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Some Thoughts on Trying Cases  
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The trial of cases and the defense of clients involve more than the knowledge of substantive law, procedure and evidence. They involve more than the knowledge of the facts of the case. They involve tactics and practical considerations which extend beyond the classroom teachings of academicians. They involve that knowledge called experience. Offered below are some thoughts for defense counsel.

Of all the decisions that defense counsel and their clients must make, none is more important than the choice of forum, *i.e.*, a bench trial or trial by members. Observation, as well as statistics, indicate that judges are more likely to confine and more likely to adjudge punitive discharges. Accordingly, it would be logical to expect large numbers of trials with members. However, this does not appear to be the case.

The choice of forum should be made very carefully. Many factors should be considered in making this choice. The first relates to the sentencing pattern established by the servicing military judge. After a judge has been in a jurisdiction for a number of months a certain pattern of sentencing in particular types of cases can usually be discerned. Thus, counsel should be able to accurately predict sentences in most bench trials. Therefore, it should follow that in those types of cases which resulted

in significant punishment, there should be more trials with court members. However logical this conclusion, it does not coincide with experience. Defense counsel must consider how the judge treats particular crimes and how the judge sentences particular individuals. Some judges place strong consideration on the age of the accused and his status—military policeman, noncommissioned officer, etc. This information must also be considered in choosing the forum.

Another factor, and in some cases the most crucial in choosing the forum, is the type of motions that will be made. Very often, especially in drug cases, a motion to suppress results in the divulging of much information adverse to the accused. There may be evidence that the accused has been suspected of being a big pusher for a long time but probable cause to apprehend or try him has never been found. Often company commanders have testified that they interview all personnel who leave the unit because these individuals are more likely to divulge the wrongdoings of their peers than those who must still live in the barracks. This evidence usually does not amount to probable cause but it is another factor to be considered in the probable cause equation when the search or the apprehension is eventually made.

As a result of Article 39a session proceedings the judge is likely to hear evidence of uncharged misconduct which may be considered in determining the sentence. On the other hand, court members would not be privy to this information and in these cases it may be better for the accused to be tried by members. Similarly, providence inquiries in guilty plea cases may divulge uncharged misconduct. It is doubtful whether this evidence may be considered for sentencing purposes but the fact remains that the judge heard it and in bench trials may subconsciously consider it.

Experience also demonstrates that court members sitting for the first time tend to acquit if the defense can present a case which is supported by some credible evidence. Moreover, they often tend to give lighter sentences at the beginning of their tenure than after they have gained experience as members. Additionally, it appears that pleas of guilty are more favorably considered by judges than by members. Thus, despite the instructions on the significance of guilty pleas, it is the rare case with members in which the sentence is materially lessened by the guilty plea. Indeed, intelligent and well respected court members have stated in *voir dire* that they do not believe a guilty

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plea is a manifestation of repentance nor a first step towards rehabilitation. Rather, they believed the government had the evidence to establish guilt and that it was this fact alone which impelled the accused to plead guilty.

On the other hand, it seems that members like a good fight and do not penalize an accused for pleading not guilty. Hopefully, nobody penalizes an accused for pleading not guilty but it seems that in trials with members the plea rarely affects the sentence.

To summarize: in choosing the forum counsel must consider:

- a. the track record of the judge and members in similar cases;
- b. the aggravating evidence which may be divulged to the judge but not the members;
- c. whether members are experienced as court members; and
- d. the nature of the plea.

Another matter of concern is that too often it appears that defense counsel are oblivious of the need to do things quickly. In busy jurisdictions they often show a callous attitude toward the need to budget the judge's time wisely. Thus, too often pretrial agreements, requests for witnesses, requests for discharge for the good of the service under the provisions of Chapter 10, AR 635-200, and motions which cannot be quickly resolved are submitted at the last possible moment. As a result, valuable judge time is squandered. A last minute motion may result in a continuance to allow the government to respond. Eleventh hour guilty pleas often result in a trial of short duration but the judge who allocated the time is left with little to do while cases which could have been tried had notice been given remain untried. Similarly, last minute requests for witnesses result in continuances and lost time which is not beneficial. Another dilatory tactic which occurs on some occasions is the request for a continuance after the members announce the findings so that the defense may further prepare its ex-

tenuation and mitigation. To wait and make such a motion at the last moment without sufficient good cause is unconscionable but nevertheless occurs too often. Such tactics can only serve to disturb the judge and may adversely affect the client.

A third matter is that of impeaching a witness. Every trial judge too often experiences the following scenario. A witness testifies contrary to a previous statement made to the defense counsel. The defense counsel then asks the witness if on a previous occasion he said something else. The witness denies making the previous contrary statement and the defense counsel is left standing in the middle of the courtroom with an open mouth. From that position one of two events result. The defense counsel starts to argue with the witness or sheepishly returns to his seat. Neither helps the client. Counsel should always have a third party present during witness interviews or such conversations must be reduced to writing and signed by the witness. The only other recourse is to have the defense counsel testify which may result in disqualification to continue as counsel. Thus, that is not a viable recourse.

A fourth area of concern is cross-examination. It has been wisely said that often the best cross-examination is none at all. Cross-examination should have more of a purpose than giving the counsel the opportunity to stand and speak. Basically, cross-examination should be purposeful. Unless the purpose is to impeach the witness, limit the impact of testimony or elicit unrelated evidence favorable to the accused, there is little need to cross-examine. Moreover, by not cross-examining, members can sometimes obtain the impression that the witness really was not significant. Before counsel rises to cross-examine, he should ask himself why he is going to do so. If he cannot give himself a decent answer, he should remain seated.

Once the defense counsel decides to cross-examine, he should be very careful how he accomplishes it. A major flaw in cross-examination is that it too often becomes a reiteration of the direct examination. As a result, the

direct examination is emphasized and the cross-examination hurts not helps, the accused. Moreover, the technique of starting at the beginning and questioning step by step has the effect of plugging any gaps that may have been left open by the direct examination. Since the purpose of cross-examination is to elicit a limited amount of information from the witness, counsel should concentrate on this information, ask the minimum number of questions necessary to achieve this purpose and sit down. If this is done, the client will have been well served and the prosecution will not have been aided. In addition, counsel will have avoided the biggest problem in cross-examination—that of saying too much too often.

If the first rule of cross-examination is "don't," the second is know the answer before the question is asked. The counsel who blindly asks questions without knowing the answer, runs a great risk for the client. A risk that most often should not be taken and one that too often will result in the divulging of adverse evidence.

Another cross-examination problem is the cross-examination of the expert witness. A successful cross-examination of a drug, fingerprint or handwriting expert from the CID laboratory is so rare as to be nonexistent. In fact, most attempts to cross-examine these witnesses result in utter disaster for the accused. Various defense oriented articles have explained how to cross-examine the chemist. Unfortunately, the results of blindly following those articles usually result in the general feeling of members and judges that the defense is playing games and wasting time. While it is theoretically possible to successfully cross-examine the laboratory expert, as a practical matter it is neither worth the time nor the effort. The following incidents have occurred in courts-martial. In a forgery case in Frankfurt, Germany, the handwriting expert was asked on cross-examination whether any expert would disagree with her conclusion. Her answer was, "No one who had any respect for their profession would disagree with my conclusion."—an answer which was both devastating to the

defense and certainly not desirable on cross-examination. Similarly, in a 1973 case tried in Karlsruhe, Germany, the chemist testified that she had received her Ph.D. in 1939 in chemistry. Nevertheless, the defense counsel continually asked her if she could discern the difference between marijuana and some common household spices. Naturally the result of the cross-examination only emphasized the chemist's credentials and opinion and injured the accused's cause.

Another area of concern is a plea of guilty to one specification when the charge sheet looks like a laundry list, or it is to a minor lesser included offense when the evidence will obviously prove the accused guilty of a much more severe offense. The tactic of pleading guilty to some offenses or to a lesser included offense and arguing that the accused pleaded guilty to some but not to others because he was honest with the court is often sound. However, the instances described above are often unreasonable pleas and essentially misuse the judge's time by compelling unnecessary providence inquiries. Moreover, they do not make a favorable impression on members. Reasonable guilty pleas are good tactics but unreasonable ones are not. Counsel should be aware of the difference and not commit those errors which can only annoy the judge and the members without helping the client.

The last matter is instructions. Experience indicates that members pay much attention to the elements of the offenses and to those affirmative defenses which are substantially raised by the evidence and which are argued by counsel. As for the remainder of the instructions, their attention is polite at best. Therefore, counsel who ask for and insist on every instruction run the risk of losing the significant instructions in a sea of inapplicable ones. Counsel should request the important instructions, run with them, and avoid shotgunning the case.

Advice can be given forever and ever but it all boils down to the trial lawyer discerning what the issues are and what they are not. The successful trial of any case depends in large

part upon the lawyer understanding the crucial issue or issues. In a self-defense case it is unwise to spend hours cross-examining witnesses about the identity of the accused. Similarly, where the defense is alibi it is fruitless to try and establish voluntary intoxication as a defense. Once the crucial issue is identified, all questions and all trial tactics should be geared to that issue. Basically, the bottom line is being a lawyer. The good lawyers discern the salient issues and concentrate on them. The poor ones never discover the issue and are lost in a fog.

A final word. Sometimes the roles of the judge and that of the defense counsel are con-

flicting. The judge seeks to clarify so the members can correctly decide the case. The defense counsel often must seek to muddy the waters and basically hide the truth. It is often in the best interests of the client that all the facts are not made known. At times the adversary system is not the best way of ascertaining truth. Nevertheless, regardless of these occasional conflicts it is the judge's desire that the defense counsel perform competently and professionally. To that end, the judge is there to help all counsel and counsel should after trial, seek out advice from the judge on tactics and other matters.

**Do Not Pass Go; Do Not Collect \$200 . . .  
Your Suspended Sentence Has Been Vacated  
Pursuant to Article 72 UCMJ!**

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You are standing in the showroom of a new car dealer contemplating the purchase of the sleek, shiny Oldsmobile sitting before you. Upon receiving permission to test drive the vehicle you wheel it out into traffic for a spin around the block, but something does not seem quite right. The performance of the engine does not appear to match the cost of the automobile. After returning to the showroom you look under the hood. Much to your dismay you do not find a top-of-the-line Olds engine. Instead there is a Chevrolet engine not up to par with the prestige and price tag in contemplation.<sup>1</sup>

And so it is with the procedure for vacating suspended sentences in accordance with Article 72, Uniform Code of Military Justice (U.C.M.J.). Military courts-martial practice, which is worthy of emulation by civil jurisdictions in an overwhelming number of ways, falls far short of the mark in carrying out probation revocation proceedings. Close scrutiny of this facet of military justice reveals not an Oldsmo-

bile engine, but perhaps something less than a Chevrolet engine and more akin to a Model T power plant. Indeed, this fact is more surprising than the discovery of the prospective car buyer!

In a jurisdiction where criminal trials are the sole predicate to judicial activity, the extensive number of cases where vacation actions have been taken produce sparse results in setting guidelines for the process.<sup>2</sup> The dearth of judicial, legislative<sup>3</sup> and executive<sup>4</sup> guidance in military jurisprudence has not been due to a lack of academic interest with the problems inherent to revocation proceedings.<sup>5</sup> Furthermore, the void of more definitive guidelines is not attributable to the fact that court-martial commands have tilled in untrodden fields. It appears that the deficiency in procedural sophistication results from a lack of sensitivity to the process by government and defense counsel alike. There is little challenge by defense counsel to the procedural mechanism which resurrects the sentence of a probationer. This has a

collateral effect of fostering the sense of complacency on the part of the government. Thus, any motivation to detail the rights and obligations of all parties to the proceedings is neutralized.<sup>6</sup>

The purpose here is not to provide an exhaustive evaluation of the military probation revocation hearing. Rather it is to dwell on specific areas of procedure which have not been considered before<sup>7</sup> and which should be contemplated for inclusion in a revocation proceeding standard operating procedure. The aspects touched on do not necessarily inure to the benefit of the probationer. A quick scan reveals they most frequently have a worthwhile effect on governmental activity. In concluding, broad suggestions will be offered which should serve to enhance the criminological attributes of probation, the ease with which the revocation proceedings effectively and efficiently can be carried out by the hearing officer, and the clarification of procedural requirements necessary during the revocation process.<sup>8</sup>

Although the early probation revocation cases have been repudiated in recent times<sup>9</sup> understanding them underscores the bridle which is placed on unconstrained authority exercisable by those supervising the probationer today.<sup>10</sup> Precursors to judicial opinions which presently cloak<sup>11</sup> due process conditions on the revocation hearing envisioned only a review of the acts of the revocation authority for an abuse of discretion.<sup>12</sup> Probation was viewed in a rather narrow light. In the seminal case of *Burns v. United States*<sup>13</sup> the Court stated:

Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing.

In *Escoe v. Zerbst*<sup>14</sup> the Supreme Court reaffirmed its perception of "[p]robation or suspension of sentence . . . as an act of grace to one convicted of a crime. . . ." <sup>15</sup> The only action demanded of a body authorized to revoke probationary status was that it adhere to any validly promulgated statutes.<sup>16</sup>

The law lay dormant until 1967 when *Mempa v. Rhay*<sup>17</sup> was decided by a unanimous Supreme Court. The Court held that an individual had certain constitutional due process rights at a combination probation revocation/deferred sentencing hearing.<sup>18</sup> Thereafter the Court announced<sup>19</sup> those minimum requirements of due process which had to be afforded one whose probation was under consideration for revocation. These included a two-stage hearing. At the first hearing determination was to be made if there was probable cause to believe that a violation of probation was committed. Thereafter a hearing on the question of whether to revoke the suspended sentence was mandated. Included in both proceedings were minimum rights. Encompassed were the right to notice of the hearings, the opportunity to be heard and confronted by the Government's evidence, a decision based on information reduced to writing and under certain circumstances the right to counsel.

The military legal community was quick to recognize the application of the due process mandate to proceedings which served to vacate suspended sentences for *any* court-martial. As in many other instances, for example, the area of self-incrimination, military practice had extended some due process safeguards for the service member in at least a limited vein before their need was recognized at all in the civilian legal environment.<sup>20</sup> Moreover the foregoing included rights to counsel which were not to appear on the civil horizon even in a lesser form until a bench mark was set in *Gagnon v. Scarpelli*.<sup>21</sup>

It was the latter case which delineated the outer perimeter in the development of military due process requirements.<sup>22</sup> Military courts limited their application of civilian revocation decisions. They simply insured that the minimum due process guidelines established by the Supreme Court were adhered to.<sup>23</sup> Military revocation procedures were not refined any further. The intent of Congress in propounding the Uniform Code of Military Justice<sup>24</sup> had never come to be fulfilled. It was envisioned early on that federal judicial procedures would

be followed. The following colloquy extracted from the House Armed Services Subcommittee hearings regarding vacation proceedings serves to spotlight the proposition:

Mr. Larkin: Now when he (the Probationer) is back on duty on probation, there are a number of instances where such persons [sic] commit additional offenses, or in some way by their conduct violate the standard of good behavior. *In the same fashion as in civilian courts*, upon such violations, they may be returned to serve out the unexpired portion of their sentence [sic].

Mr. DeGraffenried: That follows the same system they have in the federal courts now?

Mr. Larkin: That is right, and I think in most State Courts.<sup>25</sup>

With the foregoing historical perspective firmly in hand contemplation of specific procedures is the order of business. In assessing the vitality of military probation revocation proceedings one must recognize that evaluation can be approached from various points of view.<sup>26</sup> Those concepts chosen for analysis relate to practices for which military jurisprudence reflects an absence of considered reflection. It must be stressed that no inference is to be drawn by the selection for presentation of some facets of procedure over others. As has been pointed out, although military practice at one point in time was a step ahead of its civilian counterparts both qualitatively and temporally, a brief survey of federal civilian cases brings home the realization that the legal surface has barely scratched in this area. Many aspects of probation practice have never been clearly defined.

The approach to be utilized in commenting on various practices will be to entertain them as they normally would appear in the justice spectrum itself.<sup>27</sup> Specifically, under each topical heading the particular problem to be noted will be explained. Thereafter the status of the law in federal practice will be described. Finally, if appropriate a military resolution will be proffered.

### Concealed Prior Misconduct

Occasionally in the civilian sector during the course of the presentencing investigation the accused either independently, or upon request, will provide untruthful information, or will conceal preexisting acts of misconduct. The nonfeasance or misfeasance presents the putative probationer in a more favorable setting for sentencing. The question is: what if any action is available to the Government when the matter comes to light after the individual is admitted to probation. The notion has equal import in the military setting. Although the military accused does not detail information to a probation officer prior to sentencing, frequently a request will be made, either self-executed or through counsel, imploring the convening authority for clemency. Sometime later it may be discovered that misinformation was provided and it was such information which was the basis for suspending the individual's sentence.

Federal courts have had occasion to deal with this predicament in a limited number of decisions.<sup>28</sup> The finding of preexisting misconduct appears to be a valid basis, in and of itself, to withdraw the defendant's probationary status. If the respondent is found to have perpetuated the probation through an affirmative fraudulent act, such as through an improper statement or the withholding of information vacation of the suspension would be propitious. On the other hand, if the Government itself were to blame for the situation, revoking the probation would not be in order.<sup>29</sup>

### Conditions of Probation

This area of procedure is rather significant to military practice for rarely are written or oral conditions of probation set forth for the guidance of the accused. The problems are evident. As a social tool probation is unable to fulfill its potential for usefulness as the probationer is not given any firm guidance on what can or cannot be done.<sup>30</sup> Without specific conditions tailored to an individual's needs the particular social problem which has brought about the person's transgressions is incapable of correction.

From a legal point of view the problem is considerably more onerous. When the Government attempts to vacate a probationary status a strong argument can be presented that the probationer has been denied due process. In one case it was advanced that the probationer had ". . . not [been] sufficiently appraised of the standards of conduct required of him and the consequences of deviation from said standard[s]." <sup>31</sup>

It is incumbent upon the Government to clearly set out the general and specific conditions of probation to which the respondent is expected to adhere. However, if these conditions are not delineated, all is not lost. One case has held that vacation can be effectuated where criminal activity is the underlying basis for the action.<sup>32</sup> The same court was quick to add, nevertheless, that notice of special conditions would be essential as a matter of constitutional law where revocation was to be based on conduct which was not per se illegal.<sup>33</sup>

#### Timeliness

As a case winds its way through the military justice labyrinths judicial guidance has urged constant action and resolution through establishment of time frames which must be adhered to.<sup>34</sup> So too does expeditious handling attend revocation proceedings. Both the Supreme Court<sup>35</sup> and the Court of Military Appeals<sup>36</sup> have indicated that time is of the essence in carrying out the revocation procedure. "Failure to hold a prompt Morrissey preliminary hearing may eliminate the revocation option, if the analogous rules requiring dismissal of criminal charges when the right to speedy trial is denied are applied to probation revocation."<sup>37</sup>

Courts invariably deal with each case on an ad hoc basis and are generally reluctant to set fixed standards to guide authorities in their actions.<sup>38</sup> General notions of due process are the principles underlying time delays.<sup>39</sup> Although judges are quick to point out losses which face the probationer if revocation hearings are not quickly held,<sup>40</sup> time delays undermine the Government's position as well. This is particularly true in the military context where personnel assignments are fluid and

there is a great opportunity to lose control of witnesses who will be able to support the alleged violation.

The problem of speedy disposition has been dealt with in various ways. Jurisdictions in some circumstances have considered the use of per se time frames within which action must be completed<sup>41</sup> but have succumbed to balancing tests to determine the reasonableness of the delay in question provides a fairer means of determining prejudice to the probationer's right. In one case<sup>42</sup> the court adopted an ad hoc approach modeled after the Supreme Court criteria for determining sixth amendment violations. Citing *Barker v. Wingo*<sup>43</sup> the court indicated it would look to such factors as the cause of the delay, whether prejudice accrued to the defendant and the defendant's assertion of the right, as determinative of the outcome.

Within another jurisdiction courts themselves are split concerning a proper approach. One judge opined that ". . . reasonableness and fairness in view of all the facts and circumstances of a particular case . . ." <sup>44</sup> was the touchstone. Additionally essential to the analysis was a determination of whether a technical violation of the probation conditions occurred or a new crime had taken place. Another jurist in the same district indicated he would adopt the standard<sup>45</sup> for deciding pre-indictment delay arguments as being applicable to the revocation hearing as well. This, he posited, required an accused to show both that prejudice had accrued and there was a prosecutorial motive to gain a tactical advantage.<sup>46</sup>

Whatever complexities attend a statement of the law, one thing is clear. Diligent effort is the byword. Standards, not as a matter of prescriptive conduct but as a matter of viable bench marks should be established within commands. The same emphasis should be placed on the speedy resolution of revocation proceedings as staff judge advocates do in processing the case itself.

#### Mental Responsibility

It is clear both in federal<sup>47</sup> and military<sup>48</sup> practice that the question of mental competency

of the probationer at the time of the alleged act of misconduct and any vacation proceedings is an important factor at the hearing. There is a difference between the two procedures. Federal law clearly mandates<sup>49</sup> what is to be accomplished by the U.S. Attorney and what standards are to be observed in defining legal incompetence whereas in military proceedings no such direction is forthcoming.

The DD Form 455, Report of Proceedings to Vacate Suspension, which ". . . may be used as a guide for the hearing"<sup>50</sup> offers no guidance to the hearing officer. It does not provide a mental standard; it does not tell what to do if the respondent cannot participate in the proceedings; it does not provide a tack to follow if the probationer is actually insane.

The Government is responsible for determining the mental status of a probationer prior to the vacation hearing. This is not a novel idea. Recently the Army has instituted through regulation<sup>51</sup> concrete steps which must be followed prior to trial by general court-martial or special court-martial authorized to adjudge a bad-conduct discharge. This includes a mental status examination by a medical doctor who has been provided with background information about the subject. The scheme set forth in the foregoing plan incorporates by reference steps from paragraph 121, MCM, 1969 (Rev. ed.), which lucidly detail action which can be taken toward the accused. A directive such as the one just described, additionally enhanced by incorporating paragraphs 120 through 122, MCM, 1969 (Rev. ed.), would place vacation proceedings in an inviolable legal position. Moreover the Government could be assured the probationer would be served by action best suited to his or her needs.

#### Hearing Procedure

Due process requires that there should be a rational scheme by which decisions are rendered and that notice will be given concerning the framework which is to be employed. Unfortunately probation revocation proceedings in the military present many unknowns to both those supervising and those who are the focus

of interest. This does not mean that the probationer at such a hearing has an array of rights normally accorded an accused at court-martial. In fact, the contrary is true. The respondent generally is afforded only a 'pint-sized' version of rights one would normally expect at a true criminal prosecution.

It is essential that authorities carrying out Article 72 proceedings be made aware of a clearly defined methodology. This enables hearing officers and vacating authorities to provide a coherent, rational approach which lends to the efficiency of the determinative activity. Further, unfounded contentions which may be advanced on the part of the probationer may be put to rest out of hand thereby obviating recourse to legal research or the advice of counsel. Finally any due process arguments later advanced by the probationer on appeal would be sapped of their legal vitality.

#### Evidentiary Rules

Questions relating to standards of proof, application of the rules of evidence, and requirements to provide material pursuant to the Jencks Act, 18 U.S.C. § 3500 are unclear.

The standard of proof necessary to revoke is not difficult to state or apply. It merely requires the choice of a probity standard and an announcement of it for all to apply. Manifestly proof beyond reasonable doubt is not the touchstone for factual determinations at probation hearings.<sup>52</sup> Beyond this proposition courts and commentators have not taken a unified position on what should be required to satisfy the hearing officer that a probation violation has occurred. In short, the judiciary has run the gamut regarding levels of proof which should be met before an adjudication is reached.

The ABA Standards for the Administration of Criminal Justice suggest the use of a "preponderance of the evidence" standard.<sup>53</sup> Trial judges seem to prefer a lower threshold of proof which revolves around the notion of simply being satisfied in one way or another that a probation violation has transpired. The rationale for this less stringent standard seems to be premised on the philosophy that it is not

in the best interest of society to allow convicted criminals to remain at large after having been given a clemency opportunity.<sup>54</sup> Courts have articulated this guideline in various ways:

"[a]ll that is required is enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of probation."<sup>55</sup>

The judge must meet a "reasonably satisfied standard."<sup>56</sup>

The judge must be "satisfied that appellant had abused the opportunity granted him not to be incarcerated."<sup>57</sup>

The "... court is satisfied after a hearing . . . defendant's conduct has been such that the ends of justice and the interest of society and the defendant will be served by the revocation."<sup>58</sup>

The fulfillment then of the vacuum is facile. Just as the magician carrying out a card trick directs the assistant to 'choose one card, any card from the deck,' similarly must a single standard be selected. Unlike the sorcerer who implores the foil 'not to reveal the card chosen,' supervising authorities must clearly articulate, for the benefit and assistance of all, the basis by which facts will be resolved.

The amelioration of questions relating to reliance on the rules of evidence is generally easier than that for an evidentiary standard. All that is involved is the application of federal practice and a restatement of procedures adhered to at Article 32 hearings. The latter rules of procedure are salient as they are applicable to probation revocation hearings as well.<sup>59</sup> The net of the matter is clear. The rules of evidence are not adhered to.<sup>60</sup> Collateral to the issue is the role which the exclusionary rule plays at such hearings. Federal courts and state forums for the most part have refused to extend the use of the prophylactic device to the probation vacation arena.<sup>61</sup> The approach would be equally plausible in the military context, but should be brought aboveboard for all to be cognizant of.

Lastly questions concerning the relation of the Jencks Act<sup>62</sup> to probation proceedings are worthy of reflection and decision. It would appear that a dichotomy presents itself. Federal probation proceedings have repeatedly denied the use of the statute by the defense. The rationale has been predicated on the interpretation of the language of the provision, "[in] any criminal prosecution . . ." to mean precisely what is stated. In short, that a revocation proceeding is not a prosecution within the contemplation of the right. One military tribunal has taken a more liberal approach to the use of this discovery vehicle as it pertains to the pretrial investigation and has found it to be invocable by the defense.<sup>63</sup> The coin has landed on its side. Resolution is called for.

#### Procedural Rules

"Although it is true that a probation revocation hearing has been traditionally characterized as 'not one of formal procedure either with respect to notice or specification of charge or a trial upon charges,' a probationer is nonetheless entitled to 'fair' treatment."<sup>64</sup> The appellate court went on in the foregoing instance to find at the lower court the rather appalling circumstance of revocation proceedings being carried out *sans* the implementation of a formal procedure.<sup>65</sup> In a like manner the military proceeding finds itself plagued with a lack of clear contour and uniformity. The problem can be refracted into two beams. Certain matters have never been presented in any fashion to be homed in on as a guiding beacon for the hearing officer. Other practices obfuscate the investigator's path even more, as the *discretionary* guidelines offered run counter to the clear trial of federal procedure.

Each of the 'broad' groups of procedural points worthy of examination contains two specific concepts which should be resolved. In the area of 'non-guidance' providence inquiries ease themselves forward for consideration. The necessity for this action in a trial by civilian and military judges alike is beyond cavil.<sup>66</sup> Is, though, there a concomitant need for 'judicial activism' of this kind where a probationer desires to confess to the error of his or her ways

at a vacation proceeding? The answer is 'no.'<sup>67</sup> The philosophy behind such an approach lies in the fact that an admission of this sort is not deemed to be the functional equivalent of a guilty plea. No additional punishment can be adjudged in the case.<sup>68</sup>

Another matter which has not been settled dispositively is the manner in which 'hearing' officers and 'vacating' authorities must conduct themselves in light of the judicial nature of their roles. In both cases it would seem appropriate that their neutral and detached function would preclude these decision makers from entering into ex parte communications with either side to the proceeding. Although determinative case law does not abound, decisions do exist which compel open discussions.<sup>69</sup> Such communications during the vacation process are grounded on either the judicial character of the supervisory authority or minimum standards of fairness.<sup>70</sup>

The second generic group described above also presents two procedural burrs ripe for clarification. The foregoing revolve around counsel rights and the right to allocution. At all levels of military practice authorities are quick to recognize a 'right' to counsel in any given situation. A haze cloaks this 'right' at vacation proceedings. Paragraph 97b, MCM, 1969 (Rev. ed.), speaks in terms of applying 'procedural' aspects of the pretrial investigation to the vacation proceeding. The focal point of interest is the age-old juridical question of what is substance and what is procedure.<sup>71</sup> Although counsel may be required to be provided at the Article 32 hearing, is such a right mandatory at the vacation proceeding? The use of counsel guidelines established in sections 4 through 9 in Appendix 16, MCM, 1969 (Rev. ed.), is purely discretionary.<sup>72</sup> Perhaps of more import is the holding in *Gagnon v. Scarpelli*.<sup>73</sup> Counsel must only be provided to *indigents* in those revocation cases where the nature of the probationer's legal strategy necessitates counsel. Presumably this would be any contested revocation issue.

Finally what of a right to allocution by a probationer? Does the respondent at the vaca-

tion proceeding have the right to make a statement as an accused does prior to sentencing? The analytical approach which is followed in determining whether there is a counsel requirement in accordance with pretrial procedure prevails in this instance also. Decisions emanating from the federal bench hold there is no similar right.<sup>74</sup>

Thus, with both the above questions, legal positions can be marshaled for either side. The significant burden above all else is to establish one or the other as a prevailing course of action. The vacation proceeding is envisioned as being a simple, uncomplicated procedure. There would appear to be no forces which militate in favor of making it any more complex than necessary.

### Vacation Authority

The formal revocation action is also complex. It involves the answers to a duo of questions. First, does the authority purporting to revoke have the requisite degree of neutrality necessary? Second, must the authority credit the probation time toward the period of the sentence?

The inquiry structured in terms of detachment is not unique. Scholarly thought has dwelled on it before.<sup>75</sup> Judicial decisions have grappled with its constituent elements.<sup>76</sup> In its most primary form the evaluation of detached neutrality raises the question of whether a general court-martial convening authority impassively reflect on the recommendation of a subordinate special court convening authority to vacate a sentence? The purpose here is not to advance positions to support either side, but merely to underscore an exceedingly difficult question.

In these cases a method exists which can be employed to vitiate any question of bias. Prior to vacation the probationer should be 'transferred' administratively to the command of a lateral general court convening authority. This could be accomplished through an attachment order limited solely for military justice purposes. Subsequently the new convening authority could review the hearing officer's record and act with impunity.

Determining that a particular individual was legally capable of vacating a suspension triggers the second interrogatory. It is bottomed on a contention by the probationer that a failure to grant a credit would subject the person to either an enlargement of the sentence or double jeopardy.<sup>77</sup> Federal jurisdictions have rejected requests to credit time served on probation against the original sentence.<sup>78</sup> The answer most frequently though is found set forth in statutes. Jurisdictions legislatively resolve the question in differing ways.

Military authorities do not cast any illumination on the subject.<sup>79</sup> Being cast adrift without a compass one approach would appear as viable as the other. Again the keystone is uniformity, thereby mandating the selection of one practice over the other.

#### Conclusion/Recommendation

A wise, combat experienced battalion commander was once heard to counsel a young second lieutenant member of his command as follows: "Son, I don't mind that you're bringing me a lot of problems—just be sure that at the same time you bring me solutions as well." The advice fits the bill here. Accordingly, the 'second lieutenant' offers solutions.

Linking the recommendations are two basic ideas. All parties to a vacation proceeding should be placed on *notice* concerning their responsibilities. This in turn sires an additional benefit of uniformity. Both can be fulfilled through the same vehicles.

1. A guideline similar to U.S. Department of the Army Pamphlet No. 27-17 (Procedural Guide for Article 32(b) Investigating Officer), or Appendix E, Army Regulation 27-10, Military Justice Legal Services (Suggested Guide for Conduct of Nonjudicial Punishment Proceedings), should be promulgated for hearing officers/vacation authorities involved in probation revocation proceedings.

2. A handbook containing information concerning suspended sentences should be prepared for probationers. Among other information the book should have preprinted general conditions

of probation and could have space to insert special conditions of probation.

3. A reevaluation of Article 72, U.C.M.J., and paragraph 97b, MCM, 1969 (Rev. ed.), should be undertaken.<sup>80</sup> The major modifications to Article 72 should include due process compliance in the vacation of *any* sentence and authority should be granted the President to propound rules to supplement the codal provision.

Ideally, the first two recommendations could be implemented at departmental level. Nevertheless there is no reason why a local command should not promulgate its own policy guidelines. In either case the pylons supporting due process claims on the parts of probationers would be eradicated. All things considered, although the system is tarnished a bit, a small application of wax should return it to the splendor it rightfully should enjoy.

#### FOOTNOTES

<sup>1</sup> Maitland, *GM Offers New Auto or Insurance to Buyers of Engine-Switched Cars*, N.Y. Times, Apr. 26, 1977, at 1, col. 1.

<sup>2</sup> See *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977); *United States v. Rozycki*, 3 M.J. 127 (C.M.A. 1977); *United States v. Hurd*, 7 M.J. 118 (C.M.A. 1979), which set basic strictures to be adhered to. Other cases dealing with vacation proceedings limit their decisions almost unanimously to an evaluation of whether procedural requirements set forth in the foregoing cases have been complied with. *But see United States v. Lallande*, 146 C.M.R. 170 (C.M.A. 1973), as a lone foray into uncharted regions.

<sup>3</sup> Compare the limited guidance encompassed within Article 72, U.C.M.J., 10 U.S.C. § 872, with the more extensive guidelines found in 18 U.S.C. §§ 3651-3656, and extensive judicial interpretations.

<sup>4</sup> See paragraph 97b and Appendix 16, MCM, 1969 (Rev. ed.); Army Reg. No. 27-10, Military Justice Legal Services, para. 2-36 (C18, 1 Jan. 1979) [hereinafter cited as AR 27-10].

<sup>5</sup> See Comment, *Defending the Vacation of a Suspended Sentence*, 9 The Advocate 11 (1977); Young, *Due Process in Military Probation Revocation: Has Morissey Joined the Service*, 65 Mil. L. Rev. 1 (Summer 1974); Newsome, *Vacation of Suspension*, 20 JAG J. 35 (1965); Comment *Vacation of Suspended Sentences*, JAG J., Nov.-Dec. 1959 at 15; and Johnston, *Vacation of Suspension*, JAG J., Oct. 1952, at 14.

<sup>6</sup> Department of the Army Message 1972/12992 reprinted in *The Army Lawyer*, Jan. 1973, at 13 indicated at para. 8. "As an *interim guide*, DD Form 455 may be used to prepare this report" (emphasis supplied). To this date the same form is in existence as is the guide to discretionary use. See para. 2-36, AR 27-10. It may be that procedural differences between commands within the Army open up the possibility of legal attack on an 'equal protection under the law' argument.

<sup>7</sup> See fn. 5, *supra*.

<sup>8</sup> The Court of Military Appeals has stated probation revocation proceedings ". . . are integral parts of a court-martial sentence which, as such, are reviewable by this Court." *United States v. Bingham*, 3 M.J. 119, n.2 (C.M.A. 1977). Impliedly, this notion encompasses authority to review the proceedings by intermediate military appellate courts. Review may also be had pursuant to Article 69, U.C.M.J., 10 U.S.C. § 869. See, e.g., *Suspended Sentences In Regular Special Courts-Martial*, *The Army Lawyer*, September 1979, at 38.

<sup>9</sup> See *Mempha v. Rhay*, 389 U.S. 128 (1967); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

<sup>10</sup> See generally Comment, *Probation Revocation. A Survey of Constitutional Rights Since Mempha v. Rhay*, 8 Gonzaga L. Rev. 110, 110-112 (1972), for an excellent overview.

<sup>11</sup> See note 9, *supra*.

<sup>12</sup> *Burns v. United States*, 287 U.S. 216 (1932).

<sup>13</sup> *Id.*, p. 220.

<sup>14</sup> 295 U.S. 490 (1935).

<sup>15</sup> *Id.*, p. 492.

<sup>16</sup> *Escoe v. Zerbst*, 295 U.S. 490 (1935).

<sup>17</sup> 389 U.S. 128 (1967).

<sup>18</sup> The sentencing aspect of the hearing was viewed as a critical stage of the criminal proceeding and as such triggered the requirement of representation by counsel for the accused.

<sup>19</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), adopted the basic due process requirements for parole revocation hearing set out in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>20</sup> See Article 72, U.C.M.J., 10 U.S.C. § 872; para. 97b, and Appendix 16 MCM, 1969 (Rev. ed.). The MCM and regulatory provisions present a rather interesting question. Can the President and service Secretaries even create a regime under which a probation revocation proceeding may be held? Article 36, U.C.M.J., provides that the President may prescribe rules for the, ". . . pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . .". A probation revocation proceeding, ". . . is not a stage of a usual prosecution . . ." *Gagnon v. Scarpelli*, 411 U.S. 778 782 (1973). See also *United States v. Lallande*, 46 C.M.R. 170 (C.M.A. 1973) (Duncan, J. concurring in part and dissenting in part). Article 72, U.C.M.J., does not provide a delegation of authority to the President to carry out its terms. Contrarily it may be advanced that the President may fill such void in the role of Commander in Chief of the Armed Forces. This view is premised on Article II of the Constitution. See generally *United States v. Ezell*, 6 M.J. 307, 316-317 (C.M.A. 1979).

<sup>21</sup> 411 U.S. 778 (1973).

<sup>22</sup> See fns. 2 and 19, *supra*.

<sup>23</sup> See *Escoe v. Zerbst*, 295 U.S. 490 (1935); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

<sup>24</sup> 10 U.S.C. §§ 801-940.

<sup>25</sup> Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess 1208-09 (1949) (emphasis supplied).

<sup>26</sup> As an analytical framework one might approach an examination of the Article 72 proceeding from the following portals:

a. Those procedures where military and civilian practice coincide.

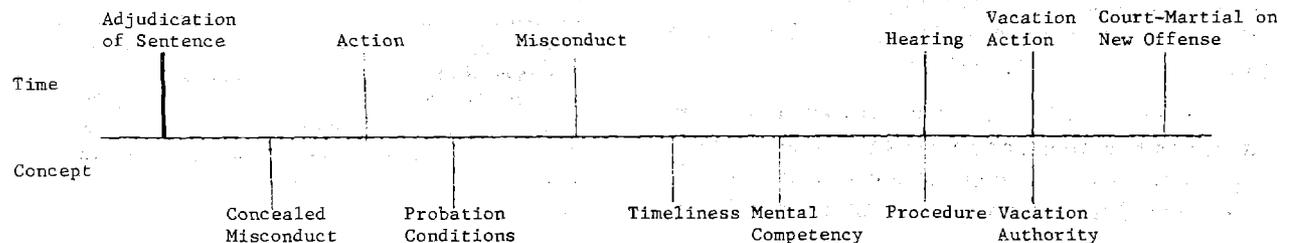
b. Those procedures which are unique to military jurisprudence and which might either:

(1) enhance due process procedure for the probationer;

(2) present a problem by virtue of being antagonistic to due process conditions or be in conflict with other military guidance on the same subject; or

(3) have produced no reflection.

<sup>27</sup>



- <sup>28</sup> See *United States v. Ecton*, 454 F.2d 464 (9th Cir. 1972); *Trueblood Longknife v. United States*, 381 F.2d 17 (9th Cir. 1967). (Although *Trueblood* is couched in language which characterizes probation as being a matter of grace versus right there is verbiage to suggest that the accused had taken affirmative steps to conceal prior misconduct from the court and probation officer.)
- <sup>29</sup> See *United States v. Hull*, 413 F.Supp. 145 (E.D. TN., 1976).
- <sup>30</sup> See *United States v. Lallande*, 46 C.M.R. 170 (C.M.A. 1973): Probation Standard, ABA Standards for Criminal Justice § 3.1. But see Newsome, *Vacation of Suspension*, 20 JAG J. 35, 39 (1965).
- <sup>31</sup> *Tittsman v. Black*, 536 F.2d 678, 680 (6th Cir. 1976). See also *United States v. Dane*, 587 F.2d 436 (9th Cir. 1978); *Kaplan v. United States*, 234 F.2d 345 (8th Cir. 1956); *United States v. Bonano*, 452 F. Supp. 743, 756, n.15 (N.D.CA. 1978); *Kartman v. Paratt*, 397 F. Supp. 531 (D.NE. 1975). Imlay and Glasheen, See *What Condition Your Conditions Are In*, 35 Fed. Probation 3 (June 1971). Cf. *Grayned v. Rockford* 408 U.S. 104, 108-114 (1972) (ordinance challenged as constitutionally deficient due to vagueness).
- <sup>32</sup> *Tittsman v. Black*, 536 F.2d 678 (6th Cir. 1976).
- <sup>33</sup> *Id.*
- <sup>34</sup> See, e.g., *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971) (speedy trial); *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979) (post trial action); *United States v. Malia*, 6 M.J. 65 (C.M.A. 1978) (review of pretrial confinement).
- <sup>35</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972). (It is important to note that two distinct time frames come into play if the probationer has been incarcerated due to the alleged misconduct. With regard to a preliminary hearing action should be taken. ". . . as promptly as convenient after arrest while information is fresh and sources are available," 408 U.S. at 485. Thereafter the final . . . "revocation hearing must be tendered within a reasonable time after the parolee is taken into custody," 408 U.S. at 488. In *Morrissey* a passage of two months was found to be reasonable for the final hearing.)
- <sup>36</sup> *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977); *United States v. Rozycki*, 3 M.J. 127 (C.M.A. 1977). In *Rozycki* the Court countenanced a more then two-month period between the end of the predicate misconduct (AWOL) and actual vacation. The Sword of Damocles was posed when the Court stated, "We hasten to add that said vacation proceedings must be completed within a reasonable period of time." 3 M.J. at 129.
- <sup>37</sup> Young, *Due Process in Military Probation Revocation: Has Morrissey Joined the Service*, 65 Mil. L. Rev. 1 (Summer 1974). See also *United States v. Hurd*, 7 M.J. 19 (C.M.A. 1979). They remanded to A.C.M.R. for its determination concerning whether the matter should be returned for a new vacation proceeding or the sentence should be approved without a bad conduct discharge. But see *United States v. Companion*, 545 F.2d 308 (2d Cir. 1976). The court finds release is not the remedy for delay absent repeated violations or an egregious situation.
- <sup>38</sup> *United States v. Williams*, 558 F.2d 224 (5th Cir. 1977); *United States v. Brown*, 458 F.Supp. 49 (E.D. P.A. 1978).
- <sup>39</sup> *Gaddy v. Michael*, 519 F.2d 669 (4th Cir. 1975); *United States v. Companion*, 545 F.2d 308 (2d Cir. 1976).
- <sup>40</sup> *United States v. Williams*, 558 F.2d 224 (5th Cir. 1977).
- <sup>41</sup> Cf. *United States ex rel. Hahn v. Revis*, 520 F.2d 632, 638 n.5 (7th Cir. 1975) *Marchand v. Director U.S. Probation Office*, 421 F.2d 331, 335, n.5 (1st Cir. 1970) (per se time frames for parole revocation proceedings).
- <sup>42</sup> *United States v. Companion*, 545 F.2d 308 (2d Cir. 1976).
- <sup>43</sup> 407 U.S. 514, 530 (1972).
- <sup>44</sup> *United States ex rel. Burgess v. Lindsay*, 395 F. Supp. 404, 410 (E.D. PA. 1975).
- <sup>45</sup> The standard in such cases is not as clear as one would believe. See generally Note, *Better Never Than Late: Pre-Arrest Delay as a Violation of Due Process*, 1978 Duke L. J. 1041.
- <sup>46</sup> See *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971).
- <sup>47</sup> See 18 U.S.C. § 4244, Mental incompetency after arrest and before trial. See also *United States v. Gray*, 421 F.2d 316 (5th Cir. 1979). Cf. *Sherburne v. United States*, 433 F.2d 1350 (8th Cir. 1970); *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970) (competency considered for its effect on probation proceedings and found to exist).
- <sup>48</sup> See Appendix 16, MCM, 1969 (Rev. ed.), DD Form 455, § 15.
- <sup>49</sup> The United States Attorney must request a judicial determination of the accused's degree of competency. The standard is a determination of whether the defendant is ". . . presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, . . ." 18 U.S.C. § 4244.
- <sup>50</sup> AR 27-10, para. 2-36.
- <sup>51</sup> AR 27-10, para. 2-40. But see *Commonwealth v. Megella*, 25 Crim. L. Rep. (BNA) 2536 (1979) (failure of court to sua sponte order psychiatric examination prior to proceeding with probation revocation hearing not denial of due process).
- <sup>52</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).
- <sup>53</sup> Probation Standards, § 5.4 (a) (iii).
- <sup>54</sup> *United States v. Smith*, 571 F.2d 370 (7th Cir. 1978).

- <sup>56</sup> *United States v. Garza*, 484 F.2d 88, 89 (5th Cir. 1973).
- <sup>57</sup> *United States v. Smith*, 571 F.2d 370, 372 (7th Cir. 1978).
- <sup>58</sup> *United States v. Markovich*, 348 F.2d 238, 241 (2d Cir. 1965).
- <sup>59</sup> *Davis v. Parker*, 293 F.Supp. 1388, 1392 (D. DE. 1968).
- <sup>60</sup> Para. 97b, MCM, 1969 (Rev. ed.). "Insofar as applicable the procedure at the hearing should be similar to that prescribed for investigations conducted under the provisions of 34."
- <sup>61</sup> See *Morrissey v. Brewer*, 408 U.S. 471, 498 (1972), for a statement of federal procedure and *United States v. Samuels*, 27 C.M.R. 280, 287, n.3 (C.M.A. 1959), for use of the rules at pretrial investigations. See also MIL. R. EVID. 1101(d) (Proposed draft as forwarded to Office of Management and Budget, September 12, 1979).
- <sup>62</sup> Note, *The Exclusionary Rule in Probation and Parole Revocation: A Policy Appraisal*, 54 Texas L. Rev. 1115 (1976). But see *United States v. Manuszak*, 438 F. Supp. 613 (E.D. PA 1977) (Illegally seized electronic transmissions can be suppressed at a probation revocation hearing by virtue of the statutory exclusionary rule contained within 18 U.S.C. § 2515. Reference in the section to its applicability at "hearings" probably encompasses those carried out pursuant to Article 72 as well.)
- <sup>63</sup> 18 U.S.C. § 3500.
- <sup>64</sup> *United States v. Jackson*, 33 C.M.R. 884, 890, (A.F.B.R. 1963) (the Jencks Act is applied "[t]aking into consideration the distinction between the court-martial system and the federal court system, we conclude, as a matter of fundamental fairness under the general concept of 'military due process . . .'" ).
- <sup>65</sup> *United States v. Joyner*, 486 F.2d 1261, 1262-3 (D.C. Cir. 1973).
- <sup>66</sup> *Id* 1262, n.5.
- <sup>67</sup> See e.g., Article 45, Uniform Code of Military Justice, 10 U.S.C. § 845; paragraph 70a, MCM, 1969 (Rev. ed.); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969)
- <sup>68</sup> *United States v. Hill*, 548 F.2d 1380 (9th Cir. 1977).
- <sup>69</sup> *Id.*
- <sup>70</sup> See *United States v. Sciuto*, 531 F.2d 842 (7th Cir. 1976), *Cf. United States v. Malia*, 6 M.J. 65 (C.M.A. 1978); *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (non-ex parte discussions at military pretrial confinement hearings and Article 32 proceedings).
- <sup>71</sup> *Id.*
- <sup>72</sup> See *Sibbach v. Wilson*, 312 U.S. 1 (1941).
- <sup>73</sup> See fn. 6, *supra*.
- <sup>74</sup> 411 U.S. 778 (1973). *Cf. United States v. Hofbauer*, 5 M.J. 409 (C.M.A. 1978); *United States v. Clark*, 48 C.M.R. 77 (C.M.A. 1973), (requirement to provide counsel UP Article 31, UCMJ only for indigent service members)
- <sup>75</sup> See *United States v. Segal*, 549 F.2d 1293 (9th Cir. 1977); *United States v. Core*, 532 F.2d 40 (7th Cir. 1976).
- <sup>76</sup> See Comment *Defending The Vacation of a Suspended Sentence*, 9 The Advocate 11 (1977).
- <sup>77</sup> See e.g., *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979).
- <sup>78</sup> See *Martinez v. Day*, 450 F. Supp. 803 (W.D. OK. 1978).
- <sup>79</sup> See *Hall v. Bostic*, 529 F.2d 990 (4th Cir. 1975); *Baker v. United States*, 368 F.2d 463 (5th Cir. 1966); *United States v. Guzzi*, 275 F.2d 725 (3rd Cir. 1960).
- <sup>80</sup> See generally paragraphs 88e and 97a, MCM, 1969 (Rev. ed.).
- <sup>81</sup> See Young, *Due Process In Military Probation Revocation: Has Morrissey Joined The Service?* 65 Mil. L. Rev. 1 (Summer 1974).

## City of Philadelphia v. John E. Bullion\*—The Federal Enclave is not a Sanctuary

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The right of a state or political subdivision to serve civil or criminal process upon a federal enclave was settled by the United States Supreme Court in *Fort Leavenworth Railroad Co. v. Lowe*.<sup>1</sup>

Notwithstanding this decision many federal employees, specifically civilian employees in Philadelphia, Pennsylvania, have attempted to create a haven for tax evaders who are employed upon the federal enclaves within Phila-

delphia.<sup>2</sup> In order to combat the problems created by today's mobile society and the ability of persons to move from state to state, many states have enacted Long-Arm Statutes in order to obtain *in personam* jurisdiction over non-residents. In its efforts to enforce its tax laws and collect the tax delinquencies from federal civilian employees employed upon the federal enclave, the City of Philadelphia has used basically two methods of obtaining jurisdiction over these individuals—personal service and substituted service under the Pennsylvania Long-Arm Statute.<sup>3</sup>

In order to obtain personal service upon employees employed at the Philadelphia Naval Yard, cooperation was essential from Navy personnel. However, in late 1974-early 1975 this cooperation broke down.<sup>4</sup> As a result the City of Philadelphia filed a civil action against the United States and various Navy officials in order to restore this cooperation.<sup>5</sup> After trial an order was entered under which the defendants were not only restrained from interfering with efforts at service of process but were imposed with the affirmative obligation of assisting the City in locating and serving these individuals.

Even with the assistance of Navy personnel in locating these civilian employees, the most successful method of service has been substituted service—long-arm service. It is due to the success of this method that the decision in *City of Philadelphia v. Bullion* manifests its import, for without the result in *Bullion* the only method of service of process remaining available to the City of Philadelphia has proven ineffective.

In *Bullion*, John E. Bullion was a resident of the State of New Jersey employed as an engineering technician by the United States Naval Air Engineering Center located on the United States Naval Base at the foot of Broad Street in the City of Philadelphia, Commonwealth of Pennsylvania. The City of Philadelphia filed a Complaint in Assumpsit against Mr. Bullion averring that he was so employed within the City of Philadelphia and was obliged to pay earnings tax<sup>6</sup> to the City, but had not done so.

The Complaint was served upon the defendant by serving the Secretary of the Commonwealth of Pennsylvania as agent for the defendant pursuant to the Pennsylvania Long-Arm Statute then in effect and by registered mail, return receipt requested, mailed to defendant's residence, also in accordance with the Statute.

Defendant filed a responsive pleading challenging the *in personam* jurisdiction of the court on the grounds that: (1) defendant could not be served under that Act since he was not "doing business" within the Commonwealth of Pennsylvania; (2) the Commonwealth of Pennsylvania does not have the right to enact legislation regulating activities upon a federal enclave; and (3) obtaining *in personam* jurisdiction of a taxpayer by use of the Pennsylvania Long-Arm Statute, is a violation of due process rights protected by the Fourteenth Amendment to the United States Constitution. Therefore, it was argued that defendant could not be served in that manner.

On May 25, 1975, the Court of Common Pleas of Philadelphia County dismissed defendant's challenge.<sup>7</sup> On February 8, 1977 the Commonwealth Court affirmed the decision of the Court below.<sup>8</sup> On June 10, 1977 the Supreme Court of Pennsylvania denied a petition to entertain a discretionary appeal by taxpayer.<sup>9</sup> On October 31, 1977 the United States Supreme Court dismissed a direct appeal for want of a substantial federal question.<sup>10</sup>

For purposes of this article discussion shall be limited to the taxpayer's second question presented: Whether the Commonwealth of Pennsylvania has the right to enact legislation regulating activities upon a federal enclave.

On one hand, it was the City of Philadelphia's position, which was adopted by the Court, that the use of the Pennsylvania Long-Arm Statute to serve process upon a defendant did not regulate any activity within the federal enclave, nor did it exercise legislative jurisdiction over the activity of the federal area by the state, and was, therefore, not in conflict with the plenary powers clause, Article I, Sec. 8, Clause 17 of the United States Constitution.<sup>11</sup> On the

other hand, defendant raised and confused two distinctly different issues: First, the issue of whether the Commonwealth had legislative jurisdiction to regulate activities upon the enclave, a power Pennsylvania did not have; and second, whether the Commonwealth had legislative jurisdiction to serve defendant by means of the Long-Arm Statute, a power Pennsylvania did have. Taxpayer brought about this confusion by claiming that the use of the Long-Arm Statute to serve him was somehow regulating activities within the enclave. This was neither a factually nor a legally valid contention. Defendant, after confusing these issues, then argued from his faulty premise that the use of long-arm service was an exercise of legislative jurisdiction over the enclave because it was regulation of the activities within the federal enclave. If such a regulation was present in the case, such an exercise of legislative jurisdiction would be, absent reservation of certain rights by the state or recession of rights to the state by the Federal Government, a violation of the plenary powers clause since in no instance may a state interfere with the activities of the enclave related to the federal purpose to which the enclave is dedicated. *Fort Leavenworth Railroad Co. v. Lowe*.<sup>12</sup> Defendant then concluded that there was no specific recession to allow regulation of activities on the enclave; therefore, the use of the Long-Arm Statute upon him was a violation of plenary powers clause. Defendant's conclusion was faulty for two reasons—first, because it starts from a faulty premise, i.e. that the use of the Long-Arm Statute is a regulation of activities upon the enclave; and second, because sufficient rights were both receded to and reserved by the Commonwealth of Pennsylvania to permit use of service of process by means of the Long-Arm Statute.

As to the first point, the use of the Long-Arm Statute in *Bullion* was not a regulation of activities by the state within the federal enclave, and *Stockwell v. Page Aircraft Maintenance, Inc.* and *Swanson Pointing Company v. Pointers Local Union No. 260*, the very cases cited by defendant clearly supported this view.<sup>13</sup> In

both of those cases, the use of the Long-Arm Statute was upheld and both cases found that use of such a statute was not a regulation of activity within the enclave. It was true, of course, that service of process by Long-Arm Statute was within the enclave in *Stockwell*; however, it is difficult to see how, if the service served within the enclave by Long-Arm Statute in *Stockwell* was not an interference with, or regulation of, activities within the enclave, that service by a similar Long-Arm Statute outside the enclave can possibly be a regulation of the activities within the enclave as in *Bullion*.

Contrary to defendant's contention, the City noted that neither the case of *Berube v. White Plains Iron Works, Inc.*,<sup>14</sup> nor *Stockwell* stand for the proposition that service by Long-Arm Statute was improper either within and/or without a federal enclave due to a lack of legislative authority over the enclave. Neither of these cases could be construed to hold that the use of a Long-Arm Statute to serve a party outside the enclave was in fact, any regulation of any activity within the enclave.

*Berube v. White Plains Iron Works*, was not decided on the issue of legislative jurisdiction over a federal enclave. In fact, the case was not decided on federal grounds at all.

The parties agree that the initial question presented by the instant motion is whether this statute would be construed by the Maine courts to sustain the service of process in this case. *Waltham Precision Instrument Co. v. McDonnell Aircraft Corp.*, 310 F.2d 20 (1st Cir. 1962); *Brewster v. Boston Herald-Traveler Corp.*, 141 F. Supp. 760, 762 (D.Me. 1956). Since this Court answers that question in the negative, it does not reach the further question raised by defendant's contention that an attempt by the Maine courts to assert jurisdiction here would transgress federal constitutional limits.<sup>15</sup>

*Bullion* premised his second argument on his interpretation of *Brennan v. Shipe*.<sup>16</sup> He argued that the Pennsylvania courts have held long-arm service, outside the enclave, improper

where the cause of action arose within the enclave. This too was erroneous. That case involved a motor vehicle accident on a federal enclave. The Pennsylvania Court upheld use of the Long-Arm Statute therein on grounds that retention by the Commonwealth of the right to serve process on the enclave, combined with the substantive right to decide the case given by the federal statute<sup>17</sup> involved therein, was sufficient to find, that for purposes of that tort claim, the federal enclave was part of Pennsylvania. Thus the Court held that the use of the Long-Arm Statute was therefore proper. There was in that case no specific recession by the federal government to use the Long-Arm Statute. The Pennsylvania Supreme Court noted that it *might* have interpreted this Act of Congress,<sup>18</sup> which provides for the use of state substantive law for personal injury claims where the cause of action occurred within a federal enclave, as a recession specific enough to warrant the use of the Pennsylvania Long-Arm Statute. The court, however, *declined* to do so.<sup>19</sup>

The Court in *Brennan v. Shipe* then discussed the case of *Kiker v. Philadelphia*.<sup>20</sup> In *Kiker*, the Court held that the Buck Act<sup>21</sup> gave Philadelphia the substantive right to impose upon those within the federal enclave the Philadelphia Wage Tax. Therefore, for wage tax purposes, it made the enclave part of Philadelphia. By analogy the federal act<sup>22</sup> involved in *Brennan*, by making substantive state law applicable to personal injury cases arising within the enclave, brought the enclave within the boundaries of the Commonwealth for purposes of the personal injury action. Since the state retained the power of service over the enclave, the court concluded that substituted service by the Non-Resident Motorist Act was proper.

A similar situation was presented in *Bullion*. The Pennsylvania Commonwealth Court noted therein that the clear and unambiguous words of the Buck Act treat the federal enclave, for the purposes of the levying and collecting of income taxes, as part of the Commonwealth of Pennsylvania.<sup>23</sup> It is hard to see how Congress could have been more clear on this issue

when it stated in the Act: "such State shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a federal area."<sup>24</sup> When the state ceded the federal enclave to the Federal Government it retained concurrent jurisdiction with the United States for purposes of service of civil and criminal process as if the land had not been ceded.<sup>25</sup> This right to serve process, combined with the substantive right to tax, clearly gives the state the right to use whatever means of process as would be available in any other case. It is this separate recession of the substantive right to tax by the Buck Act that the Pennsylvania Commonwealth Court spoke about when it required something else in addition to the reservation of service of process. *Brennan v. Shipe* was therefore of no help to taxpayer, either to show that a recession specific to the Long-Arm Statute was necessary, as he implied, or that the courts that have decided these issues were in conflict.

To arrive at the conclusion that the Buck Act was a sufficient recession of a substantive right, the Pennsylvania Commonwealth Court did not have to breach the barrier of the plenary powers clause<sup>26</sup> as it was contended by taxpayer, but only had to find sufficient legislative authority to serve taxpayer outside the enclave.

The clear intent of the Buck Act thus is to remove the tax liability barrier that was present by virtue of the fact that the income sought to be taxed was earned on the federal enclave. Once this barrier is removed by the Act, and the levy and collection of this tax is permitted, as if the income was not earned within the enclave, then any contention that the Commonwealth could not use any means of service available, in the same manner as any other state tax case, including the Long-Arm Statute in this case, was completely lacking in merit.

Also completely devoid of merit was taxpayer's contention that the Pennsylvania Commonwealth Court recognized a possible conflict between two sections of the Buck Act.<sup>27</sup> There are three reasons why the Court's recognition

of these two sections creates no conflict: (1) Section 108 could not possibly be construed so as to remove the right of the Commonwealth to serve process in all cases for this right was never relinquished (That such a reservation is possible was decided by the United States Supreme Court in *Fort Leavenworth Railroad Company v. Lowe*<sup>28</sup>); (2) since Section 106 provides the power to levy and collect by any means, as if the federal enclave were not a federal enclave, to read Section 108 in the manner urged by defendant would negate the clear intent of Section 106; and (3) the report on the Buck Act from the Committee on Finance of the United States indicates that Section 108 was included to make certain that the *criminal* jurisdiction of the federal government remained unaffected.<sup>29</sup> Clearly, such a provision cannot possibly be read to limit civil process.

Defendant sought to create a substantial federal question from the fact that the United States Court had not construed the Buck Act since the decision of *Howard v. Commissioners of the Sinking Fund of the City of Louisville*<sup>30</sup> in 1953 and the fact that Section 108 had never been construed by it. In deciding a different type of case that involved a question of the power of the City of Louisville to annex a federal enclave, as well as the right of the State of Kentucky to tax those upon the enclave, the United States Supreme Court in *Howard* summarized the effect of the Buck Act as:

In other words, Kentucky was free to tax earnings just as if the Federal government were not there.<sup>31</sup>

The City of Philadelphia perceived no conflict between the interpretation given the Buck Act by the United States Supreme Court in *Howard* and the interpretation given the Buck Act by the Commonwealth Court in *Bullion*. Furthermore, there was no question of general legislative powers in this case, as contended by taxpayer. It is beyond question that 4 U.S.C. §106 provides the substantive right to levy and collect the tax, and the Commonwealth of Pennsylvania never relinquished the right to serve

civil process.<sup>32</sup> Nothing more was needed to hold the use of Long-Arm Statute valid in this instance.

Defendant's argument that the Pennsylvania Commonwealth Court did not use the "required manner" of interpretation of congressional recession was totally without substance. Defendant's cases that allegedly dealt with this point actually dealt with the regulation of specific governmental activities within a federal enclave; and not with minor incidental contact with Federal employees during service of process outside the enclave. These cases were, therefore, not on point. The clear congressional mandate of recession that taxpayer claimed must be present applied only in cases of attempts by the states to regulate activities within the enclave. As already noted, this case was simply not such a case and taxpayer had cited not one fact or case that pointed to a contrary conclusion. Taxpayer further confused the situation by misciting *Kern-Limerich, Inc. v. Scurlock*.<sup>33</sup> That case dealt with the issue of sovereign immunity of the federal government from state taxation. The court found that a tax on a contractor was invalid because the actual legal incidence of the tax would fall on the United States. The actual quote from the United States Supreme Court which the taxpayer miscited was:

The doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate. No instance of such submission is shown.<sup>34</sup>

Such claim of immunity from taxation by an employee of the Federal Government by virtue of the federal immunity was settled by the United States Supreme Court, against the employee, in *Graves v. New York*.<sup>35</sup>

Consequently the United States Supreme Court dismissed taxpayer's appeal for want of a substantial federal question on October 31, 1979.<sup>36</sup>

Accordingly, with the decisions in *City of Philadelphia v. United States of America, et al.* and *City of Philadelphia v. John E. Bullion*, commands and commanders must be more receptive to assisting state officials in the service of process including the escorting of the individual to the party's job site and identifying the party so that service can be accomplished as a result thereof. The ability of a federal employee to find sanctuary upon a federal enclave from service of process emanating from a state court has been eliminated and the integrity of process from said court has been preserved.

## FOOTNOTES

\*Pa. Comm. Ct. 485, 368 A.2d 1375, appeal dismissed for want of a substantial federal question, 434 U.S. 914, 54 L.Ed. 2d 271 (1977).

\*\*Captain Weintraub in civilian life is a Deputy City Solicitor for the City of Philadelphia, Chief of the Tax Litigation Section. He was counsel for the City of Philadelphia in both *Bullion*, supra. and *City of Philadelphia v. United States of America, et al.*, infra.

<sup>1</sup> 114 U.S. 525, 29 L.Ed. 264, 5 S.Ct. 995 (1885).

<sup>2</sup> In 1939 the City Council of the City of Philadelphia enacted a Wage and Net Profits Tax Ordinance, Philadelphia Code 19-1500 et seq. which imposed a tax upon the income of residents wherever earned and non-residents earned in Philadelphia. Since 1939 the constitutionality of this Ordinance has been challenged from every conceivable angle and each time it has passed constitutional muster. *Kiker v. Philadelphia*, 346 Pa. 624, 31 A.2d 289, cert. denied 320 U.S. 741 (1943); *Application of Thompson*, 157 F. Supp. 93, affirmed 288 F.2d 320, cert. denied 358 U.S. 913 (1957); *N.R.T.A. v. Philadelphia*, 341 F. Supp. 1135, affirmed 406 U.S. 951 (1972); 341 F. Supp. 1139, affirmed 478 F.2d 456 (3rd Cir. 1973); *N.R.T.A. v. Murray*, 347 F. Supp. 399, affirmed 410 U.S. 919 (1972); *City of Philadelphia v. Kenny, et al.*, 28 Pa. Comm. Ct. 531, 369 A.2d 1343, cert. denied 434 U.S. 923, 54 L.Ed. 2d 281, reh. den. 434 U.S. 1025, 54 L.Ed. 2d 774 (1977); *Lang v. City of Philadelphia, et al.*, 31 Pa. Comm. Ct. 537, 377 A.2d 849, appeal dismissed for want of a substantial federal question; \_\_\_ U.S. \_\_\_, 58 L.Ed. 2d 96, reh. den. \_\_\_ U.S. \_\_\_, 58 L.Ed. 2d 672 (1978). Significantly each of these cases involved federal civilian employees employed upon federal enclaves within Philadelphia who were challenging the constitutionality and applicability of this tax to them notwithstanding the express provisions of the Buck Act, § 4 U.S.C. §§ 105-110. See footnote 27, infra. for text of pertinent sections of Statute.

Notwithstanding the foregoing to this date almost 40 years later this group of individuals is still attempting to evade payment of the tax by hiding behind the federal enclave.

<sup>3</sup> At the time of *Bullion*, supra., the Pennsylvania Long-Arm Statute was found in 42 P.S. 8301 et seq. but in 1978 Pennsylvania's new Judicial Code came into effect under which the former Long-Arm Statute was repealed and replaced by the Interstate and International Procedures Act, 42 Pa. C.S. § 5321 et seq.

<sup>4</sup> The Commandant of the Fourth Naval District implemented a procedure whereby after his legal officer reviewed the documents which the City was attempting to have served the Deputy Sheriff would go to the security office. A security officer would locate the individual and invite him to the security office to receive service. Invariably they refused. When advised of this problem the Commandant adamantly refused to consider any modification of this procedure.

<sup>5</sup> *City of Philadelphia v. United States of America, et al.*, U.S.D.C. E.D. Pa., Civil Action No. 75-642. The text of this unreported Order provides:

AND NOW, this 18th day of June, 1975, it is hereby

ORDERED ADJUDGED AND DECREED that the defendant, their agents, servants and employees, are permanently restrained from prohibiting Plaintiff, through its employees, servants and/or agents, from making service of all civil process upon civilian personnel at the Philadelphia Naval Base in any matter or in any place upon the Philadelphia Naval Base.

It is further ORDERED that the Defendants, their agents, servants and employees are to aid, assist and cooperate with Plaintiff or its employees, servants, and/or agents, duly authorized to make service of civil process upon civilian personnel at the Philadelphia Naval Base, in the making of such service in the following manner:

1. Plaintiff is to be limited to attempting service of civil process to ten individuals daily.

2. Upon being advised of the identity of the ten individuals upon whom service of civil process is to be made, Defendants, through their agents, servants and/or employees are to direct the individuals named therein that they are to report to the Security Headquarters to receive service of civil process.

3. If, and in the event, the named individual refuses to report as directed, a Security Officer is to accompany the duly authorized representative of Plaintiff to the place/or location wherein the named individual may be found, and identify the individual to Plaintiff's representative for the purpose of service of civil process.

It is also ORDERED that upon notice to this Court by Plaintiff by ex parte affidavit, of non-compliance with this Order, by any of the Defendants herein named, their agents, servants or employees, a hearing will be fixed at which time Defendants will be directed to show cause why they should not be held in contempt of Court.

BY THE COURT:

/s/

Joseph L. McGlynn, Jr.

<sup>6</sup> Philadelphia Wage and Net Profits Tax Ordinance, Philadelphia Code 19-1500, et seq.

<sup>7</sup> See unreported Order of the Court of Common Pleas of Philadelphia County, February Term, 1975, No. 4114. This was followed by an unreported Opinion on September 2, 1975.

<sup>8</sup> 28 Pa. Comm. Ct. 485, 368 A.2d 1375 (1977).

<sup>9</sup> See unreported Per Curiam Order entered by the Court, Allocatur Docket No. 2957.

<sup>10</sup> 434 U.S. 914, 54 L.Ed. 2d 271 (1977).

<sup>11</sup> United States Constitution Article 1 § 8 Clause 17:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular states, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise the authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

<sup>12</sup> 114 U.S. 525, 29 L.Ed. 264, 5 S.Ct. 995 (1885).

<sup>13</sup> In *Stockwell v. Page Aircraft Maintenance, Inc.*, 212 F. Supp. 102 (M.D. Alabama, S.D. 1962) the Court stated:

Service of process in this instance upon the agent of Grumman, at his Cairns Field Office, does not interfere with the governmental operation of the United States. 212 F. Supp. at 106.

In *Swanson Pointing Company v. Pointers Local Union No. 260*, 391 F.2d 523 (9th Cir. 1968) in footnote 2 the court noted:

2. In *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, the Supreme Court held that states can qualify sales of land to the United States so as to retain jurisdiction. Consistent therewith, Montana, in ceding to the United States exclusive jurisdiction of the lands on which Malstrom Air Force Base is situated, nevertheless reserved the right to serve and execute civil or criminal process within the limits of the territory acquired by the United States, in

any suits or transactions for or on account of any rights obtained, obligations incurred or crimes committed in Montana, within or without such territory. General Cession Statute of Montana, Mont. Rev. Code § 83-108 (1947). *The company is quite correct however, in stating that Montana does not have legislative jurisdiction within the area encompassed by Malstrom Air Force Base.* [emphasis added] 391 F.2d at p. 525.

<sup>14</sup> 211 F. Supp. 457 (N.D. Maine 1962).

<sup>15</sup> 211 F. Supp. at 458.

<sup>16</sup> 414 Pa. 258, 199 A.2d 467 (1964).

<sup>17</sup> 16 U.S.C. § 457.

<sup>18</sup> *Ibid.*

<sup>19</sup> In so declining the court said:

It is not necessary for us to do so, however, for the Pennsylvania Nonresident Motorist Act is clearly a law of Pennsylvania which by its own terms governs "the rights of the parties" in an "action sought to recover on account of injuries sustained in" a federal enclave located "within the exterior boundaries" of Pennsylvania.

The Pennsylvania Nonresident Motorist Act provides that a nonresident, or a resident who subsequently becomes a nonresident, appoints the Secretary of the Commonwealth as his agent to accept service of process for accidents or collisions "occurring within the Commonwealth."

<sup>20</sup> 346 Pa. 624, 31 A.2d 289 (1943).

<sup>21</sup> 4 U.S.C. §§ 105-110.

<sup>22</sup> 16 U.S.C. § 457.

<sup>23</sup> 368 A.2d at 1379.

<sup>24</sup> 4 U.S.C. § 106.

<sup>25</sup> 74 P.S. § 120.48.

<sup>26</sup> United States Constitution Article 1 § 8 Clause 17.

<sup>27</sup> 4 U.S.C. § 106 provides:

(a) No person shall be relieved from liability from any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

It has been settled that this legislation grants appellee the power to "levy and collect" taxes on income earned by non-residents employed on League Island. *Non-Resident Taxpayers Associa-*

*tion v. Municipality of Philadelphia*, 341 F. Supp. 1139, 1142 (D.N.J. 1971), aff'd. *men.*, 406 U.S. 951 (1972); *Kiker v. City of Philadelphia*, 346 Pa. 624, 633, 31 A.2d 289, 294, *cert. denied*, 320 U.S. 741 (1943). *Bullion*, 368 A.2d at 1378-79.

4 U.S.C. § 108 provides:

Jurisdiction of United States over federal areas unaffected.—The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction

of the United States over any Federal area. (July 30, 1947, 389, § 1, 61 Stat. 645.)

<sup>28</sup> 114 U.S. 525, 29 L.Ed. 264, 5 S.Ct. 995 (1885).

<sup>29</sup> S. Rep. No. 1625, Calendar No. 1692, 76th Congress, 3d Session 4 (May 16, 1940).

<sup>30</sup> 344 U.S. 624, 97 L.Ed. 617, 73 S. Ct. 465 (1953).

<sup>31</sup> 344 U.S. at 628.

<sup>32</sup> 74 P.S. 120.48.

<sup>33</sup> 347 U.S. 110 (1954).

<sup>34</sup> 347 U.S. at 122.

<sup>35</sup> 306 U.S. 466, 83 L.Ed. 297, 59 S. Ct. 595 (1939).

<sup>36</sup> 434 U.S. 914, 54 L.Ed. 2d 271 (1977).

### Confessions and Corroboration Revisited

*Captain Robert D. Higginbotham notes the following additions to his article entitled, "Confessions and Corroboration: Don't Let the 'Corpus Delicti' Climb Out of the Coffin," which appeared in the November 1979 issue of The Army Lawyer, at page 6.*

On page 9, before the third full paragraph, insert the following:

"Both at trial and on appeal to the Army Court of Military Review, the appellant asserted that the evidence was insufficient to convict, alleging the confession was inadmissible for lack of proper corroboration. At trial, defense counsel actually referred to the corpus delicti rule by name in objecting to admission of the confession. The conviction was affirmed.

"In *United States v. Montgomery*, CM 437923 (ACMR 30 Jul. 1979) (unpublished), the accused was implicated in the theft of several

hundred pounds of meat from a mess hall over a period of months."

Also on page 9, after the last paragraph in the article, add the following:

"In any case where admissibility of confessions or admissions is contested on grounds of lack of corroboration or trustworthiness, trial or appellate counsel should argue each bit of corroborative detail and make a showing that the confession as a whole "dovetails." Citation to *Oppen*<sup>22</sup> and *Stricklin*<sup>23</sup> and use of the term "dovetail" would enhance the argument and thus the Government's position."

### Professional Responsibility

#### Professional Responsibility Complaint Procedures

The following is a reiteration of the procedures established by The Judge Advocate General for disposing of alleged violations of the Codes of Professional Responsibility and Judicial Conduct of the American Bar Association, as well as procedures for processing requests for advisory opinions:

1. Matters pertaining to violations of the codes, which include the canons, ethical con-

siderations, and disciplinary rules, are coordinated by the Executive to The Judge Advocate General. All complaints, inquiries, or correspondence, regardless of subject matter, should be directed to the Executive.

2. No investigation of alleged professional responsibility derelictions may be conducted at any level without the approval of The Judge Advocate General. If necessary, an investigat-

ing officer (AR 15-6) will be appointed or authorized by The Judge Advocate General to reduce, to the extent possible, controverted facts in a complaint or allegation to found facts.

3. Once the facts have been determined, they are reviewed by a JAGC general officer other than The Judge Advocate General to determine whether there is probable cause to believe that a professional responsibility violation occurred. If no probable cause is found, the matter does not proceed further. The probable cause determination normally is made by the general officer having technical supervisory authority over the lawyer complained against, e.g., the Assistant Judge Advocate General for Military Law for prosecutors, and legal assistance officers, the Assistant Judge Advocate General for Civil Law for defense counsel, and general litigation attorneys, or the Chief, U.S. Army Judiciary, for military judges.

4. If probable cause is found, the file goes to the Executive who, in turn, forwards a factual synopsis and all relevant documents to The Judge Advocate General for a decision on whether the matter should be sent to The Judge Advocate General's Professional Responsibility Advisory Committee for opinion. If The Judge Advocate General decides not to refer the matter to the Committee, he may terminate the action at that point or he may refer it to the command SJA, or equivalent lawyer-supervisor, for appropriate action.

5. If The Judge Advocate General does refer the matter to the Committee, the Executive first sends a complete copy of the file to the respondent-lawyer. The lawyer is informed that The Judge Advocate General has referred the case to the Committee and that he or she may forward, within a reasonable time, any relevant matters for consideration by the Committee.

6. When the respondent replies, to include whatever matters he or she wants considered, the entire file is forwarded to the Committee with a request for an opinion and recommendations.

7. The Committee is composed of four military lawyers of various grades. A quorum consists of three members. Senior lawyers will be appointed where necessary to insure that all members are senior to the respondent. If a judge is the respondent and has allegedly violated one of the canons of the ABA Code of Judicial Conduct, the Committee will be composed of judges only.

8. Committee members read each case file and then meet to discuss the case. The chairman assigns a member the responsibility of preparing a draft opinion. A majority of the members must agree to an opinion and written dissents may be attached to the majority opinion.

9. The Committee is advisory only and has no investigative powers. Therefore, neither the respondent nor his or her counsel have a right to appear personally before the Committee. The Committee will not respond to any attempts to communicate directly with it, and will refer any such attempts to the Executive. If the Committee believes that it has insufficient information on which to arrive at an opinion, it so reports and further investigation may be directed or the case may be withdrawn by The Judge Advocate General. In either event, the respondent receives written notification from the Executive.

10. Final opinions of the Committee are returned to the Executive. If there is not a finding of a violation, the respondent is so notified and the case is closed. If a violation is found, a copy of the Committee's opinion is sent to the respondent before it is referred to The Judge Advocate General for action. The respondent is informed that he or she may submit, within a reasonable time, anything for The Judge Advocate General's consideration in taking action on the opinion.

11. Upon receipt of any matters submitted by the respondent or notice that no further matters will be submitted, the entire file is reviewed by The Judge Advocate General who takes final action on the opinion.

12. Possible sanctions that may be imposed by The Judge Advocate General as a result of

his approval of a finding of an ethical violation include a direction for oral counselling by supervising lawyers; oral admonition or reprimand; written admonition or reprimand which

may be filed in personnel files in accordance with AR 600-37; action to decertify; and reference to the State Bar of Admission for disciplinary action.

## TJAG Item

### Recruiting

U.S. Army recruiters are experiencing increased difficulties in gaining access to many high schools in CONUS. This problem, which apparently stems in part from small, vocal minorities influencing local school officials, is not confined to one geographical area but is common to many of the recruiting districts.

As one means of solving this problem, TJAG has suggested that consideration be given to

enlisting the assistance of local installation commanders and their public affairs personnel in efforts to persuade local officials that such access, when permitted by state and local law, should be granted. TJAG also urges that Staff Judge Advocates be alert for this particular problem and, should their assistance be sought, to use their community contacts to assist in resolving what is perceived to be a growing problem.

## A Matter of Record

*Notes from Government Appellate  
Division, USALSA*

### 1. Evidence:

In a recent case the Government attempted to use the reply mail doctrine to establish authentication of a laboratory report. The adequacy of the authentication is now challenged on appeal. The reply mail doctrine can be used by trial counsel to establish the authenticity of a laboratory report. This is separate and distinct from laying the foundation for a business entry exception to the hearsay rule. Paragraph 144, Manual for Courts-Martial, United States, 1969 (Rev.). Authentication deals with establishing the genuineness of the particular exhibit to be introduced. Paragraph 143b, MCM. See Wigmore on Evidence, Section 2153 (1978) and *United States v. Longtin*, 7 M.J. 784 (ACMR 1978). In order to utilize this doctrine, the trial counsel must establish:

a. That a request for laboratory analysis was prepared;

b. That the request for analysis and the items to be analysed were properly addressed, stamped, and posted in the mails;

c. That the analysis, purporting to (See MCM (1969 Rev.) paragraph 143b(1)) emanate from the laboratory, together with the remainder of the items analysed was received by return mail.

### 2. Pretrial Agreements:

The accused pled guilty to lesser included offenses as set out in Inclosure 1 to his pretrial agreement. The appellant now claims the plea was improvident as Inclosure 1 is not to be found in any copy of the record of trial nor is it present at the trial site. Such needless appellate issues can be avoided by including the offenses within the basic offer to plead guilty. If a separate inclosure is to be used, the trial counsel must check to insure that all inclosures are included in the record of trial.

### 3. Pretrial Preparation:

A recent charge alleged the theft of a television from a certain individual. The alleged victim testified at trial that the television actu-

ally belonged to her brother. The Government was forced to amend the charge over defense objection. The issue of this amendment is now before the appellate courts. Trial counsel should fully investigate his case before proceeding to trial. Each potential witness should be questioned and the trial counsel should know his answer to every question. Every element of proof should be outlined and the trial counsel should know which evidence will be used to satisfy each element.

#### 4. Prior Conviction:

After obtaining a conviction, a trial counsel introduced a prior Article 15 and a prior summary court-martial conviction. The defense objected to the Article 15 for failing to state an offense (violation of a non-punitive regulation). The judge allowed the exhibits into evidence. Both exhibits are now challenged on appeal, the Article 15 for the stated reason, the

conviction for lack of finality (the DA Form 2-2 did not contain any record of final action). Trial counsel should insure that his exhibits are complete and admissible. If admissibility is in real doubt, trial counsel should weigh his duty to protect the record against the limited affect the Article 15 is likely to have on the outcome.

A prior conviction can be considered only if it is final (paragraph 75b, MCM). For a summary court conviction, the Government must also show compliance with *Booker*, 5 M.J. 238 (CMA 1977). If the conviction arose prior to the effective date of *Booker* (11 Oct 1977), and does not comply with the *Booker* requirements, it may only be considered as evidence of the accused's prior military performance. The record should clearly reflect the purpose for which the exhibit is being considered, and should specifically indicate that it is not being considered as a prior conviction. *Syro*, 7 M.J. 431 (CMA 1979).

## Judiciary Notes

### U.S. Army Judiciary

#### Digests—Article 69, UCMJ, Applications

1. In *Cruckson*, SPCM 1979/4507, the accused was charged with wrongful possession and sale of marihuana; he was convicted of wrongful sale. He contended that the military judge improperly denied his motion to suppress the CID funds used to make the purchase of marihuana from him. According to the accused, there was no probable cause to arrest him; therefore, the military judge should have suppressed the CID funds recovered from the accused pursuant to a search incidental to his arrest. The accused further contended that the CID funds recovered from his wife should have been suppressed because the search of his wife was both the fruit of his earlier illegal arrest and independently illegal because the search was conducted without his wife's consent.

On 20 April 1979, PFC T was working as a confidential informant for the Heilbronn Joint

Drugs Suppression Team (JDST). Talking from a window in the billets of the 22d Maintenance Company, a soldier, J, agreed to set PFC T up to purchase marihuana with somebody who was on CQ. After meeting Agent C, MPI C and MPI I, at a CID safe-house, PFC T briefed them and a controlled purchase was set up. PFC T thereafter went back to the billets, and met SP4 N who was on CQ. After SP4 N ascertained that the seller was not yet present, he told PFC T to return in an hour. Later, PFC T returned to the billets under the constant surveillance of MPI C.

When PFC T entered the billets, SP4 N took him to a room where PFC T purchased six packets of hashish from the accused; PFC T paid the accused \$120 in CID funds in the form of five \$20 bills and two \$10 bills. PFC T thereafter returned to the safe-house where he was strip-searched and where he surrendered the

hashish and remaining CID funds. Since PFC T had never seen the accused before, he was only able to describe him to Agent C as having dark hair. PFC T further told Agent C that he had been introduced to the accused as Larry, last name sounding like "Crosnick." From the conversation in the room, PFC T concluded Larry was not from Heilbronn.

After debriefing PFC T, Agent C obtained a search warrant and proceeded to the 22d Maintenance Company billets where SP4 N and several others were apprehended. 1LT W, the company commander, arrived after the apprehension. From an interview with SP4 N and other occupants of the room in which the sale occurred, 1LT W and Agent C learned that Larry was from a sister unit, the 586th Maintenance Company in Ludwigsburg, that he drove a white BMW, that he supposedly worked in the motor pool, and that he came into the unit with a man named Brock to sell hashish. Pursuant to a request from Agent C, 1LT W called CPT S, the commander of the 586th, with a view toward locating and possibly apprehending Brock and Larry. Also, on 21 Apr 79, Agent C called Agent A.C. in Stuttgart and relayed to her the known information about Larry. Agent A.C. then called CPT S and relayed the information to him.

There were three Larry's in CPT S's unit. One Larry was on leave; the other two were the accused and Larry M. After Agent A.C. called him, CPT S realized it was the accused the CID wanted because the accused drove a white BMW. CPT S thereafter detained the accused upon his arrival in the company. Having only been given the name of Larry by 1LT W, CPT S had already sent Larry M. to the military police station.

Following the apprehension of the accused and Larry M. in Stuttgart, Agent C, Agent D and PFC T went from Heilbronn to Stuttgart to positively identify the perpetrator. Upon their arrival, Agent D informed Brock, Larry M. and the accused they were under apprehension for suspicion of dealing drugs. A subsequent search of the accused's wallet revealed

two \$10 bills in CID funds that PFC T had used to make the controlled buy. Based on information received from the accused, Agents C and D located Mrs. C, the accused's wife, at Ludendorf Kaserne. Agents C and D recovered five \$20 bills in CID funds from Mrs. C. According to Agents C and D, Mrs. C gave Agent D the money after Agent D asked her, "May I see the money you have in your purse? Do you object to it?" According to Mrs. C, Agent D told her that he had to have the money; she felt that Agent D was ordering her to give him the money.

The search of the accused's wife did not invade any reasonable expectation of privacy of the accused. Unless the search of the wife was the fruit of a previous illegal search of the accused, the accused has no standing to contest the legality of the search of his wife. *See Rakas v. Illinois*, 439 US 128 (1979). Further, the testimony of Agents C and D constituted clear and positive evidence, despite Mrs. C's contrary testimony, that Mrs. C voluntarily consented to the search and did not merely acquiesce in or submit to a claim of authority. *See US v. Mayton*, 23 USCMA 565, 50 CMR 784 (1975); *US v. Gordon*, 23 USCMA 525, 50 CMR 664 (1975); *US v. Justice*, 13 USCMA 31, 32 CMR 31 (1962).

At trial, the accused objected to a search of the room in which the drug sale took place, and to any testimony obtained as a result of that search. Because no reasonable expectation of privacy of the accused had been invaded, the accused lacked standing to contest the legality of the search of the room or to contest the legality of the arrest of SP4 N or anyone else. *See Rakas v. Illinois, supra.*

Where probable cause exists to believe that a crime has been committed and the person to be apprehended committed the crime, commissioned officers and CID agents in the execution of their law enforcement duties have the authority to apprehend persons subject to the Uniform Code of Military Justice. Article 7(b), UCMJ; paragraph 19a, MCM 1969 (Rev.); *US v. Hessler*, 7 MJ 9 (CMA 1979); *US v.*

Ness, 13 USCMA 18, 32 CMR 18 (1962). Probable cause may be established through information supplied by a credible informant with reliable information. *US v. Llano*, 23 USCMA 129, 48 CMR 690 (1974); *US v. Holmes*, 50 CMR 222 (ACMR 1975).

In determining whether probable cause exists, a police officer may be considered *per se* a reliable informant. Where police officers act in concert to make an arrest, the information supplied by one officer to another need not amount to probable cause; it is sufficient if the information in possession of the police department as a whole constitutes probable cause to apprehend. *US v. Gutierrez*, 3 MJ 796 (ACMR 1977).

Here, the information supplied by PFC T clearly established probable cause to believe that the crime of sale and possession of marijuana had been committed by a man named Larry, last name probably Crosnick. The only real issue at trial was the existence of probable cause to believe the accused was the "Larry" who had sold the marijuana to PFC T. Based on the totality of the information in possession of the CID agents and the accused's commander, there was probable cause to believe that the accused was in fact the Larry who had sold the marijuana to PFC T.

Relief was denied.

2. In *Prothero*, SPCM 1979/4530, the accused was undergoing the punishment of correctional custody pursuant to a previously imposed nonjudicial punishment under Article 15, UCMJ. Part of the punishment received under Article 15 had been suspended. While in correctional custody, the accused walked out of the correctional custody facility without authority and willfully disobeyed a lawful command from CPT H to return to the facility. He was tried by special court-martial for, and convicted of, violations of Articles 90 and 134, UCMJ. The accused's commander vacated the suspended punishment imposed as a result of the Article 15.

In his application for relief, the accused contended that the convening authority did not personally detail the court members as required by Article 25, UCMJ, and *US v. Newcomb*, 5 MJ 4 (CMA 1978). According to the accused, the convening authority did not sign the convening order and an error in the order with regard to a rank of one of the members prevented the presumption of regularity from attaching to the order. The accused also contended that the military judge should have instructed the court on the defense of former punishment, since there was evidence that the suspended punishment received pursuant to the Article 15 had been vacated because of the offenses for which the accused was tried.

Contrary to the assertions of the accused, the record of trial contained a memorandum from the Assistant Staff Judge Advocate to the convening authority recommending referral of the charges to the court-martial appointed by Court-Martial Convening Order (CMCO) Number 28. The convening authority personally approved the recommendation. Since the convening authority made the final decision, there was no impediment to his receiving staff assistance in the selection of the court-martial personnel. *US v. Newcomb*, *supra*, at 7 n.8.

The command line on CMCO Number 28 showed that the court personnel were personally detailed by order of COL B, the convening authority, *See US v. Haimson*, 5 USCMA 208, 17 CMR 208 (1954). The convening authority need not personally sign the convening order; the order may, as here, be authenticated with an authority line. *See* paragraph 1-15, AR 310-10. The clerical error in mistaking the rank of one of the court members did not affect the validity of the order.

Vacating a suspended punishment pursuant to Article 15, UCMJ, parallels the civilian practice of revoking probation. If a probationer commits criminal acts while on probation, he may be tried and sentenced for such action. In addition to a criminal trial and the punishment

imposed at such trial, a probationer may be subjected to revocation proceedings for the same criminal acts. Imposition of punishment upon revocation of the probation, together with the sentence imposed for the substantive offenses leading to the revocation, does not con-

stitute being twice punished for the same offense. *Bible v. Arizona*, 449 F. 2d 111 (9th Cir. 1977); *US v. Denno*, 173 F. Supp. 237 (S.D. N.Y. 1959), *aff'd*, 272 F. 2d 191 (2d Cir. 1954), *cert. denied*, 363 US 814 (1960).

Relief was denied.

**Non-Judicial Punishment  
Quarterly Court-Martial Rates Per 1000 Average Strength  
July-September 1979**

	<i>Quarterly Rates</i>
ARMY-WIDE	47.54
CONUS Army commands	51.90
OVERSEAS Army commands	40.39
USAREUR and Seventh Army commands	39.04
Eighth US Army	59.27
US Army Japan	5.34
Units in Hawaii	44.10
Units in Thailand	16.91
Units in Alaska	49.13
Units in Panama/Canal Zone	49.13

**Quarterly Court-Martial Rates Per 1000 Average Strength  
July-September 1979**

	GENERAL CM	SPECIAL CM		SUMMARY CM
		BCD	NON-BCD	
ARMY-WIDE	.43	.27	.92	.85
CONUS Army commands	.26	.22	.80	.83
OVERSEAS Army commands	.72	.35	1.12	.88
USAREUR and Seventh Army commands	.84	.32	1.11	.64
Eighth US Army	.50	.69	1.44	1.38
US Army Japan	—	—	.38	—
Units in Hawaii	.17	.33	1.16	1.88
Units in Thailand	—	—	—	—
Units in Alaska	.43	.43	.76	1.95
Units in Panama/Canal Zone	.41	—	1.10	2.88

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.

## Legal Assistance Items

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

### Taxation—Federal Income Tax—Child Care Expense

Section 214(b)(2), now Section 44A, of the Internal Revenue Code allowed as a deductible expense the cost of child care incurred to enable a parent to obtain gainful employment. In order to provide a better education and a safer environment for her son, and in order to free herself to hold a job, a mother enrolled her 13-year-old son in a private boarding school. She felt unable to work while her son remained in public school due to constantly arising problems such as teacher strikes, classroom disorders and gang fights. The mother deducted a part of the cost of the private boarding school as a child care expense. The Internal Revenue Services Commissioner's disallowance of the deduction was overturned by the United States Tax Court (*Brown v. Commissioner*, U. S. Tax Ct, Oct 24, 1979).

The court held that the portion of boarding school costs attributable to child care incurred to obtain gainful employment is deductible, and accepted, in the absence of contrary proof, the mother's estimate of the portion allocable to child care rather than to education. [DA Pam 27-12, Ch. 4].

### Real Property—Buying and Selling Real Property

The Doctrine of Implied Warranty of Habitability continues to be expanded by state courts. *Moxley v. Laramie Builders Inc.*, 7 Hous. & Dev. Reg. (BNA), (WYO, 1979).

The Wyoming Supreme Court, in a major change to the doctrine of implied warranty of habitability, decided to extend the protections of the doctrine to subsequent purchasers of homes. In this case, the original buyer sold the home two years after the initial purchase.

Shortly thereafter, the new buyer discovered that the electrical wiring was defective and sued the builder-vendor. In holding for the subsequent purchaser, the court stated that a home builder's implied warranty extends to subsequent purchasers for a reasonable time and is limited to latent defects that become manifest after the purchase. [DA Pam 27-12, Ch 34].

### Family Law—Domestic Relations—Property Settlements

The Texas Supreme Court has ruled that military readjustment benefits are not community property under Texas law. *Perez v. Perez*, 6 Fam. L. Rep. 2003 (Tx, 1979). Citing the legislative history of 10 U.S.C. § 687, the court held that Congress had two clear purposes in providing readjustment pay to reservists. The first was to help the officer who was involuntarily released from active duty readjust to civilian life, and the second was to encourage younger officers to remain on active duty beyond their original commitment. Therefore, the payment is not earned wages but a gratuity from the federal government. Because the payment is a gift, it is not community property. [DA Pam 27-12, Ch 20].

### Soldiers' and Sailors' Civil Relief Act

Reinforcing the fact that the Soldiers' and Sailors' Civil Relief Act is a sword rather than a shield, the New Mexico Supreme Court refused to allow a servicemember to invoke the act to delay contempt proceedings for his failure to obey the visitation provisions of a support order, *in re Baker*, 6 Fam. L. Rep. 2041 (N. Mex. 1979). A soldier-father had been awarded custody of his child in a New Mexico divorce proceeding. The court permitted him to take the child with him to Germany while he was assigned there, but the child was to visit his mother during summer vacations. After the

first summer, the mother refused to return the child, and the father had to return to Texas to locate the child and re-establish custody. When the father refused visitation the next summer, the mother sued. The soldier attempted to use the Soldiers' and Sailors' Civil Relief Act to stay the proceedings. Disregarding the merits of the case, the court held that stays were discretionary with the trial court. In this case, because the servicemember was refusing to comply with an existing order and because he made no showing that his military duties in Germany prevented his return to participate in the suit, the court found no abuse of discretion by the trial court in denying the stay. [DA Pam 27-166].

### New Legislation

North Dakota has, by statute in Chapter 194, discarded the preference for a natural mother as custodian for a child and substituted a best interest of the child test.

Georgia has amended its Uniform Reciprocal Enforcement of Support Act to permit registration of foreign support orders, thus giving those foreign orders the same force and effect as orders of a Georgia court.

South Carolina has amended its no-fault divorce law to permit divorce on the grounds of separation for one year rather than the three years required by prior law. [DA Pam 27-12, Ch 20].

## Reserve Affairs Items

*Reserve Affairs Department, TJAGSA*

### 1. Law School Liaison Officer Program

The Law School Liaison Officer program was established in June 1973 to provide a source of information for law students and recent law graduates interested in the Judge Advocate General's Corps, both active and reserve. The program has recently been revitalized and recognized as a vital part of the judge advocate recruiting program. The Office of The Judge Advocate General has placed increased emphasis on the importance of the program as an excellent adjunct to the active army Judge Advocate field screening officers, who are the primary recruiting contacts for future applicants for the Judge Advocate General's Corps. Close coordination between the local liaison officer and the regional field screening officer is necessary to ensure a successful recruiting program.

Liaison officers receive a letter of designation and a packet of material with which to answer questions while performing this important recruiting function. Liaison officers receive retirement/retention points in accordance with Rule 16, AR 140-185.

The 37 law schools without a liaison officer are indicated below. The roster of the liaison officers to 130 law schools will be published in a forthcoming issue of *The Army Lawyer*. Reserve Component Judge Advocates interested in this program should consult the list below and, if interested in filling one of the vacancies, contact Captain James E. McMennis, Chief, Unit Liaison and Training Office, Reserve Affairs Department, TJAGSA (telephone 804-293-6122).

### 2. Law Schools Without a Liaison Officer

#### ARIZONA

University of Arizona  
College of Law  
Tucson, AZ 85721

Arizona State University  
College of Law  
Tempe, AZ 85281

#### CALIFORNIA

University of California  
School of Law  
Boalt Hall  
Berkeley, CA 94720

Golden Gate University  
School of Law  
536 Mission Street  
San Francisco, CA 94105

University of San Francisco  
School of Law  
Kendrick Hall  
San Francisco, CA 94117

University of Santa Clara  
School of Law  
Santa Clara, CA 95023

Stanford School of Law  
Stanford, CA 94305

Pepperdine University  
School of Law  
24255 Pacific Coast Highway  
Malibu, CA 90265

Whittier College  
School of Law  
5353 West Third Street  
Los Angeles, CA 90020

*FLORIDA*

Stetson University  
College of Law  
1401 61st Street South  
St. Petersburg, FL 33707

*ILLINOIS*

Lewis University  
College of Law  
Glen Ellyn, IL 60137

*KENTUCKY*

Northern Kentucky University  
Chase College of Law  
1401 Dixie Highway  
Covington, KY 41011

*MASSACHUSETTS*

Northeastern University  
School of Law  
400 Huntington Avenue  
Boston, MA 02115

Western New England College  
School of Law  
1215 Wilbraham Road  
Springfield, MA 01119

*MICHIGAN*

Detroit College of Law  
130 East Elizabeth Street  
Detroit, MI 48201

Thomas M. Cooley Law School  
217 South Capital Avenue  
Lansing, MI 48933

*MISSOURI*

St. Louis University  
School of Law  
3624 Lindell Blvd.  
St. Louis, MO 63108

Washington University  
School of Law  
Lindell and Skinker Blvd.  
St. Louis, MO 63130

*NEBRASKA*

Creighton University  
School of Law  
2133 California Street  
Omaha, NE 68178

*NEW JERSEY*

Rutgers University  
School of Law  
Fifth and Penn Street  
Camden, NJ 08102

*NEW MEXICO*

University of New Mexico  
School of Law  
1117 Stanford, NE  
Albuquerque, NM 87131

*NEW YORK*

Yeshiva University  
Benjamin N. Cardozo School of Law  
Brookdale Center  
55 Fifth Avenue  
New York, NY 10003

*OHIO*

Ohio Northern University  
Claude W. Pettit College of Law  
Ada, OH 45810

University of Toledo  
College of Law  
Toledo, OH 43606

*PENNSYLVANIA*

Dickinson School of Law  
150 South College Street  
Carlisle, PA 17013

Duquesne University  
School of Law  
600 Forbes Avenue  
Pittsburgh, PA 15219

Villanova University  
School of Law  
Villanova, PA 19085

*SOUTH DAKOTA*

University of South Dakota  
School of Law  
Vermillion, SD 57069

*TENNESSEE*

University of Tennessee  
College of Law  
1505 West Cumberland Avenue  
Knoxville, TN 37916

*VIRGINIA*

University of Virginia  
School of Law  
Charlottesville, VA 22901

*WASHINGTON*

Gonzaga University  
School of Law  
East 702 Sharp  
Spokane, WA 99202

University of Puget Sound  
School of Law  
8811 South Tacoma Way  
Tacoma, WA 98499

*WISCONSIN*

Marquette University  
Law School  
1103 West Wisconsin Avenue  
Milwaukee, WI 53233

University of Wisconsin  
Law School  
Madison, WI 53706

*WYOMING*

University of Wyoming  
College of Law  
University Station, Box 3035  
Laramie, WY 82071

*WASHINGTON, D. C.*

American University  
Washington College of Law  
Massachusetts and Nebraska Avenues, N.W.  
Washington, D. C. 20016

Antioch School of Law  
1624 Crescent Place, N.W.  
Washington, D. C. 20009

Catholic University of America  
Columbus School of Law  
Washington, D. C. 20064

**3. Reserve Vacancies**

The 300th MP PW Command located in Livonia, Michigan has the position of Staff Judge Advocate open. This is a paid, Lieutenant Colonel slot. If interested, please call Captain James WoucZYna at the following business number: (313) 224-5742 or at his residence: (313) 885-5742. Captain WoucZYna may be contacted by letter at the following address: James WoucZYna, Frank Murphy Hall of Justice, Room 1230, 1441 St. Antoine, Detroit, Michigan 48226.

The 85th Division (Training), Chicago, Illinois, has vacancies for Lieutenant Colonel, Major and Captain. These are paid positions, 48 IDT assemblies and two weeks AT each year. If interested please call Colonel Leo E. Eickhoff

at (314) 247-3353 office or (314) 965-1363 home, in St. Louis or contact Mr. Morris Ratliff, Military Personnel Officer, 85th Division (Training), 3131 W. Bryn Mawr, Chicago, Illinois, 60659 (312) 267-2630.

The 301st Support Group (Area) based at Fort Totten, Flushing, New York, has two captain positions open. These positions are paid slots. If interested please call COL John B. Cartafalsa at the following number: (212) 520-3742 during business hours or at his residence (212) 261-1471. COL Cartafalsa may be contacted by letter at the following address: COL John B. Cartafalsa, HQ, 301st Support

Group (Area), ATTN: AFKA-ACA-SG-SJA, Fort Totten, Flushing, New York 11359.

#### 4. Mobilization Designee Vacancies

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

Current positions available are as follows:

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
LTC	09	04	01	Judge Advocate	USALSA	Falls Church
MAJ	09	06	03	Judge Advocate	USALSA	Falls Church
LTC	05B	03	02	Clms JA	USA Clms Svc	Ft Meade
LTC	20A	02	01	JA Comm Law Br	OTJAG	Washington
CPT	14	03	01	Leg Asst Off	Anniston Army Depot	Anniston, AL
MAJ	26C	01A	01	Legal Advr	USA TSARCOM	St Louis
LTC	04H	02	01	Dep SJA	USA CERCOM	Ft Monmouth
CPT	08C	01A	01	Trial Counsel	172d Inf Bde	Ft Richardson
CPT	08C	01A	02	Trial Counsel	172d Inf Bde	Ft Richardson
CPT	08C	02A	01	Defense Counsel	172d Inf Bde	Ft Richardson
CPT	08C	02A	02	Defense Counsel	172d Inf Bde	Ft Richardson
MAJ	03	04	01	Asst SJA	USA Garrison	Ft Ord
CPT	03A	04	02	Defense Counsel	USA Garrison	Ft Ord
LTC	03	01	01	SJA	101st Abn Div	Ft Campbell
CPT	03A	02	04	Trial Counsel	101st Abn Div	Ft Campbell
MAJ	03B	01	01	Ch, Def Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	01	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	02	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	03	Defense Counsel	101st Abn Div	Ft Campbell
CPT	03B	02	04	Defense Counsel	101st Abn Div	Ft Campbell
MAJ	03C	01	01	Ch, Admin Law Br	101st Abn Div	Ft Campbell
CPT	03C	02	01	Asst SJA	101st Abn Div	Ft Campbell
CPT	52B	03	01	Asst SJA—DC	USA Garrison	Ft Stewart
CPT	52C	01	02	Asst SJA	USA Garrison	Ft Stewart
LTC	03	02	01	Dep SJA	USA Garrison	Ft Hood
MAJ	03B	01	01	Ch, Def Counsel	5th Inf Div	Ft Polk
CPT	03B	03	01	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	03	02	Defense Counsel	5th Inf Div	Ft Polk

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
CPT	03B	03	03	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	03	04	Defense Counsel	5th Inf Div	Ft Polk
CPT	03B	04	02	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	03	Trial Counsel	5th Inf Div	Ft Polk
CPT	03B	04	04	Trial Counsel	5th Inf Div	Ft Polk
MAJ	02A	02	01	Ch, Def Counsel	USA Garrison	Ft Riley
MAJ	02B	03	01	Ch, Legal Asst	USA Garrison	Ft Riley
CPT	02B	04	01	Asst JA	USA Garrison	Ft Riley
CPT	02C	02	01	Asst JA	USA Garrison	Ft Riley
LTC	03	02	01	Asst SJA	USA Garrison	Ft Carson
MAJ	03B	03	01	Trial Counsel	USA Garrison	Ft Carson
MAJ	03B	04	01	Ch, Def Counsel	USA Garrison	Ft Carson
CPT	03B	06	01	Defense Counsel	USA Garrison	Ft Carson
CPT	03B	06	02	Defense Counsel	USA Garrison	Ft Carson
CPT	03B	06	03	Defense Counsel	USA Garrison	Ft Carson
CPT	03B	06	04	Defense Counsel	USA Garrison	Ft Carson
CPT	03B	07	02	Trial Counsel	USA Garrison	Ft Carson
CPT	03B	07	03	Trial Counsel	USA Garrison	Ft Carson
CPT	03B	07	04	Trial Counsel	USA Garrison	Ft Carson
MAJ	03C	01	01	Asst SJA	USA Garrison	Ft Carson
MAJ	03C	01	02	Asst SJA	USA Garrison	Ft Carson
CPT	03D	04	01	Asst SJA	USA Garrison	Ft Carson
CPT	03D	04	02	Asst SJA	USA Garrison	Ft Carson
CPT	03B	03	01	Judge Advocate	Cdr, Ft McCoy	Sparta, WI
CPT	03B	03	02	Judge Advocate	Cdr, Ft McCoy	Sparta, WI
CPT	03B	03	03	Judge Advocate	Cdr, Ft McCoy	Sparta, WI
CPT	03B	03	04	Judge Advocate	Cdr, Ft McCoy	Sparta, WI
MAJ	03C	01	01	Mil Aff Leg Asst O	Cdr, Ft McCoy	Sparta, WI
CPT	03C	02	01	Mil Aff Leg Asst O	Cdr, Ft McCoy	Sparta, WI
CPT	03C	02	02	Mil Aff Leg Asst O	Cdr, Ft McCoy	Sparta, WI
MAJ	66	02	01	Judge Advocate	Cdr, Ft McCoy	Sparta, WI
CPT	03D	02	01	Asst SJA	USA Garrison	Ft Lewis
CPT	03D	03	01	Asst SJA	USA Garrison	Ft Lewis
MAJ	03E	01	01	Ch, Leg Asst Br	USA Garrison	Ft Lewis
CPT	03E	03	01	Leg Asst Off	USA Garrison	Ft Lewis
CPT	03E	03	02	Leg Asst Off	USA Garrison	Ft Lewis
CPT	21J	01	01	Judge Advocate	USA Garrison	Ft Lewis
MAJ	03B	01	01	Chief	USA Garrison	Ft Buchanan
CPT	03B	02	01	Judge Advocate	USA Garrison	Ft Buchanan
MAJ	03D	01	01	Chief, JA	USA Garrison	Ft Buchanan
CPT	03D	02	01	Judge Advocate	USA Garrison	Ft Buchanan
CPT	03E	02	01	Judge Advocate	USA Garrison	Ft Buchanan
CPT	03B	03	01	Asst JA Instr	USA Transportation Cen	Ft Eustis

<i>GRD</i>	<i>PARA</i>	<i>LIN</i>	<i>SEQ</i>	<i>POSITION</i>	<i>AGENCY</i>	<i>CITY</i>
MAJ	04A	03	01	Sr Def Counsel	USA Inf Cen	Ft Benning
CPT	04A	05	01	Def Counsel	USA Inf Cen	Ft Benning
LTC	04B	02	01	Asst Ch MALAC	USA Inf Cen	Ft Benning
CPT	04B	04	01	Admin Law Off	USA Inf Cen	Ft Benning
CPT	04B	05	01	Admin Law Off	USA Inf Cen	Ft Benning
CPT	04B	05	02	Admin Law Off	USA Inf Cen	Ft Benning
CPT	04B	07	03	Leg Asst Off	USA Inf Cen	Ft Benning
CPT	04B	08	01	Claims Off	USA Inf Cen	Ft Benning
MAJ	09A	02	01	Asst SJA	USA Signal Cen	Ft Gordon
MAJ	09B	02	02	Asst SJA	USA Signal Cen	Ft Gordon
CPT	22D	22	01	Instr OCS Tng DI	USA Signal Cen	Ft Gordon
CPT	22D	22	02	Instr OCS Tng DI	USA Signal Cen	Ft Gordon
CPT	07A	03	01	JA	AVN Cen	Ft Rucker
CPT	07A	03	02	JA	AVN Cen	Ft Rucker
CPT	07A	04	01	Mil Judge	AVN Cen	Ft Rucker
MAJ	38A	01	01	Asst SJA	USA Garrison	Ft Chaffee
CPT	38A	03	01	Asst SJA	USA Garrison	Ft Chaffee
CPT	38A	03	02	Asst SJA	USA Garrison	Ft Chaffee
CPT	38A	03	03	Asst SJA	USA Garrison	Ft Chaffee
CPT	38A	03	04	Asst SJA	USA Garrison	Ft Chaffee
CPT	38A	03	05	Asst SJA	USA Garrison	Ft Chaffee
CPT	38A	03	06	Asst SJA	USA Garrison	Ft Chaffee
CPT	38A	03	07	Asst SJA	USA Garrison	Ft Chaffee
MAJ	38B	02	01	Admin Law Off	USA Garrison	Ft Chaffee
MAJ	38B	02	02	Admin Law Off	USA Garrison	Ft Chaffee
CPT	38B	03	01	Proc FscI Law O	USA Garrison	Ft Chaffee
CPT	38B	04	01	Asst SJA	USA Garrison	Ft Chaffee
CPT	38B	04	02	Asst SJA	USA Garrison	Ft Chaffee
CPT	38B	04	03	Asst SJA	USA Garrison	Ft Chaffee
CPT	05A	04	01	Trial Counsel	USA FA Cen	Ft Sill
CPT	05A	04	02	Trial Counsel	USA FA Cen	Ft Sill
CPT	05A	07	01	Defense Counsel	USA FA Cen	Ft Sill
CPT	05A	07	02	Defense Counsel	USA FA Cen	Ft Sill
CPT	05A	07	03	Defense Counsel	USA FA Cen	Ft Sill
MAJ	05B	03	01	Admin Law Off	USA FA Cen	Ft Sill
MAJ	05B	03	02	Admin Law Off	USA FA Cen	Ft Sill
CPT	05B	05	01	Proc Fis Law Off	USA FA Cen	Ft Sill
CPT	05B	07	01	Legal Asst Off	USA FA Cen	Ft Sill
CPT	05B	07	02	Legal Asst Off	USA FA Cen	Ft Sill
CPT	05B	07	03	Legal Asst Off	USA FA Cen	Ft Sill
MAJ	28B	04	01	Trial Counsel	USA AD Cen	Ft Bliss
CPT	28C	03	01	Defense	USA AD Cen	Ft Bliss
MAJ	05	01A	01	Dep SJA	USA Admin Cen	Ft B Harrison

GRD	PARA	LIN	SEQ	POSITION	AGENCY	CITY
CPT	05	03A	01	Asst JA	USA Admin Cen	Ft B Harrison
CPT	11D	06	01	Instr	USA Intel Cen	Ft Huachuca
CPT	11D	06	02	Instr	USA Intel Cen	Ft Huachuca
CPT	11D	06	03	Instr	USA Intel Cen	Ft Huachuca
MAJ	04A	05	01	Instr Mid East	USAIMA CA Satl Sch E	Ft Bragg
MAJ	12	02	01	Asst JA	ARNG TSA Cp Atterbury	Edinburg, IN
MAJ	12	02	02	Asst JA	ARNG TSA Cp Atterbury	Edinburg, IN
CW4	02	03	01	Leg Admin Tech	1st Inf Div	Ft Riley
CW4	03A	01	01	Leg Admin Tech	USA Garrison	Ft Hood
CW4	03A	01	01	Leg Admin Tech	5th Inf Div	Ft Polk
CW4	01G	01	01	Leg Admin Tech	Cdr, Ft McCoy	Sparta, WI
CW4	04	10	01	Leg Admin Tech	USA Garrison	Ft Sam Houston
CW4	04	04	01	Leg Admin Tech	USA Garrison	Ft Bragg
CW4	03	03	01	Leg Admin Tech	101st Abn Div	Ft Campbell

MOB DES 0-6 Positions: There are a few 0-6 MOB DES positions in the JAG inventory; however, a few vacancies do come open from time to time. We recommend that 0-6 JAG Reservists who desire MOB DES positions submit their DA Form 2976 to the Reserve Affairs Department, so that they may be considered for such positions as vacancies arise.

### JAGC Personnel Section

#### PP&TO, OTJAG

#### 1. Reassignments

##### LIEUTENANT COLONEL

	FROM	TO
COLE, Raymond D.	Europe	Korea
KUCERA, James	OTJAG	Europe
WICKER, Raymond	USAINA, Arlington, VA	Ft Monroe, VA

##### MAJOR

GIBB, Steven P.	DARCOM, Alexandria, VA	Ft Hamilton, NY
RICE, Frances P.	Ft Meade, MD	DARCOM, Alexandria, VA
WERNER, Steven	Ft Hamilton, NY	Europe

##### CAPTAIN

LEWIS, William	Korea	Ft Meade, MD
MANUELE, Gary M.	Europe	Ft Bragg, NC
MORGAN, Roderick	Ft McNair, DC	Ft McNair, DC
SERENE, Jan W.	USALSA	OTJAG
SIMMS, Stuart H.	Korea	Ft Sam Houston, TX
VENABLE, Richard	Korea	Europe
WARD, Lawrence	Ft Lee, VA	Europe

**2. Enlisted Promotions**

The following individuals were promoted to the grade of E-9 in the MOS indicated:

BLACK, Gene 71D  
 CHITI, Fred A. 71E  
 PURNELL, John 71D  
 WEDEKING, Melvin 71D

**3. RA Promotions**

*COLONEL*

TOCHER, Patrick A. 22 Dec 79

*LIEUTENANT COLONEL*

DAHLINGER, Richard 28 Dec 79  
 GREENE, William P. 12 Dec 79  
 JACOB, Gustave F. 2 Nov 79  
 LESH, Newton D. 27 Dec 79  
 LYMBURNER, John F. 14 Nov 79  
 MC RORIE, Raymond C. 15 Oct 79  
 NOBLE, James E. 29 Nov 79

**4. AUS Promotions**

*CAPTAIN*

LISOWSKI, Patrick W. 18 Nov 79  
 SMITH, Robert M. 7 Nov 79  
 WAGNER, Carl M. 19 Nov 79  
 WILBANKS, James C. 18 Nov 79

**5. JAGC Career Status Selection Board Results**

The JAGC Career Status Selection Board convened on 29 November 1979 to consider graduates of The Judge Advocate General's Funded Legal Education and Excess Leave Programs for Regular Army commissions in the JAGC and to consider JAGC officers for a Regular Army commission or Voluntary-Indefinite status. The Board recommended that 59 graduates of the Funded Legal Education and Excess Leave Programs be tendered Regular Army commissions in the JAGC and that four graduates be deferred for further consideration.

Forty-three Obligated Volunteer officers were granted career status, 25 of whom will be tendered Regular Army commissions. In addition, 24 Voluntary-Indefinite officers will be tendered Regular Army commissions.

A summary of the recommendations of the Board as to JAGC officers applying for a Regular Army commission or Voluntary-Indefinite status is set forth below:

All recommendations of the Board were approved by The Judge Advocate General on 5 December 1979.

YEAR GROUP	OBV TO VI				RA				OBV TO VI OR RA				VI TO RA		
	CONS	APP	DEFER	DISAPP	CONS	APP	DEFER	DISAPP	CONS	APP	DEFER	DISAPP	CONS	APP	DEFER
70													1	1	
71													1	1	
72													4	4	
73					1	1							4	4	
74													5	5	
75													4	4	
76	2	1		1	6	5	1		1	1			3	3	
77	3	3			31	18	13		13	12	1		3	2	1
78	1	1			1	1									
TOTALS	6	5		1	39	25	14		14	13	1		25	24	1

The closing date for submission of applications to the next career status board will be announced by message. That board will convene in May 1980.

#### 6. DARCOM Contract Law Specialty Program

Several openings exist for career force judge advocate officers to be assigned to the DARCOM Contract Law Specialty Program. This program is designed to train JAGC officers as contract law attorneys. Officers selected will be assigned to a DARCOM legal office for a 36 month stabilized tour. During the first 24 months, each participant will be trained in all areas of contract law, and, if they have not yet attended, will attend basic and advanced contract law courses at TJAGSA, Charlottesville, VA, and the Army Logistics Management Center, Ft

Lee, VA. To be eligible for consideration, officers must be commissioned in the JAGC and have either Voluntary-Indefinite or Regular Army status.

Program positions will be located at Redstone Arsenal, Alabama; Ft Monmouth, New Jersey; Rock Island, Illinois; St. Louis, Missouri; Warren, Michigan and Ft Belvoir, Virginia.

As previously announced by message, several officers will be selected to begin participation in the program in January 1980. There will be additional positions to be filled during the summer of 1980. Officers interested in assignment to the program in the summer of 1980 should so indicate by sending a letter to the Personnel, Plans and Training Office, OTJAG, not later than 15 March 1980.

### CLE NEWS

#### 1. U.S. Army Claims Service Seminars

The U.S. Army Claims Service conducts claims seminars in CONUS and Germany each year. The 1980 CONUS seminars will be conducted 9-12 March at El Paso, Texas and 16-19 March at Atlanta, Georgia. In the past some claims personnel have complained that they were unable to attend these seminars because their commands had failed to adequately budget for per diem and transportation for claims purposes.

Paragraph 1-3g, AR 27-20 requires the senior judge advocates to insure that their command adequately budgets each year for claims requirements. For these seminars to be successful they must be well attended. Staff judge advocates are urged to insure maximum attendance of their claims officers, investigators, adjudicators and clerks. It is particularly important that more investigators, adjudicators and claims clerks be given an opportunity to attend.

#### 2. Army Law Office Management

Managing an Army law office requires practical solutions to a broad range of frequently

encountered problems. The Law Office Management Course and the block of graduate course instruction on management for military lawyers are designed to provide these practical solutions. During such instruction, Army law office leadership and management situations are examined and discussed. In order to insure the widest and most complete coverage of frequently encountered problems, The Judge Advocate General's School solicits sample problems for use in these courses. Judge advocates and staff judge advocates who are "in the trenches" can provide excellent examples of the practical problems they encounter daily.

TJAGSA also welcomes examples of leadership and management practices and subject areas that should be included in the TJAGSA law office management curriculum. These ideas and examples should be provided to: The Judge Advocate General's School, ATTN: JAGS-ADA, LTC Schmidt, Charlottesville, Virginia 22901. Enough material should be provided to make the problem understood and to permit us to build a practical exercise or discussion around it.

Your help today will mean a better JA leader/manager in the future.

### 3. TJAGSA CLE Courses

February 4-April 4: 92d Judge Advocate Officer Basic (5-27-C20).

February 4-8: 51st Senior Officer Legal Orientation (5F-F1).

February 11-15: 6th Criminal Trial Advocacy (5F-F32).

February 25-29: 19th Federal Labor Relations (5F-F22).

March 3-14: 83d Contract Attorneys' (5F-F10).

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

March 17-20: 7th Legal Assistance (5F-F23).

March 31-April 4: 52d Senior Officer Legal Orientation (5F-F1).

April 8-9: 2d U.S. Magistrate's Workshop (5F-53).

April 9-11: 1st Contract, Claims, Litigation & Remedies (5F-F13).

April 21-25: 10th Staff Judge Advocate Orientation (5F-F52).

April 21-May 2: 84th Contract Attorneys' Course (5F-F10).

April 28-May 1: 53d Senior Officer Legal Orientation (War College) (5F-F1).

May 5-16: 2d International Law II (5F-F41).

May 7-16: 2d Military Lawyer's Assistant (512-71D20/50).

May 19-June 6: 20th Military Judge (5F-F33).

May 20-23: 11th Fiscal Law (5F-F12).

May 28-30: 1st SJA Responsibilities Under New Geneva Protocols (5F-F44).

June 9-13: 54th Senior Officer Legal Orientation (5F-F1).

June 16-27: JAGSO.

June 16-27: 2d Civil Law (5F-F21).

July 7-18: USAR SCH/JARC C&GSC.

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

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

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

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

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

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

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

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

### 4. Civilian Sponsored CLE Courses

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

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

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

AGAI: The Attorney General's Advocacy Institute, Washington, D.C. 20530.

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

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

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

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

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

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

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

FLB: The Florida Bar, Tallahassee, FL 32304.

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

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

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

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

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

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

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

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65101.

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

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

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

NDCLE: North Dakota Continuing Legal Education.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## February

- 1: FLB, Tax Institute, Tampa, FL.
- 1-2: PLI, Medical Malpractice, San Francisco, CA.
- 1: OLCI, Basic Tax, Columbus, OH.
- 1-2: UDCL, Estate Planning, Denver, CO.
- 2: MCLNEL, Trial Tactics for Prosecutors, Springfield & Worcester, MA.
- 2: MCLNEL, Environmental Law, Boston, MA.
- 2-9: MCLNEL, Fundamental Real Estate Transactions, Danvers & Harwick, MA.
- 4-5: FBA/BNA, FBA/BNA Conference on Housing and Housing Regulations in the 1980's, Sheraton Harbor Island, San Diego, CA.
- 4-15: AGAI, Criminal Trial Advocacy, Washington, D.C.
- 6: FBA: 4th Annual FBA/AAF Advertising Law Conference, Hyatt Regency Hotel, Washington, D.C.
- 7-8: PLI, Advanced Will Drafting, New York City, New York.
- 7-8: PLI, Lending Transactions & the Bankruptcy Reform Act, New York City, NY.
- 7-8: FLB, Real Property Law, Miami, FL.
- 8: FLB, Tax Institute, Miami, FL.
- 8: SBT, Bankruptcy, McAllen, TX.
- 8: MOB, Taxation for the GP, Springfield, MO.
- 9: ABA, Care & Feeding of Jurors, San Francisco, CA:
- 9: MCLNEL, Environmental Law, Springfield & Worcester, MA.
- 10-13: NCDA, Trial Law & Evidence, Denver, CO.
- 11-12: PLI, Occupational Safety & Health Laws, San Francisco, CA.
- 11-15: BCGI, Computer Contracts: Structure, Negotiation & Management, Denver, CO.
- 11-15: GCP, Contracting with the Government, Washington, D.C.
- 14-16: SBM, Administrative Law, Big Sky, MT.
- 15-16: UTLC, Honing Trial Advocacy Skills, Nashville, TN.
- 15-16: CLEW, Litigation, Madison, WI. \$450.
- 15: UDCL, Bankruptcy Law—Chapter 11, Denver, CO.
- 15: FLB, Real Property Law, Tallahassee, FL.
- 15: PBI, Tax School, Philadelphia, PA.
- 21: PBI, Annual Tax School, Harrisburg, PA.
- 21-22: Consumer Credit 1980, Little America Westgate Hotel, San Diego, CA. Cost: \$210.
- 21-22: SBT, Environmental Law, Houston, TX.
- 21-23: ALIABA, Environmental Law, Washington, DC.
- 22-23: VACLE, Criminal Law, Fredricksburg & Virginia Beach, VA.
- 22: UDCL, Legal Ethics Forum, Denver, CO.
- 22: FBA, 3d Annual Grant Law Conference, 4 Seasons Hotel, Georgetown, Washington, DC.
- 22-24: NCCDL, Jury Selection, Denver, CO.
- 24-28: NCDA, Organized Crime I, Phoenix, AZ.
- 24-29: ALIABA, Basic Estate & Gift Taxation, Scottsdale, AZ.
- 25-26: GWU, Labor Standards, Washington, DC. 20052. Cost: \$325.
- 25-26: FBA, FBA/BNA Conference on Housing Regulations in the 1980's, Hyatt Regency, Houston, TX.
- 25-29: AAJE, Fact Finding, Arizona State University, AZ.
- 28-29: PLI, Lending Transactions & the Bankruptcy Reform Act, New Orleans, LA.
- 28-29: ABA, Law Office Management, Chicago, IL.
- 29-3/1: GICLE, Estate Planning, Athens, GA.

29-3/1: SBT, Legal Assistant Wills & Probate, San Antonio, TX.

29: DLS, Probate, Wills & Administration, Wilmington, DE.

29: FLB, Tax Institute, Jacksonville, FL.

**March**

3-4: SLF, Law Enforcement Problems, Richardson, TX.

3-4: PLI, Occupational Safety & Health Laws, New York City, NY.

3-5: SLF, Employment Discrimination, Dallas, TX.

5: PBI, Tax School, Pittsburgh, PA.

6: SBT, Real Estate, San Antonio, TX.

6-7: UTCLE, Making Computers Work for You, Salt Lake City, UT.

6-8: PLI, Preparation of the Federal Estate Tax Return, New York City, NY.

6-22: MCLNEL, Practical Skills, Boston, MA.

7: UDCL, Conducting a Deposition, Denver, CO.

7: SBT, Real Estate, Austin, TX.

7: SBT, Bankruptcy, Houston, TX.

7-8: FLB, Probate & Will Drafting, Tampa, FL.

9-12: NCDA, Prosecuting Business Crimes, San Diego, CA.

10-14: NCDA, Applied Trial Techniques, Houston, TX.

10: FBA, 3d Annual Copyright Law Conference, Hyatt Regency Hotel, Washington, DC.

10-11: FBA/BNA, Annual Briefing Conference on Government Contracts, Barclay Hotel, Philadelphia, Pennsylvania.

10-14: AAJE, The Jury Trial, Arizona State University, AZ.

10-21: AGAI, Criminal Trial Advocacy, Washington, DC.

13: FLB, Government Agency Law, Tallahassee, FL.

13: SBT, Real Estate, Dallas, TX.

13-14: PLI, Bankruptcy, New York City, NY.

13-15: ABA, Appellate Advocacy, Washington, DC.

14: SBT, Taxation, San Antonio, TX.

14: FLB, Government Agency Law, Tampa, FL.

14: SBT, Real Estate, Fort Worth, TX.

14-15: CLEW, Litigation, Milwaukee Union, WI. Cost: \$450.

17: SBT, Practice Skills, San Antonio, TX.

19-23: FLB, Advanced Trial Advocacy, Gainesville, FL.

19/4-17: UHCL, Consumer Transactions, Houston, TX.

20-21: PLI, Advanced Will Drafting, San Diego, CA.

20: SBT, Real Estate, Lubbock, TX.

20: FLB, Government Agency Law, Orlando, FL.

20-22: NCCDL, Insanity Defenses, Nashville, TN.

21: UTCLE, Taxes for the General Practitioner, Salt Lake City, UT.

21: FLB, Government Agency Law, Miami, FL.

24-25: FBA, Communications Law and Principles of Regulatory Reform, Marriott Twin Bridges Hotel, Arlington, VA.

24-27: FBA, FBA/CCH Mutual Funds and Investment Management Conference, The Pointe, Phoenix, AZ.

26-28: PLI, Current Developments in Patent Law, New York City, NY.

27-28: FBA, Openness-in-Government VI, Washington, DC.

27-29: UMLC, Medical Institute for Attorneys, Miami Beach, FL.

27-29: PLI, Pre-Trial Tactics & Techniques in Personal Injury Litigation, New York City, NY.

27-28: PLI, Medical Evidence, New York City, NY.

27-29: PLI, Preparation of the Federal Estate Tax Return, San Francisco, CA.

28: SBT, Real Estate, Houston, TX.

28: SBT, Bankruptcy, Dallas, TX.

28: SBT, Taxation, Dallas, TX.

28-29: FLB, Technical Aspects of Environmental Law, Tampa, FL.

#### April

7-11: AAJE, The Judge Trial, Washington, DC.

9-11: PLI, Current Developments in Patent Law, Minneapolis, MN.

9-12: ICLEF, Trial Advocacy, Indianapolis, IN.

10-11: PLI, Bankruptcy, Chicago, IL.

10: SBT, Family Law, Lubbock TX.

10: SBT, Taxation, Houston, TX.

10: Construction Contract Litigation, Tampa, FL.

10-11: PLI, Tax Planning for Foundations, Tax Exempt Status & Charitable Contributions, San Francisco, CA.

11: SBT, Family Law, El Paso, TX.

11: PBI, Conflicts of Interest, Philadelphia, PA.

11: FLB, Family Law, Tallahassee, FL.

11-12: ABA, Child Custody, New York City, NY.

14-19: SBT, Practice Skills, Dallas & Fort Worth, TX.

14-15: PLI, Use of Trusts in Estate Planning, New York City, NY.

14-18: GCP: Cost Reimbursement Contracting, Washington, DC.

14-18: BCGI, Computer Contracts: Structure, Negotiation & Management, Atlanta, GA.

15-19: NCDA, Trial Techniques, New Orleans, LA.

17: SBT, Family Law, San Antonio, TX.

17-18: FBA, 7th Annual Federal Trial Practice Conference, 4 Seasons Hotel, Georgetown, Washington, DC.

17: FLB, Family Law, St. Petersburg, FL.

17: FLB, Tax Institute, Fort Lauderdale, FL.

18-19: TBI, Bankruptcy & Business Reorganization, New York City, NY.

18-19: PLI, Criminal Advocacy Institute, Denver, CO.

18: SBT, Family Law, Austin, TX.

18: FLB, Tax Institute, Tampa, FL.

18: VACLE, Construction Law, Tysons Corner, VA.

21-5/2: AGAI, Civil Trial Advocacy, Washington, DC.

22: PBI, Appellate Practice, Harrisburg, PA.

23-25: PLI, EEOC, New York City, NY.

24: SBT, Family Law, Dallas, TX.

24-25: PLI, Medical Evidence, San Francisco, CA.

24: FLB, Family Law, Pensacola, FL.

24-25: ABA, Punitive Damage Claims, Los Angeles, CA.

24: VACLE, Construction Law, Richmond, VA.

24-25: SLF, Wills & Probate Institute, Richardson, TX.

24-25: SBT, TX Law for Military Attorneys, San Antonio, TX.

25: SBT, Family Law, Fort Worth, TX.

25: NDCLE, Law Office Management, Jamestown, ND.

25-26: FBA, Northeastern Regional Conference, Bankruptcy Law, Sheraton-Hartford, Hartford, CT.

- 25: FLB, Family Law, Jacksonville, FL.  
 25: FLB, Tax Institute, Tallahassee, FL.  
 25-26: VUSL, The New Bankruptcy Code, Villanova, PA.  
 27-5/1: NCDA, Organized Crime II, Chicago, IL.  
 28-30: GCP, Patents & Technical Data, Washington, DC.  
 28-30: FBA, 4th Annual Tax Law Conference, 4 Seasons Hotel, Georgetown, Washington, DC.  
 28-5/2: SLF, Federal Income Taxation, Dallas, TX.

### Current Materials of Interest

#### 1. Note

**Military Law**—A summary courts-martial conducted as a disciplinary proceeding, in

which the accused is not represented by qualified counsel, does not result in a criminal conviction for any purpose. *United States v. Booker*, 22 Howard Law Journal 497 (1979).

#### 2. Training Films

Release Number	Title	Date
19-3559	Suspects and Witnesses: Part IV—Use of the Polygraph in Investigation	1967
19-3950	Civil Disturbances, Principles of Control (color)	1968
19-3951	Civil Disturbances, Planning for Control (color)	1970
19-4261	MP Relationships with Civilian Law Enforcement Authorities (color)	1971
19-4443	United States Disciplinary Barracks (color)	1972
19-4802	Use of Force	1974
19-4829	Investigation of Narcotic Offenses: Part II—Development of Narcotic and Dangerous Drug Investigations	1974
19-4865	Suspects and Witnesses: Part I—Interviews	1975
19-4877	MP/CID Support to the Commander	1975
19-4881	Apprehension and Search of Persons	1975
19-4904	Suspects and Witnesses: Part II—Interviews and Interrogations	1976
19-6060	Rape Prevention: Part I—You're the One	1978
19-6081	Rape Prevention: Part III—He Loves Me—He Loves Me Not	1978
19-6085	Correctional Training Program: Part I—The Army's Approach	1979
19-6086	Correctional Training Program: Part II—The Offenders	1979
19-6087	Correctional Training Program: Part III—Confinement Facilities	1979
19-6088	Correctional Training Program: Part IV—USARB	1979
19-6147	Rape Prevention: Part II—Three Women	1979
12100 19-57	(Television Tape) MP Witness in Courts	1979

For further information on the above, see DA Pamphlet 108-1, *Index of Army Motion Pictures and Related Audio-Visual Aids*, Sep 74, with change 1 dated 6 Jan 78.

#### 3. Cassette Symposium

Persuasion in Advocacy, Cassette Volume II. For further information contact The Associa-

tion of Trial Lawyers of America, Education Fund, P.O. Box 3717, Georgetown, Washington, DC 20007.

#### 4. Current Messages

The following list of recent messages is furnished for your information in keeping your

reference materials up to date. All offices may not have a need for and may not have been on distribution for some of the messages listed.

<i>DTG</i>	<i>SUBJECT</i>	<i>PROPONENT</i>
222159Z Jun 79	Ethics in Government Act of 1978—Title V, Post Employment Conflict of Interest and Title II, Executive Personnel Financial Disclosure Requirements.	DAPE-HRL
252000Z Jun 79	U.S. Army Trial Defense Service.	DAJA-ZA
240545Z Jul 79	Delegation of Approval Authority for Conference Travel Within CONUS—AR 1-211.	DAJA-ZX
142000Z Aug 79	Clarification and Guidance on AR 210-1, Private Organizations on DOD Installations.	DAAG-CMP-P
151247Z Aug 79	Filing Procedures for Records of Nonjudicial Punishment (Article 15).	DAPC-MPO-C
221419Z Aug 79	Termination of Delayed Certification of Defense Counsel.	DAJA-ZA
280421Z Sep 79	Federal Law Enforcement Coordination, Policy and Priorities.	DAPE-HRE-EM
031515Z Oct 79	Preparation of Charge Sheets.	PCRE-RD-P
041700Z Oct 79	Preparation of DA Form 3 on Reconsideration of Claims.	JACS
221530Z Oct 79	CLN FY 80 DOD Claims Appropriation.	JACS
052200Z Nov 79	Notification of Pending Change to Chapter 11, AR 27-20, Claims.	JACS
070335Z Nov 79	Medical Care Recovery Act (MCRA).	DAJA-LTT
091800Z Nov 70	FY 80 DOD Claims Appropriation.	JACS
100648Z Nov 79	Elimination of Annual Report DD Form 1555 (Confidential Statements of Affiliations and Financial Interests) and Transfer of Proponency for AR 600-50, Standards of Conduct for Department of the Army Personnel.	DAPE-HRL
131800Z Nov 79	Changes to Articles 2 and 36, UCMJ.	DAJA-CL
211000Z Nov 79	Promotion to LTC, AUS, APL, CH, JAGS and AMEDD.	DAPC-MSS-FO
271530Z Nov 79	FY 80 DOD Claims Appropriations.	JACS
232300Z Nov 79	Brigadier General MOBDES Nomination.	DAAR-GO
292032Z Nov 79	Solicitation of Army Installations.	DAAG-PSI
052100Z Dec 79	Military Service Obligations (MSO) for Officer and Enlisted Personnel Age 26 or Older.	AGUZ-RCC
062000Z Dec 79	Establishment of SGM Position in OTJAG.	DAJA-ZA
079535Z Dec 79	Selections for JAGC Regular Army and Voluntary-Indefinite Status.	DAJA-PT
070543Z Dec 79	JAGC, Regular Army Selection Board for Graduates of Funded Legal Education and Excess Leave Programs.	DAJA-PT
122004Z Dec 79	Position Vacancy (GS-13, Closing Date: 21 Jan 80).	DAJA-PT

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By Order of the Secretary of the Army:

E. C. MEYER  
*General, United States Army*  
*Chief of Staff*

Official:

J. C. PENNINGTON  
*Major General, United States Army*  
*The Adjutant General*