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Reports of Survey: A Practitioner's Guide

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I. Introduction

Field Manual 10-14-3, Surveying Officer's Guide, states that the role of the surveying officer is to seek out the facts; it then provides more specific guidance:

In addition to doing detailed investigative work, you evaluate the facts in the case, much as a judge or a jury does in a civil court case. . . . Your ethics must be of the highest caliber. You must make a careful and often time-consuming analysis of all the evidence before you give your opinion.¹

Judge advocates² would not find the above language at all troublesome, were it not for the language immediately following it:

Why isn't this important and responsible task (which seems to parallel legal procedures in civil life) processed by the Judge Advocate General's Corps? The Army has

¹U.S. Dep't of Army, Field Manual 10-14-3, Surveying Officer's Guide, para. 13 (30 Dec. 1981) [hereinafter cited as FM 10-14-3].

²The term "judge advocate" is used to include not only judge advocates, but also Department of the Army civilian attorneys who are involved with reports of survey.

REPLY TO
ATTENTION OF

DAJA-CL 1984/5405

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

1 MAY 1984

SUBJECT: Victim/Witness Assistance Program

STAFF JUDGE ADVOCATES

1. On 1 August 1984 a revised AR 27-10 will become effective. AR 27-10 will include implementation of the Military Justice Act of 1983 and the Manual for Courts-Martial, 1984. In addition, AR 27-10 will establish the Victim/Witness Assistance Program.
2. The Victim/Witness Assistance Program complies with the Victim and Witness Protection Act of 1982 and with a DOD Directive (currently in draft). This program should substantially aid witnesses and innocent victims of serious offenses who are drawn into the military justice process.
3. Staff judge advocates will have primary responsibility for implementing and supervising the Victim/Witness Assistance Program. Coordination with commanders, finance and accounting offices, and military and civilian law enforcement agencies, medical facilities, and social service organizations will be necessary to effectively implement this program.
4. Victims and witnesses (most of whom are service members or their dependents) are too often forgotten participants in the criminal process. Victims and witnesses should be treated with dignity and should be informed of their important role in the military justice system and of available supporting services and sources of redress to which they may be entitled. The Victim/Witness Assistance Program is designed to meet these goals. All of this can be done without infringing on the rights of the accused.
5. In this year of the Army Family, I expect every staff judge advocate to ensure that this program is established and operated effectively.

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

determined that the person charged should be judged by a *normal, ordinary* person like yourself *who can recognize right from wrong*. You have common sense and are capable of weighing the facts and arriving at sound, logical recommendations.³

It is obvious that FM 10-14-3 did not receive a legal review before publication.⁴

Despite the above language, judge advocates do perform important and responsible tasks in the report of survey process. The two purposes of this article are to provide judge advocates with a summary of significant administrative law opinions pertaining to reports of survey and to address problem areas and issues concerning reports of survey. This article is written for the judge advocate who advises commanders or

clients on a regular basis concerning reports of survey; it is not intended to be a comprehensive review of this subject. General familiarity with reports of survey is presumed.

II. Summary of Administrative Law Opinions

The Appendix summarizes the significant administrative law opinions pertaining to reports of survey. Although the summary is written in present tense for convenience, remember it is just that—a summary—and does not purport to contain the actual language of the opinions. Each summary contains the language of both the official reply given to the requestor and the Note for Retained Copy, *i.e.*, the legal memorandum prepared by the action officer at the Office of The Judge Advocate General (OTJAG) supporting the reply.

Consider this problem: can a report of survey be used to determine pecuniary liability for the recovery of costs incurred by the government for cleaning quarters, vacated by a service member, where the government's standards of cleanliness were not met? To see if there is an opinion addressing this issue, look in the Appendix under **Organization of this Summary**. Two sections appear pertinent—section I.A, **Definitions** (what is the definition of "damage"

³FM 10-14-3, para. 13 (emphasis added).

⁴In fact, it did not. This becomes more apparent when the reader sees in para. 19, for instance, that "[e]ach respondent or witness in a case is entitled to certain rights under Article 5 of the Constitution and under Article 31 of the Uniform Code of Military Justice." (Article 5 of the Constitution, incidentally, pertains to amending the Constitution.) Similarly, the note to para. 40 (at the bottom of page 3-17) is wrong. Although errors such as these do detract somewhat from the usefulness of the Field Manual, it still is a good reference for surveying officers since they often need a simple introduction to reports of survey as a starting point.

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refer to both genders unless the context indicates another use.

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as used in AR 735-11⁵ and underlying statutes?), and section II, **Uses of Reports of Survey**. Looking at section II, you can see that the fourth summary,⁶ opinion DAJA-AL 1975/3322, appears to be on point—but it is summarized in section I.A. Where opinions fall under two topic headings, cross-references are used. Looking at the first opinion summarized under section I.A, you should see a *Background* portion. The *Background* portion summarizes who requested an opinion and what was asked. The *Digest* portion answers the questions asked and summarizes the reasoning used. Also included are NOTES and bracketed information; these are explanatory material provided by me and are *not* part of the original administrative law opinion. Thus DAJA-AL 1975/3322 answers the question—a report of survey can be so used. Additionally, section V. of the Appendix lists the opinions contained in the summary. If you have an opinion number and want to determine whether it is summarized in the Appendix, refer to section V.

III. Scope of the Report of Survey System

The first and frequently most critical question is whether use of a report of survey is appropriate. For example, a soldier negligently drives his privately-owned automobile into an Army jeep, causing \$200 damage to the jeep. Can the report of survey system be used to hold the soldier pecuniarily liable? Because he had no responsibility for nor any relationship to the jeep, the soldier may argue that AR 735-11 does not apply. The soldier's position is that the definition of a report of survey in AR 735-11 provides that a report of survey, "also serves to determine question[s] of responsibility (pecuniary or otherwise) for the absence or condition of the articles."⁷ "Responsibility" in turn is defined as, "[t]he obligation of a person for the proper

custody, care, and safekeeping of Government property or funds entrusted to his or her possession or supervision."⁸ Relying on these two regulatory provisions, the soldier can argue that for AR 735-11 to apply, there must be some preexisting relationship between the negligent individual and the property involved; no such relationship existed under these facts.

To answer this question requires an understanding of the policies underlying the report of survey system. The primary regulation governing the use of reports of survey, AR 735-11, accomplishes three purposes. First and foremost, the report of survey is an accounting tool—a method by which the Army balances its books.⁹ It serves as, or supports, a voucher for dropping government property from the property records on which it is listed.¹⁰ Second, a report of survey is used to obtain relief from property responsibility when property under the control of the Department of the Army is lost.¹¹ At least one person must be responsible at all times for each item of government property,¹² and the report of survey is one method of relieving that person of responsibility when the

⁵*Id.* at para. 1-6ak.

⁶The same applies to some of the procedures listed in AR 735-11, para. 1-5b.

⁷AR 735-11, para. 1-6ah. Para. 3-12 lists the seven times use of report of survey is mandatory "for items recorded on property books or stock record accounts." With Issue No. 4 of the Unit Supply UPDATE, these words will be deleted since a report of survey should be used for expendable property, durable property in transit, *i.e.*, when one of the circumstances of para. 3-12 are met, even though these items may not be recorded on a property book. Of course, judge advocates must confirm that Issue No. 4 of the Unit Supply UPDATE contains this change since as of this writing Issue No. 4 has not been published.

⁸AR 735-11 is not intended to cover the loss, damage, or destruction of property caused by fair wear and tear. AR 735-11, para. 1-5b. "Property" is defined in AR 735-11, para. 1-6ad as all property under Army control except property accounted for as owned by a nonappropriated fund instrumentality under U.S. Dep't of Army, Reg. No. 215-1, The Administration of Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (20 Feb. 1984). The term "loss" as used herein refers to the loss, damage, or destruction of government property from causes other than fair wear and tear. See AR 735-11, para. 1-6u.

¹²AR 735-11, para. 1-5a.

⁵U.S. Dep't of Army, Reg. No. 735-11, Accounting for Lost, Damaged, and Destroyed Property (15 Sept. 1981) [hereinafter cited as AR 735-11; all references herein to "the regulation" are to AR 735-11 unless otherwise noted] [contained in the Unit Supply UPDATE, published quarterly; the current issue as of this writing is Issue No. 3, 1 Mar. 1984].

⁶The summaries within each section are arranged in chronological order.

⁷AR 735-11, para. 1-6ah.

property is lost.¹³ Third, AR 735-11 sets forth Army policy concerning pecuniary liability,¹⁴ and the report of survey provides a means whereby the Army can hold a soldier pecuniarily liable when his negligence proximately causes the loss of government property.¹⁵

Therefore, in interpreting the provisions of AR 735-11, the judge advocate must consider these three purposes. Language in one portion of the regulation may be intended to address the use of a report of survey as a means of obtaining relief from property responsibility and may not be applicable when determining whether or not a soldier should be held pecuniarily liable. This explains why the soldier's argument in the above example—even though initially appealing—is incorrect.

The Army's policy concerning pecuniary liability is set out in AR 735-11, para. 4-14, entitled, appropriately enough, "Policy of pecuniary liability." It provides that pecuniary liability, "will result when a person's negligence or willful misconduct toward Government property is the proximate cause of any loss, damage, or destruction of such property." Thus the soldier who damaged the jeep can be held pecuniarily liable under the authority of para. 4-14. The soldier's argument relies on inapplicable portions of AR 735-11 which address Army policy concerning responsibility for govern-

ment property, not pecuniary liability. Keep in mind that these provisions were written based on the principle that one or more persons has responsibility of some type¹⁶ for government property at all times, and this regulation provides guidance to those persons on how to obtain relief from property responsibility when property is lost. Because the soldier in this example does not have any preexisting command, supervisory, direct, or personal responsibility for the jeep, in a sense he is outside the scope of persons whom these provisions are intended to affect. Quite simply, one portion of AR 735-11 cannot be read in isolation; common sense and an understanding of the purposes of AR 735-11 are required.

There are additional reasons why the service member's defense in the hypothetical case is flawed. Para. 1-5a of AR 735-11 states that, "any person may incur responsibility for the care and custody of property." Here the soldier had a duty to drive in a nonnegligent manner. AR 735-5 furnishes additional clarification and provides that personal responsibility, "applies to all Government property issued for, acquired for, misappropriated, or converted to the person's exclusive use, with or without receipt. It includes taking all reasonable and prudent actions to properly use, care for, and safeguard the property."¹⁷ To accept the soldier's argu-

¹³*Id.* at para. 1-5b (relief from property responsibility can be obtained only by one of the ten actions listed therein).

¹⁴*Id.* at para. 4-14.

¹⁵*See id.* at para. 1-3. These purposes can be illustrated by an example. A staff judge advocate discovers that a typewriter was stolen from the office and that Private Bailey stole the typewriter, which was destroyed in the theft. Under AR 735-11, what persons are concerned with the loss of the typewriter? First, the property book officer is concerned, since he must keep accurate records of property on hand and account for this typewriter which is on his property records. Second, someone in the SJA office is responsible for the typewriter, and that individual wants to ensure that he is relieved of responsibility for the typewriter. Third, Private Bailey is concerned; since his willful misconduct proximately caused the loss, he may be held pecuniarily liable for the loss. Use of this one procedure - the report of survey - allows the property book officer to account for the typewriter, relieves the individual in the SJA office of responsibility, and allows the government to assess pecuniary liability against Private Bailey for the loss.

¹⁶U.S. Dep't of Army, Reg. No. 735-5, Basic Policies and Procedures for Property Accounting, para. 2-8 (1 Sept. 1983) [hereinafter cited as AR 735-5] provides that the four types of responsibility are command, supervisory, direct, and personal responsibility and explains the duties involved under each type of responsibility.

¹⁷*Id.* at para. 2-8e. AR 735-11, para. 1-6ak(3) also defines personal responsibility, but the wording of the definition is different despite the fact that both regulations are contained in the same Unit Supply UPDATE! This is sloppy draftsmanship. Other examples exist. For instance, in Issue No. 1 of the Unit Supply UPDATE (1 Sept. 1983), AR 735-11, para. 1-6y defined "pecuniary liability" as a "[d]ebt owed to US Government for loss, damage, or destruction of US Government property," whereas AR 735-5, Glossary, section II defined "pecuniary liability" as "[t]he personal, joint, or corporate statutory obligation to reimburse the US Government for Government property which has been lost, damaged, or destroyed because of negligence or misconduct." In Issue No. 2 (1 Dec. 1983) they did better - AR 735-11 picked up the above definition from AR 735-5, but then added a sentence: "Misconduct includes wrongful

ment would result in not holding a service member pecuniarily liable when, for example, he damages another service member's barracks room. Even though the first service member has no command, supervisory, direct, or personal responsibility concerning the second service member's room, he clearly should be held pecuniarily liable.

Consider the above example for one more point. After the decision has been made to hold the soldier pecuniarily liable on a report of survey for the \$200 damage to the jeep, he may ask to suspend collection action until such time as his automobile insurance company pays for the damage. Should this be done? AR 735-11 does not directly address this point.¹⁸ Nevertheless, the approving authority, after confirming that the soldier's insurance company most likely will pay the claim, should be willing to postpone final action for a reasonable period of time—in effect, this would suspend the collection action.¹⁹ Following this procedure fully protects

appropriation." Why add that sentence to AR 735-11, but not to AR 735-5? Issue No. 3 (1 Mar. 1984) made no changes to these definitions. See AR 735-11, para. 1-6z; AR 735-5, Glossary, section II.

¹⁸AR 735-11, Appendix I sets out the responsibilities and procedures for processing a report of survey after pecuniary liability has been assessed.

¹⁹A suggested *minimum* reasonable period of time is the expected time within which the Army would actually involuntarily withhold the indebtedness established by the report of survey from the soldier's pay. Delaying final action is the advisable approach, rather than attempting to suspend collection action on an approved report of survey (even though the command's "processing time" on reports of survey might suffer somewhat). There is no explicit authority under U.S. Dep't of Army, Reg. No. 37-104-3, Military Pay and Allowance Procedures—Joint Uniform Military Pay System (JUMPS-ARMY), Part Seven, Section H ("Government Property Lost, Damaged, or Destroyed") (paras. 70771-75) (15 Apr. 1973) to suspend collection action once the approving authority has taken final action. See also Dep't of Defense Pay Manual (1 Jan. 1967), Part Seven, Chapter 7. Arguably, though, a finance officer has the inherent authority to suspend collection; but the commander retains control if he delays final action as suggested above.

the government's interests²⁰ and avoids unnecessarily imposing a financial hardship on the soldier. It simply makes sense to take care of the soldier in this situation. Moreover, Army policy requires a soldier to maintain the same liability insurance on his privately-owned motor vehicle as is required in the surrounding state;²¹ it would be anomalous after imposing such a requirement to not allow the soldier to receive one of the benefits insurance provides—protecting the insured from a sudden cash loss.

Another issue concerning the use of reports of survey involves damage to government quarters. Setting forth Army policy concerning pecuniary liability in this area, AR 735-11 provides:

Persons occupying assigned Government quarters or having been issued Government property for use in family quarters may be charged with a loss or damage to furnishings or to the quarters caused by the result of the occupant's negligence. Included are those cases in which the loss is related to an act of a member of the household or other persons visiting the household.²²

To the extent the above language suggests that a visitor's negligence alone provides a sufficient basis to hold the service member pecuniarily liable, the regulation conflicts with 10 U.S.C. §

²⁰The government's interest in accounting for the property is protected since the accountable officer keeps a copy of the report of survey when it is sent from the initiator through the accountable officer to the appointing authority. AR 735-11, para. 3-11a. So the government's records are current. Similarly, notifying the person(s) with responsibility for the property of the reason for the delay satisfies the responsibility considerations involved.

²¹U.S. Dep't of Army, Reg. No. 190-5, Motor Vehicle Traffic Supervision, para. 2-1 (C1, 31 May 1974) states that individuals desiring the privilege of operating a privately-owned motor vehicle on the military installation must comply with the requirements for installation registration. Para. 3-3c in turn requires for such registration, certification of the continuing possession of motor vehicle liability insurance in an amount not lower than the minimum limits prescribed by the financial responsibility requirements, or the compulsory law, of the state in which the installation is located.

²²AR 735-11, para. 4-14a (emphasis added).

2775.²³ This statute states that a service member "shall be liable" for damage to government quarters or furnishings, "caused by the abuse or negligence of such member or a dependent of such member."²⁴ Congressional intent, as expressed in section 2775, is to hold a service member pecuniarily liable only when his negligence or the negligence of a family member proximately causes the loss. Therefore a report of survey should not be used to hold a service member pecuniarily liable when only the negligence of a visitor causes a loss of government furnishings or to government quarters.

²³10 U.S.C. § 2775 (1982) (Liability of member for damages to family housing, equipment, and furnishings). Even though AR 735-11, para. 1-1 lists statutes pertaining to reports of survey, it inexplicably fails to include 10 U.S.C. § 2775. Note too that AR 735-11, para. 1-1a incorrectly cites 10 U.S.C. § 4837(d); when this section was amended in 1980, subsection (d) was deleted. The correct reference is 10 U.S.C. § 4837 (1982).

²⁴10 U.S.C. § 2775a (1982). The language of the statute that the service member "shall be liable to the United States" suggests that the service member should be held liable for the full amount of the loss, not just for one month's basic pay. Compare this to the language of 37 U.S.C. § 1007(f) (1976) which provides:

If, upon final settlement of the accounts of an officer of the Army or the Air Force charged with the issue of an article of military supply, there is a deficiency of that article...the value of the lost article or the amount of the damage shall be charged against the officer and deducted from this monthly pay, unless he shows...that he was not at fault.

Implementing this subsection, AR 735-11, para. 4-17b(1) provides that accountable officers will be held liable for the full value of such loss (citing 37 U.S.C. 1007(f); Issue No. 4 will delete the words "discovered upon change of accountable officers" for clarification). Similarly, 37 U.S.C. § 1007(e) (1976) states that for damage to arms and equipment caused by the service member's abuse or negligence, that amount "shall be deducted from his pay." Implementing subsection (e), AR 735-11, para. 4-14b(2) requires collection of the full amount in such cases for loss of personal arms and equipment. Nonetheless, for damages to government quarters, current Army policy is to hold the service member liable for not more than one month's basic pay, regardless of the amount of the actual loss. It is not clear why Army policy is to assess the full value of the loss for those losses falling under 37 U.S.C. § 1007, but not for losses falling under 10 U.S.C. § 2775, given the similarity of both statutes.

IV. Report of Survey Issues

While the above section discusses the scope of the report of survey system, this section addresses issues arising after a report of survey has been properly initiated. First, when a dependent's actions cause a loss to government quarters or furnishings, what standard of care should be applied—that of the service member or that of the dependent? For example, a ten-year old dependent leaves a hot candle unattended on a bed in government quarters, causing a fire. Should the surveying officer hold the dependent to the standard of a reasonable, prudent ten-year old or of a reasonable, prudent adult? AR 735-11, para. 4-14b focuses on the age and experience of "the person concerned."²⁵ Accordingly, the ten-year old ought not be held to the standard of an adult; instead, the surveying officer should ask whether this is an act that a reasonable, prudent ten-year old would have committed under similar circumstances.

Another issue that arises often involves the concept that loss includes loss of accountability. During a joint change of command inventory, for example, the outgoing battery commander discovers that equipment is missing in one of the howitzer sections. The current section chief has just taken over and can substantiate that no equipment has been lost since he was assigned to that section. In fact, four different section chiefs have been in charge of that section during the battery commander's tour and it cannot now be determined which section chief was in charge when the loss occurred. Can the battery commander be held pecuniarily liable? The battery commander may contend that *his* negligence did not proximately cause the loss; instead, the loss resulted from the negligence of one of the former section chiefs. In this situation, the battery commander can be held pecuniarily liable because his negligence in not maintaining proper accountability proximately caused the loss of *accountability*.²⁶ Thus loss

²⁵AR 735-11, para. 4-14b does not clarify who "the person concerned" is; presumably it is the person whose act or omission caused the loss.

²⁶See DAJA-AL 1980/3272, 22 Dec. 1980, summarized in the Appendix, section I.A.

includes more than the simple physical loss of property.

A third area of concern is illustrated by the following problem. A charge of quarters (CQ) on the floor of an Army hospital loses the master key to that floor. As a result, the Army must spend \$900 to retool the locks on that floor. Challenging a finding of pecuniary liability in the amount of \$900 from a report survey, the CQ may argue that he is liable for only the \$1.50 it costs to replace the master key. If the \$900 is viewed as consequential damages, then the CQ is correct, since AR 735-11 does not provide for consequential damages. The definition of "damage" in AR 735-11 does not help either.²⁷

An alternative approach is to consider the problem as one of proximate cause, which is, "merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct."²⁸ Under this approach the resolution of the issue turns on the facts. If it was stressed to the CQ that the loss of the master key would cause him to be held liable for the costs of retooling the locks on that floor, and if he was given instructions on how to secure the master key (and the means to secure the master key), then as a *policy* matter most would agree that the CQ should bear the burden of negligently losing the master key. By the same token, failure to stress the importance of properly securing the master key presents a strong reason, on policy grounds, to not hold the individual pecuniarily liable. Of course, other factors such as the rank, experience, age, special qualifications, and intelligence of the CQ must also be considered.²⁹

Which result is correct? Is this an issue of consequential damages or of proximate cause? Clearly, tort law must be examined as a first step to determine the answer. The difficulty

with both approaches, though, is that the judge advocate is looking to tort law to solve questions pertaining to how the Army administratively manages its supply system and assesses liability. While such tort law concepts as proximate cause, foreseeability, and intervening cause are often implicated in report of survey problems, these tort concepts are not entirely applicable because they sometimes involve different *policy* considerations. So while tort law, "is not necessarily concerned with property rights or problems of government," at the same time tort law is, "a field which pervades the entire law," and is, "interlocked at every point with property, contract and other accepted classifications."³⁰ Keeping in mind the purposes of the Army's report of survey system, the judge advocate must apply general tort principles carefully, particularly when competing Army policy considerations are involved.

The point is that judge advocates must be alert to such issues. This issue is unresolved; there is no guidance on point. Given that AR 735-11 does not expressly allow holding a service member pecuniarily liable for the *effects* caused by the loss of government property, it would appear that the CQ in the above example could be held pecuniarily liable for only \$1.50 (the cost of replacing the lost master key).

A final area of concern involves legal review of reports of survey when unusual situations arise that are not directly addressed in AR 735-11. Consider, for instance, the issue of damages. The drafters of AR 735-11 cannot be expected to have foreseen every possible situation involving damage to government property. Judge advocates should accept reasonable determinations concerning valuation of damage. For example,

²⁷AR 735-11, para. 1-6m defines "damage" as "[a] condition that impairs either the value or use of an article and that may occur in varying degrees. . . . The term usually implies that damage is the result of some act or omission."

²⁸W. Prosser, *Handbook of the Law of Torts* 41 (4th ed. 1971).

²⁹These factors are, of course, to be considered in all cases. AR 735-11, para. 4-14b.

³⁰W. Prosser, *supra* note 28, at 1.

how does the investigating officer³¹ determine the value of the loss when mess hall cash collection sheets³² are missing? Since there is little explicit guidance, the investigating officer's approach will depend upon the situation (*e.g.*, whether all sheets and all cash are missing, whether only the cash is missing, etc.). If only one sheet is missing, for instance, the investigating officer can use recent cash collection sheets from the mess hall to compute the average ratio of officers to enlisted personnel using the mess hall, thereby taking into account the officer surcharge. If all sheets are missing, the investigating officer will have to estimate the number of persons served at that particular meal. That can be done in a variety of ways, such as simply taking statements from mess hall personnel. If the investigating officer acts soon enough, he can take a survey at the mess hall and ask each person if he or she ate the meal in question in the mess hall. This would determine a safe, minimum figure of loss. The investigating officer could also use historical data from the mess hall to determine the average number of meals served. As a last resort, the investigating officer can estimate the number of meals served by figuring the quantity of food prepared, subtracting the leftover food, and then determining the number of persons served by using an average quantity of food per person figure. Again, the investigating officer is best qualified to determine which is the most accurate method for that meal in that mess hall.

³¹AR 735-11, para. 3-27a provides that a commander *may* direct that in lieu of a report of survey, an investigation be conducted under U.S. Dep't of Army, Reg. No. 15-6, Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977); one such situation is when a Cash Meal Payment Sheet is lost or destroyed. U.S. Dep't of Army, Reg. No. 30-1, The Army Food Service Program, para. 3-95 (21 Mar. 1977) [hereinafter cited as AR 30-1], however, states that to obtain relief from lost or destroyed cash or cash collection sheets, an investigation *will* be initiated in accordance with the provisions of AR 15-6.

³²A cash collection sheet, DD Form 1544 (Cash Meal Payment Sheet) is an accountable form used to record the cash payment for meals served in appropriate fund dining facilities. These sheets are issued in covered books consisting of fifty individual sheets. AR 30-1, para. 3-55a.

Similarly, if a mess hall's rations account exceeds the three percent tolerance built into the rations accountability system,³³ should the investigating officer offset the loss by this three percent tolerance figure? Again, AR 735-11 does not directly address this matter. The three percent tolerance level appears to be an acceptable loss figure that the Army provides as a "grace figure" to mess hall personnel. Holding individuals liable for small losses is not warranted because the cost of collection often is greater than the amount that could be collected and because of the adverse effect on morale. Additionally, this tolerance factor alerts the command and mess hall management personnel to potential problems in the account.³⁴ The Army is not contending that no loss occurred but rather that the Army's policy is to administratively forgive small losses. Keeping in mind the purposes for the three percent tolerance, the investigating officer should not "offset" the pecuniary charge with this three percent amount. The underlying rationale simply does not apply when greater losses are involved.³⁵

V. Procedural Issues

A few recurring procedural issues deserve mention. First, when a special court-martial convening authority's power to convene special courts-martial had been withheld, can he serve as the approving authority on reports of survey?³⁶ If he is an O-6 or higher, then the authority to act as an approving authority can possibly be delegated under AR 735-11, para. 1-6e. But if he is an O-5—for example, the battalion commander of a division's aviation battalion—then

³³See AR 30-1, chapter 3, section XII. This three percent tolerance applies to dining facilities operating under the Field Ration Issue system (FRIS) or under the Army Ration Credit System (ARCS). Generally, the FRIS is used by Reserve Component personnel at all times and by active Army units during extended field training exercises, while the ARCS is used by the active Army during garrison operations; the ARCS is not applicable to Reserve Component personnel. See AR 30-1, para. 3-1.

³⁴AR 30-1, para. 3-75a.

³⁵I wish to stress that this is my conclusion; there is no source directly addressing this issue.

³⁶AR 735-11, para. 1-6e lists who can be an approving authority.

he cannot serve as the approving authority if his authority to convene special courts-martial has been withheld.³⁷ AR 735-11, para. 1-6e requires that the approving authority *actually exercise* special court-martial convening authority.³⁸

Two questions often arise concerning the use of a Department of the Army (DA) civilian as a surveying officer. Presently AR 735-11 provides that DA civilians will not be used as surveying officers except where enough military personnel are not available.³⁹ This requirement will be deleted from AR 735-11 in a future issue of the Unit Supply UPDATE.⁴⁰

The second issue is also raised by para. 4-5 of AR 735-11, which states that the surveying officer "should" be senior to the person subject to possible pecuniary liability.⁴¹ When is a DA civilian senior to a service member for purposes of AR 735-11? The regulation offers no guidance, although other publications provide guidance on civilian equivalencies for other purposes; for instance, a major is the equivalent

of a GS-12 for purposes of assigning family housing overseas.⁴² Appointing authorities need not, however, strictly adhere to the guidance from these other publications. Obviously they are developed for other purposes and are not presently incorporated into AR 735-11. Also, AR 735-11 does not mandate, but rather only suggests, that the surveying officer be senior to the person subject to possible pecuniary liability. The problems related to the more rigid military rank structure are usually not present when DA civilian surveying officers are used; there is less potential for the use or perception of seniority to improperly influence the civilian surveying officer's findings and recommendations.⁴³

Once the report of survey reaches the staff judge advocate's (SJA) office,⁴⁴ the procedural requirements are straightforward. The report of survey must be reviewed by an attorney before the approving authority can hold an individual pecuniarily liable; a copy of this legal review must be included as part of the record with the report of survey.⁴⁵ The attorney requirement means that a Funded Legal Education Program (FLEP) officer who has not yet passed the bar, or any other nonattorney, cannot perform this legal review. A FLEP officer

³⁷Normally, of course, such a battalion commander by virtue of his position could convene special courts-martial under Uniform Code of Military Justice art. 23, 10 U.S.C. § 823 (1982).

³⁸A related issue is whether an O-4, who is a battalion executive officer and is properly appointed as the acting commander, may sign off on reports of survey as the appointing and approving authority in the absence of the battalion commander (assuming, of course, that the battalion commander can serve as the appointing and approving authority). Under these circumstances, the battalion executive officer may act as the appointing and approving authority on reports of survey.

³⁹AR 735-11, para. 4-5a. The intent of this provision was clarified in Message, HQDA WASH DC/DALO-SMP-U, 051716Z Mar 84, subject: Civilian Survey Officers.

⁴⁰Issue No. 4, Unit Supply UPDATE. Judge advocates should verify this change when Issue No. 4 is published.

⁴¹With Issue No. 4 of the Unit Supply UPDATE, the last sentence of AR 735-11, para. 4-5a will be changed to delete the first two words in the sentence, i.e., "When possible." This concern to avoid coercion and potential perceptions of coercion is the reason that in Issue No. 4 of the Unit Supply UPDATE, AR 735-11, para. 1-6e will require that the approving authority for reports of survey containing recommendations affecting general officers be the next general officer in the chain of command senior in grade to the general officer being held pecuniarily liable or relieved from responsibility.

⁴²Dep't of Defense Dir. No. 4165.45, Determination of Family Housing Requirements (19 Jan. 1972) provides the following equivalencies for purposes of assigning on-post housing: GS-7, O-1; GS-8 and 9, O-2; GS-10 and 11, O-3; GS-12, O-4; GS-13 and 14, and GM-13 and 14, O-5; GS-15 and GM-15, O-6. Dep't of Defense Dir. No. 1000.1, Identity Cards Required by the Geneva Convention (30 Jan. 1974) lists the same equivalencies; these equivalencies were developed to conform with the rank categories prescribed in Article 60, GPW for monthly advances to prisoners of war and to facilitate treatment of prisoners of war with due regard to rank, in keeping with Article 43, GPN. U.S. Dep't of Army, Reg. No. 60-21, Exchange Service Personnel Policies, Table 1-1 (1 Aug. 1979) contains the same equivalencies for use within the Army and Air Force Exchange Service.

⁴³For example, a GS-12, in my opinion, could properly be appointed as a surveying officer when a Major is the responsible individual, even though they are listed in *supra* note 42 as equivalent. The experience, time in service, and position of the individuals concerned should also be considered.

⁴⁴The term "staff judge advocate's office" is used to refer to all legal offices providing advice on reports of survey.

⁴⁵AR 735-11, para. 4-24d.

could, however, conduct an initial review and draft the office's written legal opinion, but an attorney must independently review the report of survey and sign the legal opinion.⁴⁶ Equally important, the SJA must ensure that the attorney who performs the legal review is not the same attorney who reviews the case before the appeal authority's action on the case.⁴⁷ In short, the procedural requirements placed on the SJA office are minimal.

VI. Advising Clients

In addition to advising commanders, judge advocates provide advice to service members and DA civilians concerning reports of survey. Although AR 735-11 states that the office of the staff judge advocate "will" provide advice to an individual "against whom a pecuniary charge is recommended,"⁴⁸ the common practice is to assist the individual earlier in the report of survey process. For example, a judge advocate may assist an individual in preparing a statement for the surveying officer's consideration under AR 735-11, para. 4-10a. A judge advocate may also be asked if an officer should pay an indebtedness resulting from a report of survey, since the Army generally cannot involuntarily withhold money from an officer's pay for this purpose while he serves on active duty.⁴⁹ A ser-

vice member may also ask a procedural question concerning reports of survey, such as whether the Army can involuntarily hold him on active duty if he is held pecuniarily liable and has not paid the indebtedness.⁵⁰ Obviously, questions such as these arise frequently.

Judge advocates also provide advice concerning appeals and remission of indebtedness.⁵¹ In this regard several points are worthy of consideration. Despite the language of AR 735-11, para 5-1b that the appeal process and a petition for remission of indebtedness are the, "sole procedures for seeking relief from pecuniary liability established according to this regulation," the Army Board for Correction of Military Records (ABCMR) is also an available avenue of relief.⁵² When legal issues concerning reports of survey are presented to the ABCMR, the Administrative Law Division. OTJAG renders opinions on these legal issues. To the extent that the language of AR 735-11 that, "[f]ormer members and employees may appeal... under the provisions of AR 15-185," suggests that only former members and employees may seek relief from the ABCMR, that language is misleading.⁵³ Application to the ABCMR can be made by service members and DA civilians while still on active service.⁵⁴

How should a loss from a report of survey be treated on a service member's income tax form? Depending on the circumstances surrounding

⁴⁶It is my *opinion* that a FLEP officer cannot so act; however, there is no formal, written policy on this matter to my knowledge.

⁴⁷AR 735-11, para. 5-6. This is not to say that this is not the individual attorney's responsibility; some system should be used to avoid this simple (and potentially embarrassing) error.

⁴⁸AR 735-11, para. 4-11. See also U.S. Dep't of Army, Reg. No. 27-3, Legal Assistance, para. 2-4b (1 Mar. 1984) (legal assistance officers may render legal advice and assistance on reports of survey with approval of SJA).

⁴⁹AR 735-11, para. 4-29b provides that involuntary collection from an officer's current pay for a report of survey indebtedness can be made only for (1) accountable officers and (2) loss of personal arms and equipment. See Dep't of Defense Pay Manual, para. 70702 and Table 7-7-3 (1 Jan. 1967). Under the Debt Collection Act, Pub. L. No. 97-365, 96 Stat. 1749 (1982), 31 U.S.C.A. § 3717(a)(1) (West 1983), interest will accrue at a minimum rate of interest "equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year" until the indebtedness is paid.

⁵⁰There is no authority to hold a service member beyond ETS in such circumstances. U.S. Dep't of Army, Reg. No. 635-200, Enlisted Separations, paras. 1-27, 1-28 (1 Oct. 1982). The same rule applies for officers. See U.S. Dep't of Army, Reg. No. 635-100, Officer Personnel, para. 3-13(C27, 1 Aug. 1982).

⁵¹AR 735-11, paras. 4-11, 5-4d.

⁵²U.S. Dep't of Army, Reg. No. 15-185, Army Board for Correction of Military Records (18 May 1977) [hereinafter cited as AR 15-185] establishes procedures for applying to the ABCMR to correct a military record.

⁵³AR 735-11, para. 5-4b.

⁵⁴AR 15-185, para. 6.

the loss,⁵⁵ the amount of the loss can properly be claimed as an itemized deduction on Schedule A, under section 162⁵⁶ as a trade or business expense or under section 165⁵⁷ as a loss incurred in a trade or business by an individual. If the loss falls under section 165, the requirement that the total losses during the year exceed ten percent of the individual's adjusted gross income and that the individual reduce each separate loss by \$100 does not apply.⁵⁸ Fines and penalties paid to a government agency for violating the law are not deductible under section 162;⁵⁹ with the distinctions made in Appendix B of AR 735-11⁶⁰ between the report of survey on the one hand, and the disciplinary tools available to commanders on the other hand, payment made as a result of a report of survey should not be considered such a fine or penalty.

A judge advocate may be asked whether an indebtedness resulting from a report of survey may be discharged in bankruptcy.⁶¹ If the service member files under Chapter 7 of the Bank-

ruptcy Code,⁶² the only way the government may collect the report of survey indebtedness is to submit an unsecured claim in Bankruptcy Court. In most cases, the debt will be discharged without any money being distributed to satisfy the government's claim. On the other hand, if the petition is filed under Chapter 13 (Adjustment of Debts of an Individual With Regular Income), the government will probably recover some portion of the report of survey claim.

Finally, two quick suggestions on preparing report of survey appeals. First, judge advocates should not "shotgun" issues. If a judge advocate believes a report of survey is incorrect because of one or two major legal errors, he should not prepare a detailed appeal raising minor errors in the report of survey if they do not provide a sufficient basis to overturn the report of survey. The appeal loses its effect; the danger is that the decisionmaker will assume that all the issues have the same lack of merit as do the weaker issues. Second, judge advocates should have the client sign the appeal letter, even if it was prepared entirely in the judge advocate's office. It is simply more effective to have the client sign the letter—judge advocates should not need to see their name in print and most commanders will realize that judge advocate assistance was provided.

VII. Conclusion

These are some of the report of survey issues that commonly arise and suggestions on how to solve them. One interesting issue not addressed is whether the Army's report of survey procedures are constitutionally sufficient. A DA civilian in Hawaii was held pecuniarily liable in the amount of \$1,644 on a report of survey when he negligently drove a government truck so as to proximately cause \$8,789 in damages to the truck. The employee submitted the matter to arbitration. Based on the "inadequacy" and "unconstitutionality" of the investigation, the "financial responsibility" assessed against the employee was ordered rescinded.⁶³ The arbitrator also determined that the Army's action was

⁵⁵This is not to suggest that all losses from a report of survey can be deducted by the service member held pecuniarily liable. It is doubtful, for example, that a loss resulting from intentional misconduct would be considered an ordinary and necessary expense related to carrying on a trade or business or a loss incurred in a trade or business.

⁵⁶26 U.S.C. § 162 (1982) (Trade or Business Expenses). IRS Publication 529, 2 (Rev. Nov. 1983) provides that laboratory breakage fees paid by research scientists are deductible as an employee business expense; many report of survey losses seem to be similar.

⁵⁷26 U.S.C.A. § 165 (West. Supp. 1983).

⁵⁸This requirement applies only to an individual's casualty loss under 26 U.S.C.A. § 165(c)(3), and not to losses incurred in a trade or business under 26 U.S.C.A. § 165(c)(1).

⁵⁹See 1 Fed. Income Tax Regs. (P-H) § 1.162-21 (June 1, 1983); IRS Publication 529, 4 (Rev. Nov. 1983).

⁶⁰AR 735-11, Appendix B, para. B-2, for example, states that "the report of survey is a supply-oriented document; it is not intended to be used as corrective action or punishment for negligence or misconduct that may have contributed to the loss." And para. B-4 states that "[t]he report of survey is not a form of punishment, nor has it proven to be effective as a deterrent."

⁶¹See generally Dep't of Defense Pay Manual, para. 70708 (1 Jan. 1967) (Bankruptcy).

⁶²11 U.S.C. §§ 1-1103 (1982).

⁶³912 Gov't Empl. Rel. Rep. (BNA) 35, 42 (May 11, 1981).

an unwarranted "personnel action" within the meaning of the Back Pay Act⁶⁴ and awarded attorney fees in the amount of \$3,500.⁶⁵ Not only the decision itself, but also the arbitrator's language indicate his feelings:

This Arbitrator is *particularly distressed and disturbed* by the fact that the command... could not have adopted the simple procedure of making applicable to the Board [sic] of Survey investigation, in the appointing order, the provisions of AR 15-6 relating to interested persons. It seems *basic* to this Arbitrator that if financial or job related interests are to be or could be affected, the due process *requires* that the party be given *some opportunity to defend himself*.

...

These *minimum safeguards* would at least include the right to be present during the

taking of testimony, in person and through counsel, the right to cross examine witnesses, and to present testimony and argument. Absent these safeguards, the Arbitrator *firmly believes* that the application of AR 735-11 to Grievant in this case is *repugnant to his constitutional rights*, deprives him of property and other *valuable* rights in violation of the Fifth and Fourteenth Amendment and is unlawful... The *unlimited application* of AR 735-11 to situations such as the instant matter, is clearly *reprehensible and violate* [sic] *basic constitutional safeguards*.⁶⁶

This decision is included not to suggest it was correctly decided or that the Army's report of survey system is constitutionally deficient, but to stimulate the reader into thinking more critically about the report of survey system. If this article accomplishes only that, it is successful.

⁶⁴5 U.S.C. § 5596 (1982).

⁶⁵912 Gov't Empl. Rel. Rep. (BNA) 35, 42 (May 11, 1981).

⁶⁶*Id.* at 41, 42 (emphasis added).

Appendix

Summary of Significant Report of Survey Administrative Law Opinions

Purpose

This summary is designed to provide a reference for judge advocates to use when reviewing or providing advice concerning reports of survey. This summary (1) alerts judge advocates that these opinions have been decided and (2) summarizes the reasoning and conclusions of these administrative law opinions.

Both the written reply to the requester (the "streamliner") and the Note for Retained Copy (containing the research and reasoning) are summarized; no effort is made to distinguish between the two. Each summary contains a *Background* section, which summarizes the

questions asked, and a *Digest* section, which is taken from the streamliner and the Note for Retained Copy. The *Digest* is written in present tense for convenience - all references are to sources (statutes, Army regulations, etc.) in effect at the time of the opinion. Included in the *Digest* are notes, which are not part of the opinion but which provide additional or clarifying information. Information in brackets is also not part of the opinion.

This summary is an individual work product from the Administrative Law Division, The Judge Advocate General's School. Judge advocates should of course refer to the actual opin-

ions when the precise language or holding of the opinion is needed.

Current regulation: AR 735-11, Accounting for Lost, Damaged, and Destroyed Property (15 Sep. 1981) (with change 1, effective 15 Dec. 1983) (published in the Unit Supply UPDATE, Issue No. 3, 1 Mar. 1984).

The following are the editions of AR 735-11 (all entitled "Accounting for Lost, Damaged, and Destroyed Property") from the 1959 edition to the present edition:

- (1) AR 735-11, 15 Sep. 1981, effective for the ARNG 1 Oct. 1981; effective for the USAR and active Army 1 Dec. 1981 (by message).
- (2) AR 735-11, 15 Oct. 1978, effective 1 Jan. 1979.
- (3) AR 735-11, 1 May 1974, effective 1 July 1974.
- (4) AR 735-11, 26 May 1971, effective 1 Nov. 1971.
- (5) AR 735-11, 11 July 1967, effective 11 July 1967.
- (6) AR 735-11, 1 June 1959, effective 1 June 1959.

Organization of this Summary

- I. Basic Concepts
 - A. Definitions
 - B. Procedures
- II. Uses of Reports of Survey
- III. Key Players
- IV. Relief from Reports of Survey
- V. List of Summarized Opinions

I. Basic Concepts

A. Definitions

DAJA-AL 1975/3322, 19 Mar. 1975. "Damage" includes failure to properly clean government quarters upon vacation.

Background: The Comptroller of the Army requested a legal opinion as to whether or not a report of survey may properly be used to determine pecuniary liability for the recovery of costs incurred by the government for cleaning quarters, vacated by a service member, where standards of cleanliness were not met.

Digest: The failure of a service member to clean

government housing upon vacation constitutes "damage" to government property within the language of 10 U.S.C. § 4835 and AR 735-11 [then in effect, as explained above]. 10 U.S.C. § 4835 provides that:

Under such regulations as the Secretary of the Army may prescribe, any officer of the Army designated by him may act upon reports of surveys and vouchers pertaining to the loss, spoilage, unserviceability, unsuitability, or destruction of or damage to property of the United States under the control of the Department of the Army.

Para. 4-18(d), AR 735-11 [then in effect] [now para. 4-14a], implementing this statute with regard to government quarters, provides that "liability attaches with any loss of such property or to such quarters due to the occupant's gross negligence."

NOTE: 10 U.S.C. § 4835 currently reads as above. The current para. 4-14a provides that "Persons . . . may be charged with a loss or damage to furnishings or to the quarters caused by the result of the occupant's negligence." Thus the current wording is similar, except of course that the current standard is simple, not gross, negligence.

The question that must be considered, therefore, is whether failure to meet the cleanliness standards constitutes "loss, spoilage, unserviceability, unsuitability, or destruction or damage to" government quarters. With the exception of "damage," the listed terms are inapplicable by definition. Para. 1-8(i), AR 735-11 [1 May 1974] [now para. 1-6m] defines "damage" as "a condition which impairs either the value or use of an article, and may occur in varying degrees," [same as current definition] which would seem to include quarters rendered unusable as a result of failure to clean.

It should be noted, however, that in order to hold a person pecuniarily liable for cleaning expenses, it must be established that the damage was caused by his gross negligence.

NOTE: As mentioned above, the current standard is simple negligence. This opinion should not be read as requiring that the negligence be that of the service member. 10 U.S.C. §

2775 and para. 4-14a, AR 735-11 currently both allow collection when the negligence is that of the service member or a member of the household.

DAJA-AL 1980/3272, 22 Dec. 1980. "Loss" includes loss from government accountability.

Background: A staff judge advocate (SJA) requested an opinion from The Judge Advocate General concerning the definition of loss in AR 735-11 and the relationship of proximate cause to the loss. The SJA was concerned with the situation where negligent property accountability procedures resulted in difficulty in establishing how or when losses of property occurred. Some judge advocates assumed that loss meant physical loss; in a given case where negligence could be established in property accountability, but the circumstances of the physical loss could not be established, these judge advocates could not determine that the negligence involved was the proximate cause of the loss.

Digest: The loss addressed in AR 735-11 is the *loss from government accountability*. While in many instances the physical disappearance of property and the loss from government accountability will coincide, this is not always the case. The following example illustrates the distinction to be made:

The supply specialist for Company A received 25 fans six months ago. Receipt was noted on the proper documents. The supply specialist issued fans to members of the unit without making any record reflecting the date or recipient of the issue. A physical inventory shows only 22 fans present in the company. The supply specialist has no independent recollection of the recipients of the fans.

In this example, the fans were lost from government accountability as soon as they left the supply room, since at that point no one could account to the government for the existence or condition of the property, because of the specialist's failure to keep adequate records of property issued. The *physical* disappearance of the three fans cannot be determined (*i.e.*, they may have been lost, sold, stolen, pawned, etc.), so the

supply specialist's actions (or omissions) cannot be causally related to the physical disappearance of the fans. However, there is a causal relationship between the actions (or omissions) of the specialist and the loss of the fans from government accountability. It is this loss upon which pecuniary liability may be predicted under AR 735-11.

If an investigation reveals that following proper supply procedures (hand receipting, taking inventory, etc.) would have ensured *accountability* for the property, any individual whose negligence resulted in the failure to use hand receipts, for example, could be determined to be pecuniarily liable for the loss of the property, within the monetary limits of AR 735-11.

A commander's responsibility is not a function of his being able to only physically locate certain property; responsibility turns on the ability to account to the government for property entrusted to his care and the care of his subordinates. Certainly not every loss of property within a command can be causally attributed to the commander; but where the commander's individual negligence results in the government's inability to account for property, AR 735-5 indicates the commander is meant to be responsible for that loss (*i.e.*, failure to account properly).

To equate physical disappearance with loss in all cases would subvert the intent of the current regulatory scheme, which is designed to ensure property accountability. Such an equation would operate to protect the supervisor who has lax property accountability procedures, because the laxness would make it difficult, if not impossible, to determine the physical disappearance of property regardless of when accountability had been lost. The current system focuses on individuals and their obligation to account for property, not on creating a method for being able to trace the physical presence of every individual item of government property.

NOTE: Para. 1-6u of the current AR 735-11 clarifies the situation: "Loss. Loss of, damage to, or destruction of, property of the U.S. Government under the control of the Army. The loss

referred to includes the loss from Government accountability. Property is considered lost when it cannot be accounted for by the person responsible for it."

B. Procedures

JAGA 1969/8370, 31 Jan. 1969. No exclusionary rule for failure to read Article 31 rights warning.

Background: A staff judge advocate requested an opinion whether an admission made to a surveying officer may be considered in determining pecuniary liability if the service member under investigation had not been given an Article 31 rights warning.

Digest: Such evidence can be considered, even in the absence of an Article 31 warning, in determining pecuniary liability. However, because an incriminating admission to a surveying officer without an adequate warning precludes its use in a court-martial, surveying officers should be cautioned to advise a service member of his rights if, at any time during the administrative investigation, the service member becomes suspected of an offense punishable by courts-martial.

In interpreting the guidelines for the admissibility of evidence at administrative proceedings, prior opinions of this office [Military Affairs Division, OTJAG] have consistently expressed the view that statements taken in violation of Article 31 may be admitted into evidence. JAGA 1960/3973, 7 Apr. 1960 (reduction proceedings); JAGA 1960/4162, 26 May 1960 (elimination proceedings); JAGA 1962/4873, 23 Nov. 1962 (elimination proceedings); JAGA 1962/5001, 18 Dec. 1962 (reduction proceedings).

NOTE: The following reasoning was used:

Where a surveying officer is required, para. 5-3b, AR 735-11 requires that he be selected on the basis of the criteria established by AR 15-6 [12 Aug. 1966, then in effect], and that with regard to the "recommendations" resulting from the investigation, AR 15-6 will be used as a procedural guide (para. 5-9b, AR 735-11). This complementary relationship of AR 735-11 establishes the requirement that the rules of

evidence outlined in AR 15-6 are to be generally followed by a surveying officer or survey board (*see also* para. 1, AR 15-6). In this regard, para. 10, AR 15-6 provides that "proceedings utilizing this regulation are administrative and not judicial in nature, an investigating officer... is not bound by rules of evidence prescribed for trials by courts-martial or for court proceedings generally."

NOTE (cont.): Although the above reasoning is questionable, the conclusion is still valid. The current AR 735-11 does not refer to AR 15-6, Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977) when describing the duties of the surveying officer. The only reference to AR 15-6 is that an AR 15-6 investigation may be used in place of a report of survey (*see, e.g.*, para. 3-27, AR 735-11). Para. 1-1, AR 15-6 currently provides that AR 15-6 "may be made applicable to investigations or boards which are authorized by another directive, but only by a specific provision in that directive or in the letter of appointment." Also, "[e]ven when not specifically made applicable, this regulation [AR 15-6] may be used as a general guide for investigations or boards authorized by another directive, but in that case its provisions are not mandatory." Para. 1-1, AR 15-6. [end of NOTE]

Line of duty investigations must be distinguished, since the applicable DA pamphlet prohibits the consideration of any written statement against interest obtained in violation of Article 31. This requirement stems from 10 U.S.C. § 1219: "Statement of origin of disease or injury: limitations. A member of an armed force may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has. Any such statement against his interests, signed by a member, is invalid." [This section is still in effect.] This requirement, therefore, does not apply to reports of survey.

NOTE: The opinion uses language such as, "This office has consistently stated that there is no requirement for a surveying officer to administer an Article 31 warning...." This results from a lack of precision and should be interpreted to mean that any such failure to

provide Article 31 warnings does not render any statements obtained inadmissible. As stated in paragraph two of this summary, the opinion cautions that surveying officers should advise a service member of these rights "if at any time during an administrative investigation, he becomes suspected of an offense punishable by courts-martial."

NOTE: Unlike current opinions, which are signed by or for The Judge Advocate General, this opinion, as was the practice then, was signed by the Chief, Military Affairs Division.

DAJA-AL 1978/1932, 27 Feb. 1978. Payment of court-ordered restitution—service member must be given credit on report of survey indebtedness.

Background: The Deputy Chief of Staff for Logistics asked The Judge Advocate General to review a report of survey involving the following facts. Sergeant T. was found grossly negligent on a report of survey in his handling of certain government property. Additionally, Sergeant T. entered a plea of *nolo contendere* in a United States district court and was sentenced to four years confinement for violation of 18 U.S.C. § 641 [both then and now, pertaining to stealing, embezzling, selling without authority, etc., public money, property, or records]. Sergeant T. was placed on probation on the condition that restitution be made to the government within three years.

Digest: Since this court-ordered payment was a condition of probation rather than a specific punitive fine, all payments made by Sergeant T. must be deducted from the total indebtedness determined by the report of survey. To do otherwise would bring to the government an unauthorized recovery in excess of its actual loss. Had the civil court imposed a fine in this case, such action would be considered to have been punitive action, which would not preclude further pecuniary liability through the report of survey system. This is because the report of survey has been recognized as a property adjustment document, and any pecuniary charge resulting therefrom does not preclude, nor is it affected by, criminal or administrative sanctions taken against a service member [citing earlier opinions].

DAJA-AL 1979/2544, 8 May 1979. Affidavit should be required if an accountable officer is involved.

Background: The Deputy Chief of Staff for Logistics asked whether an affidavit is required before an accountable officer may be relieved from liability for property charged to him.

Digest: An affidavit is required, since pursuant to 37 U.S.C. § 1007(f), an accountable officer shall be charged for lost or damaged articles in his account, "unless he shows to the satisfaction of the Secretary of the Army . . . by one or more affidavits setting forth the circumstances, that he was not at fault." [This is also the current wording of that subsection.]

NOTE: Currently the report of survey form, DA Form 4697, includes an affidavit in block 12. Thus a properly completed DA Form 4697 meets the statutory requirement.

NOTE: See also DAJA-AL 1983/1482, 7 Apr. 1983, where The Judge Advocate General opined that it was legally objectionable to adopt a suggestion which would allow a person preparing DA Form 4697 to sign a certificate to acknowledge that the statements in block 11 are true. This 1983 opinion cited DAJA-AL 1979/2544.

II. Uses of Reports of Survey

JAGA 1969/3591, 28 Mar. 1969. Dependent damaging another service member's government quarters - no pecuniary liability.

Background: A staff judge advocate asked whether, under para. 7, AR 735-10 [Principles and Policies Accounting for Lost, Damaged, and Destroyed Property, 26 Apr. 1967, then in effect] a military person or government employee can be held pecuniarily liable for damage caused to government property by his minor child, where such property is other than the parents' assigned government quarters or government furnishings contained in the assigned quarters.

Digest: A military person or government employee cannot be held pecuniarily liable under para. 7, AR 735-10 in such a situation.

Para. 7c and d, AR 735-10 [then in effect] provides:

c. Individuals may be charged for loss of property not in their personal custody or under their supervisory control (personal or supervisory responsibility) where such loss was occasioned by their willful misconduct or gross negligence.

d. Individuals who occupy assigned Government quarters, or have been issued Government property for use in family quarters, will be charged, except for loss resulting from fair wear and tear or Act of God, with any loss of such property or to such quarters due to the occupant's simple negligence, including those instances where the loss is related to an act of a member of his household or other individual and the evidence shows that the occupant, under the circumstances failed to exercise a reasonable degree of care.

Para. 7c imposes pecuniary liability on a person for loss of property not in his personal custody or under his supervisory control only if *his* willful misconduct or gross negligence caused the loss. Pecuniary liability under para. 7d extends only to property assigned to the individual charged for the loss.

NOTE: In my opinion, this opinion is still valid. Presently 10 U.S.C. § 2775 provides (in part):

Liability of member for damages to family housing, equipment, and furnishings.

(a) A member of the armed forces shall be liable to the United States for damage to any family housing unit, or damage to or loss of any equipment or furnishing of any family housing unit, assigned to or provided such member if it is determined, under regulations issued by the Secretary of Defense, that such damage or loss was caused by the abuse or negligence of such member or a dependent of such member.

(d) The Secretary of Defense shall issue regulations to carry out the provisions of this section, including regulations for determining the cost of repairs or replacements made necessary as the result of abuse or negligence on the part of a

member or dependent of a member.

NOTE (cont.): Para. 4-14a, AR 735-11 now provides:

Persons occupying assigned Government quarters or having been issued Government property for use in family quarters may be charged with a loss or damage to furnishings or to the quarters *caused by the result of the occupant's negligence*. Included are those cases in which the loss is related to an act of a member of the household or *other persons visiting the household*. However, losses resulting from fair wear and tear or an act of God are not included. (emphasis added)

NOTE (cont.): Neither the statute nor para. 4-14a authorizes holding a service member liable for damages to *another's* government quarters caused by his dependent. 10 U.S.C. § 2775 is unusual in that a non-negligent service member may be held pecuniarily liable for the negligence of another (his or her dependent). In contrast, the general intent of AR 735-11 is that service members will be held liable only when *their* acts or omissions proximately cause damage to or loss of government property.

NOTE (cont.): However, if a *service member* is negligent in not controlling his dependent, and the dependent damages another's government quarters or government furnishings, then, (in my opinion) the service member *could* be held liable. For example, if the dependent's prior conduct placed, or should have placed, the service member on notice that the dependent required supervision, and the service member negligently failed to provide such supervision, then the service member could be held liable for any subsequent damage to another's government quarters caused by his dependent.

NOTE (cont.): The incident occurred on an exclusive jurisdiction installation. In a separate part of the opinion, The Judge Advocate General (relying on the *McGlenn* doctrine; see 114 U.S. 542 (1884)) opined that the state law in effect at the time the United States acquired exclusive jurisdiction over the installation determines the liability issue. Under the facts of this opinion, the controlling state law then in effect provided that a parent was not liable for

the torts of his minor child, in the absence of the relation of master and servant, or principal and agent. Under the facts of the case, no master-servant or principal-agent relationship existed.

NOTE (cont.): This part of the opinion should not be read to suggest looking to state law to resolve the issue of negligence on a report of survey. Instead, the requestor was asking two separate questions, and the part of the opinion addressing the first issue of liability is not relevant to that part of the opinion resolving the report of survey questions.

NOTE (cont.): In a report of survey, reliance on state law seems misplaced; the report of survey system is an accountability procedure, which also serves to determine questions of pecuniary liability. The absence of reference to state law in AR 735-11 and the need for uniformity suggests that reference to state law to determine questions of negligence is unnecessary and wrong. The point is - judge advocates should carefully research this issue of whether state law is applicable before providing advice.

NOTE: Unlike current opinions, which are signed by or for The Judge Advocate General, this opinion, as was the practice then, was signed by the Chief, Military Affairs Division. Reference is made in this summary to The Judge Advocate General for convenience.

DAJA-AL 1974/5583, 15 Jan. 1975. Report of survey may be used for loss of MPRJ.

Background: Noting that the cost to reconstruct a Military Personnel Records Jacket (MPRJ) was \$250 [in 1974 dollars], The Adjutant General asked what actions could be taken to obtain reimbursement from service members who willfully destroy or negligently lose their MPRJ.

Digest: An MPRJ is government property as defined in para. 1-8x, AR 735-11, which includes "all property under the control of the Department of the Army except NAF property." Thus the procedures in AR 735-11 are applicable to the loss of or damage to an MPRJ caused by a service member having custody thereof. The accompanying memorandum from The Adjutant General indicates that the cost of reconstruction of an MPRJ is approximately

\$60.00 [in 1974 dollars].

NOTE: The current definition of government property in para. 1-6ad, AR 735-11 is almost identical.

DAJA-AL 1975/3239, 10 Mar. 1975. Accountability for deserters' clothing.

Background: The Deputy Chief of Staff for Logistics (DCSLOG) requested comments on a proposal to eliminate reports of survey for missing individual-issue military clothing of AWOL service members and deserters, and to use the "charge sale system" set forth in AR 700-84 as a means of satisfying pecuniary liability. A major command (MACOM) and installation originally posed the question to DCSLOG. The specific question asked was:

Does the Army Report of Survey system described in AR 735-11, 1 May 1974, constitute a nonwaivable statutory requirement for property accountability, which would preclude consideration by the Secretary of the Army of an alternative administrative procedure, for determining the pecuniary liability of military members, without prior Congressional amendment to any applicable section of the United States Code?

Digest: Pay may be withheld involuntarily from a service member only when specifically authorized by statute. In the case of loss of or damage to arms or equipment, the statutory authority to withhold is contained in 37 U.S.C. § 1007(c). That section requires a finding of abuse or negligence on the part of the member prior to deduction from pay. Accordingly, an examination into the circumstances of the loss of or damage to arms or equipment is required prior to the imposition of pecuniary liability in order to determine if the loss or damage was caused by the abuse or negligence of the member. That examination is, by definition, a survey. In order for the Secretary of the Army or his designee to fulfill the statutory requirements of 10 U.S.C. § 4835, a report of that survey must be made. Thus, in that sense, a report of survey is statutorily required.

AR 735-11 sets forth the procedures to be used in implementation of the statutory require-

ments. While its provisions are not waivable, there would be no legal objection to changes to simplify the administrative procedures used in determining whether loss of or damage to arms or equipment was caused by the abuse or negligence of the member, and in effecting collection of the amounts determined to be due.

A difficulty here is that the MACOM and installation originally posing the question are using the term "report of survey" in a different way. They are using it in the sense of that body of procedure contained in AR 735-11, while DCSLOG is responding in the statutory sense. Nevertheless, it is clear, to the extent the MACOM proposal envisions an administrative charge without a finding of abuse or negligence, it is legally objectionable. However, the procedures in AR 735-11 could be simplified and modified to resolve many of the objections the installation and MACOM have to the present system.

As an aside, it should be noted that DCSLOG's indorsement to the MACOM commander advised that pecuniary charges could be involuntarily satisfied under the Uniform Code of Military Justice (UCMJ). The UCMJ provides no means to satisfy such indebtedness as are under consideration here.

DAJA-AL 1975/3822, 14 Feb. 1975. Report of survey can be used when service member fails to properly clean government quarters upon vacation.

Summarized in section I.A.

DAJA-AL 1976/4133, 16 Apr. 1976. Simplification of the report of survey system.

Background: The Deputy Chief of Staff for Logistics requested review of certain proposals made by a major command (MACOM) to reduce the incidence and use of reports of survey. Specifically, the MACOM wanted to amend AR 735-11 and certain other regulations, to: (1) authorize more combat serviceable organizational equipment for sale by the clothing sales store, (2) authorize the sale of such items through the central issue facility, (3) defer the use of reports of survey concerning service members dropped from the rolls until the serv-

ice member returns to Army control, and (4) eliminate the use of reports of survey in cases involving \$100 or less of potential liability unless a weapon is involved.

Digest: 37 U.S.C. § 1007(e) requires that the amount of any damage, or cost of repairs, to arms or equipment caused by the abuse or negligence of a member of the Army, who had the care of, or was using, the property when it was damaged, shall be deducted from his pay. Compliance with this statute is accomplished by determinations of pecuniary liability under the report of survey system established by AR 735-11. However, the determinations required to comply with the statute may be accomplished under any investigative system which assures fundamental due process before a member's pay is involuntarily taken. Nonetheless, the requirement that a deduction shall be made from the member's pay in such instances mandates the use of some system to determine pecuniary liability for loss of or damage to arms and equipment.

In all other instances use of a report of survey type system is legally required only when it is determined, as a matter of policy, to attempt to establish pecuniary liability (10 U.S.C. § 4835). Disciplinary action or other administrative measures are available to control losses of property, should the present report of survey system be limited. Moreover, use of the particular report of survey system established by AR 735-11 is not statutorily required, and there would be no legal objection to changes simplifying the administrative procedures used in determining pecuniary liability.

In response to the specific suggestions - first, sales of combat serviceable organizational items through the clothing sales store or central issue facility could be authorized in accordance with 10 U.S.C. § 4621. However, the question of what accounting and fiscal problems would be created by such procedure is beyond the purview of this office.

Second, no legal objection exists to deferring report of survey proceedings until an AWOL service member returns to Army control. However, many practical problems can be visualized by such a delay in accounting for missing

government property, *e.g.*, in many instances returnees are assigned to a different station from that which they departed.

Third, 37 U.S.C. § 1007(c) requires that a deduction from pay occur after a determination of pecuniary liability in instances involving damage or cost of repairs to "arms and equipment." Therefore in the case of "arms and equipment," unless the service member admits liability through voluntary replacement or preparation of a statement of charges, some type of investigative system is necessary to assure that the statutorily required determinations of pecuniary liability are made, regardless of the value of the "arms and equipment" involved. As to all other property, there is no legal objection to eliminating the present report of survey system and making no attempt to determine pecuniary liability for loss of, or damage in any amount to, government property.

DAJA-AL 1978/2184, 29 Mar. 1978. Loss of NATO property - no involuntary collection.

Background: The Deputy Chief of Staff for Logistics requested a review of an approved report of survey in which a service member assigned to United States Army, Europe was held liable for damaging NATO property. The Judge Advocate General concurred in the opinion expressed by the Administrative Law Division, Office of the USAREUR Judge Advocate.

Digest: The provisions of 37 U.S.C. § 1007(c) authorize withholding the pay of enlisted personnel for administratively determined debts only to the United States or its instrumentalities. Absent specific statutory authority, both the federal courts and the Comptroller General of the United States have found the involuntary withholding of current pay to be improper. There is no known statutory authority for withholding pay to satisfy the NATO claim in this case.

The above paragraph is based on *Smith v. Jackson*, 241 F. 747, 771 (5th Cir. 1917), *aff'd*, 246 U.S. 388 (1918); 29 Comp. Gen. 99 (1949) and the cases cited therein; and 51 Comp. Gen. 226 (1971). These cases and decisions consistently hold that involuntary withholding of current

pay may not be accomplished absent statutory authority.

Additionally, the United States Army Claims Service indicated that under Article VIII, NATO SOFA, there is no basis for a NATO claim against the United States for the loss in question. Furthermore, the Claims Service indicated that even if a potential foreign claim were present, there would be no basis to recoup any payments made from the individual service member [citing JAGD 516/111, 18 July 1956, 6 Dig. Ops. Pay and Allowances § 101.1].

NOTE: 37 U.S.C. § 1007(c) provides:

Under regulations prescribed by the Secretary concerned, an amount that an enlisted member of the Army or the Air Force is administratively determined to owe the United States or any of its instrumentalities may be deducted from his pay in monthly installments. However, after the deduction of pay forfeited by the sentence of a court-martial, if any, or otherwise authorized by law to be withheld, the deductions authorized by this section may not reduce the pay actually received for any month to less than one-third of his pay for that month.

DAJA-AL 1980/2328, 23 July 1980. Cash sales of handtools.

Background: The Deputy Chief of Staff for Logistics requested background information concerning the Army's program permitting personnel to account for lost, damaged, or destroyed Army handtools by purchasing replacements from Self-Service Supply Centers (SSSC), which are working capital (or "stock") funds operated by the Army.

Digest: The program permits individuals responsible for the loss, damage, or destruction of handtools to obtain relief from accountability for such handtools by purchasing replacements in lieu of signing a statement of charges or cash collection voucher or responding to a report of survey. The overall property accountability program of the Army (AR 735-11) is implemented pursuant to 10 U.S.C. §§ 4832, 4835. The program authorizing cash sales of handtools

was designed to simplify quick replacement of lost handtools where liability is admitted by the individual responsible for the loss.

10 U.S.C. § 4621(a)(1) authorizes officers designated by the Secretary to procure and sell "articles specified by the Secretary of the Army or a person designated by him, to members of the Army." [still the current wording] Those sales are made from the SSSC pursuant to the regulations implementing 10 U.S.C. § 2208. ["Working - capital funds"] DOD Directive 7420.1 implements 10 U.S.C. § 2208 and specifically recognizes the authority of working capital funds to make authorized cash sales to individuals. 10 U.S.C. § 2208(h) and 31 U.S.C. § 487 [since repealed] permit the proceeds from SSSC sales of "materials, stores, or supplies sold to officers and soldiers of the Army" to be deposited in the stock funds and not returned to the Treasury as would otherwise be required with proceeds from the sales of materials. [10 U.S.C. § 2208(h) was amended 12 October 1982, but the amendment does not alter this opinion.] The handtool program relies on the same basic statutory authority as the commissary, petroleum, and clothing sales programs in the Army. The provisions of Army Regulations 735-11 and 710-2 (Material Management for Using Units, Support Units, and Installations) properly implement the handtool replacement program pursuant to the cited statutes and directives.

DAJA-AL 1980/2674, 3 Oct. 1980. Reciprocal Army-Air Force reports of survey.

Background: The USAREUR Judge Advocate requested an opinion regarding the reciprocal agreement between the Air Force and the Army described in para. 8-4b, AR 735-11 [then in effect] authorizing reciprocal enforcement of reports of survey. Specifically, he asked: (1) whether the 1954 Army-Air Force agreement concerning reciprocal enforcement of reports of survey has been rescinded and (2) if not, what effect does the Comptroller General's decision in 51 Comp. Gen. 226 (1971) have on the terms of the agreement.

NOTE: Under para. 8-4b, AR 735-11 (15 Oct. 1978, then in effect), where an Army report of survey held an Air Force service member pecuniarily liable, the approving authority noti-

fied the equivalent Air Force commander of the charge and requested collection. The Air Force had agreed to recognize the finality of the Army approval of the pecuniary charge, just as the Army had agreed to similarly recognize Air Force approval of pecuniary charges against Army personnel involving Air Force property.

Digest: The agreement has not been rescinded. Second, the Comptroller General has determined, consistent with an earlier opinion of The Judge Advocate General (JAGA 1956/8800, 13 Mar. 1957), that involuntary collections from enlisted members' pay may not be predicated exclusively on a determination of liability in another service's report of survey. It should be noted that this processing of a case to determine pecuniary liability is an entirely distinct matter from subsequent action to involuntarily collect an indebtedness thus determined; involuntary collection in cases of inter-service surveys was the issue in the Comptroller General's decision. Furthermore, nothing would preclude one service's basing a determination of liability and supporting involuntary collection on the findings and recommendations in a report of survey conducted by another service.

NOTE: Para. 8-7 ("Reports of survey reciprocal agreement between Army and Air Force") of the current AR 735-11 provides, for example, that an Air Force report of survey will be forwarded to the Army approving authority with jurisdiction to act on reports of survey concerning the Army member involved. The Air Force report of survey will contain all evidence gathered as a result of the survey, the findings and recommendations of the surveying officer, and recommendations of the appropriate Air Force report of survey approving authority. The Army approving authority will then take action on the findings and recommendations according to Army regulations. Collection action will be pursued under the Army's regulations. Additionally, the Army approving authority will notify the Air Force approving authority of the action taken and take action to reconcile any differences in the anticipated action and recommendations of the Air Force. These same procedures are used when an Army report of survey is forwarded to the Air Force for action.

NOTE (cont.): Thus the present handling of Air Force reports of survey involving Army personnel allows for involuntary collection of pay from the Army service member, since it does not run afoul of the Comptroller General's decision referenced above.

III. Key Players

JAGA 1969/3370, 31 Jan. 1969. Surveying officers - no exclusionary rule for failure to read Article 31 rights warnings.

Summarized in section I.B.

DAJA-AL 1978/2603, 8 June 1978; DAJA-AL 1978/2912, 29 June 1978. Approving authority - doctrine of administrative finality.

Background: In DAJA-AL 1978/2603, the Commander, U.S. Army Physical Disability Agency (USAPDA) requested that The Judge Advocate General reconsider three of his prior opinions that pertained to the doctrine of administrative finality. Specifically, the Commander, USAPDA requested that the three opinions be reconsidered to determine whether manifest error (often cited as an exception to the doctrine of administrative finality) would permit revocation of retirement orders whenever a determination is made, subsequent to a retirement, that the retirement was ordered erroneously.

Digest: The resolution of this question depends on whether manifest error is a separate exception to the doctrine of administrative finality (now accepted as synonymous with the term "functus officio"). It is not.

The doctrine of administrative finality recognizes that, once a final administrative act has been ordered or approved by an official legally competent to do so, that official has exhausted his power to act in connection with that case, subject to certain exceptions. Those exceptions are fraud, mistake of law, mathematical miscalculation, and substantial new evidence discovered contemporaneously with or within a short time following the action. While various authorities in discussing exceptions to the doctrine have referred to manifest error, a thorough review of precedents from the U.S. Supreme

Court, the Court of Claims, the Comptroller General, and the Attorney General, as well as this office's [Administrative Law Division, OTJAG] prior consideration of the doctrine, indicates that the term manifest error does not refer to an independent exception but was introduced merely as general descriptive language encompassing other exceptions to the doctrine.

The doctrine of administrative finality is intended to preclude reopening administrative acts based on errors of judgment, the precise reason asserted for wanting to reopen the retirements considered in the opinions from this office referenced above. If there were no such doctrine, any administrative action could be reopened whenever it was later decided that the action was not the product of thoughtful and diligent deliberation. While reopening all questionable judgments could have the desirable effect of protecting the public treasury, such an approach would place an unacceptable burden on the administration of the government and the individuals concerned. By permitting any case to be reopened and reevaluated upon the assertion of manifest error, final resolution of claims for and against the government would become impossible.

Administrative finality is far more than just a matter of administrative convenience. It serves as a powerful incentive for claimants (and the government) to make a complete and accurate assertion of their positions prior to the final decision. In addition, the doctrine provides a degree of certainty in the conduct of the affairs of government that is essential in an ordered society.

The doctrine, with its exceptions, is more flexible than its judicial counterpart, *res judicata*. Nevertheless, the exceptions to the doctrine cannot be stretched to reach every case of carelessness or bad judgment; that would make it meaningless. Therefore the opinions questioned by the Commander, USAPDA remain valid.

NOTE: The 22-page Note for Retained Copy of DAJA-AL 1978/2603 contains a thorough discussion of the doctrine of administrative finality. The doctrine of administrative finality can be traced back in American legal writings at least 150 years. The Note for Retained Copy

traces the development of this doctrine and examines numerous judicial opinions and administrative decisions concerning this doctrine.

Background: In DAJA-AL 1978/2912, The Judge Advocate General applied the doctrine of administrative finality to action taken on a report of survey. There the installation commander, who was the proper approving authority, was authorized and did take final action "by authority of the Secretary of the Army." [Under paras. 5-2c and 5-7a, AR 735-11, 1 May 1974, the installation commander could take final action where the total value of the loss did not exceed \$5,000; the loss here involved was approximately \$700. The current AR 735-11 does not contain similar monetary limitations on approving authorities.] The installation commander had taken final action in his approval of the investigating officer's findings and recommendations, including the relief from pecuniary liability of all individuals concerned.

The Adjutant General requested review of the report of survey. An individual from The Adjutant General's office advised that if The Judge Advocate General should find that the investigation were deficient or that the findings were inconsistent with the evidence, then the investigation would be returned to the approving authority UP para. 10-2, AR 735-11 [then in effect].

Digest: [After noting other reasons why the two individuals involved should not be held pecuniarily liable, The Judge Advocate General stated that the doctrine of administrative finality precluded such action in this case.] The approval was a final action taken by a commander having authority to take such final action. There is no evidence of any of the exceptions to the doctrine, *i.e.*, fraud, mistake of law, mathematical miscalculation, or substantial new evidence timely discovered. See generally DAJA-AL 1978/2603 [above].

The only exception that could even arguably apply is mistake of law. Mistake of law, as an exception to the doctrine of administrative finality, might apply if the wrong standard had been applied in determining whether the two individuals concerned should be held pecuniarily liable. For example, if a standard of gross

negligence were applied when the proper standard was simple negligence, the mistake of law exception could apply. In the case under consideration, however, neither the approved findings and recommendations nor the action of the approving authority suggests what standard was applied. In the absence of evidence to the contrary, the actions of the approving authority are presumed to be proper. Thus, the mistake of law exception does not apply to the facts of this case, and the doctrine of administrative finality controls.

NOTE: In this opinion, the approving authority's final action was to hold the individuals concerned not liable. What about the reverse situation, where the approving authority holds an individual liable and then changes his mind? The opinion does not address this situation. However, the approving authority probably could so act, since under Chapter 5 (Reopening and Appeals of Reports of Survey) of AR 735-11, the approving authority may reopen, correct and amend reports of survey either by a "[d]ecision at a headquarters that such action is necessary" or by an "[a]ppeal filed by military personnel or civilian employees who have been held pecuniarily liable" on a report of survey (para. 5-1b, AR 735-11). In fact, the appeal process under Chapter 5 requires that appeals be routed through the approving authority, and "[u]pon reconsideration, the approval authority may grant the requested relief" (para. 5-5f). In effect, once the approval authority takes final action, although he has exhausted his authority to further act in that particular action, he then has a role in the appeal process. It is in this latter capacity that he can change his earlier determination of pecuniary liability. Efficiency dictates that an erroneous initial finding of pecuniary liability be corrected at the lowest appropriate level—the approving authority—rather than at the appeal authority level.

NOTE (cont.): Despite the above reasoning, allowing the approving authority to so act seems to contravene the reasoning behind the doctrine of administrative finality, as explained in DAJA-AL 1978/2603:

- (1) The doctrine is intended to preclude reopening administrative acts based on

errors of judgment; such reopening would place an unacceptable burden on the administration of the government.

(2) By permitting cases to be opened, final resolution of claims for and against the government would become impossible.

(3) It serves as a powerful incentive for all involved to make a complete and accurate assertion of their position before final action.

(4) The doctrine provides a degree of certainty in the conduct of the affairs of government that is essential to an ordered society.

In DAJA-AL 1982/1607 [summarized in section IV], The Judge Advocate General, explaining why there was no reason to resubmit a denied request for reconsideration through the approving authority as an appeal, stated that the approving authority cannot act on appeals. The drafters of AR 735-11 should have taken the consistent approach of removing the approving authority from any decisionmaking role after taking final action, unless one of the exceptions to the doctrine of administrative finality were applicable.

DAJA-AL 1979/2544, 8 May 1979. Accountable officer - affidavit should be required if an accountable officer is involved.

Summarized in section I.B.

DAJA-AL 1980/2722, 20 Oct. 1980. A commander is not an accountable officer solely by virtue of his assignment as a commander.

Background: A staff judge advocate requested an opinion regarding the meaning of the term "accountable officer" as used in AR 735-11. Specifically, the staff judge advocate disagreed with the U.S. Army Finance and Accounting Center's view that a commander is an accountable officer solely because of his position as a commander.

Digest: Para. 1-7a, AR 735-11 [15 Oct. 1978] defines "accountable officer" as a: "commissioned officer, warrant officer, or civilian employee of equivalent grade accountable for

the storage, issue, or hand receipting of Government property and specifically charged with maintaining records in connection with these tasks. *Hand-receipt holders are not included.*" (emphasis added)

NOTE: The current definition in para. 1-6c is similar: "Accountable officer. The person officially designated (per AR 735-5) to maintain a formal set of accounting records of property or funds, whether public or quasi-public. The accountable officer may or may not have physical possession of the property or funds. *Hand receipt holders are not considered accountable officers.*" (emphasis added) [end of NOTE]

Para 1-4a, AR 735-5 [22 May 1974] defines "accountability" as: "The obligation of an individual *officially designated with respect to a specified activity*, to maintain records of item balances and/or dollar values in accordance with a prescribed system showing authorized debits, credits, and available balances on hand or in use by such activity." (emphasis added)

NOTE: Currently, "accountability" is defined in para. 2-7, AR 735-5, 1 Sep. 1983; para. 2-9a of AR 735-5 reads: "Accountability pertains to maintaining formally prescribed property records for a property or sales account. *It is an obligation officially assigned to a specific person and may not be delegated.*" (emphasis added)

NOTE: The Judge Advocate General distinguished the concepts of *accountability* and *responsibility*, citing the applicable portions of AR 735-5 [then in effect] and AR 735-11 [then in effect]. These distinctions have been carried over, unchanged, in the current versions of these two regulations. [end of NOTE]

Quite simply, accountability involves the basic obligation of a person to keep an accurate record of property, documents, or funds. It is concerned primarily with maintaining formal records. In contrast, responsibility arises from the possession of property, or from the command or supervision of others who have possession of property.

NOTE: Para. 2-8b, AR 735-5 presently reads: "*Command responsibility*. Command responsibility [as opposed to accountability] is...the special relationship between a commander and

the property within his or her command. It is inherent in command and cannot be delegated. It is evidenced by assignment to a command position at any level..." [end of NOTE]

10 U.S.C. § 4832 authorizes the Secretary of the Army to prescribe regulations for the accounting of Army property and the fixing of responsibility for that property. Nothing in the statute mandates a particular definition of "accountable officer," leaving the definition to the property accountability regulations of the Secretary. Those regulations (Army Regulations 735-5 and 735-11) appear to make it clear that a commander is not of necessity an accountable officer, although nothing would preclude a commander from potentially being an accountable officer.

It is, of course, possible that the nature of local circumstances and procedures may result in a commander's becoming an accountable officer. Such an event would depend on the establishment of a special relationship between the commander and the property, not on the officer's assignment as the commander of an organization. An opposite conclusion would mantle commanders at all echelons with accountability for property clearly not within their control.

DAJA-AL 1980/3136, 25 Nov. 1980. Appeal authority does not have discretionary authority to forgive a portion of a pecuniary charge.

Background: The Deputy Chief of Staff for Logistics (DCSLOG) requested an opinion regarding the legality of granting the appeal authority on a report of survey the discretionary power to reduce pecuniary charges resulting from reports of survey.

Digest: An approved finding of pecuniary liability under the provisions of AR 735-11 constitutes a determination that a debt is owed to the United States. Only in specific, narrow circumstances has Congress authorized members of the Department of the Army to forgive such debts. The only relevant provision is the authority granted the Secretary of the Army in 10 U.S.C. § 4837(d) to remit or cancel certain debts of enlisted members of the Army [renumbered now as 10 U.S.C. § 4837; both have the same wording].

The basis for the report of survey system of AR 735-11 is the secretarial authority granted under 10 U.S.C. §§ 4832, 4835. Part of the regulatory scheme prescribed by the Secretary includes a limited liability for loss, damage, or destruction of government property. The limit of one month's basic pay applies in all cases, except those involving individual arms and equipment (37 U.S.C. § 1007(e)) and losses caused by the negligence of accountable officers (37 U.S.C. § 1007(f)). This limit on liability prescribed by the Secretary is on the amount of liability which can be determined prior to final action on a report of survey and is based on the authority granted in 10 U.S.C. § 4832. Once final action is taken pursuant to 10 U.S.C. § 4835, there is no authority for reduction of indebtedness other than that based on 10 U.S.C. § 4837(d); this statute by its terms applies only to enlisted members currently on active duty. Legislative action would be required to expand this authority to include officer, civilian, and former or retired enlisted personnel.

The Secretary of the Army's authority under 10 U.S.C. § 4837(d) is implemented in AR 600-4, 1 Sep. 1979 [now AR 600-4, Remission or Cancellation of Indebtedness for Enlisted Members, 1 Dec. 1983, effective 1 Jan. 1984]. Within the narrow guidelines prescribed in that regulation, the Commander, U.S. Army Military Personnel Center (MILPERCEN) is designated to act on requests for remission of indebtedness submitted by enlisted personnel [same as current version]. Requests not satisfying the specific criteria under which the Commander, MILPERCEN may act must be forwarded to the Army Secretariat [Assistant Secretary of the Army (Manpower and Reserve Affairs)] for action [same as current version].

Thus the appeal authority for reports of survey could at most be given only the same sort of authority currently exercised by the Commander, MILPERCEN according to AR 600-4. The narrow limits within which that authority could be granted probably would not provide the sort of "discretionary power" anticipated by the DCSLOG request, and, in any event, could extend only to a limited number of military personnel. Therefore, appropriate legislation would be required to accomplish the above.

NOTE: Under the above reasoning, presumably an approval authority could be granted discretionary power to reduce a pecuniary charge before taking final action, except for those reports of survey involving individual arms and equipment (37 U.S.C. § 1007(e)) and losses caused by the negligence of accountable officers (37 U.S.C. § 1007(f)). Of course, no such discretion exists under AR 735-11 and consequently approval authorities cannot presently so act.

NOTE: 37 U.S.C. § 1007(e) provides that:

The amount of any damage, or cost of repairs, to arms or equipment caused by the abuse or negligence of a member of the Army or the Air Force, as the case may be, who had the care of, or was using, the property when it was damaged, shall be deducted from his pay.

Thus the statute mandates deduction of the amount of damage for arms and equipment, not *personal* arms and equipment. On the other hand, AR 735-11 currently provides for liability for the full loss only in cases of damaged *personal* arms or equipment (para. 4-17b(2), AR 735-11). This is probably a reasonable interpretation by the Secretary of the Army of 37 U.S.C. § 1007(e).

DAJA-AL 1981/3873, 5 Oct. 1981; DAJA-AL 1981/4181, 1 Dec. 1981. Approving authority is not bound by surveying officer's or appointing authority's recommendations.

NOTE: Copies of these opinions were not available. The Operations Management Information System (OPTIMIS) summaries are printed below.

JFILE 81/3873 AR 735-11; PECUNIARY LIABILITY: REPORTS OF SURVEY RECORDING NLO TO ODCSLOG RESPONSE TO REQUEST FOR INFO INTERPRETING PROVISIONS OF AR 735-11 WHEN APPROVAL AUTHORITY DOES NOT AGREE WITH SURVEY OFFICER'S RECOMMENDATION OF RELIEF FROM LIABILITY.

JFILE 81/4181 AR 735-11; PECUNIARY LIABILITY: REPORTS OF SUR-

VEY; PROPERTY: REPORT OF SURVEY RECORDING NLO TO PROPOSED ODCSLOG RESPONSE TO DEFENSE COUNSEL CONCERNING INTERPRETATION OF PROCEDURES FOR DETERMINING LIABILITY UP REPORT OF SURVEY REG WHERE THE APPROVING AUTHORITY DISAGREES WITH SURVEYING OFFICER'S RECOMMENDATION THAT NO PERSONAL LIABILITY BE CHARGED. ATTACH 81/3873

IV. Relief from Reports of Survey

DAJA-AL 1977/5520, 4 Oct. 1977. Secretary of the Army may remit or cancel the indebtedness of a service member resulting from damage to a GSA automobile.

Background: The Commander, U.S. Army Military Personnel Center requested an opinion regarding the authority of the Secretary of the Army to remit an indebtedness resulting from a report of survey conducted following damage to a GSA vehicle driven by an active duty Army service member. A report of survey investigation determined that "inattentive driving" was the cause of the accident. The service member was held pecuniarily liable and sought remission of the debt by the Secretary of the Army. The Judge Advocate General replied that the debt may properly be considered for remission under 10 U.S.C. § 4837 and AR 735-11.

Digest: Para. 70722b, DOD Pay Manual (DODPM) follows the general rules set forth in 43 Comp. Gen. 161 (1963) wherein the Comptroller General determined that the power of the service Secretaries to remit indebtedness was limited [Para. 70722b, DODPM states (both then and in the current version of the DODPM) that "a Secretary may not remit a member's indebtedness because of liability for damage to property of another service."]. Under 43 Comp. Gen. 162, three primary factors are required to give the Secretary power to remit an indebtedness: (1) there must be a debt to the United States, (2) the enlisted member seeking remission must fall within the jurisdiction of the

Secretary concerned, and (3) the department must have jurisdiction over the debt itself.

Therefore, problems with damage to other-service property would not usually be within the jurisdiction of the Secretary of the Army for purposes of remission (*see* para. 70722b, DODPM). However, the present case differs somewhat from that presented in 43 Comp. Gen. 162 and, hence, those envisioned by the DODPM. In cases involving damage to GSA vehicles, financial responsibility for the cost of repair, etc., falls directly on the agency employing the driver of the vehicle in all cases of misconduct or improper action (*see* 41 CFR §§ 101-39.704 and 103-39.807 (1976)) [both similar to current version]. Inattentive driving falls within the scope of improper action set forth in 41 CFR § 101-39.704 (1976).

Therefore, despite the fact that the vehicle was the property of another agency (GSA), the evidence in this case appears sufficient to place financial responsibility on the Army and thus to bring the debt within the jurisdiction of the Secretary of the Army for remission, if deemed appropriate.

DAJA-AL 1978/2447, 28 Apr. 1978. Remission of indebtedness not appropriate for service member receiving a general discharge.

Background: The Commander, U.S. Army Military Personnel Center requested an opinion regarding whether the Secretary of the Army may authorize, under 10 U.S.C. § 4837(d) [renumbered now as 10 U.S.C. § 4837; both have the same wording], remission of indebtedness of enlisted members who are to receive a general discharge under honorable conditions.

Digest: The provisions of 10 U.S.C. § 4837(d) authorize remission of indebtedness to the United States remaining unpaid before, or at the time of, the enlisted member's honorable discharge. Remission is authorized only if it is in the best interest of the United States.

Only the Comptroller General and federal courts may render definitive opinions on the subject of this request. However, this office is unaware of an opinion from either source interpreting 10 U.S.C. § 4837(d) to include a general

discharge under honorable conditions within the term "honorable discharge." In the absence of clear authority to do so, this office recommends against remitting the indebtedness of members receiving a general discharge.

The Comptroller General's decision in 39 Comp. Gen. 415 (1959) contains a summary and discussion of the legislative history of section 4837(d). As noted therein, the original remission authority was limited to the time of honorable discharge. In 1937, the statute was changed to allow remission prior to discharge. No time limit was imposed on when remission prior to discharge could be authorized. If remission is considered well before discharge, the character of discharge would be unknown and would have no bearing on the decision to remit.

The Comptroller General stated the legislative history of section 4837(d) supports the conclusion that the statute was enacted to stop desertions and encourage reenlistments. *Id.* at 416. The term "discharge" in section 4837(d) cannot be taken as reference to a formal document but rather to the actual termination of a status on the active list. *Id.* at 418. It could therefore be argued that "honorable discharge" means termination of military status under honorable conditions. However, the context of 39 Comp. Gen. 415 involves termination of status per se, not the character of the termination. Those purposes meet the statutory requirement that remission be "in the best interest of the United States." If a member is sufficiently near separation for the character of his discharge to be known, the likelihood of desertion is minimal. Additionally, the provisions of section VIII, Chapter 2, AR 601-280 [then in effect] make the likelihood of reenlistment after receipt of a general discharge minimal. Therefore, it is difficult to see how remission in such a case could be in the best interest of the United States.

DAJA-AL 1980/1068, 16 Jan. 1980. When appeal by one service member, on report of survey involving joint liability, is granted, co-actor should also be relieved from pecuniary liability.

Background: The Commander, United States Army Finance and Accounting Center

(USAFAC) requested guidance on what action should be taken with respect to one tort-feasor when only his co-actor appealed the original finding of pecuniary liability and that appeal was denied. The Deputy Chief of Staff for Logistics [DCSLOG] requested legal review of its response to USAFAC. In the original report of survey, SP4 B and SSG M were held jointly responsible for the loss of a generator. SSG M successfully appealed the finding of pecuniary liability. In a memorandum of concurrence, The Judge Advocate General agreed with DCSLOG's proposed response.

Digest: The granting of an appeal as to one individual held jointly liable with another destroys any basis for holding the co-actor on any joint liability theory. JAGA 1968/3980, 28 May 1968; JAGA 1968/3796, 12 Apr. 1968; DAJA-AL 1977/5140, 1 Aug. 1977.

Para. 4-10c, AR 735-11, 1 May 1974 (applicable to this case) directs in essence a *de novo* review of a report of survey when new or additional evidence is submitted for consideration [citation should be to para. 5-10 of the 1 May 1974 version of AR 735-11, which para. is entitled "Repayment of amounts previously collected (collections erroneously received)."] That paragraph has the same title and is substantially similar to para. 4-30 of the current AR 735-11]. That review in this case found no pecuniary liability supported by the evidence. Because the original finding was based on a joint venture theory, the allowance of SSG M's appeal effectively destroys the basis for placing liability on SP4 B.

DAJA-AL 1980/2895, 21 Oct. 1980. Service member may not appeal a finding of pecuniary liability or request reconsideration once his military service is terminated.

Background: A member of Congress requested information on behalf of a constituent, a former service member, concerning a report of survey and the constituent's desire to appeal the decision taken under that report of survey to hold him pecuniarily liable.

Digest: Current Army regulations do not permit an appeal or request for reconsideration by a former service member from a finding of

pecuniary liability resulting from a report of survey. The former service member could, however, request an exception to these regulatory restrictions from the proponent of the applicable Army regulations or could apply to the Army Board for Correction of Military Records for relief.

One of the drafters of AR 735-11 explained that the rationale behind the service member limitation on report of survey appeals and reconsiderations was intentional; the notion was that a member or employee could properly come within the concerns of a general court-martial convening authority (the appellate authority for reports of survey), while a former or non-affiliated individual could not be considered as being within the concerns of a particular general court-martial convening authority. [Yet this rationale does not explain why AR 735-11 does not simply allow former employees to appeal to an appropriate officer within HQDA.]

NOTE: Currently para. 5-4b, AR 735-11 provides that "[f]ormer members and employees may appeal within the time constraints of paragraph 5-4c. . . ." Para. 5-4c of AR 735-11 states that unless "good cause" for a greater delay exists, appeals must be filed within 2 years.

NOTE: The appeal procedure and the request for reconsideration procedure have been combined into what is now termed an appeal. See para 5-5f, AR 735-11. See also DAJA-AL 1982/1607, summarized below.

DAJA-AL 1980/3136, 24 Nov. 1980. Appeal authority does not have discretionary authority to forgive a portion of a pecuniary charge.

Summarized in section III.

DAJA-AL 1982/1607, 26 May 1982. Request for reconsideration is separate from an appeal.

Background: A major command contended that AR 735-11 (15 Sep. 1981) violates the rights of an individual in that one separate administrative process, a request for reconsideration, was eliminated and currently an individual has only one opportunity for seeking relief from a finding of pecuniary liability. The Deputy Chief of

Staff for Logistics requested a legal opinion on this issue.

Digest: An individual's right to request reconsideration of a finding of pecuniary liability has not been deleted from AR 735-11, as was suggested by the major command. Para. 5-5f provides that "appeals will be received and acted on initially by the approval authority as requests for reconsideration" [unchanged by change 1 to AR 735-11]. This reconsideration right is separate and distinct from the right of appeal. The current chapter combines the processing of a request for reconsideration with the processing of an appeal. It was believed that nothing was to be gained by having a denied request for reconsideration returned to the individual, only to have it sent immediately, as an appeal, through the same channels it had just traveled. Because the approving authority would already have had at least two opportunities to make a determination in favor of the individual, and because the approving authority cannot act on appeals, there was no reason not to forward a denied request for reconsideration directly to the appeal authority for consideration. The basic difference between the current Chapter 5, AR 735-11 and its predecessor is that an individual is no longer required to twice submit what in essence is the same action.

V. List of Summarized Opinions

Opinion	Section
JAGA 1969/3370	IB
JAGA 1969/3591	II
DAJA-AL 1974/5583	II
DAJA-AL 1975/3239	II
DAJA-AL 1975/3322	IA
DAJA-AL 1976/4133	II
DAJA-AL 1977/5520	IV
DAJA-AL 1978/1932	IB
DAJA-AL 1978/2184	II
DAJA-AL 1978/2447	IV
DAJA-AL 1978/2603	III
DAJA-AL 1978/2912	III
DAJA-AL 1979/2544	IB
DAJA-AL 1980/1068	IV
DAJA-AL 1980/2328	II
DAJA-AL 1980/2674	II
DAJA-AL 1980/2722	III
DAJA-AL 1980/2895	IV
DAJA-AL 1980/3136	III
DAJA-AL 1980/3272	IA
DAJA-AL 1981/3873	III
DAJA-AL 1981/4181	III
DAJA-AL 1982/1607	IV

Weingarten: An Analysis of the Impact of New Developments on the Federal Sector

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Introduction

During the past year, the National Labor Relations Board (NLRB) decided several cases that appear to have a major impact on the right of an employee to be represented at an investigatory interview conducted by an employer. These recent decisions expand the employee's representational right, known as the "Weingarten right," to include the right to advance notice of the subject of an investigatory interview, as well

as a right to consult with a representative prior to the interview. These rights also extend to non-union employees. This article will discuss the Weingarten right as it has developed in both the private and federal sectors, analyze new developments in several recent NLRB decisions and the probable impact of the decisions on federal sector labor relations law, and then discuss the policy considerations underlying the decisions.

The Weingarten Right

The National Labor Relations Act¹ (NLRA), which deals with labor relations in the private sector, contains no provision establishing a right to union representation at investigative interviews. That right has developed through interpretations of the NLRA by the NLRB and various courts. In 1975, the Supreme Court reversed the Fifth Circuit Court of Appeals² and ordered enforcement of an NLRB decision³ that an employee did have a right to union representation in an investigatory interview.⁴ An employee had been questioned by a management official regarding thefts from company property. The employee asked to have her union representative present at the interview. When the request was denied, the union filed an unfair labor practice charge with the NLRB. The NLRB held that the employee did have a right to be assisted by a union representative at the interview. The Court held that the NLRB was correct in finding that, although not specifically contained in the NLRA, the right arose from the protections guaranteed under section 7 of the NLRA.⁵ The Court recognized that this is a qualified right and arises only when an employee reasonably believes that discipline could result from an investigatory interview by the employer, and the employee requests union representation. The Court established other qualifications to the right, including the fact that the employee may not interfere with the employer's investigation and that the employer has the option of terminating the investigation and proceeding to take action without the employee's input, despite a request for union representation. The Court further recognized that the employer had no duty to bargain with a union representative during such interviews and that the representative was only there to

assist the employee in presenting facts to the employer.⁶

Federal Sector - A Statutory Right

At the time of the *Weingarten* decision, federal sector labor relations was in its infancy; the right of federal employees to organize and collectively bargain was established by executive order in 1969.⁷ Even now, hardly through adolescence, federal sector labor law is very prone to influence by developments in the private sector. The Federal Labor Relations Council (FLRC), created by executive order to serve a role in the federal sector similar to that served by the NLRB in the private sector, announced in December 1976 that the *Weingarten* right did not apply to federal employees.⁸ Congress apparently recognized an inherent unfairness in this approach; when the Civil Service Reform Act (CSRA) was passed in 1978, it included a provision providing rights to all federal employees similar, but not identical, to those established in *Weingarten*.⁹ In passing the provision, Congress recognized that protections under the statute might evolve differently than protections in the private sector. The House-Senate Conference Committee Report supporting the legislation specifically observed that future court decisions interpreting the *Weingarten* right in the private sector would not necessarily determine the evolution of the right in the federal sector.¹⁰

The primary difference between the right Congress created in the federal sector and the right in the private sector is that in the private sector the Supreme Court found the right one of those guaranteed to *employees* in section 7 of the NLRA, *i.e.*, the right to engage in concerted activities for mutual protection. The federal sector right created in the CSRA gives the *union* the right to serve as the exclusive repre-

¹Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-168 (1976)).

²NLRB v. J. Weingarten, Inc., 485 F.2d 1135 (5th Cir. 1973).

³J. Weingarten, Inc., 202 NLRB No. 446, 79 LRRM 1269 (1973).

⁴NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

⁵29 U.S.C. § 157 (1976). This is the "concerted activity for mutual aid" section of the NLRA.

⁶*Weingarten*, 420 U.S. at 256-61.

⁷Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Compilation).

⁸See FLRC No. 75P2, 4 FLRC 710 (1976).

⁹5 U.S.C. § 7114(a)(2) (Supp. II 1978).

¹⁰House Conf. R. No. 1717, 95th Cong., 2d Sess. 156, reprinted in 1978 U.S. Code Cong. & Ad. News 2888.

representative of employees: "An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at... [Weingarten hearings]."¹¹ The federal sector right arises when four conditions are met. First, the employee must be faced with an investigative examination by an agency representative. Second, the employee must believe that the examination may result in disciplinary action and this belief must be reasonable. Third, the employee must request representation. Fourth, the union must elect to attend the examination.

Another important difference between the federal sector right and the private sector right is that the CSRA specifically requires that federal employees be notified of the right annually.¹² Interestingly, the original House version of the CSRA contained a requirement that employees be notified of the right to representation before any investigatory interview; however, the Senate version contained no such requirement. The annual notification requirement was adopted as a compromise between the two positions.¹³ Since the CSRA does not specify a means of notification, the notification is handled in various ways by the different federal agencies. A third important difference is that a union in the federal sector must represent all employees in the bargaining unit, including employees who are not union members.¹⁴

Surprisingly, there has been little litigation involving the *Weingarten* right in the federal sector. One First Circuit case dealt with the notification issue, holding that if the annual notification had been made, the agency, in this case the Navy, was not required to re-notify an employee of the right before questioning in a *Weingarten* interview.¹⁵ Another case dealt with the requirement that an employee's belief that disciplinary action could result from an

interview be reasonable.¹⁶ A third decision, although not dealing directly with section 7114, discussed an attempt by a union to expand by contract the scope of the statutory right to include a right to remain silent at such interviews. The Ninth Circuit refused to enforce a Federal Labor Relations Authority (FLRA) decision that the proposal was negotiable holding that it conflicted with the substantive management right to discipline employees rather than the procedural aspects of conducting disciplinary interviews.¹⁷

Despite congressional observation that the federal right may well evolve differently than the private sector right, the FLRA, created as successor to the FLRC under the CSRA, has generally followed the NLRB decisions interpreting the right. Examples of this similarity include FLRA rulings that a union representative need not be included in a meeting when the sole purpose is to give notice of proposed discipline, the decision to discipline having already been made;¹⁸ that once a request for union representation is made it must be honored if the questioning is to continue, absent a clear waiver by the employee;¹⁹ and that the union representative must not be prevented from effectively representing the employee by an order not to speak.²⁰ This pattern of following NLRB decisions in this area makes new developments in the private sector a focus of concern in the federal sector.

¹¹See *IRS v. FLRA*, 671 F.2d 560 (D.C. Cir. 1982).

¹²See *Navy Public Works Center v. FLRA*, 678 F.2d 97 (9th Cir. 1982). *But see Miguel v. Department of the Army*, 727 F.2d 1081 (Fed. Cir. 1984) (negotiability of procedure not substantive right).

¹³See *Naval Ordinance Station, Louisville, KY*, No. 4-CA-539, 81 FLRR 1-3002 (Dec. 31, 1980). *See also Miguel v. Department of the Army*, 727 F.2d 1081 (Fed. Cir. 1984) (where a collective bargaining agreement specifically required written notification of the right to have a union representative present before notice of disciplinary action, it was error not to make the notification).

¹⁴See *Lackland Air Force Base Exchange*, 5 FLRA No. 60 (1981).

¹⁵See *Defense Depot Mechanicburg*, No. 2-CA-525, 81 FLRR 1-3003 (Dec. 30, 1980); *Norfolk Naval Shipyard & Tidewater Virginia Employees Metal Trades Council*, 9 FLRA No. 55 (1982).

¹¹5 U.S.C. § 7114(a)(2) (Supp. II 1978).

¹²*Id.* § 7114(a)(3).

¹³1978 U.S. Code Cong. & Ad. News 2889-90.

¹⁴See 5 U.S.C. § 7114(a)(1) (Supp. II 1978).

¹⁵See *Sears v. Department of the Navy*, 680 F.2d 863 (1st Cir. 1982).

Recent NLRB Decisions

The discussion of recent developments in the private sector *Weingarten* right will focus on two cases decided by the NLRB. The first is *Pacific Telephone*²¹ dealing with the right to advance notice and preparation before a *Weingarten* interview. The second is *Materials Research*²² dealing with the scope of the *Weingarten* right as it applies to non-union employees. Both cases substantially alter the meaning of the *Weingarten* right as it is currently understood in the private sector. Both cases have been criticized as representing a trend at the NLRB to introduce constitutional-type criminal law safeguards into administrative proceedings.²³ An analysis of the trend these cases represent in private sector labor law is necessary because of their probable impact on decisions in the federal sector.

In *Pacific Telephone*, two employees were summoned along with a union representative to discuss evidence that one employee had installed unauthorized telephone equipment in the other's home. After they received notice of the interview, both employees and the union representative asked management to advise them of the purpose of the interview. All three were denied this information. After the first employee had been interviewed, the union representative asked for an opportunity to confer with the second employee prior to the second interview; this request was also denied. As a result of the interviews, both employees were subsequently discharged. The NLRB held that the employer, failing to inform the employees of the subject matter of the interview and failing to grant the employees a pre-interview conference with the union representative, violated the employees' *Weingarten* rights. The NLRB further held that as a result of the violation, both employees were entitled to reinstatement and back pay.

²¹262 NLRB 127, No. 1982-83 NLRB Dec. (CCH) § 15,004, *aff'd in part*, 711 F.2d 134 (9th Cir. 1983).

²²262 NLRB No. 122, 110 LRRM 1401 (1982).

²³See, e.g., Spelfogel, *Employee Representation in Investigative Interviews, Pre-Election Propaganda, and Non-Majority Bargaining Orders: Some Hot Issues Under the NLRA*, Fed. Bar News & J., Nov. 1983, at 448.

The Ninth Circuit Court of Appeals agreed that the evidence established a violation of the right. However, the court declined to enforce that portion of the order awarding reinstatement and back pay.²⁴ As the discharges were for good cause and not for the employees' asserting their *Weingarten* rights, the NLRB did not have the authority to order reinstatement and back pay. By declining to enforce the latter portion of the decision, the Ninth Circuit joined three other federal circuits²⁵ in refusing to assist the NLRB in creating an automatic make-whole remedy when there has been a violation of *Weingarten* rights.

The plain language of the NLRA precludes a make-whole remedy when a discharge is for just cause.²⁶ The NLRB's zeal for expanding the scope of the *Weingarten* right and creating such a rule seems to continue unabated. It should be noted, however, that the recent appointment of three conservative members to the NLRB may result in a reversal of this trend. For example, in a recent decision the NLRB, with three Reagan appointees joining in the majority opinion, reversed *Alleluia Cushion*²⁷ and ruled that an employee acting alone to protest work conditions is not entitled to section 7 protection.²⁸

The FLRA has not yet had occasion to deal with the *Pacific Telephone* issue in its review of *Weingarten* right cases. Management's obvious argument here, of course, is that the CSRA says nothing about advance notice of consultation rights before a *Weingarten* interview. In fact, such a requirement was considered and rejected by the Congress. No Office of Personnel Management or other agency guidance requires advance notice of consultation rights and, absent such guidance, few, if any, federal

²⁴See *Pacific Telephone & Telegraph Co. v. NLRB*, 711 F.2d 134 (9th Cir. 1983).

²⁵See e.g., *NLRB v. Kahn's & Co.*, 694 F.2d 1070 (6th Cir. 1982); *NLRB v. Illinois Bell Telephone Co.*, 674 F.2d 618 (7th Cir. 1982); *Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095 (8th Cir. 1981).

²⁶See 29 U.S.C. § 160(c) (1976).

²⁷221 NLRB No. 999 (1975).

²⁸See *Meyers Industries*, 268 NLRB No. 73 (1983).

supervisors would be inclined to grant such rights. However, we can expect that *Pacific Telephone*-type issues will occur at the agency level as attorneys familiar with private sector decisions are retained to represent clients whose terminations from government service have been at least partially a result of *Weingarten* interviews. The FLRA has held, however, that violations of the CSRA will not require a make-whole remedy when the agency can show grounds independent of the interview that justify the discipline imposed.²⁹

The issue of an automatic make-whole remedy is further clouded by the Supreme Court's ruling that fifth amendment protections do not apply to employer investigations where there is no probability of criminal prosecution.³⁰ Since the Supreme Court has previously held that an employee may be required to answer questions absent a threat of criminal liability, the question of whether it would now support extensions of the *Weingarten* right in ways that only affect *how* to answer questions is unclear. However, the Supreme Court has given great deference to NLRB interpretations of the NLRA as long as its interpretations were permissible or reasonable.³¹

In *Materials Research*, the NLRB was faced with the situation where a non-union employee asked that a co-worker accompany him to a *Weingarten* interview. The employer denied this request and subsequently dismissed the employee. In analyzing whether a violation of *Weingarten* rights had occurred, the NLRB noted that in other situations it had held that section 7 rights are enjoyed by employees regardless of union membership. Because the Supreme Court based the *Weingarten* right on section 7, the NLRB assumed, despite language in *Weingarten* discussing "union representatives,"³² that the Supreme Court did not intend

that the *Weingarten* right be restricted to employees represented by unions and therefore expanded the right to include non-union employees.

As of this writing, there has been no judicial decision in the *Materials Research* case. However, in a companion case, the Ninth Circuit denied enforcement of an NLRB order that a discharged non-union employee be reinstated where, in a *Weingarten* situation, he requested that "any co-worker" be present to witness his disciplinary interview.³³ The court based its decision on the fact that a request that any other co-worker be present did not represent concerted activity. The court restricted its holding to the facts in the case and specifically stated other facts may represent concerted activity.³⁴ However, the Third Circuit, dealing with the same issue, ordered enforcement of an NLRB decision holding that a non-union worker was entitled to representation at a *Weingarten* investigation.³⁵ Given this split among the federal circuits and the sensitivity of the issue, the Supreme Court may ultimately resolve this question.

The right to engage in concerted activity has been protected in the past in situations where no union was present in the employment environment.³⁶ Policy considerations seem to favor a finding that an employee's right to the assistance of a fellow worker in a *Weingarten* interview should not depend on the presence or absence of a union. Given the proper fact situation establishing concerted activity, the Supreme Court would probably enforce an NLRB order recognizing a *Weingarten* right in a non-union environment. The closer question is whether the Supreme Court would enforce the right to representation absent "concerted activity," which the NLRB seems to feel is justified.

²⁹See *Defense Depot Mechanicsburg*, No. 2-CA-525, 81 FLRR 1-3003 (Dec. 30, 1980).

³⁰U.S. Const. amend. V; *Garrity v. New Jersey*, 385 U.S. 493 (1967).

³¹See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 448 (1979); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

³²*Weingarten*, 420 U.S. at 252.

³³*Dupont de Nemours & Co. v. NLRB*, 707 F.2d 1076 (9th Cir. 1983.)

³⁴*Id.* at 1079.

³⁵See *DuPont v. NLRB*, No. 82-3363 (3d Cir. Dec. 29, 1983).

³⁶See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

Conclusion

Given the state of the law in the private sector, one must still consider that in the federal sector the right created by the CSRA is clearly designed to protect the *union's* right to be a representative as opposed to the *employees'* right to be represented. As noted earlier, a union must represent all employees in the bargaining unit whether or not they are union members; therefore, the *Materials Research* situation would only arise in the federal sector

when an employee is not in a bargaining unit. However, significant public policy considerations, such as unequal treatment between employees in the private sector and employees in the federal sector that originally led Congress to create the right for federal employees, and the fundamental fairness of allowing employees to protect themselves, may well cause Congress to reconsider its original position that *Weingarten* is a union right in the federal sector and expand it to include all employees, whether or not they are in a bargaining unit.

Strike Activity in the Federal Sector: The Management Response

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Introduction

In 1976, candidate Jimmy Carter promised that, if elected, he would initiate a complete overhaul of the federal civil service. Two years later President Carter made good on that promise, signing into law the Civil Service Reform Act of 1978,¹ which became effective in January, 1979. Under the new law, federal labor-management relations for the first time had a statutory foundation, in contrast to prior reliance on the provisions of several executive orders.² In many respects, the federal statute parallels comparable congressional enactments governing private sector labor-management relations. Perhaps the most significant difference, however, is the absolute prohibition of strikes by organized labor in the federal sector.

Strikes in the federal sector were prohibited long before the passage of the Civil Service Reform Act. The principal case on point is *United Federation of Postal Clerks v. Blount*.³ The court in that case emphasized that Congress had

an obligation to ensure that the machinery of the federal government continued to function at all times without interference. Prohibition of federal sector strikes was a reasonable implementation of that obligation. Congress has provided specific statutory authority as well. 5 U.S.C. § 7311(3) prohibits the acceptance or holding of federal employment by any person who "participates in a strike...against the government of the United States...." Persons who participate in a strike against the federal government are subject to criminal prosecution under 18 U.S.C. § 1918, with possible penalties ranging from a \$1000 fine to imprisonment for a year and a day, or both. Furthermore, upon the acceptance of federal employment, employees are required to take an oath negating their intention to participate in a strike.⁴

Strike Activity: What Is It?

Unfortunately for attorneys who practice in the area, Congress did not provide the labor practitioner with a definition of what conduct constitutes a "strike." Section 7116(b) of the Civil Service Reform Act, in discussing an unfair labor practice for a labor organization, provides that it is an unfair labor practice for a

¹Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C. § 1101 (Supp. II 1978)).

²Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Compilation).

³325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

⁴See 5 U.S.C. § 3333 (1976).

labor organization "to call, or participate in, a strike, work stoppage, or slowdown . . . or to con- done any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity . . ." ⁵ Substantially the same provision concerning strikes was included in Executive Order 11,491, the predecessor to the new Act. Like the executive order, the Act provides that any labor organization which by "omission or commission has willfully and intentionally, with regard to any strike, work stoppage or slowdown, violated section 7116(b)(7) of this title" shall upon such a finding by the Federal Labor Relations Authority have its exclusive recognition status revoked or be subject to other disciplinary action. ⁶ Nowhere in these sections nor in the definitions section of the Act, section 7103, are the terms "strike," "work stoppage," or "slowdown" defined. The legislative history of the preceding passage of the Act is also silent on this point.

Congress has addressed the issue, however, albeit in a different context. The unfair labor practices section of the new Act closely parallels the unfair labor practices section of the Labor-Management Relations Act of 1947, the comparable private sector statute. ⁷ That statute does define the term "strike," and it is a relatively broad definition. A strike includes "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." ⁸ Note that this congressional enactment includes slowdowns as well as the "concerted interruption of operations by employees" under the broad umbrella of a "strike."

If the labor counselor considers a "concerted interruption of operations" as the test, it is easy to classify heretofore unpunished (or at least unconsidered) activity as strike activity. For example, concerted employee tardiness or unauthorized extensions of rest periods may involve a concerted interruption of operations.

A concerted "sickout" is another such activity, and at least one court has considered such activity akin to a strike. ⁹ In *NLRB v. Insurance Agents' International Union*, ¹⁰ the union membership, among other things, refused to solicit new business, to comply with company reporting procedures or perform customary duties in the office, and deliberately absented themselves from special conferences arranged by their employer. The Supreme Court concluded that these were "slowdown" tactics. The Court also alluded to the "economic pressure" exerted by labor and seemed to equate this type of economic activity with more overt strike action.

The Federal Labor Relations Authority addressed the issue in *AFGE Local 3369 & Social Security Administration*. ¹¹ In this case, approximately forty union employees met on the morning of 25 May 1978 and decided that at 2 P.M., the same day, they would file a grievance with management by confronting the office manager at his office to protest the terrible physical conditions at the building. As planned, at 2 P.M. approximately sixty employees left their work stations and accompanied two union leaders to the manager's office. The union leader told the district manager that this action constituted a formal protest. Management responded by telling the employees involved that they would be held responsible for their actions and that disciplinary action would be taken. He then told them to return to their desks. They did so, and the administrative law judge found that the whole incident lasted only three to six minutes.

Six months later the Social Security Administration filed a complaint alleging that the union engaged in an unfair labor practice by leading employees in an unauthorized work stoppage. ¹² The administrative law judge con-

⁵ U.S.C. § 7116(b)(7)(A), (B) (Supp. II 1978).

⁶ U.S.C. § 7120(f) (Supp. II 1978).

⁷ 29 U.S.C. §§ 141-187 (1976).

⁸ 29 U.S.C. § 142(2) (1976).

⁹ *Air Transport Ass'n of America v. Professional Air Traffic Controllers Organization (PATCO)*, 594 F.2d 851 (2d Cir. 1978), cert. denied, 441 U.S. 944 (1979).

¹⁰ 361 U.S. 477 (1960).

¹¹ 4 F.L.R.A. 22 (1980).

¹² Because the action arose prior to the effective date of the Civil Service Reform Act, the complaint alleged a violation of section 19(b)(4) of Executive Order 11,491.

cluded that there was no definition in Executive Order 11,491 of the types of conduct that constituted a strike or work stoppage. He then considered several private sector cases before the National Labor Relations Board (NLRB) that dealt with no-strike provisions and concluded that a cessation of work constituted a strike when it was designed to protest working conditions or was designed to bring pressure upon an employer. Recognizing that he was not bound by private sector decisions, he nevertheless decided that the rationale of those cases should be followed. If the activity was designed to bring pressure upon management, it was proscribed. The Federal Labor Relations Authority agreed and ordered the union to cease and desist from encouraging or engaging in such activity or condoning such activity by failing to take affirmative action to stop it.

Although the decision here must be tempered somewhat by the fact that it was brought under the "old" executive order, it nevertheless points to the adoption of a rather broad definition of the term "strike" by the Federal Labor Relations Authority.

A more recent case which specifically dealt with the statute is *AFGE Local 1557*.¹³ In this case, the union met with management to discuss an employee's desire to transfer. The transfer was not granted and the union steward, in retaliation, ordered his employees to "work to rule." Many of the employees approached urged others, in turn, to follow the same course. The employees subsequently engaged in this conduct. The General Counsel, Federal Labor Relations Authority, found that the steward's call to "work to rule" was a slowdown within the meaning of the statute and concluded that the statute does not necessarily require a formal, highly organized strike effort to constitute proscribed activity. It was clearly understood by the employees that the "work to rule" call meant that they were to reduce their efforts and their production. The union, through its official, had condoned a slowdown in violation of the statute. The General Counsel determined that such conduct was an unfair labor practice.

The administrative law judge and the Authority chose to rely upon NLRB decisions in *AFGE Local 3369 & Social Security Administration* in determining what conduct constitutes a strike. The labor counselor can glean additional authority by examining state and local public sector statutes and case law. Nearly every state proscribes strike activity by certain classes of public employees, and numerous states have statutes with very specific definitions as to what constitutes a strike. For example, the Ohio Revised Code defines a strike as

[t]he failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, compensation, rights, privileges, or obligations of employment, or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment.¹⁴

The Michigan statute varies only slightly:

"Strike" means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment.¹⁵

Note that both of these statutes, which are fairly typical of state laws defining the term "strike," include "abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment" as strike activity. With such a broad definition, it is not too difficult to envision several types of employee actions which meet the technical definition of a "strike," provided that such activity is designed to "induce, influence, or coerce a change in

¹³81 Fed. L. Rel. Rep. (L. Rel. Press) 1-3033 (June 30, 1981).

¹⁴Ohio Rev. Code Ann. § 4117.01(A).

¹⁵Mich. Comp. Laws § 423.201(a).

working conditions." Some state laws do not define the term "strike," although that same state may proscribe its occurrence in the public sector. In such instances, case law generally provides a definition. In *Wilmington v. General Teamsters Local Union 326 & International Brotherhood of Teamsters*,¹⁶ the Delaware Supreme Court defined "strike" as "some 'concerted action' or 'combined effort' by a group which is designed to exert pressure upon an individual or entity or accede to certain demands."¹⁷ Note that both the Michigan statute and the Delaware Supreme Court stress concerted group action.

Sanctions Against the Union

Under the Act, sanctions for strike activity are severe for the offending employee organization. In *Professional Air Traffic Controllers Organization & FAA*,¹⁸ the Federal Labor Relations Authority agreed with the finding of the administrative law judge that the Professional Air Traffic Controllers Organization (PATCO) had willingly and intentionally violated section 7116(b)(7)(A) of the Act by calling and participating in a strike at Federal Aviation Administration facilities. There was no issue as to whether or not the union activity constituted a strike; the union had characterized the activity as a strike from its inception on 3 August 1981. The Authority, relying on sections 7103(a)(4)(D) and 7120(f) of the Act, revoked PATCO's status as the exclusive employee representative and held that PATCO, as of the date of the decision, was no longer a labor organization within the meaning of the Act.¹⁹ The Authority cited the legislative history of the Act to conclude that revocation of union certification was *required* where the union had called, participated in, and condoned strike activity. Only where the union had made efforts to prevent or stop the strike activity could the Authority consider other forms of disciplinary action.²⁰

¹⁶321 A.2d 123 (Del. 1974).

¹⁷*Id.* at 126.

¹⁸7 F.L.R.A. 10 (1981).

¹⁹See 5 U.S.C. §§ 7103, 7120 (Supp. II 1978).

²⁰5 U.S.C. § 7120(f)(2) (Supp. II 1978).

In the event of a strike, there are statutory procedures available to the government to enforce the unfair labor practice provisions of the statute. 5 U.S.C. § 7118(a) provides that upon the receipt of an unfair labor practice charge, the General Counsel of the Federal Labor Relations Authority must investigate the charge. Based on the investigation, the General Counsel must decide whether or not to issue a complaint. After a hearing and findings of fact, the Authority is authorized to issue a cease and desist order against any unfair labor practice.²¹ 5 U.S.C. § 7123 provides for the judicial review of final orders of the Authority. Federal district courts are also provided enforcement powers.

The government may feel that it does not have time to pursue this somewhat cumbersome enforcement procedure. Where national security is involved, or where public safety is concerned, the government may want to pursue immediate equitable relief in the federal district courts. Such was the situation in *United States v. PATCO*.²² On 30 July 1980, the president of the PATCO local at Chicago's O'Hare Airport wrote the Federal Aviation Administration demanding, *inter alia*, that the FAA provide an immediate \$7500 bonus to each air traffic controller. Because of the complexity of the O'Hare operation, the union also wanted the O'Hare facility to be upgraded to a level five facility. The union allowed the FAA ten days in which to grant its requests or the air traffic controllers at O'Hare would "withdraw their enthusiasm."²³ The FAA responded by warning PATCO of its statutory obligation not to strike and stated that it considered the union letter a threat of an illegal job action.

Beginning on 6 August 1980 and continuing for ten days, the air traffic controllers at O'Hare participated in a work slowdown. On 17 August 1980, the United States petitioned the local federal district court for a temporary restraining order. It was issued, and the following day the U.S. requested a preliminary injunction. Instead, the court granted PATCO's motion to

²¹5 U.S.C. § 7118(a)(7) (Supp. II 1978).

²²653 F.2d 1134 (7th Cir. 1981).

²³*Id.* at 1136.

dismiss the suit reasoning that title VII of the Civil Service Reform Act vested exclusive jurisdiction over strike activities by federal employees in the Federal Labor Relations Authority. The court was thus without any authority to grant injunctive relief.

The Seventh Circuit disagreed with the district court regarding the exclusiveness of the title VII remedy. Citing the time-consuming unfair labor practice enforcement procedures, the court concluded that: "While the Government is waiting for the FLRA to follow this procedure, the employees could be out on strike. Such a result is not consistent with the goal of 'an effective and efficient Government.'"²⁴ The court added:

An intentional slowdown or strike by air traffic controllers at O'Hare Airport is too fraught with dire consequences to the public to confine the United States to the procedures set out in Title VII. Policy considerations dictate that the Government be able to consider whether more prompt relief can be afforded by an alternative procedure.²⁵

The court concluded that the United States could enforce the no-strike provisions of 5 U.S.C. § 7311 by seeking injunctive relief in the federal district courts pursuant to 28 U.S.C. § 1345.²⁶

Criminal Sanctions Against Employees

As noted, strike activity by federal employees has been made criminal by 18 U.S.C. § 1918. Until the celebrated air traffic controllers' strike in 1981, there had been no prosecutions under the statute. Of the approximately 13,000 air traffic controllers who participated in the nationwide work stoppage, the Department of Justice authorized 78 prosecutions. One such reported prosecution is *United States v. Amato*.²⁷ Amato and codefendant Maimone

were prosecuted under 5 U.S.C. § 7311 and 18 U.S.C. § 1918(3) for participating in the air traffic controllers strike. Both were PATCO officials: Amato was the president of the local and Maimone was a past president. Both asserted that they were the victims of prohibited selective prosecution. It was undisputed that Department of Justice policy was to prosecute the strike leaders.

The court considered the selective prosecution defense in light of the Second Circuit decision in *United States v. Berrios*.²⁸ In order to establish the defense, Amato was required to prove that he was, in fact, singled out for prosecution, and that the government's selection of him for prosecution was based upon some discriminatory factor or done in bad faith. The court dismissed the defense, reasoning that there was no impermissible classification. It was permissible, according to the court, for the United States to prosecute strike leaders who were not necessarily PATCO officials. The court concluded that the status of a person as a union official or as a strike leader should not immunize him from prosecution under 18 U.S.C. § 1918(3).

Despite the fact that there had been no prior prosecutions under the statute, the court concluded that 18 U.S.C. § 1918(3) was clearly a criminal statute that provided for criminal penalties. The statutory restriction on striking was not void for vagueness, as asserted by the defendants. The court concluded:

It is absolutely clear that a federal employee who strikes still forfeits his or her right to employment under Section 7311 and may be prosecuted under 18 U.S.C. 1918. It is equally clear that a labor union that participates in such a strike may still be prosecuted as well under 18 U.S.C. 2(a).²⁹

On virtually the same facts, the U.S. District Court for the District of Colorado granted a

²⁴*Id.* at 1138.

²⁵*Id.* at 1140.

²⁶See also *Air Transp. Ass'n of America v. PATCO*, 667 F.2d 316 (2d Cir. 1981).

²⁷534 F. Supp. 1190 (E.D.N.Y. 1982).

²⁸501 F.2d 1207 (2d Cir. 1974).

²⁹*Amato*, 534 F. Supp. at 1201. 18 U.S.C. § 2(a) (1976) states that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

motion to dismiss the prosecution of the defendant and three codefendants in *United States v. Haggerty*³⁰ where the selective prosecution defense was raised by appellants. The court found that a list of potential defendants was prepared by the Department of Justice and submitted to all local U.S. Attorneys even before the air traffic controllers strike began. No discretion was provided local U.S. Attorneys to develop cases against other strike participants. Based on this evidence, the court concluded that there was, in fact, improper selective prosecution.

Despite the result in *Haggerty*, it is clear that the courts will entertain prosecutions under 18 U.S.C. § 1918(3).

Adverse Actions

In addition to the very onerous criminal sanctions which may be imposed, the federal employee who participates in an illegal job action will, in almost every case, be removed from federal employment. In *Schapansky v. FAA*,³¹ the appellant was removed from his position as a GS-14 air traffic control specialist because of his alleged participation in a strike against the federal government from 3 to 5 August 1981. The appellant conceded that he had not been at work on the days in question, but contended that his voluntary absence was a "legal protest" and that he thought that the PATCO lawyers "would take care of it." In an appeal to the Merit Systems Protection Board, the presiding official concluded that the appellant's contention that he was unaware of the strike and did not intend to participate in it was "incredible."

Of particular interest to labor counselors is the Board's conclusion that the agency properly relied on the crime provision of 5 U.S.C. § 7513(b) to waive the thirty day period of advance written notice of an adverse action. The statutory provision states that an employee against whom an action is proposed is entitled to at least thirty days advance written notice "unless there is reasonable cause to believe the

employee has committed a crime for which a sentence of imprisonment may be imposed...."³² The Board, citing 18 U.S.C. § 1918, which provides that participation in a strike against the United States is a felony, concluded that since the appellant was absent from work and was one of the picketers, the agency could have reasonably believed that the appellant committed a crime for which imprisonment might be imposed. The agency's invocation of the crime provision of 5 U.S.C. § 7513(b)(1) was thus justified.

The Board refused to mitigate the penalty by applying the standards enunciated in *Douglas v. VA*.³³ In *Douglas*, the Board concluded that it had the authority to review the imposed penalties and to mitigate those which were clearly excessive or disproportionate to the sustained charges. Here the Board concluded that the text of 5 U.S.C. § 7311(3) could be read to require removal as to the mandatory penalty for individual federal employees who participate in a strike. Thus, the agency's imposition of the removal penalty could not be deemed to be clearly excessive or disproportionate to a sustained charge of striking. The Board sustained the removal of the appellant.

Employee Defenses

Commonly, the disciplined employee will argue that his or her strike participation was involuntary. Oftentimes, the employee alleges that he or she was afraid to cross a picket line, or that his or her family was threatened with physical harm. In *Johnson v. FAA*,³⁴ the Merit Systems Protection Board considered the coercion defense. The appellant, a GS-14 air traffic control specialist, was removed from his position based on his participation in a strike against the government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918 and for being absent without leave. The appellant had participated in the air traffic controllers nationwide strike in August 1981.

³⁰528 F. Supp. 1286 (D.Col. 1981).

³¹No. DA075281F1130, 82 Fed. Merit System Rep. (L. Rel. Press) 7047 (Oct. 28, 1982).

³²No. DC075281F0998, 83 Fed. Merit System Rep. (L. Rel. Press) 7050 (Nov. 10, 1982).

³³5 U.S.C. § 7513(b) (Supp. II 1978).

³⁴No. 075299006, 81 Fed. Merit System Rep. (L. Rel. Press) (Apr. 1981).

The appellant did not deny his strike participation. He testified that he could not report to work because he feared retaliation against himself and his family. He stated that during the summer of 1981 he had suffered various personal problems which left him poorly equipped to deal with union pressure. He was also disturbed by the menacing manner of another controller when he told that controller in June that he could not personally support a strike. After the strike began, he called his supervisor and asked him when he could return to work. The supervisor told him that he could return for an oral interview, but the applicant refused to return at a time when the pickets were at the facility gate. During the strike, he made plans to move his family to another location for their protection.

The presiding official concluded that the appellant involuntarily absented himself from work because he feared for his personal safety and the safety of his family. He ordered the removal action canceled.

The Board disagreed. The employee was required to demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a threat or other intimidating conduct directed toward him which was sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist. The Board rejected the test urged by the agency, *i.e.*, that because a strike against the government was a crime under 18 U.S.C. § 1918, the Board should adopt the generally accepted standard for duress in criminal cases. That test provides that duress is a defense only if the actual or threatened force would induce a well-founded fear of impending death or serious bodily harm from which there was no escape short of engaging in the otherwise unlawful conduct. Also rejected were the tests sometimes used in civil cases, *i.e.*, threats of damage to property, interference with business, and other forms of economic compulsion. The Board concluded that a stricter standard was required of a federal employee attempting to refute a charge of participation in a strike against the government; the severity of a federal employee's participation in a strike against the government justified the stricter standard. The Board con-

cluded that the moral exhortations, overheard statements, and generalized threats did not establish the appellant's coercion defense. Johnson's removal was sustained.

Subsequent Board decisions have stressed the requirement of fear of direct physical harm in establishing the defense of duress. In *Hanson v. Dep't of Transportation*,³⁵ the appellant, an air traffic controller, testified that on 5 August 1981, an unknown person telephoned his residence and told his wife that their house would be burned down if the appellant crossed the picket line. As he approached his duty site the following day, he observed the strikers damaging cars that neared the picket line; he returned home. The presiding official sustained his removal but the Board reversed, concluding that the cumulative effect of the indirect threats of physical harm and the direct threat to his wife was sufficient to intimidate a person of reasonable firmness.

In *Clark v. FAA*³⁶ the Board concluded that the coercion defense had not been established. The appellant had heard or observed general threats; but none were specifically directed at her. The Board sustained her removal. In *Connors v. Dep't of Transportation*,³⁷ Connors was threatened with certain reprisals if he failed to cooperate with the air traffic controllers' strike activity. Specifically, he was employed as a trainee and his instructors threatened to prevent his graduation to a full performance level unless the appellant cooperated in the strike. The Board sustained his removal. A fear of jeopardizing personal career advancement does not establish the coercion defense.

Speech Encouraging Strike Activity

In a case where management cannot prove direct strike participation, it may nonetheless be able to sustain an employee removal based on the employee's vocal encouragement of strike activity. An example of the Merit Systems Pro-

³⁵No. CH075281F1758, 83 Fed. Merit System Rep. (L. Rel. Press) 5218 (Aug. 17, 1983).

³⁶No. BN075281F0313, 83 Fed. Merit System Rep. (L. Rel. Press) 5183 (July 29, 1983).

³⁷No. DC075281F0925, 83 Fed. Merit System Rep. (L. Rel. Press) 5185 (Aug. 1, 1983).

tection Board's rather rigid, but appropriate, attitude toward illegal strike activity can be found in *Brown v. FAA*.³⁸ The appellant, a GS-15 air traffic control specialist, appeared on the ABC news program "Nightline" on 4 August 1981. He was identified on that program as an FAA supervisor. On that program he addressed the viewing strikers and stated, "I'm so happy that you're together—stay together please—because if you do you win." The appellant was removed based on this language which, according to the agency, amounted to an "approval of" and "support for" the air traffic controllers' strike.

The Board cited the Supreme Court case of *Pickering v. Board of Education*³⁹ to conclude that whether or not a public employee's speech is constitutionally protected depends on striking a balance between the interests of the citizen and the interests of the government. In *Connick v. Myers*,⁴⁰ the Supreme Court elaborated on its decision in *Pickering*. When public employee discipline is involved, first amendment protection for public employee speech extends only to speech on matters of public concern. The Board, relying on *Pickering* and *Myers*, concluded that while Brown's speech involved an issue of public concern, the form and the content of his speech limited its first amendment protection. The remarks were clearly directed at striking controllers and the speech did not contain any information regarding the strike which could be interpreted as being of any significant interest to the public in terms of either air safety or the issues involved. In fact, the remarks encouraged the continuation of an illegal act that had caused a national emergency. Because the speech was only remotely related to the public concern, Brown's speech was entitled to only limited first amendment protection.

Applying *Pickering*, the Board considered what impact the appellant's speech had on the government's interest in fulfilling its responsibilities to the public. The deciding official testified that the appellant's remarks had created the impression that management supported the strike. He believed that the appellant had acted contrary to management interests and thus Brown could no longer function as a manager in the future. The Board agreed. The speech, particularly in the context in which it was delivered, encouraged and heartened the strike participants at a time when the public interest required that they return to work. His remarks were made at the time of a national emergency and they contradicted the orders of the President and high level agency officials. Brown's speech was contrary to his obligation as a supervisor to assist the agency in its efforts to fulfill its mission. His removal was sustained.

The Board's decision must be tempered somewhat by the fact that the appellant was employed in a supervisory capacity. Whether the result would be the same where a lower-level non-supervisory employee is involved is questionable. Nevertheless, the Board sanctioned a removal for off-duty conduct which did not involve actual strike participation.

Conclusion

It is clear that federal managers carry a loaded gun when strike activity is the target. Not only is union strike activity an unfair labor practice—it is also the death knell of the union. Sanctions against individual employees are similarly onerous. Unlawful strike activity and strike participation prohibits a broad range of employee activities. The government labor counselor should realize this when dealing with work stoppages or slowdowns, or anything that encourages these activities.

³⁸No. NY075281F1457, 83 Fed. Merit System Rep. (L. Rel. Press) 7028 (May 19, 1983).

³⁹391 U.S. 563 (1968).

⁴⁰103 S. Ct. 1684 (1983).

Data Base Management Systems: A Primer on Computerized Information Management and How It Can Be Used in the JAGC's Practice

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A universal feature of all organizations is the need to keep track of information in a systematic, organized manner that allows quick and easy access of the information. A typical staff judge advocate (SJA) office manually maintains files and records on a myriad of subjects, including courts-martial, legal assistance appointments, bar lists, and administrative law opinions. Managers can now use microcomputers to make the task of maintaining record keeping systems easier and more useful.

Computer programs are now commercially available which can facilitate information management at the local SJA office; these are called data base management systems (DBMSs). They are also called data base managers or file managers. A data base is nothing more than a collection of information which is maintained on a permanent magnetic storage medium, *e.g.*, hard disks or floppy diskettes. The data base manager is the program which allows the user to create, organize, retrieve, and manipulate the data contained therein.

A data base management system for computers employs the basic organizational concepts utilized in manual record keeping systems, but couples with it the speed and accuracy of a computer. Consequently, a computer cannot be expected to organize an already chaotic manual record keeping system whose central problem involves poor organization or sloppy data maintenance and updating. The computer allows the record keeping process to be accomplished in a faster and more efficient manner and is only as good, and accurate, as the information in the data base.

A good example of a manual record keeping system whose organization and structure is easily convertible to a DBMS is the Uniform Filing System for Filing Administrative Law Opinions. This manual system was developed several years ago and has been used extensively in the

field and at the Office of The Judge Advocate General.¹

A Summary of the Manual System for Filing Administrative Law Opinions

The process of writing and storing an administrative law opinion begins with the initial request for the opinion, involves several intermediate steps, and ends with the filing of the opinion and the concomitant creation of a topical index card. The topical card file is maintained separately from the formal written opinion and consists of index cards organized by the topic or subject matter of the opinion.² Each index card references the case number assigned to the opinion and contains the topic and/or subtopic of the opinion as well as the date of the opinion and a digest summarizing the contents of the opinion. The opinions are filed or indexed by case number for easy reference.

The keystone to this manual system is the topical card file. A typical search involves the user leafing through each of the index cards under the topic to be researched and scanning the digests for relevancy. The case numbers of relevant opinions are noted and the opinions are then retrieved from the file cabinet. The topical card file is indexed by topic, the opinion file is organized by case numbers, and the two files are cross-referenced by case number. The opinions are maintained separately since it would be extremely cumbersome to directly use an opinion file indexed by topic as each file would have

¹See U.S. Dep't of Army, Pamphlet No. 27-21, *Military Administrative Law Handbook*, paras. 8.9-10 (C4, 15 May 1980); Lane, *A Uniform System for Administrative Law Opinions*, *The Army Lawyer*, Sept. 1972, at 10.

²See DA Pam 27-21, app. 8-A. These topics form the backbone for organizing the administrative law opinions of The Judge Advocate General and should be used in the field as well to provide uniformity throughout all levels of JAGC practice.

to be physically removed and scanned for relevancy. Such a process would be not only time-consuming but would contribute to misfiled opinions because they would be constantly removed and refiled in the course of every search.

DBMS Concepts as Applied to the Filing of Administrative Law Opinions

The Uniform Filing System for Administrative Law Opinions brings into focus the basic data base management concepts needed for creating an effective storage and retrieval system. Just as the opinions themselves cannot be directly indexed and accessed in the manual system due to space limitations, neither can the opinions be directly maintained by the computer due to its physical storage limitations. A single floppy diskette could store no more than 150 pages of opinions. Consequently, the opinions must still be stored separately in a file cabinet. However, the topical card file is a prime candidate for conversion to automated information management.

The manual topical card file has already been organized by topic for optimum manual retrieval, and the automated topical card file will proceed on similar grounds so that the conversion process requires minimal change. When data base terminology is applied to our manual system, we refer to the topical card file as our data *file* or data base which consists of a set of index cards or *records*. Each index card or record contains pre-set categories of information, *i.e.*, *fields*, such as topic, subtopic, case number, date of opinion, and a digest or summary of the opinion. Appendix I is an example of a topical card *file* used in the manual system.

In our data base, the various fields define the structure of every record in the file. Unlike the topical card file where extra notes can be jotted down on the card, our data base is moderately inflexible. Each record will have the same number, name, and size of fields which can only be changed by modifying the structure of the entire data base. Increasing the size or number of fields will not only have a ripple effect throughout the entire data base, but the fields may only be changed in strict accordance with the DBMS instruction manual or you run the risk of erasing the entire data base. This latter

possibility emphasizes the cardinal principle of maintaining back-up or archive copies of your data files to avoid the necessity of recreating an entire data base which was accidentally erased.

Each field possesses basic structural characteristics reflecting its type, size, and title. Three common field types are character, numeric, and logical. Character or alphanumeric fields contain information consisting of letters, numbers, or symbols. A numeric field contains only numbers and is primarily used for calculations. The logical field is similar to a toggle switch indicating either a true or false status. Character fields will be used to store all the information used by our data base. The size or length of the field reflects the maximum number of characters that the field can hold. Each field must be titled or labeled for identification and internal control purposes by the DBMS. Appendix 2 is an illustration of this process.

Some fields in a file serve special functions such as a unique key and an index key. A unique key field is established whenever the user wants to insure that there are no duplicate entries. An indexed key field or fields is the field selected for indexing the data base. In our example, the only unique key would be the case number, and the data base would be indexed alphabetically by topic and subtopic. The index key is used to create a separate index file that works in conjunction with the data base. This index file is a list of field selected for indexing and a "pointer" to the corresponding data base record. The index file is then maintained in alphabetical order while our corresponding data file remains unchanged. Although this may sound more complex than necessary, the process is transparent to the user as the index file is created and maintained automatically by most DBMSs when new records are added or old records deleted.

Creating the Data File

No commercial software is currently available off-the-shelf that would allow us to run our topical card file data system. Nor is there every likely to be any off-the-shelf software designed to satisfy any of the specialized information management needs of a field SJA office. However, many general purpose DBMSs are availa-

ble which would allow the creation of a computerized filing system. The difficulty in creating a special use data base by using a general purpose DBMS will vary with the sophistication and power of the program. Unfortunately, it seems that a software program's difficulty of use is often directly proportional to the ability of the software to manage the data base, and these programs usually come in the form of "menu driven" or "command driven" packages. A menu driven DBMS is generally user friendly and requires less computer expertise to operate than a command driven program because the command-driven DBMS usually requires knowledge of the program's particular command language and syntax.

In creating the data base file, you will first have to define the file structure. The first step is to name the data base file, *e.g.* ADLAW and to select the number of fields per record. Then the fields must be further structured as to title, type, and size. The title will consist of a recognizable name, *e.g.*, TOPIC, SUBTOPIC, DATE, DIGEST, CASENUMBER. The field size or length will normally be determined by the maximum size of the information that is likely to be inserted therein. The size selected should be reasonable, taking into consideration the maximum capacity of your floppy diskette. For example, if each record consists of five fields totalling 500 characters (or bytes), and your floppy diskette can hold a maximum of 360 kilobytes of information, then you are limited to maintaining a maximum of 720 records (360,000/500) per diskette. Space limitations can sometimes be minimized by judicious selection of data fields and field lengths or by using variable codes in our topic and subtopics such as "NAFI" to represent the topic "Nonappropriated Fund Instrumentalities." While this short-cut decreases the ease of access, the advantages of a four- or five-character field over a fifty-character field can result in a substantial saving of diskette storage space in a large data base. Appendix 3 is a facsimile of an automated topical card file.

Additional fields could be created to increase the power of our data base to reflect information normally placed on the opinion cover sheet, *e.g.*, whether the opinion is used for policy or conven-

ience purposes. Here a one character field could be created to contain a one-letter code of "P" for policy and "C" for convenience. An additional field could be created for storing key descriptive words or phrases to further identify the opinion beyond the topic or subtopic. This field could then be searched later for a special phrase or part of a phrase rather than using the topic index and scanning each digest thereunder. This search capability will be discussed in more detail later.

The final step is to create your key field for indexing purposes. As indicated earlier, the logical choice for the computer file would be the topic and subtopic fields.

Entering Data

Once the file has been created, *e.g.*, ADLAW, with the appropriate fields, you are now ready to enter the information contained on each index card. Selecting the DBMS data entry function will display screen prompts to assist the user by indicating the nature and type of information that is to be entered. The user then enters the data from as many cards as he or she wishes. The data entry function can then be accessed later as the need arises to enter new opinions or cases.

The data entry process is facilitated by internal controls and program checking to prevent the user from entering more information than the field can hold or inserting letters in a numeric field. A good tool to assist the user is the screen format function which allows the screen to be arranged in a fashion conducive to entering data by setting the screen up to resemble the index card itself.

Searching or Retrieving Data

The search capability of the computer is probably the most powerful aspect of the DBMS. The DBMS takes advantage of the alphabetical organization of the indexed file to find a topic heading in a matter of seconds. The DBMS can also search through nonindexed fields in the data base for a particular phrase or word. However, searches of nonindexed fields are much slower because the DBMS must literally examine each record consecutively to determine whether or not the phrase is located therein,

whereas a search on an indexed field literally jumps through the file ignoring the portions which do not correspond alphabetically to the requested information.

Most DBMSs have the capability to perform what is known as a substring search to determine whether a field or fields contain a particular word or phrase. A string is nothing more than a group of characters and numbers, and a substring is simply a portion of the whole string of characters. The word "nonappropriated" could be considered a string with the phrase "approp" being a substring thereof. For example, a regular search for the phrase "PX" would miss the field containing the special words "PROCUREMENT, PX, NAFI, FUNDING" as it would match up the requested phrase, *i.e.*, "PX," to the entire string of data in the field, *i.e.*, "PROCUREMENT, PX, NAFI, FUNDING" and conclude that the two are not the same. However, a substring search would determine whether the phrase "PX" is located anywhere inside the field. Although this exhaustive type of search is slower than an indexed search, the speed is relative as the search is definitely faster than a manual search of all the records.

The nonindexed field search using substrings is an extremely useful tool as there are many records with the same generalized topic and subtopic headings, and the indexed search is not significantly different than the manual search of the indices in the topical card file. In many instances, the user may have to examine multiple topics and subtopics to determine the location of the relevant opinions. A substring search of the digest field and the key name field provides two significant advantages—it is faster and more accurate than a manual search. Furthermore, the computer will not suffer from eye fatigue and overlook entries.

For example, you wish to find opinions dealing with the post exchange or "PX." One way is to search the indexed key under "NONAPPROPRIATED FUND INSTRUMENTALITIES". However, there may be a relevant opinion under "MILITARY INSTALLATIONS" which would not be located without another search. Even with another search there is no guarantee that you will not have overlooked a

relevant opinion. A better way is to search the field titled DIGEST to see whether the field contains the phrase "PX." Also, Boolean logic, *e.g.*, "OR" or "AND," can be used to increase the thoroughness of your search to determine whether these fields contain the phrases, "PX" or "Post Exchange" or "Commissary" . . .

The search function can also be used to identify older opinions by examining the DATE field to locate records before a certain date. Those older opinions can be reviewed for timeliness, relevancy, and accuracy.

Advantages of a DBMS

The obvious advantage of the DBMS is the speed and thoroughness with which the entries in the data base can be searched. However, a DBMS offers additional capabilities. Data bases and office opinions on floppy diskettes can easily be copied onto another diskette, not only for archive purposes, but to make the information available to other sections within the office or to be used on other compatible computers. Reports can be generated containing information extracted from the data base in case the user feels that he or she simply must have a hard copy. These reports can be printed on standard paper or they can be printed as index cards for use as a topical card file when the office goes to the field. Tractor-fed (pin-feed) paper is available which is four-by-five inches in size and made of perforated card-stock quality paper.

The report function of the DBMS would offer more utility for a data base consisting of the jurisdiction's court-martial cases. Again, the fields in each record would be similar to those used on the courts-martial wall charts, *e.g.*, name of the accused, unit, charges, dates of preferral and referral, court-martial level, type and date of pretrial restraint, names of court-martial personnel, trial date, findings, sentence, current status of case. . . . Management reports can easily be generated therefrom listing cases by jurisdiction, trial counsel, defense counsel, military judge, court room, or date. Of extreme importance is using the date fields to determine time elapsed for pretrial restraint and post-trial processing delays.

Conclusion

Computers and DBMSs provide useful information management tools for any office. However, their implementation must consider hardware and software costs, as well as the time and expense in training personnel and converting a manual system to an automated system. The new system will need a trial period to ascertain and correct "bugs" which can either be bothersome or fatal to your data. Remember, the computer cannot rectify those problems in a manual system attributable to sloppy data entry or poor organization and maintenance. However, the benefits to be gained are substantial and worth

considering.

The flexibility of the DBMS' search capability is awesome and allows the user to retrieve information heretofore inaccessible in a manual record keeping system—one consisting of file cards or wall charts. The search capability can be used to extract information from the data file to prepare and organize reports covering all areas of judge advocate practice. The utility of readily available and current reports and information is readily apparent to anyone who has been forced to reply, "I'll get back to you after I check it out."

APPENDIX 1

Topical Card File From Manual System

Topic: Nonappropriated Funds

Case Number: 70-115

Subtopic: Protection of Assets

Date: 6 Jan 70

Digest:

A PX may provide its own security for its assets by using an armored car service, to be paid by exchange funds. (AR 60-10) (CPT Lane)

NOTE: This card was taken from DA Pam 27-21, figure 8-2, and is only provided to illustrate a topical card file.

APPENDIX 2**Field Identification**

Data files are created by defining the number and structure of each field in the record. Each field must be named prior to defining the type and maximum amount of data that can be stored in it.

Field 1	Name:	Topic
	Type:	Character
	Maximum Length:	45 Characters

Field 2	Name:	Subtopic
	Type:	Character
	Maximum Length:	45 Characters

Field 3	Name:	Case Number
	Type:	Numeric
	Maximum Length:	9 Numerics

Field 4	Name:	Case Date
	Type:	Character
	Maximum Length:	8 Characters

Field 5	Name:	Digest
	Type:	Character
	Maximum Length:	150 Characters

NOTE: "Character" refers to either alpha or numeric items, e.g., a date written as 12 Dec 82.

APPENDIX 3

Facsimile of Automated Topical Card File

Field Names

field 1 field 2 field 3 field 4 field 5

	TOPIC	SUBTOPIC	CASE NUMBER	CASE DATE	DIGEST
first record	Military Installations	Law Enforcement; Military Vehicles	82-3046	15 Dec 82	Use of breathalyzer tests for service members reviewed
second record	Nonappropriated Funds	Protection of Assets	70-115	6 Jan 70	A PX may provide its own security for its assets by using an armored car service, to be paid for by exchange funds. (AR 60-10) (CPT Lane)
intermed. records	↔	↔	↔	↔	↔
last record	Standards of Conduct		83-1936	20 May 83	Participation in Fund Raising Project.

NOTE: Fields, records, and files are interrelated so that fields define the parameters of each record. The data file is made up of a series of records with the same field structures.

The records listed in this appendix are only provided to illustrate an automated topical card file.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

Campaign Contributions

Guidance concerning 18 U.S.C. § 603 was provided in Message DA ALEX VA/DAAG-DPS, 091400Z Apr 84, subject: Restrictions on Political Activities/Contributions, which provides in part:

The counsel to the President advises of the potential for a violation of 18 U.S.C. 603 by federal employees who contribute to "Reagan-Bush '84," the authorized Presidential campaign committee. This statute restricts political contributions by federal employees to those in employing authority. Since 18 U.S.C. 603 applies to all U.S. military and DA civilians, these personnel

should refrain from making contributions to "Reagan-Bush '84," the authorized campaign committee of the President. While such prohibition is not applicable to family members, care should be taken in the manner of contributing in order to ensure that the distinction between employee and family member contributions is apparent.

[Ed. Note: The text of the 14 February 1984 memorandum for the heads of all federal departments and agencies from The White House, signed by Mr. Fred F. Fielding, counsel to the President, subject: 18 U.S.C. § 603 was printed in the May 1984 issue of *The Army Lawyer*.]

Claims Service News

U.S. Army Claims Service, OTJAG

Changes to IRC Confirm Tax Free Status of Personal Injury Damages in Structured Settlements

The Periodic Payment Settlement Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605 (1982), amended the Internal Revenue Code, effective for taxable years ending after Dec. 31, 1982, and confirmed the tax free status of periodic payments received on account of personal injury. By creating statutory certainty for claimants through codification of existing administrative practice, this law adds impetus to the use of structured settlements, benefitting both claimants and the United States.

Prior to amendment by the Settlement Act, section 104(a)(2) of the Internal Revenue Code merely provided for the exclusion from gross income of amounts received as damages "on account of personal injuries." The Internal Revenue Service had little difficulty applying section 104(a)(2) to situations where the injury settlement was paid in one lump sum. Where, however, the actual receipt was deferred or where payments were made periodically over a

number of years, the investment feature had to be taken into account. If the claimant either owned or was in constructive receipt of the settlement, any income earned thereon was taxable to him or her. For example, in Rev. Rul. 76-133, 1976-1 C.B. 34, the IRS allowed the exclusion of only the lump sum settlement award and not the interest earned on the settlement in a case where the court ordered that the award be placed in five year deposit certificates issued in the claimant's name, but which could not be withdrawn until maturity. Therefore, where the lump sum damage amount is invested for the benefit of the claimant who has actual or constructive receipt or economic benefit of the lump sum, only the lump sum amount is excludable under section 104(a)(2).

On the other hand, where the periodic payments are made through a reversionary trust owned by the United States, all of the amounts received have been ruled excludable by the IRS.

Rev. Rul. 77-230, 1977-2 C.B. 214. Similarly, where a single premium annuity is purchased to provide monthly payments to the claimant, all of the payments are excludable because the claimant's only right is to receive the monthly payments. Rev. Rul. 79-220, 1979-2 C.B. 74. Also, the exclusion is not affected by the fact that the periodic payments may increase by a set amount year to year. Rev. Rul. 79-313, 1979-2 C.B. 75.

The legislative history makes it clear that the Settlement Act was intended to codify the existing practice of the IRS rather than change the law. S. Rep. No. 646, 97th Cong., 2d Sess. 4 (1982). The codification was accomplished by adding the phrase "and whether [received] as lump sums or as periodic payments" to section 104(a)(2). A new section 130 was added to the Internal Revenue Code setting out the tax treatment of the assignee-payor of the tortfeasor's

liability. The IRS has not yet issued implementing regulations.

The U.S. Army Claims Service, as well as other federal agencies, is finding it increasingly in the best interests of the United States to undertake structured settlements in damage suits involving catastrophic injuries. Studies by the insurance industry have shown that such settlements are less costly to the tortfeasor and provide superior protection to the injured party over the long term. The stream of payments, tailored to the needs and requirements of the injured party, provides a lasting and secure measure of protection. With periodic payments now confirmed by statute as excludable from gross income, structured settlements should become more common as claimants' counsel learn of the Settlement Act and the statutory certainty it affords their clients.

Judiciary Notes

U.S. Army Legal Services Agency

Designation of Companion Cases

Department of the Army Message DAJA 1984/5120, 13 January 1984, requires that the cover of each record of trial forwarded for review by the Army Court of Military Review be annotated with the names of accused persons involved in related cases or with a remark that there are none. More than four months later, numerous records are being received which do not comply with the message. Some jurisdictions are complying some of the time, which indicates that the message was received but that the final inspection of forwarded records is incomplete. Jurisdictions that need a copy of the message may obtain one from the Clerk of the Court (JALS-CCZ), U.S. Army Judiciary, Falls Church, VA 22041.

Records of Trial

If, for any reason, the commander exercising court-martial jurisdiction is changed during some portion of the court-martial process and such change calls for an assumption of com-

mand document, as required or authorized by paragraphs 3-1b, 3-3b, or 3-4a, AR 600-20, a copy of that document should be included in the record of trial or its allied papers. Staff judge advocates should establish procedures to insure that applicable assumption of command documents are furnished to their office and to the persons responsible for assembling the record of trial.

Message Address

Messages intended for the U.S. Army Judiciary or the U.S. Army Legal Services Agency must not be addressed to "HQDA." Messages so addressed go to the wrong communications center and are not likely to be received.

Although the present edition of AR 105-32 lists "CDRUSALSA WASH DC" as an authorized addressee (the regulation is being revised), the most appropriate message addresses are CUSA-JUDICIARY FALLS CHURCH VA //JALS-XX// or CDRUSALSA FALLS CHURCH VA //JALS-XX//. These messages

are received through the Military Traffic Management Command Communications Center located in the Nassif Building, Falls Church, VA.

Publication of ACMR Opinions

The U.S. Army Judiciary has instituted measures to reduce the time interval between issu-

ance of a decision by the Army Court of Military Review and publication of the opinion in West's Military Justice Reporter. So far the result has been to reduce the median age of opinions appearing in any biweekly advance sheet from eighty-five days to fifty-two days, with the most recent opinions appearing approximately thirty days after being issued by ACMR.

LAMP Committee Report

Captain Thomas W. McShane

ABA Young Lawyers Division Liaison to LAMP Committee

The American Bar Association (ABA) Standing Committee on Legal Assistance for Military Personnel (LAMP) held its Spring 1984 meeting in Hawaii on 15 and 16 March. The meeting was the first ever held in Hawaii by the LAMP Committee, and was hosted by the Office of the Staff Judge Advocate, U. S. Army Support Command, Hawaii (USASCH), located at Fort Shafter. Besides Committee members, advisors and liaisons, several dozen military lawyers stationed in Hawaii and representing all the services attended the Committee's open sessions.

Reports on legal assistance in Hawaii were delivered by the senior representatives of each service. The Army reported on its Expanded Legal Assistance Program (ELAP), operated in Hawaii in conjunction with the Hawaii Bar Association, whose president was also present at the meeting. The demand on ELAP, it was mentioned, greatly exceeded the resources. The Navy emphasized its Family Service Center concept, which encompasses such diverse elements as chaplains, bankers, legal assistance officers, and babysitters under one roof. All services, particularly the Navy and Marine Corps, reported problems in providing legal assistance to an area as vast as that covered by the Pacific Command, especially in light of the constant, demanding burden of criminal investigations and courts-martial.

The Committee viewed a videotape, entitled "Cooperation is the Keynote," highlighting the resources available to legal assistance offices

through the ABA. The tape is to be made available for viewing at legal assistance offices. Other projects discussed included "Operation Standby," a program in effect in several states, such as Florida and North Carolina, using volunteer civilian attorneys to assist and advise military attorneys in areas of state law. This program it is hoped, will be expanded to include other states.

The Committee also discussed proposals to combine the various ABA military committees into one section on military law or into an even broader section of government lawyers. The Committee's consensus was that a separate military law section might lack a sufficient population base and would deprive military attorneys of their ties with civilian practitioners. These ties are presently maintained through the ABA Standing Committees on Military Law, Lawyers in the Armed Forces, and Legal Assistance for Military Personnel. A section of government lawyers, it was pointed out, would not only duplicate the Federal Bar Association, but would further isolate the military lawyer from the mainstream of private practice.

The Committee also addressed problems associated with absentee voting by military personnel. The services are stressing voting assistance this year because of the elections, but many states continue to provide obstacles to military voters and refuse to cooperate with the military. The LAMP Committee, it was felt, could be especially helpful after the fall elections in se-

curing ABA support for uniform absentee voting legislation.

Use of paralegals by the services was discussed, and it was quickly discovered that no uniform approach exists. The Committee examined education and use of paralegals by civilian firms, though again standards and practices vary widely. The military services, it was agreed, should continue to train personnel to perform paralegal tasks which do not require an attorney, regardless of whether these individuals are called "paralegals" or "legal clerks." The Committee decided to address this question in an upcoming issue of its *Legal Assistance Newsletter*, copies of which are mailed to legal assistance offices.

The Committee briefly discussed other issues of concern to military lawyers such as malpractice legislation, malpractice insurance, a Uniform Law on Notarial Acts, and legislation to

create a statutory basis for legal assistance. Following a full day of business on the 15th, the Committee concluded its visit on 16 March by touring military facilities and visiting legal assistance offices on the island of Oahu.

The March meeting was successful in large part because of the excellent support and participation by local judge advocates and because of efforts by USASCH in coordinating arrangements so well. The LAMP Committee traditionally meets at military installations of all services on a rotating basis. In line with this policy, the Committee meets again on 14 and 15 June at the Air Force Academy in Colorado Springs, Colorado, and 29 and 30 November at the Coast Guard Base, Governor's Island, New York. The Committee holds open sessions at each meeting and local judge advocates are encouraged to attend.

Legal Assistance Items

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

FTC Credit Practices Rule Issued

In an action of interest to legal assistance attorneys in the consumer law area, the Federal Trade Commission culminated more than eleven years of investigation, hearings and research with a final trade regulation rule governing credit practices, issued on 1 March 1984, to be effective on 1 March 1985.

The purpose of the rule is to restrict certain remedies used by lenders and retail installment sellers in consumer credit contracts. The rule makes it an unfair credit practice for a lender or retail installment seller to include a cognovit, or confession of judgment clause, or other waiver of a right to notice and opportunity to be heard in an agreement with a consumer. The rule also prohibits lenders and retail installment sellers from requiring a consumer to waive any limitations or exemptions from attachment, execution or other process on the consumer's real or personal property unless the waiver applies solely to property subject to a security interest ex-

cuted in connection with the obligation.

Assignment of wages or other earnings is prohibited, except under limited circumstances. It will also be an unfair credit practice for lenders and retail installment sellers to take a security interest in a consumer's household goods unless it is a purchase money security interest in the household goods which are the subject of the transaction.

A specific prohibition will also govern how lenders and retail installment sellers credit late charges to a consumer's account. The FTC found that the rule was necessary because some lenders and retail installment sellers engage in a practice known as "creeping" or "pyramiding" a late charge, i.e., using an accounting principle that results in the assessment of a multiple delinquency charge due to a single late payment. Under this method, when a consumer pays late, the payment is first applied to any late charge, then to the interest charge, and finally to the principal amount of the payment. Any

payments thereafter are automatically delinquent because the subsequent payment is first applied to the remaining balance. Timely payments in succeeding months are given the same treatment, the cumulative effect of which can be substantial.

The rule also contains protections for cosigners, including a notice which must be given to cosigners before they become obligated to the lender or retail installment seller. The notice states:

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, the fact may become a part of *your* credit record.

This notice is not the contract that makes you liable for the debt.

Although the rule does not take effect until 1 March 1985, legal assistance attorneys, as a preventive law measure, may want to encourage voluntary compliance by local lenders and sellers and should discuss the rule in preventive law classes. If service members are aware of the rule, they may request voluntary compliance with lenders and sellers with whom they deal on an individual basis.

Washington Adopts Mandatory Wage Assignment Provision

Effective 7 June 1984, every Washington court order establishing a child support obligation must contain a provision allowing for the entry of a mandatory wage assignment without prior notice to the obligor, if a support payment

equal to at least one month's support is more than fifteen days overdue.

The wage assignment may not exceed fifty percent of disposable earnings or, where support arrearages are specified in the order, the lesser of fifty percent of disposable earnings or the sum of current support ordered plus the amount ordered to be paid toward arrearages. If more than one assignment is issued, the employer must apportion the nonexempt earnings equally among the claims. The employer is entitled to a processing fee to be deducted from the employee's remaining earnings not exceeding ten dollars for the first disbursement and one dollar for each additional disbursement.

North Carolina UCCJA Decision Involves Military

The North Carolina Court of Appeals, in a recent decision, declined to accept jurisdiction in a child custody case involving a military officer transferred from Texas to North Carolina pursuant to military orders. In *Naputi v. Naputi*, 313 S.E.2d 179 (N.C. Ct. App. 1984), the parties were divorced in Texas and custody of the children was awarded to the ex-wife. The officer was transferred to North Carolina and one of the children came to live with him. He thereafter petitioned a North Carolina court to modify the Texas decree and award custody of the child to him. The ex-wife objected that the North Carolina court lacked jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA).

The trial court found that it had jurisdiction under the UCCJA's emergency jurisdiction provisions. The appellate court, however, determined that the trial court should have inquired into whether or not the Texas court lacked jurisdiction or had declined to exercise jurisdiction. The appellate court found that Texas had maintained jurisdiction and that North Carolina was without jurisdiction to modify the Texas decree. The court stated that if the officer desired to pursue a modification, he should bring the action in Texas, not North Carolina.

Legal Assistance Directory Distributed

A 1984 edition of the Army Legal Assistance Information Directory has been distributed to legal assistance offices worldwide. The direc-

tory has four sections, the first of which is the Air Force Legal Assistance Directory containing detailed listings of Army, Air Force, Navy, Marine and Coast Guard legal assistance offices. Section II is a directory of lawyer referral services operated by state, county, and local bar associations which is published by the American Bar Association's Standing Committee on Lawyer Referral and Information Service.

Section III of the directory is a new section which contains a roster of Reserve judge advocates who have been designated special legal assistance officers pursuant to paragraph 1-6b(2)(C), AR 27-3, Legal Assistance. Under this program, if an Army legal assistance officer has a client with a legal problem in a state or city listed, the legal assistance officer or the client may contact one of these Reserve attorneys, who may agree to counsel, advise, or represent the client. If the special legal assistance officer agrees to do so, it is at no cost to the client. Instead, the Reserve judge advocate receives retirement points.

The final section is a reprint of a publication entitled, "Where To Write For Vital Records," published by the Department of Health and Human Services. It contains addresses for each state and territory on where to write for birth, death, marriage and divorce records.

Housing Power of Attorney Requirement Discontinued

In a recent message distributed to housing offices worldwide, the Director of Human Resources Development, Office of the Deputy Chief of Staff for Personnel, announced that spouses may be permitted to sign for and terminate family quarters and sign for furnishings without being required to furnish a power of attorney or notarized statement. The message, R042357Z May 84, relies on a recent opinion of The Judge Advocate General that such powers of attorney or notarized statements are not required. The spouse's signature on behalf of the sponsor does not change the basic responsibility of the service member for such property. Commanders are encouraged to permit spouses to sign for family quarters and furnishings and to discontinue requirements for powers of attorneys or notarized statements. The policy will be included in the next change to AR 210-50, Family Housing Management.

Preparation of Legal Documents Before Deployment

Senior officers throughout the Army were recently presented with the following information:

The Judge Advocate General continues to emphasize the Army Legal Assistance Program (ALAP) as an important means of improving the quality of life in military communities. The ALAP provides soldiers and their families with the support required to resolve the legal problems encountered in everyday life.

A new regulation governing the ALAP has been published and is effective 1 April 1984. AR 27-3, Legal Assistance, is a major step forward for the ALAP. The new regulation:

- Identifies the minimum legal assistance services that should be made available in a legal assistance office;

- Adds certain military administrative matters to the scope of legal assistance services;

- Expands opportunities for military legal assistance officers to represent eligible clients in local civilian civil court proceedings;

- Includes a preventive law discussion;

- Eliminates all criminal matters, civilian as well as military, from the scope of legal assistance services;

- Revises procedures for referring clients to civilian attorneys;

- Emphasizes the active duty military member as the primary client; and

- Sets priorities of other eligible clients.

Commanders are encouraged to visit and observe the operation of their legal assistance office(s).

Commanders are urged to review their own personal legal affairs and to stress such a review for the officers serving under them. Recent deployment experience has indicated that while commanders and senior officers have done an exemplary job in making sure their soldiers' legal affairs were in order, they have neglected

their own. Commanders and senior officers who are subject to speedy deployments are as much

in need of up-to-date wills and powers of attorney as the soldiers they lead.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

ARPERCEN Contact

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

Howard I. Manweiler

Brigadier General, Army National Guard

Brigadier General Howard I. Manweiler is the newly appointed Army National Guard Special Assistant to The Judge Advocate General, Army. He is the principal advisor to The Judge Advocate General and to the Director, Army National Guard of the United States regarding Judge Advocate General's Corps personnel management, training and military law matters for the Army National Guard. Prior to the assumption of these duties, he was the Staff Judge Advocate and principal legal advisor to The Adjutant General of Idaho, and Special Deputy Attorney General for the Military Division, State of Idaho.

General Manweiler enlisted in the Idaho Army National Guard on 8 March 1948 and was ordered to active duty during the Korean conflict in May 1951 with the 148th Field Artillery Battalion. He was transferred to Europe where he was assigned as Regimental Personnel Sergeant Major with the 172nd Infantry Regiment, 43rd Infantry Division before being released from active duty on 16 December 1952.

On 16 December 1953, he received a direct

commission in Field Artillery and later served as a platoon leader, executive officer, and company commander of Battery B, 148th Field Artillery Battalion. General Manweiler was appointed to the Judge Advocate General's Corps in March 1960 and was promoted to the grade of Colonel in September 1980. On 1 November 1983, he was appointed the Army National Guard Special Assistant to The Judge Advocate General and promoted to Brigadier General on 29 February 1984.

Promotion Concerns

Do you know your date of rank? Your promotion eligibility date? The level of military education required for promotion to the next higher grade? Problems with promotions can often be traced to one of these issues.

Most passovers, especially from captain to major, result from the failure to timely complete the educational requirements of paragraph 2-6, AR 135-155. That provision requires commissioned officers to complete the educational requirements in table 2-2 of the regulation not later than the date the selection board convenes. For promotion from captain to major, the educational requirement is completion of an officer advanced course.

It is wise to complete the educational requirement at least three or four months prior to the convening date of the board. Time is required for processing and transmitting necessary documents evidencing educational completion to the officer's promotion consideration file. If the officer's file does not reflect completion, even though the requirement may have been satisfied prior to the convening date of the board, the result is a passover. Each year a substantial number of captains are passed over for this reason. The officer must then be identified for consideration by a stand-by board, and, at least, wait

substantially longer to know if he or she has been selected. However, should this be the second passover, other complications arise including the initiation of discharge proceedings which may jeopardize the officer's present assignment.

These problems can occur at all grades but present a greater problem upon promotion from captain to major because of the numbers of officers considered and course completion documents to be processed. To avoid the problem, learn the date of your next promotion board and plan accordingly.

Incomplete records also cause promotion problems. If you have not received a microfiche of your official military personnel file (OMPF) at least four months before your selection board convenes, request it. Major Hamilton, the JAG Personnel Management Officer (PMO) at ARPERCEN, can provide you one if your record has been put on microfiche. Your review of the performance portion (that portion containing Officer Evaluation Reports (OERs), Academic reports (AERs), etc.) of the microfiche will enable you to discover and correct critical errors or omissions in your file. If you are missing documents in your file, you may send hard copies of such documents to ARPERCEN to allow them to complete your promotion consideration file. Missing OERs and educational completion documents are the most critical. It is also important that you have an official full-length, current (within the last year) photograph in your record. A photograph that portrays you as overweight, sloppy, or in a

poorly fitting uniform will certainly be harmful to your promotion chances! Give yourself enough time to correct any problem with your record—six months is not too early to begin.

It is important for you to realize that Reserve Component judge advocates are considered by the Army Promotion List (APL) selection board. This means you are considered along with officers from other branches of the Army—not only judge advocates. The APL board convening dates for the remainder of CY 84 are:

To CW2 (11 Jun 84) DOR of 30 Dec 81 and earlier.

To CW2 (10 Dec 84) DOR of 30 Jun 82 and earlier.

To CW3 & 4 (09 Jul 84) DOR of 31 Aug 79 and earlier.

To LTC (05 Sep 84) DOR of 01 Jan 79 and earlier.

To COL (10 Oct 84) DOR of 01 Jan 81 and earlier.

The dates for the APL mandatory selection boards for CY 85 are not available at this time. Those dates will be published in *The Army Lawyer* as soon as they are established.

The mandatory selection boards are held at ARPERCEN, St. Louis, Missouri. Major Hamilton, the PMO, is there to advise and assist you. His telephone numbers and addresses are provided in the first item of this section. You may also contact the Reserve Affairs Department, TJAGSA for advice and assistance at (804) 293-6121.

Enlisted Update

Sergeant Major Walt Cybart



Reclassification

There seems to be extensive confusion in the field regarding the MOS reclassification letters recently distributed by MILPERCEN. As I stated in the March 1984 issue of *The Army Lawyer*, the program is *strictly voluntary* at this time. The reclassification letters were supposed

to go to all 71D30s except those with Special Background Investigation security clearances and those on PCS orders with a will-proceed date within 90 days. The fact that you did or did not receive a letter has nothing whatsoever to do with your job performance or value to the Corps.

For those of you with courts-martial and/or civil convictions (other than traffic tickets) in your file, it would be prudent to seriously consider reclassification at this time. When the proposed changes to AR 611-201 become effective, personnel with these convictions may be involuntarily reclassified into an MOS not of their choosing.

CLE

Our Legal Clerk/Court Reporter Course at Monterey, California was a resounding success. Over 200 personnel attended and, as of now, I have not received any negative comments. A special thanks goes to MSG Richard Walden

and his crew for the outstanding efforts and attention to detail that made this course a success.

We are trying to arrange to have the 1985 course at the U.S. Military Academy, West Point. Further details will be published when available. The Chief Legal Clerk/Senior Court Reporter Course has found a home at TJAGSA and in the future will have a course number assigned to it to make it possible to attend using training funds. It will, however, remain in the current format and be by invitation only. The dates for the 1985 course are 10-14 June; plan ahead and budget for this.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

July 9-13: 13th Law Office Management (7A-713A).
 July 16-20: 26th Law of War Workshop (5F-F42).
 July 16-27: 100th Contract Attorneys (5F-F10).
 July 16-18: Professional Recruiting Training Seminar.

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

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-24: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

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

October 2-5: 1984 Worldwide JAG Conference.

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

3. Civilian Sponsored CLE Courses

September

6: ABICLE, Insurance, Mobile, AL.

7: ABICLE, Insurance, Montgomery, AL.

7-8: SBT, Legal Assistance Seminar, Dallas, TX.

8: CCLE, Buying & Selling Real Estate (Video), Cortez, CO.

9-13: NCDA, Trial of the Violent Juvenile, Kansas City, MO.

10-11: PLI, Federal Civil Rights, New York, NY.

13-14: PLI, Insurance, Excess, and Reinsur-

ance Coverage Disputes, New Orleans, LA.

13-14: PLI, Estate Planning Institute, San Francisco, CA.

13-14: PLI, Managing the Large Law Firm, New York, NY.

13-14: PLI, Managing the Medium-Sized Law Firm, New York, NY.

13-14: PLI, Managing the Small Law Firm, New York, NY.

14: ABICLE, Insurance, Birmingham, AL.

16-10/5: NJC, General Jurisdiction—General, Reno, NV.

16-19: NCDA, Representing State & Local Governments, Tampa, FL.

16-21: NJC, Civil Litigation—Graduate, Reno, NV.

17: PLI, Amendments to the Federal Rules of Evidence, New York, NY.

17-19: FPI, Construction Contract Litigation, Cambridge, MA.

17-19: FPI, Practical Environmental Law, Williamsburg, VA.

17-19: FPI, Proving Construction Contract Damages, Reno, NV.

19-21: FPI, Practical Construction Law, San Francisco, CA.

19-22: FBA, 1984 Annual Convention, Baltimore, MD.

20-21: PLI, Copyright, Patent & Trademark, New York, NY.

20-21: PLI, Managing the Large Law Firm, New York, NY.

20-21: PLI, Managing the Small Law Firm, New York, NY.

21: PLI, Managing the Medium-Sized Law Firm, New York, NY.

24-25: PLI, Law Library: Business Information Services, New York, NY.

28: ABICLE, Collections, Birmingham, AL.

28: WSBA, Trial Advocacy, Seattle, WA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the April 1984 issue of *The Army Lawyer*.

Current Material of Interest

1. Manual for Courts-Martial, United States, 1984

On 13 April 1984, President Reagan signed Executive Order 12,473 which promulgates the Manual for Courts-Martial, United States, 1984. The executive order may be found at 49 Fed. Reg. 17,152 (Apr. 23, 1984).

2. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative

indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBERTITLE

- AD BO77550 Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7
- AD BO77551 Criminal Law, Procedure, Trial/JAGS-ADC-83-8
- AD BO77552 Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
- AD BO77553 Criminal Law, Crimes &

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

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Number	Title	Change	Date
Issue No. 8	Reserve Components Personnel UPDATE		1 May 84
AR 20-1	Inspector General Activities and Procedures		1 May 84
AR 210-7	Commercial Solicitation on Army Installations	901	4 May 84
AR 623-105	Officer Evaluation Reporting System	901	22 Mar 84

3. Articles

- Gianelli Immwinkelreid, *Depositions in Criminal Practice*, 11 *Crim. Def.* 12 (1984).
- Gifford, *Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework*, 57 *S. Cal. L. Rev.* 101 (1983).
- Goodman & Waltuck, *Declarations Against Penal Interest: The Majority Has Emerged*, 28 *N.Y.L. Sch. L. Rev.* 51 (1983).
- Gorman, *Are There Impartial Expert Psychiatric Witnesses?*, 11 *Bull. Am. Acad. Psychiatry & L.* 379 (1983).
- Graham, *Evidence and Trial Advocacy Workshop: Privileges—Husband and Wife; Identity of Informant*, 20 *Crim. L. Bull.* 34 (1984).
- Grant & Coons, *Guilty Verdict in a Murder Committed by a Veteran With Post-Traumatic Stress Disorder*, 11 *Bull. Am. Acad. Psychiatry & L.* 355 (1983).
- Kennedy & Homant, *Attitudes of Abused Women Toward Male and Female Police Officers*, 10 *Crim. Just. & Behav.* 391 (1983).
- MacGrady, *Protection of Computer Software—An Update and Practical Synthesis*, 20 *Hous. L. Rev.* 1033 (1983).
- Murray, *Products Liability v. Warranty Claims: Untangling the Web*, 3 *J.L. & Com.* 269 (1983).
- Stone, *Content Regulation and the First Amend-*

- ment*, 25 Wm & Mary L. Rev. 189 (1983).
- Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 Creighton L. Rev. 95 (1983-1984).
- Comment, *Refuge in America: What Burden of Proof?*, 17 J. Mar. L. Rev. 81 (1984).
- Comment, *Voluntary Legitimation Rights of Unwed Fathers in Texas*, 20 Hous. L. Rev. 1157 (1983).
- Note, *Resentencing on Surviving Valid Courts After a Successful Appeal: A Double Jeopardy and Due Process Analysis*, 69 Cornell L. Rev. 342 (1984).
- Note, *State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law*, 15 Case W. Res. J. Int'l L. 137 (1983).
- Note, *The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society*, 59 Notre Dame L. Rev. 181 (1983).
- The Federal Courts Improvement Act*, 32 Clev. St. L. Rev. (1983).
- Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982-1983*, 72 Geo. L.J. 185 (1983).

By Order of the Secretary of the Army:

Official:

ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

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 It also discusses the
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 and the recommendations
 for further research.

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 The references list the
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The appendixes contain
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