca, NY.

11-14: National College of District Attorneys Course, Welfare Fraud Seminar, Broadmoor Hotel, Colorado Springs, CO.

14: American Foreign Law Association, Fall Luncheon Meeting, "Current Developments in Argentine Commercial Law as They Concern American Attorneys," The Lawyer's Club, 115 Broadway, New York, NY.

15-16: Federal Publications Inc., Government Contract Program, Cost Estimating for Government Contracts, Sheraton Chateau LeMoyné, New Orleans, LA.

15-18: National College of Criminal Defense Lawyers and Public Defenders, Forensic Sciences, Denver, CO.

16-17: ABA National Conference of Lawyers and CPA's meeting, Arizona Biltmore, Phoenix, AZ.

16-18: Virginia Bar Association, Annual Meeting, Conference Center, Williamsburg, VA.

19-20: University of Santa Clara School of Law, Federal Publications Inc., "Renegotiation of Government Contracts," Plaza Room,

Tropicana Hotel, Las Vegas, NV. Contact: Miss J.K. Van Wycks, Seminar Division, Federal Publications Inc, 1725 K Street NW, Washington, DC 20006, Phone 202-337-8200.

19-23: University of Denver College of Law Federal Publications Inc., Government Construction Contracting, Williamsburg, VA. Contact: Construction Contracts Course, Federal Publications Inc., 1725 K Street NW, Washington, DC 20006.

20-22: US Civil Service Commission CLE Program, Environmental Law Seminar, Washington, DC.

22-23: ABA Litigation Section, national institute on "Proof of Damages," Fairmont Hotel, San Francisco, CA.

22-24: ALI-ABA Program, Modern Real Estate, Transactions, Los Angeles, CA.

25-29: National College of District Attorneys Course, Advanced Organized Crime Study Group, New Orleans, LA.

25-30: American Academy of Judicial Education Program, Problems in the Conduct of a Jury Trial, University of Miami, Coral Gables, FL.

27-30: 1976 Seminar for Federal Public Defenders, San Diego, CA.

30-31: Practising Law Institute, Eighth Annual Criminal Advocacy Institute, "Acquiring, Preparing and Utilizing Forensic Experts," Americana Hotel, New York, NY.

#### FEBRUARY

Secretary, 11400 Rockville Pike, Rockwell Bldg., Rockville, MD 20852.

19-20: ABA Section of International Law, national institute on "Current Legal Aspects of Doing Business in the Middle East," The Mayflower, Washington, DC.

19-22: National College of Criminal Defense Lawyers and Public Defenders, Defender Management Workshop, Washington, DC.

22-27: American Academy of Judicial Education Program, Trial Judges Writing Program, University Inn, Coral Gables, FL.

23-24: ABA Center for Administrative Justice, Application for the Administrative Procedure Act, Meeting, Washington, DC.

24-25: US Civil Service Commission CLE Program, Application of the APA to Administrative Proceedings, Washington, DC.

25-28: National College of District Attorneys Course, Pretrial Problems Seminar, Houston, TX.

26-29: National College of Criminal Defense Lawyers and Public Defenders, Advanced Evidence, Washington, DC.

February 29-March 5: National College of District Attorneys Course, Prosecutor's Office Administrator Course, Houston, TX.

### MARCH

National Conference of ABA/AMA, meeting

National District Attorneys Association, New Orleans, LA.

7-10: National College of District Attorneys Course, Criminal Justice System Workshop.

12-13: ABA Section of Insurance, Negligence and Compensation Law, national institute on "Medical Legal Aspects of Litigation," Fairmont Colony Square, Atlanta, GA.

14-18: National College of District Attorneys Course, Organized Crime Seminar, Boston, MA.

15-17: FBA-BNA Briefing Conference on Government Contracts, Warwick Hotel, Philadelphia, PA.

3-5: US Civil Service Commission CLE Program, Institute for New Government Attorneys, Washington, DC.

5-7: ALI-ABA Program, Environmental Law, Fairmont Hotel, San Francisco, CA.

6-8: ABA Section of Taxation, Midyear Meeting, Houston Oaks Hotel, Houston, TX.

8-11: American Academy of Judicial Education Program, Criminal Law III: Effective Assistance of Counsel, Right to Counsel, Double Jeopardy, Speedy and Public Trial, Insanity Defense and Competency to Stand Trial, Arizona State University, Tempe, AZ.

8-11: National College of District Attorneys Course, Major Fraud/White Collar Crime Seminar, Los Angeles, CA.

11-14: American Academy of Judicial Education Program, Evidence III: Relevancy, Authentication, and Judicial Notice, Arizona State University, Tempe, AZ.

12-17: ABA Midyear Meeting, Philadelphia, PA.

13-15: National Association of Women Lawyers, Midyear Meeting, Philadelphia, PA.

13-15: National Organization of Bar Counsel, Meeting, Philadelphia, PA.

17-20: American Academy of Forensic Sciences, Annual Meeting, Washington, DC. Contact: American Academy of Forensic Sciences,

18-19: ABA Section of Administrative Law, national institute on "Oversight and Review of Agency Decision-making," The Mayflower, Washington, DC.

18-20: ALI-ABA program "Land Planning and Regulation of Development, Shoreham Hotel

18-21: National College of Criminal Defense Lawyers and Public Defenders, Forensic Sciences, Houston, TX.

19-20: ALI-ABA program, "Practice under the New Federal Rules of Evidence," Hyatt Regency, Phoenix, AZ.

21-26: National College of District Attorneys Course, Prosecutors Investigators School

23-25: US Civil Service Commission CLE Program, Seminar for Attorney Managers, Washington, DC.

25-26: ALI-ABA program, "Tax Consequences of Property Transactions" co-sponsored by Emory University School of Law, Emory University School of Law, Atlanta, GA.

26-27: Practising Law Institute, Eighth Annual Criminal Advocacy Institute, "Acquiring, Preparing and Utilizing Forensic Experts," Sir Francis Drake Hotel, San Francisco, CA.

## Procurement Law Item

*From: Procurement Law Division, OTJAG*

### INFORMATION REGARDING PROTESTS FOR SJA'S.

In order to assure that installation contracting officers promptly coordinate their actions on protests with the Staff Judge Advocate so that timely assistance can be provided, the following procedure has been instituted:

(i) All Staff Judge Advocates will receive an information copy of each protest filed with the Comptroller General regarding any procure-

ments handled at their installation. The copy will be provided at the same time that the installation contracting officer is requested to compile the administrative report which will be submitted to the Comptroller General; and

(ii) A copy of each decision rendered by the Comptroller General on each protest involving your installation will be provided for information and guidance on future protests.

## Legal Assistance Items

*By: Captain Mack Borgen and Captain Stephan Todd, Administrative and Civil Law Division, TJAGSA*

### ITEMS OF INTEREST

*Consumer Affairs—Recent Statutory and Regulatory Consumer Protections.*

**Warranties.** Consumer product warranties became the subject of congressional enactment under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (4 January 1975). Title I of the Act, the so-called "Truth-in-Warranties Act," is located at 15 U.S.C.A. §§ 2301-2312 (Feb. 1975). Title II of the Act, expanding the role and the authority of the Federal Trade Commission, is at 15 U.S.C.A. §§ 45-57c.

Title I does not require a supplier of consumer products to give a written warranty. The supplier has three options: (a) to give no warranty; (b) to give a written warranty; or (c) to give a service contract. In the case of consumer goods costing more than \$10, if the supplier gives a written warranty, he must designate whether it is a "full" or a "limited" warranty. The criteria for a "full" warranty are established in the Act. 15 U.S.C.A. § 2304. Of particular importance, a written warranty may not modify or disclaim any implied warranties.

The Federal Trade Commission has published guidelines on the implementation and enforcement of Title I. 40 Fed. Reg. 25721 (18 June

1975), 44 U.S.L.W. 2015 (8 July 1975). In addition, proposed rules concerning the disclosure of warranty terms and conditions, pre-sale availability of warranty terms, and informal dispute settlement procedures have been promulgated. 40 Fed. Reg. 29892 (16 July 1975). The Act applies to consumer goods manufactured after 4 July 1975. [See DIGS No. 8E-6, "Truth in Warranty" Law" (November 1975).] [Ref: Ch. 10, DA Pam 27-12.]

**Residential Real Estate Closing Costs.** Giving cognizance to the need for reform of the real estate settlement (closing) process in this country, Congress enacted the Real Estate Settlement Procedures Act, which is codified at 12 U.S.C.A. §§ 2601-2616 (Feb. 1975). The Act does not place a limit on the amount of closing costs that may be charged. Rather, the purpose of the Act is to inform prospective residential real estate mortgagors of the settlement process in general and of the specific costs involved in their particular transactions. The Act, *inter alia*:

a. Provides for the development of a uniform settlement statement form to be used in all transactions governed by the Act;

b. Provides for the development of an informational booklet on real property settlement services to be distributed to prospective borrow-

ers at the time of application for a mortgage loan; and

c. Requires the lender, at least 12 days prior to settlement, to provide the borrower with an itemized listing of the settlement costs involved in the transaction. HUD is empowered to promulgate rules concerning the waiver of the 12 day period.

The Act, which went into effect on 22 June 1975, has been the subject of a great deal of controversy. Legislation has been introduced to modify or suspend certain portions of the Act. In addition, HUD recently amended its regulation to allow a borrower to waive all but one day of the disclosure period prior to settlement. 40 Fed. Reg. 47792 (10 October 1975), 24 C.F.R. 82 [Ref: Chs. 10, 34, DA Pam 27-12.]

*Credit Billing Statements.* Congress has provided a remedy, albeit limited, to consumers who disagree with the information concerning the status of their credit account as reflected on the account statement furnished by creditors. The Fair Credit Billing Act, 15 U.S.C.A. §§ 1666-1666j (Feb. 1975) (effective 28 October 1975), provides that if a consumer gives written notice to the creditor of an alleged error in the account statement, the creditor must either:

(a) correct the error and notify the consumer, or

(b) after investigating the alleged error, furnish a written explanation to the consumer as to why the creditor believes the account to be correct.

If the creditor fails to take one of the above actions, the creditor forfeits the right to collect the disputed amount, up to a maximum of \$50, from the consumer. The implementing regulation promulgated by the Federal Reserve System is at 40 Fed. Reg. 43200 (19 September 1975), 12 C.F.R. 226, 44 U.S.L.W. 2160 (7 October 1975). [Ref: Ch. 10, DA Pam 27-12.]

*Credit Cards.* In addition to providing consumers a means of contesting alleged errors in credit billing accounts, the Fair Credit Billing Act, *supra*, also limits the "holder-in-due-course" defense for the issuers of open-end plan credit cards. The Act provides that the issuers of such

credit cards are subject to all claims, except tort, and defenses arising out of any transaction in which the credit card is used as the method of payment or extension of credit, if:

(a) the consumer has made a good faith attempt to obtain resolution from the person honoring the credit card;

(b) the amount of the transaction exceeds \$50; and

(c) the place of the initial transaction occurred within the same state as, or within 100 miles of, the mailing address previously provided by the cardholder.

The restrictions in (b) and (c) above are not applicable if the person who honored the credit card:

(a) is the same person as the card issuer;

(b) is controlled by the card issuer;

(c) is under direct or indirect common control with the card issuer;

(d) is a franchised dealer in the card issuer's products or services; or

(e) obtained the order for the transaction through a mail solicitation made by or participated in by the card issuer in which the cardholder was solicited to enter into such transaction by using the credit card issued by the card issuer.

The Federal Reserve System's implementing regulation is located at 40 Fed. Reg. 43200 (19 September 1975), 12 C.F.R. 226, 44 U.S.L.W. 2160 (7 October 1975). [Ref: Ch 10, DA Pam 27-12.]

*Sex Discrimination.* The Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691-1691b (Feb. 1975) (effective 28 October 1975), prohibits discrimination based on sex or marital status with respect to any aspect of a credit transaction. An inquiry as to marital status does not, *per se*, constitute discrimination. Implementing regulations promulgated by the Federal Reserve System are published at 40 Fed. Reg. 49298 (22 October 1975), 12 C.F.R. 202, 44 U.S.L.W. 2192 (28 October 1975). [Cross-reference: Legal Assistance Items, THE ARMY LAWYER, pp. 26-27 (February 1975)] [Ref: Ch 10, DA Pam 27-12].

*Mail Order Merchandise.* The Federal Trade Commission has recently promulgated a regulation dealing with undelivered mail order merchandise. The regulation, published at 40 Fed. Reg. 49492 (22 October 1975), 16 C.F.R. 435, 44 U.S.L.W. 2192 (28 October 1975), provides that the solicitation for the sale of merchandise to be ordered by the buyer through the mails constitutes an unfair method of competition and an unfair or deceptive act or practice if the seller does not have a reasonable basis to expect to be able to ship the merchandise:

(a) within the time stated in the solicitation, or

(b) if no time was stated, within 30 days after the receipt of a properly completed order.

If the seller is unable to ship the merchandise within the applicable time period, the seller must, prior to the expiration of the time period, offer the buyer the option either to consent to a delay in shipping or to cancel the order and receive a prompt refund. [Ref: Ch 10, DA Pam 27-12.]

*Preservation of Consumer Claims and Defenses.* The Fair Credit Billing Act, *supra*, eliminates the "holder-in-due-course" defense in certain credit card transactions. A recent Federal Trade Commission regulation, 40 Fed. Reg. 53506 (18 November 1975), 16 C.F.R. 433, 44 U.S.L.W. 2240 (25 November 1975), provides that it constitutes an unfair or deceptive act or practice for a seller to utilize a consumer credit contract that does not contain the provision, set forth in the regulation, announcing that the holder of the contract takes it subject to all the defenses and claims which the buyer could assert against the seller. The regulation covers both the situation where the seller extends the credit to the consumer and where the consumer obtains a loan to purchase the goods or services from a seller who (a) referred the consumer to the creditor or (b) is affiliated with the creditor by common control, contract, or business arrangement. The regulation becomes effective on 14 May 1976.

The Federal Trade Commission has proposed amending the regulation to make it an unfair or deceptive practice or trade on the part of a creditor to take or receive a consumer credit contract

which does not contain the provision. [Ref: Ch 10, DA Pam 27-12.]

*Consumer Protection Information.* It is possible to be placed on a mailing list for copies of fact sheets and news releases from the Federal Trade Commission. The address is:

Office of Public Information  
Room 496  
Federal Trade Commission  
6th & Pennsylvania Ave., N.W.  
Washington, D.C. 20580

In addition, individual copies of particular FTC statutes and regulations may be obtained from the Office of Public Information, ATTN: Legal and Public Records. [Ref: Ch 10, DA Pam 27-12.]

*State Taxation of Military Income—Recent Developments.* The Department of Defense will send tax information (service member's name, rank, military income, social security number, duty station, home address) to each member's home state. It had been the position of the Office of Management and Budget that such transference of information was precluded by the new Privacy Act, 5 U.S.C.A. § 552a, however DOD has determined that in accordance with the Freedom of Information Act, 15 U.S.C.A. § 552, the provision of such information to the states is permitted.

In a related development the issue of withholding for State income tax purposes is still under consideration by Congress. It appears that, at a minimum, a system allowing voluntary withholding will be enacted. Congress is still considering the alternative proposals such as mandatory withholding, garnishment of military pay in order to collect back taxes, and changing Section 514 of the Soldiers' and Sailors' Civil Relief Act so as to allow the state of station to tax the military income as "income earned within the State." [Ref: Ch 43, DA Pam 27-12.]

## ARTICLES AND PUBLICATIONS OF INTEREST

*Family Law—Change of Name—Married Woman.* A monograph entitled "You Can Use the Name of Your Choice! California Law on

Name Usage, Name Change, and Birth Certificates," has been prepared by the Stanislaus County Legal Aid. Copies of the four page summary may be obtained by writing 925 J Street, Post Office Box 3291, Modesto, California 95353. See also the discussion of the recent Virginia Supreme Court case, *In re Strikwerda*, Va. (December 1, 1975) at 2 FAMILY L. RPTR. 1021, 2074-2075 (December 9, 1975). Citing cases from Connecticut, Florida, Indiana, Maryland, New Jersey, New York, Ohio, and Wisconsin, the Virginia Supreme Court held that absent a showing of fraudulent purposes, a married woman may resume her maiden name. (Cross-Reference: Legal Assistance Items, THE ARMY LAWYER, pp. 33-34 (July 1975)) [Ref: Ch 24, DA Pam 27-12.]

*Family Law—Support of Dependents—State Garnishment Laws.* The Senate Finance Committee has recently prepared two compilations which may be invaluable in rendering advice and assistance regarding the garnishment of federal wages under 42 U.S.C.A. § 659. The names of the Committee Prints are "Provisions of State Laws and Other Data Relating to Wage Garnishment, Attachment and Assignment, and Establishment of Paternity" (October 1975) (\$2.65) (State by State Summaries) and "Child Support—Data and Materials" (November 10, 1975) (\$1.90) (Analysis of Social Services Amendments of

1975, 42 U.S.C. § 651 *et seq.*, as amended, and background statistical information). Both publications may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. See also Bernet, "The Child Support Provisions: Comments on the New Federal Law," 9 FAMILY L.Q. 491 (Fall 1975). [Ref: Ch 26, DA Pam 27-12.]

*Federal Income Taxation—Refugees of Southeast Asia—Tax Status.* The Internal Revenue Service News Release No. IR-1523, dated November 6, 1975, contains information regarding the tax status of refugees from Southeast Asia and their sponsors. Copies should be obtainable from local IRS offices. If unavailable locally, they may be procured by writing the Internal Revenue Service, Room 1107, 1111 Constitution Avenue, Washington, D.C. 20224 or HQDA (DAJA-LA), WASH., D.C. 20310. [Ref: Ch 41, DA Pam 27-12.]

*Veteran's Benefits—Estate Planning—Survivor's Benefits.* DA Pam 360-526, *Once A Veteran—Benefits/Rights/Obligations*, September 1975. This 37-page pamphlet summarizes the numerous benefits and entitlements available to veterans. Additionally, the pamphlet includes a useful post-separation "benefits timetable" and a list of the names and addresses of those offices and agencies established to assist veterans. [Ref: Chs 13, 16 and 44, DA Pam 27-12.]

## CRIMINAL LAW ITEM

*From: Criminal Law Division, OTJAG*

The necessity of providing a copy of the Staff Judge Advocate's post-trial review to defense counsel for comment has generated certain administrative difficulties. One sample comment from defense counsel follows:

"The accused was transferred to the Disciplinary Barracks, Fort Leavenworth, Kansas, on (date). The defense contends that it has been materially prejudiced in its ability to respond to the review due to its inability to personally consult him regarding the review's contents, especially regarding the section concerning his rehabilitation prospects."

Colonel Clausen, SJA, III Corps and Fort Hood, offers the following suggestions to attempt to minimize such problems:

1. Make every effort to insure that the post-trial review is prepared and a copy provided to the defense counsel prior to transfer of the accused.

2. In the post-trial review affirmatively call the attention of the convening authority to the fact that the defense counsel has submitted comments and advise him that those comments should be read and considered prior to action being taken in the case.

**JAGC Personnel Section***From: PP&TO, OTJAG*

1. *JAG Funded Legal Education Program and Excess Leave Program.* Paragraph 2-2e and 3-2b(1)(e), change 5, AR 623-105 dated 18 August 1975 which became effective on 1 November 1975 establishes specific requirements for the ratings of officers participating in these programs.

**2. Orders Requested as Indicated**

<i>NAME</i>	<i>FROM</i>	<i>TO</i>
<b>MAJORS</b>		
PRICE, James F.	Stu Det, Ft Ben Harrison, IN w/dy sta Geo Washington Univ	USALSA, w/dy sta Contract Appeals Div
SANDELL, Lawrence	USALSA, w/dy sta Ft Bliss	USALSA, w/dy sta Ft Carson
<b>CAPTAINS</b>		
COOPER, Thomas	USA Claims Svc, Ft. Meade, MD	Korea
COPPAGE, Charles	USA Engineer Cmd, Ft. Belvoir, VA	Korea
GRAINER, Marc	OTJAG	USALSA, Falls Church, VA
GRAYSON, Brett	1st Inf Div, Ft Riley, KS	Korea
GREGG, Robert	OTJAG	Of Gen Counsel, DA
KIRKPATRICK, Neal	Inf Center, Ft Benning, GA	Korea
NORSWORTHY, Levator	USA Engineer Cmd, Ft Belvoir, USA Recruiting Cmd, Ft Sheridan, IL	OTJAG USA Garrison, Ft Sheridan
ROBERTS, James	USA Retraining Bde, Ft Riley, KS	USA Missile Cmd, Redstone Arsenal, AL
SOFOCLEOUS, Frank	Field Artillery Cen, Ft Sill, OK	Korea
<b>WARRANT OFFICERS</b>		
BURBANK, Ronald	Korea	Europe

**Current Materials of Interest**

Rick Blackwood and Robin Blackwood, "What Are the Father's Rights In Abortion?" *J. LEGAL MEDICINE*, Oct. 1975, at 28. Rick Blackwood, A.B., M.F.S., is attending the U.S. Naval Candidate School at Newport, R.I. Robin Blackwood, A.B., M.S., is a lieutenant, j.g., on active duty in the U.S. Navy, assigned to the Cornell University Law School, Ithaca, NY.

Pope & Lowell's, "The Criminal Process During Civil Disorders," 1975, *DUKE LAW JOURNAL* 581 (1975) in two parts.

The American Bar Association Commission on Correctional Facilities and Services, 1705 DeSalle Street, NW, Washington, DC 20036, has recently compiled the following material:

Anatomy of a Civil Rights Lawsuit: Establishing an Inmate's Right to Due Process in Prison Transfers

Community Programs for Women Offenders: Cost and Economic Considerations

**Medical Experimentation on Prisoners:  
Some Economic Considerations**

**Legal Issues in Addict Diversion (A technical  
Analysis)**

**Volunteer Program Development and  
Structure (A Missouri Profile)**

Copies may be obtained free by writing to the  
above address.

By Order of the Secretary of the Army:

Official:

**FRED WEYAND**  
*General, United States Army*  
*Chief of Staff*

**PAUL T. SMITH**  
*Major General, United States Army*  
*The Adjutant General*