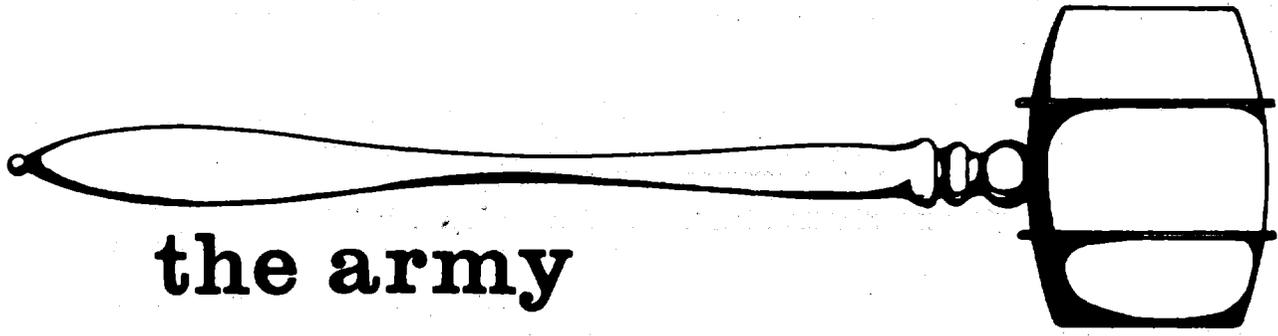


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**The CITA Program—Its Implication  
for Army Lawyers**

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In the next few months nearly every installation and headquarters will be affected by the Commercial and Industrial Activities (CITA) Program. The government work force is undergoing a fundamental change which will impact on the way the Army does business for the next several decades. Thousands of government jobs and millions of dollars are at stake resulting in a gigantic tug-of-war between private firms and opposing government employee unions. Army lawyers will find themselves in the midst of this and their professional response will strongly influence both the direction and outcome of significant CITA actions.

The CITA Program, with limited exceptions, is concerned with acquiring the various goods and services needed by the Government from the most economical source, whether it be obtained by contract with the private sector or by performance "in-house" by government employees. The proposed revised DOD regulations (DODI 4100.33 and DODD 4100.15) apply only within the United States and its territories and possessions, and do not apply to nonappropriated fund instrumentalities, or to products and services acquired in accordance with treaties or international agreements.

Since 1955 it has been the policy of the Federal government to rely on the private sector when possible for needed goods and services. This policy however, has been only moderately implemented as its application at all stages has been full of intense congressional interest, controversial, and relatively ineffective.

Historically, the Army has been much more involved in contracting for goods than for services. Part of this was due to a perception that the Army should be self-sufficient and have the organic capability of performing the necessary services it required, because the private sector was not interested in furnishing the service or it could not be satisfactorily obtained by contract. Times and technology have changed.

Private industry often has the equipment and work force to perform many commercial activities as well as the government and at lower cost. Government attitudes have changed. In his State of the Union Address last year, President Carter emphasized that "private business and not the government must lead the expansion in the future."

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(OMB) has responsibility for implementing the program and providing guidance to the Executive Agencies. It has issued a revised OMB Circular A-76, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government," dated March 29, 1979, which defines policy on the basis of three precepts: (1) the government will look first to competitive private enterprise to supply the products and services it needs; (2) inherently governmental functions, such as management and policy making, must be performed by Federal employees; (3) the taxpayer is entitled to economy in government; emphasis will be on cost comparison in deciding whether to accomplish work by using a contractor or by using Federal employees. Exceptions to this general policy are permitted in the interest of National Defense or where no satisfactory commercial source is available.

The Army has been contracting for some 35,000 man years of CITA effort at an annual cost of \$900 million. This accounts for less than 1/3 of the total services it receives. The CITA program promises to give private firms a much greater share of the work traditionally performed by the civilian and military personnel of the Army.

*The Army Lawyer* welcomes articles on topics of interest to military lawyers. Articles should be typed double spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Because of space limitations, it is unlikely that articles longer than twelve typewritten pages including footnotes can be published. If the article contains footnotes they should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (12th ed. 1976). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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OMB Circular A-76 requires that government agencies conduct a systematic review of government activities that provide goods and services which could be obtained from the private sector. These activities include custodial services, fire protection, health care, and base operation. In short, practically any service which is available from a commercial source must be reviewed under the CITA Program, and only a few functions, such as those which must be performed by government personnel because of their inherently governmental nature are excluded from the program. DOD components must annually update their inventory of CITA's and specific service contracts and prepare a detailed schedule for review.

In the course of conducting these reviews the critical focus will be on cost comparison to obtain economy in the government. This will be accomplished by allowing the private sector to bid against the government to provide those services which might be obtained by contract. The government will enter its bid as an in-house competitor and a contract will then be awarded to the lowest bidder consistent with the OMB Guidance.

This firm bid anomaly places the government in the position of competing with private industry in the course of carrying out a CITA policy which requires that it not compete with private industry.

Under the present OMB cost principles, expected to be effective within DOD by 1 October, if a contractor can do the work and achieve a savings of at least 10% of the estimated government in-house personnel costs, a conversion to contract will be effected. As to initiation of in-house performance, the government does not want to commit itself unless savings are significant, especially if a large new capital investment is involved. Consequently, the in-house bid must result in savings of at least 10% in personnel costs and 25% in cost of equipment and facilities over the contractor bid to start up an activity in-house. OMB Circular A-76 requires standard cost factors

to be used in such comparisons. Retirement is computed at 20.4%, Federal employee insurance at 3.7% and Workmen's Compensation at 1.9% is the calculation of the government in-house bid. In spite of being able to add certain cost factors to the contractor's bid, it is apparent that in-house costs will have difficulty competing with contractor bids.

In response to the new guidance from OMB and DOD implementing instructions, the Army has embarked on an ambitious and extensive review of CITA functions during the period FY 80-84. There are an estimated 6,000 functions and just under 9,000 and 10,000 spaces associated with these reviews in FY 80 and 81, respectively. In anticipation that some functions scheduled for review will be found cost effective to contract, the Army end strength for FY 80 was reduced by 6,048 civilian and 1,356 military spaces, and potential savings over and above contract and contract administration costs are estimated at 14 million dollars for FY 80.

This anticipated surge into the services area will bring new legal challenges to Army lawyers. Greater knowledge of labor and civilian personnel law, fiscal law, acquisition and contract law will be essential. Some installations will not have the required depth of specialized legal talent. MACOM's will have to assess the expertise within their commands and provide extra training and schooling where necessary.

In-house labor problems will have high priority. Because of the practically irreversible impact a conversion will have on the in-house work force, resistance has been, and will continue to be, high. Conversion to contract means loss of government jobs, livelihoods and financial security. Government employees are apprehensive. Their unions are already actively involved in protecting them, filling numerous Freedom of Information Act (FOIA) requests for information on jobs to be affected, CITA reviews, government proposals, etc. Unions argue that government employees can generally do a more efficient job, that they have a greater

interest in performing well, and that just because a service is available from a private firm does not necessarily mean that money will be saved, particularly where potential short term savings will be offset by long range costs.

Unions are assisting the in-house work force to align in-house functions in a more cost effective mode. They are asking the government to base its cost comparisons on the union recommended work force structure on the theory that the government bid will be more competitive if it reflects what the union says the functions should cost, as opposed to what it is presently costing. If the government bases its comparisons on the union recommendations, they will have to be implemented if the government bid is lower. Consequently, whether the job is done with fewer in-house personnel, or by contract, jobs will be lost and employees unhappy.

Unions have already initiated some litigation; more should be anticipated in an effort to slow down the CITA Program. Congress imposed a moratorium on contracting out during FY 1978 and is presently considering legislation which would require greater administrative control and congressional review before a decision to contract out would be final.

The unions charge that DOD is using contracting as a method of avoiding personnel ceilings. The revised A-76 specifically states that a function cannot be contracted out solely for that purpose and manpower reductions will be made whether installations contract for certain services or not. However, these budgetary pressures are at work, manpower cuts have been directed, and the commands will be under some pressure to contract to avoid disruption. Possibly the biggest single issue with commanders is the end strength reduction imposed prior to conducting the CITA review. This reduction prevents hiring civilian personnel or requisitioning military to fill vacancies occurring in the functions to be reviewed.

Government effort is being made to protect

the in-house work force by providing them the first right of refusal to work for a contractor. This will help, but an employee with many years of service is unlikely to want to leave the government. Consequently, seniority rights will come strongly into play, and individuals ultimately losing their jobs may not be qualified to work for a contractor. Moreover, as solicitations for bids go out, many experienced personnel may begin to look for other jobs in anticipation of the work going to a contractor. This could result in a decreased work force during the transition period if the work goes to contract, and a difficult period of bringing it up to strength if it remains in-house. The latter will become increasingly more difficult because of the requirement that the activities be reviewed every five years and the knowledge that those activities which remained in-house after initial review may well be contracted out next time. The stability and morale of the work force could be major problems, matters which seem to have been given little consideration in development of the CITA concept.

The CITA Program tends to polarize relationships between the command and the work force. The team or family concept at the installation is altered immeasurably and the role of unions strengthened as the in-house work force begins to retrench in anticipation of job loss. Moreover, once a decision to contract has been made, it is considered by some to be irreversible as the government stands to lose any credibility it might have had should it attempt to perform the function in-house in subsequent years.

The firm bid approach has resulted in special problems in the FOIA area with both unions and potential contractors asking for release of information to assist the former in realigning the in-house work force on which the government bid may be based and the latter in preparing their bids. Information which traditionally was generally available to the public, such as manpower documents, now becomes more closehold to preserve the viability of the sealed bid scheme.

The CITA Program has been characterized by false starts, delays, changing policy and seemingly a general lack of direction. This may be due in part to action of special groups as evidenced by the Congressional moratorium in FY 78 and the delays in publishing A-76 and the accompanying Cost Comparison Handbook. In addition, administration is becoming increasingly more complex and demands greater effort. New cost and accounting procedures require more sophisticated analysis and demand expanded skills of the work force.

The Service Contract Act requires that contractors use prevailing wage rates published by the Department of Labor. Some DOL wage determinations have been higher than in-house rates, and have discouraged contractor participation. Another perennial problem is that of "buy-in" which is facilitated by the absence of the traditional safeguards of prepriced options, and sound pricing review and auditing practices. However, there is also cause for concern that there may be a buy in by the in-house work force because contract specifications and statements of work can be written so extensively as to drive the contractor's cost up when it is doubtful that the in-house work force has the capability to meet the same standards. As more contractor personnel are hired, the danger of

strikes will also increase. These problems will require careful management by government personnel. Army lawyers will need to keep pace with developments. They will have to learn to review and analyze specifications for a wide variety of service contracts. Performance standards which varied at the whim of a government supervisor must now be carefully translated into objective contract specifications. Greater demands will be placed on contract administration personnel, particularly their mode of inspecting and assessing job performance.

To assist Army lawyers, a CITA seminar will be held during the 1979 Annual JAG Conference at Charlottesville, Virginia. Moreover, a special two-day CITA course will be offered on December 6th and 7th, which can be taken separately or in conjunction with the Contract Law workshop (December 4th and 5th).

Whether measured in dollars or personnel spaces, CITA is a high priority for the Army. Our client relies on our timely advice as professionals. We must be fully apprised of these mainstream activities and prepared to assist commanders in the challenging job of implementing them with a minimum of legal problems.

### **The Gate Search: Breaches In The Castle's Fortifications?**

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Recently, in sustaining the gate search of a servicemember's private vehicle the Navy Court of Military Review gratuitously proffered an additional predicate to the efficacy of the intrusion. It opined the government's activity legal ". . . because appellant was passing through a gate on a military reservation, where his vehicle was *always* subject to random gate searches. See *United States v. Harris*, 5 M.J.

44 (C.M.A. 1978)." <sup>1</sup> (emphasis supplied) The law is not quite as simplistic as the Court would leave one to believe.

The purpose of this analysis is to dispel the Navy Court of Military Review conclusion. Specifically, the article will concisely trace the development of the gate search concluding with a view of the present state of the law. There-

after, a number of 'problem' areas and their inherent ramifications will be set forth. The troublesome aspects selected for consideration are not exclusive. Their importance lies in the fact that they are illustrative of the subtleties underlying the legal framework. In conclusion, the authors will offer a guideline by which those difficulties generated can be ameliorated.

Basic to the structure of the evaluation are certain constraints. The article will limit itself to actions occurring at the reservation boundary, as distinguished from searches and seizures occurring within the confines of the base.<sup>2</sup> Moreover, the perspective detailed will concern itself with military personnel versus civilians. Lastly, the focus will be upon private vehicles as contrasted to government ones.

In order to have a firm grasp of what the law and problems are in the idiom of gate searches, it is essential to understand two basics. They are the legal character of the 'beast' and how it has aged. At the outset it must be noted that the stratagem of gate searches involves the constitutional considerations of 'search' and 'seizure.' The 'seizure' involves governmental control exercised over the vehicle and individuals in it during the pendency of the stop.<sup>3</sup> The 'search' involves a governmental invasion into an area in which the driver or passengers may have a reasonable expectation of privacy.<sup>4</sup>

The second prong to a clear view of the problem entails a short romp through history. The legal pylons upon which these intrusions have been supported are varied. Close evaluation reflects that the underpinnings have evolved through three distinct, developmental stages.

Early on, there was a general acquiescence<sup>5</sup> to the notion that a commanding officer exercised plenary authority over persons and property within the military jurisdiction.<sup>6</sup> Perhaps implicit in this philosophy was the concept of 'military necessity,'<sup>7</sup> i.e., the idea that, ". . . since such an officer [had] been vested with

unusual responsibilities in regard to personnel, property, and material, it [was] necessary that he be given commensurate power to fulfill that responsibility."<sup>8</sup>

Thereafter, in the second stage of maturity, military jurists displayed not only more interest, but a more pronounced approach as well to gate search intrusions. Nevertheless, the rather shallow and variegated approach adopted in opinions left the practitioners in the field little to be thankful for. The judiciary zeroed in on the problem from different perspectives. These cases legitimized the government's action by applying different legal principles. The predicates included: a reasonable administrative intrusion with security being the underlying rationale,<sup>9</sup> a reasonable administrative intrusion citing statutory or regulatory authority which protected military resources,<sup>10</sup> a 'reasonable' intrusion (*sub silentio* implying the application of fourth amendment considerations),<sup>11</sup> and express consent acquired as a precondition to on-post driving privileges.<sup>12</sup>

It has been, though, the presently constituted Court of Military Appeals<sup>13</sup> which has raised the law to the third and final level of consciousness. This Court has attempted to definitize this facet of search and seizure practice more than ever before. Through its opinions in *United States v. Rivera*<sup>14</sup> and *United States v. Harris*<sup>15</sup> the Court has established a bifurcated standard for assessing the propriety of a gate search program. The appropriate benchmark in a given set of circumstances is dependent on the geographical location of the installation. *Rivera*<sup>16</sup> controls in the foreign environment, whereas *Harris*<sup>17</sup> guides the result of a gate search at a base in the United States. Although ostensibly the Court has clarified those actions the government can take vis-a-vis entrants to a military enclave, the legal underpinnings are still relegated to an amorphous state.<sup>18</sup>

In the overseas command, the Court may be divided in reasoning, but is unified in mandate. The installation commander has broad authority to institute gate search programs without

any degree of belief that criminal activity is afoot.<sup>19</sup> The factors which support the need for an administrative search are duplicitous. They are the overwhelming drug problem which strikes at the heart of the commander's ability to field an effective fighting force on one hand, and the necessity (military necessity?) of protecting the unit's security on the other.

The permissible activity the commander may be involved in at installations within the United States is considerably more circumscribed. "Such a seizure of persons at the gate of a military base within the United States is fundamentally dissimilar to the one in *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978), due to its situs in our country."<sup>20</sup>

In its most basic terms *Harris*<sup>21</sup> presents a scheme which must be employed in reviewing any gate search program. Two basic questions must be addressed. First, under the circumstances presented, can the intrusion which the program entails be carried out at all? Secondly, if a gate search program is constitutionally permissible, is the regime employed to carry out the program in conformance to fourth amendment requirements?

As to question one, the crux of the problem is resolved in each particular instance by a reasoned analysis of the factors set forth in *Harris*.<sup>22</sup> Against these parameters the service-member's fourth amendment interest in a reasonable expectation of privacy and freedom from governmental intrusion must be measured against the societal need for the activity. If the latter outweighs the former, then the program may be instituted.

Having once decided that a gate search program is legally viable, then a procedure which is compatible with fourth amendment strictures must be employed. This includes among other actions<sup>23</sup> withdrawing the exercise of discretion from law enforcement officers.<sup>24</sup>

Notwithstanding the significant inroads attained by the Court in dissipating the haze

shrouding gate search programs, a number of questions yet exist for resolution. It is these to which the command judge advocate must be sensitive in order to obviate potential problems in litigation. Just as the coach of a team has a game plan with all contingencies considered, so too must the judge advocate formulate a plan of action impervious to legal error.

At the forefront of those areas subject to concern are the limitations emanating from regulatory provisions. Army regulations by their language superimpose above judicial decisions additional parameters which guide commanders in their actions. Certain facets of controlling regulations have never been clearly defined in meaning, use or application.

Typical of interpretive vexations is the term 'military necessity' and its application to the justification process. Army Regulations 190-22<sup>25</sup> and 210-10<sup>26</sup> provide that the commanding officer of an installation may order searches of individuals upon entering, during their stay on, or upon departure from the installation when based upon 'military necessity.' Thus the question becomes, what is military necessity? The phrase has been defined as "an administrative inspection to effectuate a proper military regulatory program."<sup>27</sup> Closer introspection reveals a dispositive meaning to be rather elusive.<sup>28</sup> Moreover, as the Court was quick to point out in *Harris* ". . . military necessity is only a factor, rather than a determinant, in the balancing process. . . ." <sup>29</sup> of justification.

Equal in magnitude to the employment of imprecise language as suggested above, is regulatory suggestion that gate searches can be utilized in a rather wholesale fashion. A case in point evolves from a recommendation contained within paragraph 2-7b, Army Regulation 190-51.<sup>30</sup> The guidance proffered highlights the use of a gate search program in order to provide security of supplies and equipment. The problem is not endemic to departmental level. Commands, installations, and units given the hint of a program without legal standard are encouraged to institute local policies to effectuate

similar tactics. The flaw in these plenary schemes cries out. The regulations reflect the lack of a considered ad hoc balancing process<sup>31</sup> mandated by the Court in *Harris*.<sup>32</sup> Army Regulation 190-51 indicates it is directed toward the control of "... unclassified and nonsensitive Army supplies."<sup>33</sup> Nothing in the regulation indicates Department of the Army, or any particular subelements are facing an overwhelming loss problem vis-a-vis this type of materiel. Further, no support is derived from the guidelines suggested within the regulation which militates in favor of this most significant intrusion. In short, it is one thing to have a permissible administrative inspection program in consonance with fourth amendment practice and another to legitimate a general warrant in the control of law enforcement officials.

Finally, accepting *arguendo* the efficacy of a regulation concerned with the implementation of a gate search action, what effect results from a failure to adhere to its provisions? The question is difficult to answer having plagued civilian and military courts alike. Most recently the question has seemingly been resolved in the federal civilian sector with the Supreme Court decision in *United States v. Caceres*.<sup>34</sup> The Court refused to extend the exclusionary rule to a situation where Internal Revenue Service agents failed to adhere to departmental rules prior to surreptitiously monitoring the offer of a bribe.<sup>35</sup>

The Court of Military Appeals in its decision of *United States v. Holsworth*<sup>36</sup> has followed the lead of the Supreme Court. Courts of Military Review previously have approached the problem in an antithetical manner. Some cases are decided on the theory that the government has a duty to faithfully abide by rules it establishes.<sup>37</sup> Any evidence derived in contravention to the promulgated directive is to be excluded by virtue of its characterization as "fruit of the poisonous tree." Contrarily, a second line of cases attempts to resolve for whose benefit the statutory stricture is created. If it is decided that the procedure is for the benefit of the government, and not involving a significant

basic right of the accused, the evidence is admitted.<sup>38</sup> The problem is apparent. Which of the three military standards is to be followed? Further, if it is the latest pronouncement, what violations will be characterized as statutory versus constitutional so as to trigger the exclusionary rule? The only hope of a command is to insure rigid compliance with all regulatory provisions whether derived from above or self-imposed.

Setting aside the various regulatory hurdles facing the prospective authorizing official, the command action taken in and of itself is a veritable garden of weeds which must be carefully pruned. The quizzical vegetation which flourishes in the sunlight of the searches ranges from whether a particular commander<sup>39</sup> is sufficiently removed from law enforcement activity so as to be able to authorize the program in the first place<sup>40</sup> to whether the direction which traffic is flowing makes a difference in the vitality of the program.<sup>41</sup>

In the first instance legal counsel must evaluate the degree of neutrality surrounding the official making the determination a gate search program is in order. The opinion rendered in *United States v. Ezell*<sup>42</sup> has placed the issue squarely in the spotlight.<sup>43</sup> Nonetheless, setting forth the problem area is considerably easier than applying it in reality. Has the authorizer or delegee become so involved and obsessed with the situation sought to be rectified so as to divest his or herself with the requisite impartiality necessary to determine whether a program is in fact permissible under the circumstances? Every authorization requires scrutiny of a commander's involvedness. Concomitantly, the putative official must insure that he or she does not become so inextricably enmeshed in the process so as to be disqualified.<sup>44</sup>

When one considers personal involvement of an authorizing official, a subject of ancillary concern is civil liability. Hopefully one authorizing a gate search program will be working closely with an attorney, but what of the situation where legal advice is not prevalent or, that

which is provided is lacking? The latter situations may give rise to a program for which a legal basis is wanting. The action may be due either to ignorance of the law or, plain disregard for it when the authorizer is bent on conducting the intrusion come hell or high water. In either event the official, and perhaps those involved in breaching an aggrieved service member's fourth amendment rights, may find themselves involved in litigating a constitutional tort.<sup>45</sup> The situation is exacerbated by the fact that immunity provided federal officials is not absolute, but is qualified based on good faith and reasonable grounds.<sup>46</sup> Hence individuals involved in the incipient stages of the authorizing process must think in terms beyond evidentiary aspects.

Two related salient considerations which merit reflection concern the justification which is relied on to support the intrusion. At the outset, it must first be decided whether the quality of the problem merits the action being undertaken. Thereafter consideration must be accorded to the sufficiency of probity of the detriment, if any, which is required before the official may implement the program.

With regard to the former inquiry, decisional law has sanctioned a limited number of threats to the military community which will legitimately underpin gate search programs. Among these have been: the deterrence of persons from introducing contraband (generally drugs) onto the installation,<sup>47</sup> the security of the base,<sup>48</sup> and the prevention of removal of government property.<sup>49</sup> These do not necessarily reflect the universe of valid predicates, but they do present a fair picture of those "public needs" which are viable. Above all, it must be recalled that the impetus for the government's action is not considered alone. As has been indicated previously,<sup>50</sup> it is incumbent to first "balance the reasons for the intrusion."<sup>51</sup>

Once having established a proper moving force, evaluation must focus on analysis of whether it is necessary to convince the empowering official at all, and if so, by what

particular burden, of the alleged *raison d'être* for the search. Recent Supreme Court decisions in the field of administrative searches have mandated the application of the warrant requirement except in the most limited of circumstances.<sup>52</sup> These decisions have in turn spawned lower court pronouncements which reflect on the meaning of "administrative probable cause."<sup>53</sup> Nevertheless the Supreme Court in *Marshall v. Barlow's Inc.*<sup>54</sup> clearly explicated the fundamental nature of administrative probable cause:

Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' *Camara v. Municipal Court*, supra, 387 U.S., at 538.<sup>55</sup>

The natural extension of civilian administrative search decisions ineluctably require that a proper commander<sup>56</sup> issue an authorization to conduct the operation and such authorization be supported by administrative probable cause.<sup>57</sup> The information which is presented in one instance may simply reflect that a lawful regulation must be fulfilled such as a departmental security regulation. In another instance detailed and extensive facts may have to be presented to demonstrate the problem sought to be combated such as is the case where the threat of drugs to the community is alleged.

Honing in on those actions which are immediately relatable to action taken on the scene, other matters surface which must be closely scrutinized. The Court in *Harris* concluded that although the use of the gate search under the circumstances was reasonable, the methodology employed adversely affected personal privacy rights.<sup>58</sup> The majority required that an officer who was 'neutral in outlook' had to determine times, places and procedure to be followed

during the implementation of a program.<sup>59</sup> The questions left for head on contemplation by a legal advisor are manifold. Specifically, may vehicles or persons which are being stopped during the course of a program be traveling in either direction (*i.e.*, ingress versus egress) from the post and once halted, how intrusive may the inspection process be? Further what, if any, ramifications are involved in the procedure based on the Supreme Court's holding in *Delaware v. Prouse*?<sup>60</sup>

In formulating the general plan to control the conduct of a gate search program consideration of the travel direction of the objects of search is essential. The foregoing is crucial because what may be constitutionally legitimate and administratively sound in one context may be improper and inefficient in another. Two illustrations serve to contrast the analysis. Consider the secured complex where explosives and other highly flammable materials are contained. Before entering each person and vehicle is thoroughly searched for matches and other lighting devices which could ignite and thereby produce a disastrous result. The supervisory authority over such a complex should have no concern if individuals remove ignitable items, hence dispensing with intrusion upon egress. Instructive in the opposite situation is a scenario found in the concurring opinion of *United States v. Keithan*.<sup>61</sup> It was opined that inspection of outgoing vehicles would be proper in order to ". . . recover government property, prevent escapes from confinement or custody, ensure national security . . ." <sup>62</sup> and the like.

What of the bounds of intrusiveness permissible during the course of the inspection? The question is no less significant as in the case of other types of administrative incursions.<sup>63</sup> The extent of the search eminently proper in one context might very well be unacceptable in another situation. The Court of Military Appeals, although not explicitly defining the means and reach of the inspection process, has clearly displayed its sensitivity to the subject. In *Rivera*<sup>64</sup> and *Harris*<sup>65</sup> the lead opinions recognized the fact that the government's breach of the con-

stitutionally protected area was very limited.<sup>66</sup> It was accomplished in each case initially by the use of a drug detection dog's olfactory sense. Would the Court have equally blessed an intensive inspection of the car which included the trunk, underbody, engine, as well as containers being brought on post<sup>67</sup> coupled with an intimate inspection of the person? Manifestly then, rigid guidelines must be built in to the inspection procedure which set the scope of the search. In creating these parameters close thought must be given to the essence of the problem being grappled with against the necessity of the governmental conduct.

The last area meriting attention for those designating a gate search scheme falls on the impact of *Delaware v. Prouse*.<sup>68</sup> The case stands as the automobile analogue to the *Terry v. Ohio*<sup>69</sup> pedestrian stop and frisk analysis. In short, there must be an articulable and reasonable suspicion that the vehicle or occupants are subject to seizure. The rationale underlying the case is to preclude the "unconstrained exercise of discretion" by police.<sup>70</sup> It is at this philosophic point where military gate searches meet civilian practice. In explaining its decision the Court described various procedures which could legally be employed in choosing vehicles to be subjected to inspection. Not included was the military approach.

The Court of Military Appeals has aimed at the problem from a different perspective than the Supreme Court. It has simply removed law enforcement officials from the process providing in lieu, a neutral who ". . . could be given absolute discretion to make these selections . . . without advice or suggestions from law enforcement officials."<sup>71</sup> The 'problem' ripe for adjudication, or more appropriately, for correction before ever maturing to a litigable level is how much discretion is the individual orchestrating a gate search mission actually vested with. In short, may the officer-in-charge of a program designate any vehicles desired as the object of inspection or must a more systematic structure be adhered to?

The latter course of action would be in consonance with the guidance proffered by the Supreme Court. This envisions the use of a one hundred percent check or an application of the program to every Xth vehicle.<sup>72</sup> Conversely, it might very well be that the methodology adopted for the armed forces adequately vitiates the problem of law enforcement discretion both Courts have recognized. Further, the concurring opinion in *Prouse*<sup>73</sup> perceives vehicle stop situations which require additional latitude than was approved for the facts before the Court. Does the military gate search come within the scope of the carved-out exception?

Notwithstanding the considerable amount of gloom and despair thus having been sprinkled about like 'pixie dust,' the practitioner in the field advising the commander can take heart. A viable framework to approach the gate search is at hand. Before laying it out though, it is first incumbent to assay the fool's gold, *i.e.* those ostensible avenues which lack the legal depth of their appearance.

It might very well be, particularly in the case of drug interdiction, that the government might attempt to accomplish by indirection that which it could not do directly. Specifically would it not be proper to cut out all the legal analysis, rigid procedures, and paperwork, by simply emplacing a canine cannibis connoisseur at the gate a la *Harris*.<sup>74</sup> As vehicles coming in were stopped for identification checks,<sup>75</sup> the puppy could do its thing.<sup>76</sup> As the proposition goes, a valid alert would provide the basis<sup>77</sup> for any combination or singular application of a: search incident to apprehension,<sup>78</sup> vehicle search<sup>79</sup> or vehicle inventory.<sup>80</sup> It would seem, alas, that judicial scrutiny would not condone a governmental subterfuge of this sort.<sup>81</sup>

Another lucrative means of ameliorating the administrative burden and expenditure of human resources ("time is money") to breach the mantle of privacy would appear to be through the prior acquisition of an *express* consent to search.<sup>82</sup> That is, before individuals were granted on-post driving privileges they

would be required to sign a statement which waived fourth amendment rights as to themselves<sup>83</sup> and any third parties who might be in possession of the vehicle.<sup>84</sup> Suffice it to say this mode of end running the stringent requirements mandated by the Court of Military Appeals was explicitly rejected in *Harris*.<sup>85</sup> "Conditioning such a right upon an agreement to permit a search would collide with the Fourth Amendment."<sup>86</sup>

What then is the panacea to be applied? There is no universal gate search operating procedure which can be suggested. An *ad hoc* approach must be taken relative to the perceived detrimental situation. A three-tiered process is recommended for this analysis.

1. The commander (or authorized alter ego) would *find* in a written assessment a severe threat to the military community which militated in favor of a gate search program.<sup>87</sup>
2. In writing, the commander (or authorized alter ego) would authorize the program additionally setting forth explicit guidelines concerning scope, manner and procedures to be adhered to.
3. The inspection would be carried out in a manner which removed all discretion from the control of law enforcement officials.

The recommendation set forth should not be alien to either the commander or legal advisor. It is not dissimilar to the 'unit inspection' scenario except that the presumptive rationale for the latter, *i.e.*, to insure the health, welfare and morale of the servicemembers, does not attend the former. With a gate search, the necessity for the intrusion must be actual and demonstrated in each instance.

One fact should be clear having spelunked through the legal labyrinths underpinning the gate search. The tunnels are strewn with boulders and rocks which provide considerable op-

portunity for injury. The fact that individuals pass through the gate of a military facility does not ipso facto make them amenable to inspection. "It ain't necessarily so."<sup>88</sup> Those involved in engineering a reasonable administrative program of this type must be sublimely sensitive to each legal nuance so as to be able to propound a legally sound operation.

## Footnotes

- <sup>1</sup> *United States v. Gillis*, 6 M.J. 570 (N.C.M.R. 1978).
- <sup>2</sup> See, e.g., *United States v. Neloms*, 48 C.M.R. 702 (A.C.M.R. 1974).
- <sup>3</sup> See *Delaware v. Prouse*, 47 U.S.L.W. 4323 (U.S. March 27, 1979).
- <sup>4</sup> See *Rakas v. Illinois*, 48 L.Ed.2d 387 (1978).
- <sup>5</sup> See *United States v. Herndon*, 1 C.M.A. 461, 4 C.M.R. 53 (1952); *United States v. Matthews*, 13 C.M.R. 615 (A.F.B.R. 1953); *United States v. Pagerie*, 15 C.M.R. 864 (A.F.B.R. 1953).
- <sup>6</sup> See *United States v. Doyle*, 1 C.M.A. 545, 4 C.M.R. 137 (1952); *United States v. Florence*, 1 C.M.A. 620, 5 C.M.R. 48 (1952); *United States v. Brown*, 10 C.M.A. 482, 28 C.M.R. 48 (1959); *United States v. Gebhart*, C.M.A. 606, n. 2, 28 C.M.R. 172, 176, n. 2 (1959). Cf. *United States v. Crowley*, 9 F.2d 927 (N.D. Ga. 1922); *United States v. Grisby*, 335 F.2d 652, 655 (4th Cir. 1964).
- <sup>7</sup> See *United States v. Harris*, 5 M.J. 44, 64, n. 28 (C.M.A. 1978).
- <sup>8</sup> *United States v. Doyle*, 1 C.M.A. 545, 548, 4 C.M.R. 137, 140 (1952).
- <sup>9</sup> *United States v. Poundstone*, 22 C.M.A. 277, 46 C.M.R. 277 (1973) (Darden, J., concurring); *United States v. Unrue*, 22 C.M.A. 466, 47 C.M.R. 566 (1973); *United States v. Gaddis*, 41 C.M.R. 629 (A.C.M.R. 1969); *United States v. Smith*, 46 C.M.R. 926 (N.C.M.R. 1972); *United States v. Dukes*, 48 C.M.R. 443 (N.C.M.R. 1973).
- <sup>10</sup> *United States v. Blade*, 49 C.M.R. 646 (A.F.C.M.R. 1974); *United States v. Sanchez*, 50 C.M.R. 450 (A.F.C.M.R. 1975); *United States v. Keithan*, 1 M.J. 1056 (N.C.M.R. 1976). Cf. *United States v. Rotramel*, 1 M.J. 559 (A.F.C.M.R. 1975). See also Army Reg. No. 190-22, Search, Seizure and Disposition of Property, para. 2-3 (12 June 1970); Army Reg. No. 190-51, Security of Army Property at Unit and Installation Level, para. 2-7b (1 August 1978); Army Reg. No. 210-10, Installations Administration, para. 2-23 (12 September 1977).
- <sup>11</sup> *United States v. Poundstone*, 22 C.M.A. 277, 46 C.M.R. 277 (1973), Cf. *United States v. McClellan*, 1 M.J. 575 (A.C.M.R. 1975).
- <sup>12</sup> *United States v. Smith*, 46 C.M.R. 926 (N.C.M.R. 1972).
- <sup>13</sup> C.J. Albert B. Fletcher Jr., J. William H. Cook, J. Matthew J. Perry.
- <sup>14</sup> 4 M.J. 215 (C.M.A. 1978).
- <sup>15</sup> 5 M.J. 44 (C.M.A. 1978).
- <sup>16</sup> *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978).
- <sup>17</sup> *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).
- <sup>18</sup> The members of the Court approach the legal resolution to the problem from three directions. C.J. Fletcher does not expressly adopt the applicability of the fourth amendment to the intrusions. He measures the government's conduct in each case by a 'reasonableness' standard. Judge Perry's position goes unstated in *Rivera*, but he specifically notes the application of the fourth amendment to the *Harris* activity. Judge Cook ascribes far reaching plenary powers to an installation commander in both cases. He appears to countenance a 'military necessity' philosophy. In his view a commanding officer could order gate searches without probable cause or military necessity.
- <sup>19</sup> See *United States v. Holsworth*, 7 M.J. 184 (C.M.A. 1979).
- <sup>20</sup> *United States v. Harris*, 5 M.J. 44, 66 (C.M.A. 1978) (Fletcher, C.J., concurring). Does this statement limit applicability of the holding to installations only within the contiguous forty-eight states? What result in Hawaii and Alaska? Compare Army Reg. No. 27-10, Military Justice Legal Services para. 2-14 (1 January 1979). How are bases located in Puerto Rico, Virgin Islands, Panama Canal Zone and Guam treated?
- <sup>21</sup> The case is dispositive only as to the factual scenario before the Court. "The reasonableness of any procedure may be litigated in an appropriate proceeding, and we will consider each factual situation as it comes before us." *Id.*
- <sup>22</sup> (a) public need (b) available alternatives (c) degree of potential for frightening or offending motorists (d) scope of intrusion (e) extent of interference with legitimate traffic (f) amount of discretion involved (g) practicality of requiring reasonable suspicion (h) nature of the vehicle (i) command responsibilities (j) right and duty of service member to enter base (k) security considerations.
- <sup>23</sup> These include compliance with regulations and proper authorization.

- <sup>24</sup> Cf. *Delaware v. Prouse*, 47 U.S.L.W. 4323 (U.S. March 27, 1979). But see *United States v. Bowles*, 7 M.J. 735 (A.F.C.M.R. 1979) (security police officer directs time, place and duration of intrusion).
- <sup>25</sup> Search, Seizure and Disposition of Property, para 2-3 (12 June 1970).
- <sup>26</sup> Installations Administration, para 2-23 (12 September 1977).
- <sup>27</sup> *United States v. Unrue*, 47 C.M.R. 556, 559 (C.M.A. 1973).
- <sup>28</sup> See *United States v. Harris*, 5 M.J. 44, 64 (C.M.A. 1978).
- <sup>29</sup> *Id.*, p. 65.
- <sup>30</sup> Security of Army Property at Unit and Installation Level (1 August 1978).
- <sup>31</sup> Moreover in the case of paragraph 2-7b, the methodology employed seems to be in contravention to the direction contained in *Harris*, *supra*, that law enforcement agents not have any discretionary involvement.
- <sup>32</sup> See note 21, *supra*.
- <sup>33</sup> Army Reg. No. 190-51, Security of Army Property at Unit and Installation Level, para. 1-1 (1 August 1978).
- <sup>34</sup> 47 U.S.L.W. 4349 (U.S. April 2, 1979).
- <sup>35</sup> The Court premised its decision on legal and practical reasons. Legally it found no violation of a constitutional or statutory right. In a more pragmatic vein, the Court was indisposed to apply the prophylactic device in the fear that such action would mollify executive agency motivation to promulgate procedural rules. In addition the Court perceived the executive branch as having the primary responsibility for establishing sanctions for violations of internal regulations. *Id.*
- <sup>36</sup> 7 M.J. 184 (C.M.A. 1979). But see *United States v. Dillard*, 2 M.J. 955 (A.C.M.R. 1976), *pet. granted*, 2 M.J. 159 (C.M.A. 1976). See also *United States v. Chase*, 1 M.J. 275 (C.M.A. 1976); *United States v. Rotramel*, 1 M.J. 559 (A.F.C.M.R. 1975); *United States v. McLellan*, 1 M.J. 575 (A.C.M.R. 1975). Cf. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979); *United States v. Hood*, 7 M.J. 128 (C.M.A. 1979); *United States v. Marler*, 7 M.J. 629 (A.F.C.M.R. 1979).
- <sup>37</sup> See *United States v. Steed*, 2 M.J. 442 (A.C.M.R. 1975); *United States v. Carlton*, 2 M.J. 510 (A.C.M.R. 1976).
- <sup>38</sup> See *United States v. Dillard*, 2 M.J. 955 (A.C.M.R. 1976); *United States v. Perl*, 2 M.J. 1269 (A.C.M.R. 1976).
- <sup>39</sup> Who is a proper authorizing official? Must it be the installation commander or may a subordinate commander so act? Compare Army Reg. Nos. 190-22 and 210-10, *supra*; *United States v. Umlauft*, 47 C.M.R. 812 (N.C.M.R. 1973); *United States v. Rotramel*, 1 M.J. 559 (A.F.C.M.R. 1975); with *United States v. Poundstone*, 46 C.M.R. 277 (C.M.A. 1973) (Darden, C.J., concurring); *United States v. Smith*, 46 C.M.R. 926 (N.C.M.R. 1972).
- <sup>40</sup> *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979).
- <sup>41</sup> *United States v. Keithan*, 1 M.J. 1059 (N.C.M.R. 1976) (Dunbar J., concurring).
- <sup>42</sup> 6 M.J. 301 (C.M.A. 1979).
- <sup>43</sup> Comments on *Ezell* have begun to proliferate. See, e.g., Squires, *Neutral Commanders in the Barracks*, 11 *The Advocate* 104 (1979); Cooke, *United States v. Ezell: Is the Commander a Magistrate? Maybe*. *The Army Lawyer*, August 1979, at 9.
- <sup>44</sup> The Court in *Ezell*, p. 319, *supra*, recognized the integral role which detection dogs play in the gate search process. It would not find a lack of neutrality due to active command participation solely because the animal's use was approved or directed in this context.
- <sup>45</sup> *Butz v. Economou*, 57 L.Ed.2d 895 (1978).
- <sup>46</sup> *I.D.*
- <sup>47</sup> See, e.g., *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).
- <sup>48</sup> See, e.g., *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978).
- <sup>49</sup> See, e.g., *United States v. Johnson*, 6 M.J. 681 (N.C.M.R. 1978).
- <sup>50</sup> See note 22, *supra*.
- <sup>51</sup> *United States v. Harris*, 5 M.J. 44, 63 (C.M.A. 1978).
- <sup>52</sup> Compare *Michigan v. Tyler*, 436 U.S. 499 (1978); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Camara v. Municipal Court*, 387 U.S. 523 (1967), with *United States v. Biswell*, 406 U.S. 311 (1972); *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970).
- <sup>53</sup> See, e.g., *Matter of Carlson*, 580 F.2d 1365 (10th Cir. 1978); *Marshall v. Weyerhaeuser Company*, 456 F. Supp. 474 (D.N.J. 1978); *United States v. Roux Laboratories, Inc.*, 456 F. Supp. 973 (M.D. Fla. 1978).

<sup>54</sup> 436 U.S. 307 (1978).

<sup>55</sup> *Id.*, at 320-321.

<sup>56</sup> Quaere: Could a military judge issue such an authorization?

<sup>57</sup> This would appear to be so irrespective of whether the program was to be of extended duration in the case of an enclave which required intensive security perpetually, or was an action of more limited intensity such as one involved with the interdiction of drug traffic.

<sup>58</sup> *United States v. Harris*, 5 M.J. 44, 65 (C.M.A. 1978).

<sup>59</sup> *Id.*

<sup>60</sup> 47 U.S.L.W. 4323 (U.S. March 27, 1979).

<sup>61</sup> 1 M.J. 1056, 1058 (A.F.C.M.R. 1976) (Dunbar, J., concurring).

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g., United States v. Edwards*, 577 F.2d 883, 893 (5th Cir. 1978) (inventory of an automobile); *United States v. Asbury*, 586 F.2d 973 (2d Cir. 1978) (border search). *See also* Alexander, Unwarranted Power at the Border: The Intrusive Body Search, 32 Southwestern Law Journal 1005 (1978).

<sup>64</sup> *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978).

<sup>65</sup> *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).

<sup>66</sup> *See United States v. Rivera*, 4 M.J. 215, 216 n. 5 (C.M.A. 1979).

<sup>67</sup> *Cf. United States v. Maglito*, 43 C.M.R. 296 (C.M.A. 1971).

<sup>68</sup> 47 U.S.L.W. 4323 (U.S. March 27, 1979). (A law enforcement official stopped the defendant's car to check his driver's license and registration. The patrolman was without any belief that an offense had been committed. The officer observed marijuana in plain view which was seized and made the basis of the prosecution in question.)

<sup>69</sup> 392 U.S. 1 (1968).

<sup>70</sup> *Delaware v. Prouse*, 47 U.S.L.W. 4323, 4327 (U.S. March 27, 1979). Interestingly enough neither the *Harris* decision (*see* 5 M.J. 44, 65 n. 29 (C.M.A. 1978)) nor seemingly the *Prouse* opinion (*see* 47 U.S.L.W. 4323, 4327, n. 26 (U.S. March 27, 1978)) concern themselves with the initial seizure in other situations where control is exercised. Exemplifying the foregoing circumstances are the pre-entrance identification check stop and pre-exit stop to check

authorizations and technical aspects of military vehicles. Although both actions fall within early stages of the seizure continuum apparently they are deemed to be reasonable. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (it is permissible to stop "for brief questioning routinely conducted at permanent checkpoints" without "any individualized suspicion"). The governmental stops in question are found acceptable notwithstanding the fact that such might deteriorate into a more disadvantageous situation for the driver/passenger. *See, e.g., United States v. Robinson*, 6 M.J. 109 (C.M.A. 1979); *United States v. Rotramel*, 1 M.J. 559 (A.F.C.M.R. 1975); *United States v. Texador-Perez, pet. granted*, 7 M.J. 1 (C.M.A. 1979).

<sup>71</sup> *United States v. Harris*, 5 M.J. 44, 65 n. 30 (C.M.A. 1978).

<sup>72</sup> *Delaware v. Prouse*, 47 U.S.L.W. 4323, 4327 (U.S. March 27, 1979). Quaere: What result if only rented cars with teenage drivers were stopped?

<sup>73</sup> *Id.*

<sup>74</sup> *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).

<sup>75</sup> *See* note 69, *supra*.

<sup>76</sup> *Cf. United States v. Grosskreutz*, 5 M.J. 344 (C.M.A. 1978). (N.B. This case was decided subsequent to *Harris*.)

<sup>77</sup> *Cf. United States v. Neloms*, 48 C.M.R. 702 (A.C.M.R. 1974).

<sup>78</sup> *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>79</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>80</sup> *South Dakota v. Opperman*, 428 U.S. 364 (1976).

<sup>81</sup> *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 469-471 (1971); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Chimel v. California*, 395 U.S. 752, 767 (1969); *United States v. Mossbauer*, 44 C.M.R. 14 (C.M.A. 1971).

<sup>82</sup> *See United States v. Smith*, 46 C.M.R. 926, 929 (N.C.M.R. 1972).

<sup>83</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>84</sup> *United States v. Matlock*, 415 U.S. 164 (1974).

<sup>85</sup> *United States v. Harris*, 5 M.J. 44, 61 (C.M.A. 1978).

<sup>86</sup> *Id.*

<sup>87</sup> *See* note 22, *supra*.

<sup>88</sup> G. Gershwin, I. Gershwin, D. Heyward, *Porgy and Bess*, Gershwin Publishing Company (1935).

## Stop Look And Arrest 'Em

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On the evening of 19 June 1979, Private Smith drove from the barracks to the PX to buy some beer. A Military Policeman on routine patrol observed Smith's car and stopped the vehicle to check Smith's driver's license, vehicle registration, and inspection sticker. The MP approached the car, shined his flashlight through the open window, and asked to see Smith's license and registration. As Smith reached into the glove compartment of the car for the registration, the MP saw a plastic bag containing marijuana in plain view on the car floor. Private Smith was arrested and subsequently charged with wrongful possession of marijuana in violation of Article 134, UCMJ.

### MOTION TO SUPPRESS

At an Article 39(a) session, the defense counsel moved to suppress the marijuana on the grounds that the stop and detention were totally capricious and therefore violative of the Fourth Amendment.<sup>1</sup> In response to defense counsel's questioning, the MP testified that he had observed neither traffic or equipment violations, nor any suspicious activity prior to stopping Smith's vehicle. He further stated that he made the stop solely to check the driver's license and registration. Characterizing the stop as "routine", the MP stated: "I observed the car in the area and was not answering a call, so I decided to pull it over."

The trial counsel proffered two arguments supporting the admissibility of the marijuana. First, she argued that Private Smith implicitly consented to the stop and search by voluntarily entering the military installation.<sup>2</sup> Secondly, she argued that the stop constituted a proper exercise of governmental authority based on the principle of military necessity;<sup>3</sup> the necessity being the need to use this type of adminis-

trative inspection to effectuate the protection of the health, safety, welfare, and efficiency of military personnel. The trial counsel concluded that the seizure was legal because the stop was reasonable, the marijuana was found in plain view,<sup>4</sup> and the search was incidental to an apprehension.<sup>5</sup>

Trial counsel's implied consent argument probably would not warrant the denial of the motion to suppress. At least one Court of Military Review has held that the duty of a servicemember to be present on a military installation negates the member's ability to make a consensual decision concerning entry.<sup>6</sup>

Prior to 27 March 1979, a Military Judge likely would have denied defense counsel's suppression motion on the basis of the legitimate governmental interest in maintaining highway safety.<sup>7</sup> On that date, the United States Supreme Court, in *Delaware v. Prouse*,<sup>8</sup> considered a situation similar to Private Smith's and held that an automobile stop to check a driver's license and registration by civilian police was unreasonable under the Fourth Amendment.

What is unreasonable in the civilian sector, however, is not necessarily unreasonable in the military sector.<sup>9</sup> Although the Supreme Court<sup>10</sup> and the Court of Military Appeals<sup>11</sup> have determined that the protections of the Fourth Amendment are applicable to military personnel, these protections apply differently in the military than within the civilian community.<sup>12</sup> This difference results from the competing constitutional interest of military necessity whenever the Armed Forces are concerned.<sup>13</sup> Accordingly, the question arises whether *Prouse* is applicable to military jurisprudence. Or, practically stated: Can military police still stop, look and arrest servicemembers in this manner?

**DELAWARE v. PROUSE**<sup>14</sup>

In *Prouse*, a patrolman stopped an automobile merely to check the driver's license and registration.<sup>15</sup> The patrolman smelled marijuana smoke as he approached the vehicle. While requesting the driver's license and registration, the officer saw a bag of marijuana on the floor of the car and immediately arrested the driver for possession.

The defendant's attorney moved to suppress the marijuana on Fourth Amendment grounds.<sup>16</sup> The trial court granted this motion.<sup>17</sup> Delaware's Supreme Court affirmed the lower court's decision.<sup>18</sup> The United States Supreme Court granted certiorari to resolve the conflict between jurisdictions with respect to this issue.<sup>19</sup>

The nation's Highest Court balanced Delaware's interest in ensuring highway safety through the use of spot document checks<sup>20</sup> against the resulting intrusion on the privacy and rights of detained persons.<sup>21</sup> Finding the contribution of discretionary vehicle spot checks to highway safety to be "marginal at best,"<sup>22</sup> while entailing "a possible unsettling show of authority"<sup>23</sup> and creating "substantial anxiety"<sup>24</sup> to individuals, the Court concluded that Delaware's governmental interest did not outweigh the intrusion on Fourth Amendment rights. As a result, the Court found that Delaware's proprietary interest in maintaining highway safety did not justify the arbitrary invasion of an individual's reasonable expectation of privacy solely at the unfettered discretion of law enforcement officers in the field.<sup>25</sup> The Supreme Court recently extended this prohibition of discretionary stops and searches to include pedestrians.<sup>26</sup> Interestingly, the Supreme Court's decision prohibiting discretionary searches followed the Court of Military Appeals' prohibition of discretionary gate searches by a year.<sup>27</sup>

Although the Court disallowed the use of unconstrained, discretionary spot checks,

*Prouse* does not totally preclude vehicle document checks. The majority specifically acknowledged the validity of a less intrusive, alternate method of enforcing highway safety—"roadblock-type stops."<sup>28</sup>

**SPOT CHECKS—A MILITARY NECESSITY?**

In order to assess the reasonableness of MP spot checks of operators' licenses and vehicle registrations, it is necessary to focus upon the governmental interest which purports to justify the official intrusion upon a constitutionally protected right. By virtue of his position, the installation commander inherits certain unique responsibilities concerning the health, safety, welfare, and efficiency of his military personnel.<sup>29</sup> Military and civilian courts have recognized that the commander, in the discharge of his military responsibilities, may be required to maintain a regulatory program which necessitates inspection of persons and property without probable cause or consent.<sup>30</sup> The rubric applied to such situations is "military necessity."<sup>31</sup>

Two Army regulations provide for the stop and search of individuals on a military post.<sup>32</sup> In the absence of probable cause, both regulations permit a stop and search predicated on military necessity.<sup>33</sup> But like obscenity,<sup>34</sup> military necessity has escaped definition.

Chief Judge Fletcher, concurring in *United States v. Ezell*,<sup>35</sup> enunciated what appears to be the current view of the Court of Military Appeals concerning the constitutional effect of military necessity. He stated:

[M]ilitary necessity cannot assume the proportions of a legitimate constitutional justification for intrusive government action unless the party asserting it as warranting a different rule than in the civilian community shows this military condition to exist and to necessitate such a reasonable response by the Government.<sup>36</sup>

In Private Smith's case, trial counsel bears the burden of proving a bone fide military necessity for MP spot checks. To successfully defeat defense counsel's motion to suppress, the trial counsel must successfully establish the following:

- (1) That the installation commander has a duty to maintain personnel in a state of maximum readiness;
- (2) That the health, safety, welfare, and effectiveness of these soldiers are directly affected by the prevailing highway safety conditions on the post;
- (3) That a causal nexus exists between spot checks and the health and welfare of soldiers through the increased safety of post roads.

In summary, the trial counsel must argue that the correlation between military effectiveness and highway safety elevates the military interest in spot checks above a state's interest in highway safety.

### STRIKING A BALANCE

The ultimate determination of the soundness of trial counsel's argument may rest with an appellate military court. A military judge faced with this argument, however, must weigh it and the government's supporting evidence against the deprivation of the individual soldier's Fourth Amendment rights.

The installation commander's duty to maintain a combat ready force is readily supported by Army regulations<sup>37</sup> and judicial decisions.<sup>38</sup> Perhaps some military judges would be favorably persuaded by statistics indicating that the health, safety, welfare, and effectiveness of soldiers is affected by highway safety conditions on or near a military post. For example, at one major CONUS installation, auto accidents are a leading cause of death and serious injury to servicemembers.<sup>39</sup>

Establishing the causal relationship between MP spot checks and the military necessity for them, however, may be the trial counsel's "Achilles Heel." Logic dictates that soldiers on convalescent leave because of car accidents cannot perform their assigned duties. But in terms of actually meeting a military need by discovering unlicensed drivers or deterring them from driving, military judges could find MP spot checks too intrusive and insufficiently productive to qualify as a reasonable military law enforcement practice. Therefore, these judges would conclude that the discretionary nature of spot checks, like discretionary gate searches,<sup>40</sup> renders such checks improper under the Fourth Amendment.

### CONCLUSION

After *Prouse*, the practice of spot checks by military police is suspect and open to challenge. *Prouse* itself presents a formidable roadblock to trial counsel.

From a practical viewpoint, the difficulties raised by *Prouse* can be avoided through the use of systematic roadblocks, which were expressly sanctioned by the Supreme Court, instead of random spot checks.

Finally, *Prouse* implicitly adds support to the validity of systematic gate searches.<sup>41</sup> The Supreme Court's rationale validating the use of roadblocks—the reduced shock effect to the individual—certainly can be argued in favor of such gate searches.

### Footnotes

\* Captain Grendell received his B.S. magna cum laude from John Carroll University in 1975 and his J.D. from Case Western Reserve University in 1978.

<sup>1</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . U.S. CONST. Amendment IV.

<sup>2</sup> Perhaps the trial counsel relied on a post regulation, such as Fort Benning Regulation 190-5, which provides in part:

"Upon entering the Military Reservation, the

- driver subjects himself and his vehicle to search by military police.”
- See *United States v. Neloms*, 48 C.M.R. 702 (A.C.M.R. 1974).
- <sup>3</sup> For support, the trial counsel could have cited, *U.S. v. Neloms*, 48 C.M.R. 702, 709 (A.C.M.R. 1974):  
“... [T]he law enforcement officials had the authority to stop the vehicle and question the driver as to registration, licensing, and safety . . .”
- <sup>4</sup> Under the plain view doctrine, a law enforcement official may seize an item if he was properly situated when he saw it, if he reasonably believed that the item was connected with a crime, and the item was inadvertently found. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).
- <sup>5</sup> See *United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976).
- <sup>6</sup> *United States v. Blade*, 49 C.M.R. 646, 651 (A.F.C.M.R. 1974):  
“... [T]he servicemember really doesn't have any choice whether to enter his base or not. . . .”
- <sup>7</sup> See *U.S. v. Neloms*, 48 C.M.R. 702 (A.C.M.R. 1974); *U.S. v. Unrue*, 47 C.M.R. 556 (A.C.M.R. 1973).
- <sup>8</sup> 47 U.S.L.W. 4323 (U.S. March 27, 1979).
- <sup>9</sup> See *United States v. Ezell*, 6 M.J. 307, 328 (C.M.A. 1979) (Fletcher, C.J., concurring). See also *Middendorf v. Henry*, 424 U.S. 25 (1976); *Schlesinger v. Councilman*, 420 U.S. 738 (1975).
- <sup>10</sup> See, e.g., *Burns v. Wilson*, 346 U.S. 137 (1953).
- <sup>11</sup> See, e.g., *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978); *U.S. v. Grosskrevtz*, 5 M.J. 344 (C.M.A. 1978).
- <sup>12</sup> “[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian, . . . ‘the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.’” *Parker v. Levy*, 417 U.S. 733, 744 (1974) (citations omitted). See also *United States v. Unrue*, 22 C.M.A. 466, 47 C.M.R. 556 (1973).
- <sup>13</sup> See notes 30-36 *infra*.
- <sup>14</sup> 47 U.S.L.W. 4323 (U.S. March 27, 1979) (reported in 440 U.S. —, 99 S.Ct. —, 59 L.Ed.2d 660).
- <sup>15</sup> The patrolman testified that he had not observed any traffic or equipment violations, nor suspicious activity prior to stopping the vehicle. *Id.* at 4324.
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> Prior to *Prouse*, six jurisdictions upheld the constitutionality of spot checks. *United States v. Jenkins*, 528 F.2d 713 (10th Cir. 1975); *Myricks v. United States*, 370 F.2d 901 (5th Cir.), cert. dismissed, 386 U.S. 1015 (1967); *State v. Holmberg*, 194 Neb. 337, 231 N.W. 2d 672 (1965); *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *Palmore v. United States*, 290 A.2d 573 (D.C. App. 1972); *Leonard v. State*, 496 S.W. 2d 576 (Tex. Crim. App. 1973). Five Jurisdictions found spot checks to be unconstitutional. *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971); *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977); *People v. Ingle*, 36 N.Y. 2d 413, 330 N.E. 2d 34 (1975); *State v. Ochoa*, 23 Ariz. App. 510, 534 P.3d 441 (1975), rev'd on other grounds, 112 Ariz. 582, 544 P.2d 1097 (1976); *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973).
- <sup>20</sup> Attorneys for the State of Delaware argued that “the State's interest in the practice [spot checks] as a means of promoting public safety upon its roads more than outweighs the intrusion entailed.” 47 U.S.L.W. 4323 (U.S. March 27, 1979).
- <sup>21</sup> *Id.* at 4327.
- <sup>22</sup> *Id.* at 4326.
- <sup>23</sup> *Id.*
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.* at 4327.
- <sup>26</sup> *Brown v. Texas*, 47 U.S.L.W. 4810 (U.S. June 25, 1979).
- <sup>27</sup> *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).
- <sup>28</sup> 47 U.S.L.W. 4323, 4327 (U.S. March 27, 1979).
- <sup>29</sup> See generally AR 210-10, 12 Sept. 77. See also *United States v. Harris*, 5 M.J. 44, 59 (C.M.A. 1978).
- <sup>30</sup> See, e.g., *United States v. Burrow*, 396 F. Supp. 890 (D.C. Md. 1975); *United States v. Poundstone*, 22 C.M.A. 277, 46 C.M.R. 277 (1973).
- <sup>31</sup> See, e.g., *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).
- <sup>32</sup> Paragraph 2.23, AR 210-10, 12 Sept. 77; paragraphs 2-1, 2-3b, AR 190-22, 12 June 70.
- <sup>33</sup> For example, paragraph 2.23, AR 210-10, 12 Sept. 77, in pertinent part provides:
- The installation commander may direct authorized guard personnel, to search the persons and their possessions (including vehicles) or any persons (including military personnel, employees, and visitors) upon their entering, during their stay, or upon their leaving facilities over which the Army has responsibility. These searches are authorized when based

upon probable cause that an offense has been committed or upon military necessity. (Emphasis added.)

<sup>31</sup> “[W]e have assumed that obscenity does exist and that we know it when we see it, . . . but we are manifestly unable to describe it . . .” *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., joined by Stewart and Marshall, JJ., dissenting).

<sup>32</sup> 6 M.J. 307 (C.M.A. 1979).

<sup>33</sup> *Id.* at 327.

<sup>34</sup> See, e.g., AR 210-10, 12 Sept. 77; AR 600-20, 28 Apr. 71.

<sup>35</sup> “It is the primary business of armies and navies to

fight or be ready to fight wars should the occasion arise.’ . . . ‘No question can be left open as to the right to command in the officer. . . .’” 417 U.S. at 743-44 (citations omitted).

<sup>36</sup> At Fort Hood, Texas, there were 4,482 motor vehicle accidents resulting in 18 deaths and 551 injuries in the two-year period 1977-1978. III Corps and Fort Hood Provost Marshall Traffic Accident Enforcement Index (1977-1978).

<sup>37</sup> See *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978). See also, Eisenberg and Levine, “The Gate Search: Breaches In The Castle’s Fortifications?,” *The Army Lawyer*, September, 1979.

<sup>38</sup> *Id.*

## First Amendment Rights in the Military

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### I. Introduction

A member of the military is subject to greater restrictions upon his First Amendment freedoms than his civilian counterpart.<sup>1</sup> This paper attempts to outline the current status of the law relating to the military member’s First Amendment rights.

There are two classic justifications for the greater restriction of a serviceman’s First Amendment rights. First, there is a Constitutional commitment to civilian supremacy over the military.<sup>2</sup> Controls on military speech help prevent the ultimate evil of a military takeover of the government and, to a lesser degree, inhibit excessive military influence upon government policy.<sup>3</sup> It is thus paradoxical that “the serviceman [must] sacrifice some of the liberties which he is called upon to protect.”<sup>4</sup> Second, restriction of a serviceman’s First Amendment rights is necessary to maintain discipline and morale within the military structure. Unlimited free speech is inconsistent with the command structure, military authority and unquestioned obedience.<sup>5</sup> Disagreement, debate and dissent would all but cripple military combat readiness and the capacity for immediate, unified action.<sup>6</sup>

Fewer than ten free speech cases have been decided by the United States Court of Military Appeals (USCMA).<sup>7</sup> This paucity of cases, combined with the fact that these cases have arisen over the last fifty years—from World War I America to post-Viet Nam America—have resulted in several different tests or policies being applied to the First Amendment in the military law context.<sup>8</sup> The “clear and present danger” test was first announced by Justice Holmes in *Schenck v. United States*,<sup>9</sup> an espionage case from the World War I era. Holmes established that

[t]he question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.<sup>10</sup>

The court in *Dash v. Commanding General*<sup>11</sup> employed a “balancing of interests” approach. In considering whether restraint of a serviceman’s First Amendment rights is justified, one must balance “the competing private and public interests at stake in the particular circumstances.”<sup>12</sup> The Supreme Court has used the

term "chilling effect" to describe impermissible infringement upon First Amendment freedoms by certain overbroad statutes in the civilian context.<sup>13</sup> But commentators have urged its use in the military area since the particular environment of the military has the potential to be more "chilling" than most other facets of American life.<sup>14</sup> From these various approaches, USCMA chose the "clear and present danger" test to apply in the military context. In *United States v. Priest*,<sup>15</sup> USCMA rejected the civilian standard espoused in *Brandenburg v. Ohio*<sup>16</sup> (prohibited speech must be that which is directed at "inciting or producing imminent lawless action and [be] . . . likely to . . . produce such action"<sup>17</sup>) and expressly adopted the lesser standard of "clear and present danger."

The first court-martial to squarely raise First Amendment issues was *United States v. Voorhees*.<sup>18</sup> The case involved the court-martial of a military censor for violating censorship regulations in publishing a private manuscript. The military argued that it had the authority to censor private material for policy or security reasons. All three judges agreed with the latter justification for infringement, but, as to the former, one judge refused to reach the question and the other two judges split on the issue. The case contains a good discussion of the civilian supremacy justification for infringement on First Amendment rights in the military.

## II. Speech

### A. Disloyal Statements

Articles 77 through 132 of the Uniform Code of Military Justice (UCMJ)<sup>19</sup> describe particular military crimes.<sup>20</sup> Articles 133 and 134, the "general articles," complete the criminal section of the UCMJ.<sup>21</sup> Article 133 proscribes "conduct unbecoming an officer" while article 134, through three clauses, prohibits "all disorders and neglects to the prejudice of good order and discipline"; bans "all conduct of a nature to bring discredit upon the armed forces"; and makes 18 U.S.C. § 2387 specifically applicable to the military. Section 2387 applies to "anyone

who, with intent to interfere with the loyalty, morale or discipline of the armed forces, urges or attempts to cause disloyalty, insubordination, or refusal to duty."<sup>22</sup>

In *United States v. Harvey*,<sup>23</sup> the court held that clause 1 of article 134 was a lesser included offense of clause 3 of the same article. A Marine was charged with six violations of clause 3 for making anti-war statements to a group of other Marines. He was subsequently convicted of four violations of clause 1. The distinction between the two clauses is that if a military member makes statements disloyal to the United States, he violates clause 1; if, in addition, he has the intent to promote the insubordination or disloyalty of another military member, he violates clause 3. Although the court in *Harvey* made a distinction between clauses 1 and 3 of article 134, it left several questions unanswered. What constitutes a disloyal statement has not yet been fully defined, but the USCMA later held that advocating violence as a means of overthrowing the government is disloyal.<sup>24</sup> Moreover, the statements must be directed toward the United States as a political entity.<sup>25</sup> Thus a statement against the person of the President, a particular branch of the service or a national policy may not be successfully prosecuted under article 134.<sup>26</sup> The issue of whether the statement must be publicly or privately made has not yet been decided, but dictum in *Harvey* implies that the statements must be made publicly.<sup>27</sup>

The USCMA's definitional approach spawned critical commentary on vagueness and overbreadth grounds.<sup>28</sup> The USCMA had also been criticized for not squarely facing the key issue of First Amendment rights in the military with meaningful constitutional analysis.<sup>29</sup> These criticisms were forcefully answered by the Supreme Court in *Parker v. Levy*,<sup>30</sup> where it held that the general articles were not vague or overly broad and that a military member's First Amendment rights are subject to greater restriction than those of a civilian. Levy, an Army physician who refused to train Special Forces personnel for duty in Viet Nam, had been convicted of violations of article 90 (willful disobedience of

an order), article 133, and the first clause of article 134. In upholding his convictions by reversing the Court of Appeals, the Court stated that "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment"<sup>31</sup> (a fact which most of the commentators failed to fully appreciate, as they cited for support of their positions many of the more recent constitutional gains which apply to the civilian community). The UCMJ is not the same as a civilian criminal code and the "different character of the military community and of the military mission" requires greater restriction of First Amendment freedoms in the military.<sup>32</sup> And while the language of the general articles may be broad, the longstanding customs and usages, the numerous samples and examples of violations of the general articles which appear in the Manual for Courts-Martial (MCM) and the treatment of the general articles by the military courts all combine to defeat the vagueness and overbreadth argument.<sup>33</sup>

It is undeniable that *Parker* signaled a change in the Supreme Court's view of the military justice system.<sup>34</sup> Everett, a Professor of Law at Duke University, notes that the Burger Court went further than necessary to dispose of the vagueness and overbreadth argument.<sup>35</sup> His view is that *Parker* reflects an increasing confidence in the military justice system and a departure from the jurisdiction-narrowing decision in *O'Callahan v. Parker*.<sup>36</sup> Imwinkelried and Zillman, law professors at the University of San Diego and Arizona State University respectively, view *Parker* as an indication of how the Burger Court finally perceives the overbreadth doctrine.<sup>37</sup> They suggest that although *Parker* allows greater restrictions upon speech in the military, it also expands standing to challenge these greater restrictions.<sup>38</sup> Since the court reached the merits in answering Captain Parker's overbreadth argument, it granted him standing to assert *jus tertii* because the military had previously used the general articles to punish speech.<sup>39</sup> The significance of *Parker* is that the Court will now apparently allow a petitioner standing to assert the right of a third

party that a statute has a "significant, first amendment area of impact" even though the statute does not purport to regulate First Amendment rights on its face.<sup>40</sup> Once standing is granted, though, the petitioner must show that the overbreadth was sufficiently substantial to justify facial invalidation.<sup>41</sup>

In *Secretary of the Navy v. Avrech*<sup>42</sup> an enlisted Marine composed an anti-Viet Nam war stencil and asked his superiors for permission to reproduce it. He was convicted of a violation of article 134. The Supreme Court upheld his conviction and rejected his overbreadth and vagueness challenges, citing *Parker*. Though publishing a disloyal statement was one of the examples of prohibited conduct specifically enumerated in the MCM, Private Avrech was convicted of *attempting* to publish the statement. Imwinkelried and Zillman suggest that even though *Avrech* concerned abstract political activity, it would be construed narrowly and apply only to servicemen who try to influence other servicemen in a war zone.<sup>43</sup> *Parker* and *Avrech* probably indicate a refinement of the clear and present danger standard used in the military law context<sup>44</sup> and may signal the evolution of a "'clear danger to discipline' standard for testing restrictions on servicemen's advocacy."<sup>45</sup>

#### B. Contemptuous Words

Article 88 of the UCMJ prohibits officers from using contemptuous words in referring to public officials. Article 88's predecessors applied to officers and enlisted men alike and were responsible for over 100 prosecutions.<sup>46</sup> The historical justification for article 88 is the maintenance of civilian supremacy over the military,<sup>47</sup> but one commentator suggests that its predecessors were used to punish ". . . noisy drunks . . . habitual gripers . . . [and] blowhards,"<sup>48</sup> while high ranking, outspoken officers such as Colonel Billy Mitchell were tried under the general article 134.<sup>49</sup>

*United States v. Howe*<sup>50</sup> is the only modern case of an article 88 violation. Lt. Howe was

charged with violations of articles 88, 133 and 134 for participating in an anti-war demonstration while carrying a placard which read "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS IN 1968" and "END JOHNSON'S FACIST AGGRESSION IN VIET NAM." The article 134 charge was dismissed by the law officer (now called military judge) at the court-martial, but Lt. Howe was convicted of violating the other two articles. The USCMA affirmed the conviction, rejecting Howe's arguments of insufficient notice and indefiniteness on the article 88 charge and failure to give instructions regarding intent on the article 133 charge. Both articles have long histories of justifiable purpose not in violation of the Constitution and intent is not even an element of Article 133.

### C. Complaints

The right to complain has seldom arisen in the military justice context.<sup>51</sup> Ideally, complaints are handled within the military structure. Options available to one who has a complaint range from informal, "tactful" discussions at the bar with a superior to formal written complaints lodged with the Inspector General (who is not in the particular chain of command of the installation or the dominant unit on that installation) or some comparable system. But the complaint system in the military has been the subject of some recent criticism.<sup>52</sup>

DoD Directive 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces, sets out the official policy of the Department of Defense for handling, *inter alia*, complaints. The Directive admonishes commanders to insure a working open door policy, which is considered a basic principle of good leadership.<sup>53</sup>

In the *United States v. Wolfson*,<sup>54</sup> the Army Board of Review overturned the conviction of an Army doctor who had complained directly to General Westmoreland during one of the

general's tours of inspection in Viet Nam. Captain Wolfson had been convicted under article 92 (dereliction of duty) and article 133 (conduct unbecoming an officer). The Army Board of Review noted that complaining serves a useful purpose and is constitutionally protected by the First Amendment. The Board also noted that article 138 of the UCMJ mandated a procedure whereby an unsatisfied complaint must be forwarded to the officer exercising general court martial jurisdiction over the serviceman against whom the complaint is made. The Board also stated that minor problems such as this should be handled by administrative means, saving article 138 for use in more serious cases. The administrative means referred to in the opinion are various formal and informal systems in the respective services whereby one may address problem areas in discussions or counseling sessions with military chaplains, legal officers, psychiatrists, psychologists or medical officers.

Every military member has a statutory right to unfettered communication with members of Congress.<sup>55</sup> The issue of whether this right extends fully to petitions by groups of servicemen<sup>56</sup> is currently awaiting resolution by the Supreme Court.<sup>57</sup> The right was stringently protected for a single serviceman in *United States v. Schmidt*.<sup>58</sup> Army Specialist Fourth Class Schmidt sent a letter to his Senator complaining of his living conditions. His First Sergeant thought the complaint unjustified and assigned him to extra details. When this harassment continued, Schmidt handed a letter to his commanding officer which threatened to disclose the story to a newspaper if the harassment did not stop. Schmidt was subsequently convicted by general court-martial upon charges of extortion and wrongful communication of a threat. The USCMA reversed the Board of Review and dismissed the charges. It held that under these facts the appellant lacked the appropriate mens rea for the crimes charged. To affirm the conviction under the circumstances would be unfair and would damage the integrity of the military judicial system.

### III. Publication

DoD Directive 1325.6<sup>59</sup> allows servicemen to publish "underground newspapers" so long as they do so off duty and do not use any government property. However, they may be punished for any violation of federal law or the UCMJ in doing so.<sup>60</sup> Generally such UCMJ violations arise under articles 82 (soliciting desertion, mutiny, or sedition), 88, 89 (disrespect toward a superior commissioned officer), 92 (failure to obey a lawful order or regulation—usually a regulation regarding clearance, disclaimers, dissent or political activities) and 134.<sup>61</sup> For an analysis of the military's censorship power over servicemen authored publications, see the discussion on *United States v. Voorhees*, Section I, *supra*, p. 2.

Generally, a servicemember can possess any publication on base that he likes unless the quantity of such publication suggests an intent to distribute.<sup>62</sup> A commander may decide what publications will be made available through the base's official outlets,<sup>63</sup> but he may not ban a specific issue of a publication that he has approved.<sup>64</sup>

In *Overseas Media Corporation v. McNamara*<sup>65</sup> a publishing corporation brought an action to force the government to allow sale of its publications in military exchanges in the Far East. The lower court had entered summary judgment for the government. The circuit court rejected the government's argument that its decision not to carry the publication was insulated from judicial review. The government had argued that its decision was nonreviewable because it was either military operations or government procurement. In remanding for an evidentiary hearing because of an unclear record, the court stated that the government had failed to show that its actions could be classified as military operations. The court also expressed some doubt as to whether the government's actions could be classified as government procurement in the usual sense of the term. Thus, it would appear that if the government were un-

successful in its non-reviewability argument, it would have to show that its decision not to carry the publication was not an abuse of discretion. In a letter to the publisher, the Department of Defense (DoD) had based its rejection on the grounds that (1) there was already a balanced selection of publications available in the exchange, (2) other publications could not be carried due to space limitations, and (3) the method of delivery to exchanges was already "saturated." Were the government successfully able to defend this position, there would probably be no abuse of discretion.

### IV. Political Activities

Any unofficial distribution of printed material on a military installation must receive prior approval from the commander.<sup>66</sup> If a commander determines that such material presents a "clear danger to loyalty, discipline or morale" or that distribution of it "would materially interfere with the accomplishment of a military mission," he may prohibit its distribution or impound distributed copies of the publication.<sup>67</sup>

This authority was affirmed by the federal courts. In *Dash v. Commanding General*,<sup>68</sup> a group of army enlisted men challenged a regulation promulgated by the post commander which prohibited unauthorized distribution of printed material on the post. The court upheld the authority of the post commander to prohibit on-post distribution where he determines that there is a clear danger to loyalty, discipline or morale. In *Schneider v. Laird*,<sup>69</sup> a serviceman who published an underground newspaper challenged the constitutionality of Army Regulation 210-10, the authority upon which the post commander in *Dash* relied in issuing his unofficial distribution regulation. The court held AR 210-10 constitutional, citing *Dash* and also held that a serviceman is not constitutionally entitled to a hearing prior to the denial of his request to distribute on post. And the conviction of an Air Force enlisted man who solicited signatures in front of an exchange in Viet Nam for an anti-Viet Nam war petition was upheld on the authority of *Parker* and *Dash*.<sup>70</sup>

But a different result may obtain where the fact situation is altered. In *Kiiskila v. Nichols*,<sup>71</sup> a civilian employee of the post credit union was stopped while entering the military installation where she worked. Her car was searched and about fifty pounds of anti-Viet Nam war literature was found in her trunk. The post commanding officer ordered that she be permanently excluded from the post on the ground that she had "engaged in conduct prejudicial to good order and discipline and the accomplishment of my military mission."<sup>72</sup> As a result her employment at the post credit union was terminated "with reluctance."<sup>73</sup> The appellant alleged that the exclusion order violated her First and Fifth Amendment rights. The appellees contended that she was not prohibited from exercising her constitutional rights, she was just prohibited from entering the post. The commander testified that he had excluded her because he determined that she would attempt to distribute unauthorized literature on post.

The court found that the order violated the appellant's First Amendment rights and ordered that the appellant be readmitted to the post. The court's reasoning was that in allowing a credit union to operate on the post, the Army knew that access by civilians would be required. Thus an exclusion order was tantamount to dismissal from government employment and the appellant's allegations warranted "careful scrutiny."<sup>74</sup> Using a "weighing of interests" approach,<sup>75</sup> the court held that the conduct upon which a commander bases his decision that an employee will violate post regulations must be conduct which "directly and imminently foreshadows proscribed on-the-base activity"<sup>76</sup> and "is directed to inciting or producing imminent lawless action."<sup>77</sup> Basically, the government failed to conclusively show that the appellant had an intent to distribute the literature on post in violation of the commander's regulation.

In *United States v. Flower*<sup>78</sup> a civilian who had been ordered excluded from an army post by the commander was arrested for distributing leaflets on the post. He was subsequently convicted of a violation of 18 USC § 1382. When

the case reached the Supreme Court, it reversed summarily with three justices dissenting. The majority opinion held that although the leaflet distribution area was officially on post, the area was completely open to the public at all times. Thus the post commander had abandoned any special authority to control First Amendment freedoms on this public street.

The argument that "*Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government then that place becomes a 'public forum' for the purposes of the First Amendment" was firmly rejected by the Supreme Court in *Greer v. Spock*.<sup>79</sup> In *Greer* the respondents, political candidates who sought to campaign and distribute literature on an army post, challenged the constitutionality of army regulations interfering with such activity. The respondents had received judgment at the appeals level allowing them to conduct political activities in areas of the post open to the general public. The Supreme Court reversed the judgment. It held that the regulations restricting political activity on the post were neither invalid on their face nor invalid as applied to the respondents. The holding stressed the "American constitutional tradition of a politically neutral military establishment under civilian control."<sup>80</sup>

Zillman and Imwinkelried see *Greer* as a narrowing of the public forum doctrine.<sup>81</sup> In discussing the political neutrality of the military, they suggest that all partisan political activity be banned from military installations<sup>82</sup> and that *Greer* was an adequate opportunity to so hold. But their analysis rests on the assumption that "an installation commander . . . [may] allow access to any candidate he chooses so long as he makes the same opportunity available to other candidates."<sup>83</sup> This assumption is partly based upon dictum in *Greer*<sup>84</sup> which arguably was merely a response to a possible equal treatment or fair play argument. To suggest that an installation commander may open up "his" base or post to unlimited political activity runs contrary to the language in *Greer*.<sup>85</sup> Though Zill-

man and Imwinkelried conclude "the Court again has delegated considerable responsibility in resolving constitutional issues to the military,"<sup>86</sup> this author feels that the military would probably regard the case more along the lines of an order rather than some form of guidance.

One federal district court has held unconstitutional a regulation requiring prior command approval for all distributions on post by military personnel. In *Huff v. Secretary of Navy*<sup>87</sup> Marine Corp members stationed at a base in Japan challenged a regulation which required military members to submit for approval any literature to be distributed on or off base. The court held that the regulation was constitutional as applied to off-base distributions because of the military's duty to insure compliance with international agreements.<sup>88</sup>

But the regulation as applied to on-base distribution was constitutionally objectionable. Some of the material sought to be distributed were letters to congressmen.<sup>89</sup> The court suggested that the regulation might have been reasonable had it allowed distribution without prior approval during off-duty hours in the recreational or public areas of the base. The court distinguished *Huff* from *Carlson v. Schlesinger*<sup>90</sup> on the ground that the political activity occurred on a base located in a war zone and *Greer* on the ground that it occurred at a training base.<sup>90A</sup>

In sum, members of the Armed Forces are prohibited from participating in off-post demonstrations when (1) in uniform;<sup>91</sup> (2) in a foreign country;<sup>92</sup> (3) on duty;<sup>93</sup> (4) violence is likely to result;<sup>94</sup> or (5) such activities constitute a breach of law and order.<sup>95</sup> And the commander has wide discretion to prohibit political activities on military installations by military members.<sup>96</sup> But where service members are based overseas and have no adequate off-post forum for the exercise of their First Amendment rights, they may be entitled to greater freedom of political expression on post.<sup>97</sup> A civilian who attempts to exercise First Amendment rights on a military installation may be

entitled to do so in areas that are so open to the general public that the military is deemed to have abandoned any claims to the control of First Amendment expression.<sup>98</sup> But on any other area of the post, civilian political demonstrations are subject to control by the post commander.<sup>99</sup>

## V. Association

Members of the military are subject to greater restriction upon their freedom of association than members of the general public.<sup>100</sup> But the restrictions apply to only a few specific types of conduct and may be enforced even more narrowly.<sup>101</sup>

The long standing tradition of prohibiting fraternization between officers and enlisted men may be enforced through punishment under various articles of the UCMJ or, as in most cases, through administrative means. Fraternization, association between officers and enlisted men, might weaken the command structure and adversely affect military authority and discipline.<sup>102</sup> However, most fraternization prosecutions have involved homosexual behavior or cases with homosexual implications and have led Moyer, a leading authority in military law, to conclude that "the pattern of application [of the UCMJ sanctions] is . . . not commensurate with the classic justifications for the taboo."<sup>103</sup>

In *United States v. Pitasi*<sup>104</sup> the accused was convicted of violations of articles 125 (sodomy) and 134 (one of the general articles). By the time the case reached the USCMA, only one fraternization charge remained. The court upheld the conviction and rejected the argument that the offense of fraternization was unconstitutional on vagueness grounds. The defense also unsuccessfully argued that the prior decision by the USCMA in *United States v. Lovejoy*,<sup>105</sup> mandated that the lesser offense of fraternization merged with the greater offense of sodomy and thus the fraternization charge should be dropped. The court construed the facts in *Lovejoy* narrowly and upheld the charge of frater-

nization as a crime under the UCMJ. But, in dictum, the court suggested that although some conduct was by its nature "palpably and directly prejudicial to the good order and discipline of the service . . . , not every social contact between an officer and enlisted man is or even can reasonably be prohibited."<sup>106</sup> Homosexual conduct may also be punished under article 133 (conduct unbecoming an officer).<sup>107</sup>

18 U.S.C. § 1382 gives installation commanders authority to exclude persons from their installation. In *Cafeteria Workers v. McElroy*,<sup>108</sup> the Supreme Court held that a civilian employee of a restaurant on a Navy base was not denied (Fifth Amendment) due process of law by her exclusion without a hearing on security grounds.<sup>109</sup> *Bridges v. Davis*<sup>110</sup> involved a petition for injunctive relief by three politically active ministers who had been excluded from a military installation in Hawaii. The appellants claimed violation of their freedoms of speech and religion. The court upheld the base commander citing *Cafeteria Workers* and stated that his broad discretion was reviewable only when "the action was patently arbitrary or discriminatory."<sup>111</sup>

A serviceman may also be criminally punished for membership in certain organizations.<sup>112</sup> In *United States v. Blevins*,<sup>113</sup> the accused was convicted under article 134 of affiliation with a group which advocated the violent overthrow of the United States government. The defense's argument that a knowing affiliation (specific intent) must be shown was rejected by the court.<sup>113A</sup>

## VI. Religion

The issue of freedom of religion has rarely arisen in military law, but it has sometimes been used, usually unsuccessfully, as a defense in disobedience of orders prosecutions.<sup>114</sup> It has also unsuccessfully been raised in an attempt to gain entry to a military installation.<sup>115</sup> But it has been successfully used to challenge mandatory chapel attendance at the service academies.<sup>116</sup> Other issues involving the freedom of religion include compulsory medical treatment, uniform regulations and saluting.<sup>117</sup> In general, freedom of religion is the least restricted of the servicemen's First Amendment freedoms and has had the least exposure in court.

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### Footnotes

- <sup>1</sup> See, *Parker v. Levy*, 417 U.S. 733 (1974).
- <sup>2</sup> VAGTS, "Free Speech in the Armed Forces," 57 Colum. L. Rev. 187 (1957) at 188.
- <sup>3</sup> *Ibid.* at 188-89.
- <sup>4</sup> *Ibid.* at 189.
- <sup>5</sup> *Ibid.* at 188.
- <sup>6</sup> *United States v. Voorhees*, 16 CMR 83, 108-09 (1954).
- <sup>7</sup> Moyer, *Justice and the Military* (1972) at 787.
- <sup>8</sup> *Ibid.* at 796.
- <sup>9</sup> 249 U.S. 47 (1919).
- <sup>10</sup> *Ibid.* at 52.
- <sup>11</sup> 307 F. Supp. 849, 853 (DSC 1969).
- <sup>12</sup> *Ibid.*
- <sup>13</sup> Moyer, *Justice and the Military* at 802.
- <sup>14</sup> *Ibid.* at 802-03.
- <sup>15</sup> 45 CMR 338 (1972).
- <sup>16</sup> 395 U.S. 444 (1969).
- <sup>17</sup> *Ibid.* at 447.
- <sup>18</sup> 16 CMR 83 (1954).
- <sup>19</sup> 10 USC §§ 801-940.
- <sup>20</sup> Imwinkelried and Zillman, "An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community," 54 Texas L. Rev. (1975) at 43 (hereinafter cited as "Evolution in the First Amendment").
- <sup>21</sup> *Ibid.*
- <sup>22</sup> Moyer, *Justice and the Military* at 806.
- <sup>23</sup> 42 CMR 141 (1970).

- <sup>24</sup> United States v. Priest, 45 CMR 338 (1972).
- <sup>25</sup> See, United States v. Grey, 42 CMR 255 (1970).
- <sup>26</sup> Moyer, *Justice and the Military* at 825.
- <sup>27</sup> 42 CMR at 144.
- <sup>28</sup> See, Sherman, "The Military Court and Servicemen's First Amendment Rights," 22 Hastings L.J. 325 (1971) (hereinafter cited as "Military Courts"). Professor Sherman was civilian defense counsel on appeal in United States v. Harvey. But Moyer sees refinement of the definition as a conscious step by USCMA in response to such criticism. Moyer, *Justice and the Military* at 827. Amazingly, a note in the Suffolk University Law Review announced the demise of the two general articles because they were vague and overly broad. The author based his conclusion on a few federal appeals court decisions, one of which, *Levy v. Parker*, 478 F.2d 772 (3rd Cir. 1973), was then set for oral argument before the Supreme Court. One senses that the author was probably surprised by the Court's holding in *Parker v. Levy*, 417 U.S. 733 (1974), discussed in the text *infra*. See, NOTE, "Freedom of Speech in the Military," 8 Suffolk L.R. 761 (1974).
- <sup>29</sup> Sherman, "Military Courts" at 372-73; Moyer, *Justice and the Military* at 828.
- <sup>30</sup> 417 U.S. 733 (1974).
- <sup>31</sup> 417 U.S. at 744, citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953).
- <sup>32</sup> 417 U.S. at 758.
- <sup>33</sup> *Ibid.* at 752-54.
- <sup>34</sup> See, Imwinkelried and Zillman, "Evolution in the First Amendment;" Everett, "Military Justice in the Wake of *Parker v. Levy*," 67 Mil. L. Rev. 1 (1975). (Hereinafter cite as "Military Justice").
- <sup>35</sup> Everett, "Military Justice" at 4.
- <sup>36</sup> 395 U.S. 258 (1969).
- <sup>37</sup> Imwinkelried and Zillman, "Evolution in the First Amendment."
- <sup>38</sup> *Ibid.* at 43; but see, the D.C. Circuit's later discussion of the overbreadth doctrine and standing in *Carlson v. Schlesinger*, 511 F.2d 1327 at 1334 (D.C. Cir. 1975). Appellees were denied standing to assert the facial invalidity of prior approval regulations on overbreadth grounds.
- <sup>39</sup> *Ibid.* at 61.
- <sup>40</sup> *Ibid.* at 60-61.
- <sup>41</sup> *Ibid.* at 60.
- <sup>42</sup> 418 U.S. 676 (1974).
- <sup>43</sup> Imwinkelried and Zillman, "Evolution in the First Amendment" at 87.
- <sup>44</sup> *Ibid.*
- <sup>45</sup> *Ibid.*
- <sup>46</sup> Moyer, *Justice and the Military* at 828.
- <sup>47</sup> See, Note, "Dissenting Servicemen and the First Amendment," 58 Geo. L.J. 534 at 541 (1970).
- <sup>48</sup> See, Kester, "Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice," 81 Harv. L. Rev. 1697 (1968).
- <sup>49</sup> *Ibid.*
- <sup>50</sup> 37 CMR 429 (1967).
- <sup>51</sup> Moyer, *Justice and the Military* at 932.
- <sup>52</sup> See, e.g., Rivkin, "G.I. Rights and Army Justice" (1970); Williams, "The New Exiles" (1971); Barnes, "Pawns" (1971); Sherrill, "Military Justice is to Justice as Military Music is to Music" (1969).
- <sup>53</sup> See, para. III G.
- <sup>54</sup> 36 CMR 722 (ABR 1966).
- <sup>55</sup> 10 USC § 1034.
- <sup>56</sup> For the position that the right applies only individually and not to groups, see Terrell, *Petitioning Activities on Military Bases: The First Amendment Battle Rages Again*, — Emory L.J. —, (1979). Professor Terrell presents a well researched and reasoned analysis of the issue on the eve of the Supreme Court's resolution of it.
- <sup>57</sup> *Secretary of the Navy v. Huff*, 413 F. Supp. 863 (D.D.C. 1976), *aff'd* 575 F.2d 907 (D.C. Cir. 1978), *cert. granted*, 47 U.S.L.W. 3615 (March 20, 1979); *Brown v Glines*, 401 F. Supp. 127 (N.D. Cal. 1975), *aff'd*, 586 F.2d 675 (9th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3615 (March 20, 1979); *Brown v. Allen*, 404 F. Supp. 1081 (N.D. Cal. 1975), *aff'd*, 583 F.2d 438 (9th Cir. 1978), *cert. applied for*, Sup. Ct. App. No. 1005 (Dec. 1978).
- <sup>58</sup> 36 CMR 213 (1966).
- <sup>59</sup> See, n. 53, *supra*.
- <sup>60</sup> Moyer, *Justice and the Military* at 851.
- <sup>61</sup> *Ibid.* at 852; see, e.g., *United States v. Priest*, 45 CMR 338 (1972). Priest, the editor of an underground newspaper, was convicted of a clause 3 violation of article 134.
- <sup>62</sup> *Ibid.*
- <sup>63</sup> But see, *Overseas Media Corporation v. McNamara*, discussed *infra* in text.

- <sup>64</sup> DoD Directive 1325.6.
- <sup>65</sup> 385 F.2d 308 (D.C. Cir. 1967).
- <sup>66</sup> *Ibid.*
- <sup>67</sup> DoD Directive 1325.6, para III(A)(1) and III(A)(2).
- <sup>68</sup> 307 F. Supp. 849 (D.S.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970).
- <sup>69</sup> 453 F.2d 345 (10th Cir. 1972), *cert. denied*, 407 U.S. 914 (1972).
- <sup>70</sup> Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975).
- <sup>71</sup> 433 F.2d 745 (7th Cir. 1970).
- <sup>72</sup> *Ibid.* at 747.
- <sup>73</sup> *Ibid.*
- <sup>74</sup> 133 F.2d 748.
- <sup>75</sup> *Ibid.*
- <sup>76</sup> *Ibid.* at 751.
- <sup>77</sup> *Ibid.*
- <sup>78</sup> 407 U.S. 197 (1972).
- <sup>79</sup> 424 U.S. 828 at 836 (1976).
- <sup>80</sup> *Ibid.* at 839.
- <sup>81</sup> Zillman and Imwinkelried, "The Legacy of *Greer v. Spock*: The Public Forum Doctrine and the Principal of the Military's Political Neutrality," 65 Georgetown L.J. 773 (1977).
- <sup>82</sup> *Ibid.* at 806.
- <sup>83</sup> *Ibid.* at 800.
- <sup>84</sup> See, 424 U.S. 838, last paragraph.
- <sup>85</sup> See, e.g., 424 U.S. at 838, "it is . . . the business of a military installation like Fort Dix to train soldiers, not to provide a public forum."
- <sup>86</sup> *Ibid.* at 806.
- <sup>87</sup> 413 F. Supp. 863 (D.D.C. 1976).
- <sup>88</sup> See, also, *Culver v. Secretary of Air Force*, 389 F. Supp. 331 (D.D.C. 1975), where the conviction of an Air Force Judge Advocate was upheld for participating in an anti-war demonstration while off base in a foreign country.
- <sup>89</sup> See, § IIC., *supra*, p. 8, for a discussion of the statutory right to communicate with members of Congress.
- <sup>90</sup> 511 F.2d 1327 (D.C. Cir. 1973).
- <sup>90A</sup> See, n. 57, *Supra*.
- <sup>91</sup> *United States v. Toomey*, 39 CMR 969 (AFBR 1968).
- <sup>92</sup> *Culver v. Secretary of Air Force*, n. 88, *supra*; *Huff v. Secretary of Navy*, n. 87, *supra*.
- <sup>93</sup> DoD Directive 1325.6, para. III.F.
- <sup>94</sup> *Ibid.*
- <sup>95</sup> *Ibid.*
- <sup>96</sup> *Carlson v. Schlesinger*, n. 70, *supra*.
- <sup>97</sup> *Huff v. Secretary of Navy*, n. 87, *supra*.
- <sup>98</sup> *United States v. Flower*, n. 78, *supra*.
- <sup>99</sup> *Greer v. Spock*, n. 79, *supra*.
- <sup>100</sup> *Moyer, Justice and the Military* at 946.
- <sup>101</sup> *Ibid.*
- <sup>102</sup> *Ibid.*
- <sup>103</sup> *Ibid.* at 952.
- <sup>104</sup> 44 CMR 31 (1971).
- <sup>105</sup> 42 CMR 210 (1970).
- <sup>106</sup> 44 CMR at 38.
- <sup>107</sup> See, *United States v. Hooper*, 26 CMR 417 (1958), where the accused was convicted of, *inter alia*, a violation of article 133. The specification alleging violation of that article cited association with known homosexuals.
- <sup>108</sup> 367 U.S. 886 (1961).
- <sup>109</sup> But cf., *Kiiskila v. Nichols*, discussed in § IV, *supra*, p. 11, where on similar facts the government failed to justify an exclusion order which infringed upon a civilian employee's First Amendment rights.
- <sup>110</sup> 443 F.2d 970 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).
- <sup>111</sup> *Ibid.* at 974.
- <sup>112</sup> A detailed discussion of unionization of the military is beyond the scope of this paper.
- <sup>113</sup> 18 CMR 104 (1955).
- <sup>113A</sup> But see, *Stapp v. Resor*, 314 F. Supp. 475 (S.D.N.Y. 1970) where the court reinstated a serviceman who had been discharged for mere association with a member of the Communist Party.
- <sup>114</sup> See, e.g., *United States v. Burry*, 36 CMR 829 (CGBR 1966).
- <sup>115</sup> See, *Bridges v. Davis*, discussed in § V, *supra*, p. 16.
- <sup>116</sup> *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972).
- <sup>117</sup> See, *United States v. Morgan*, 17 CMR 584 (AFBR 1954); *United States v. Cupp*, 24 CMR 565 (AFBR 1957); see gen., Foreman, "Religion, Conscience and Military Discipline," 52 Mil. L. Rev. 77 (1971).

## Unabsorbed Overhead In Government Contracts

*Captain William S. Key*

Government-caused delays and standby costs related to delays in contract performance occur frequently under federal contracts. Contractor claims arising from such delays frequently include a request for payment of unabsorbed overhead. Are such costs allowable? If so, under what rationale and how is the amount to be computed?

Often it is not a simply matter to determine what costs should be allowed for payment by the government under a cost type contract, whether incurred pursuant to a termination for convenience of the government, as part of an equitable adjustment pursuant to a change in performance ordered under the change clause, or by other equitable adjustment. Basic cost data are often subject to disagreement, regardless of the context in which presented.

The Defense Acquisition Regulation (DAR) at Section XV sets forth cost factors to be applied in the computation of contract costs.<sup>1</sup> To be allowed, a cost must be reasonable; one that does not exceed, in nature or amount, what would be expected to be incurred by the reasonably prudent person in the sound conduct of a competitive business.<sup>2</sup>

In addition to being reasonable, a cost must be allocable<sup>3</sup> to the government contract in question by being either directly benefitting the contract or by benefitting both the government contract and such other work as may be simultaneously performed, if a proportionate breakdown can be made of the costs by relative benefits to each contract. An indirect cost which is necessary to the overall operation of the business is also allowable, even if the benefit to the government contract cannot be shown,<sup>4</sup> such as manufacturing overhead or general and administrative expenses.

Because reported costs may vary according to the method of computation, the contracting

officer must understand how they are computed. The Truth in Negotiations Act<sup>5</sup> requires that cost or pricing data be submitted (and certified as accurate, complete, and current) on negotiated contracts in excess of \$100,000 where the price is neither a product of competition nor a regular market price or one set by law or regulation. The contracting officer may in his discretion request such data on negotiated contracts under \$100,000.<sup>6</sup> Because such data would be difficult to evaluate if based upon widely varying accounting systems, contracts subject to the Act generally are also subject to requirement that they comply with uniform cost accounting standards.<sup>7</sup> The bidder must inform the contracting officer in writing of the system employed and of the methods used for allocating indirect costs.<sup>8</sup> In contracts not subject to the Act, the contractor's accounting system usually will be accepted if it conforms to generally accepted accounting principles.<sup>9</sup> There are, however, numerous specific exceptions for various categories of costs and required treatment of others<sup>10</sup> in addition to the general standards listed in DAR for specific categories of costs.<sup>11</sup>

The three major components of cost in contracts for supplies or construction are materials, labor, and overhead. The direct costs of materials and labor are relatively simple to calculate: What raw materials or components went into the product's manufacture and who worked on it for how long. Overhead, being an indirect cost, must be allocated to the government contract on a fair and reasonable basis, with the burden being on the contractor to establish what that basis should be and to show how such a basis was computed.

Overhead can be divided into groups, such as material overhead (warehousing, stockage costs), engineering overhead (design and plans, engineer salaries), manufacturing overhead (plant maintenance and depreciation, electric-

ity, water), and general and administrative expenses (executives, secretaries, cost of maintaining the administrative offices).<sup>12</sup> The problem is how to apportion a fair and proper share of such category to the government contract in question. If the whole company is working at full capacity on nothing but one government contract, 100 percent of the overhead is allocable to that contract, but if there are two contracts, the overhead must be absorbed proportionately by them as these costs in some measure will apply to all work done by the contractor.

A suggested method<sup>13</sup> as an example, using general and administrative expense (G&A), is to total this overhead cost for the past year and divide that total by the total amount of manufacturing costs for the plant output of the past year. This result provides a G&A cost percentage figure (a fraction of the manufacturing cost) which can then be applied prospectively to the manufacturing costs (or estimates) for new contracts in the current year. Variables enter into the formula due to inflation, labor contracts, utility rate adjustments and any number of other things, but a rough G&A overhead working figure can be obtained by this method if adequate cost records are kept by the contractor. Because it is a percentage of other costs, it cannot be applied routinely to government contracts,<sup>14</sup> but gives a guide for the actual amount to be negotiated<sup>15</sup> and allows a provisional overhead rate to be set for purposes of obligating funds.<sup>16</sup>

Because the basis for computing an overhead rate is the cost of the work done, what happens when a delay occurs and work stops? Obviously, overhead continues to accrue, but the labor and materials costs slow or cease, and the computed ratio is no longer appropriate because the base used to absorb the overhead has diminished or disappeared by slowing or stopping work in the contract. If the delay is the fault of the contractor, he must take the loss, but if it is attributable to the government, should not the government be responsible? In fixed-price contracts, several clauses may be used to give the

contractor an equitable adjustment in contract price for delays caused by the government, such as the suspension of work,<sup>17</sup> government delay of work<sup>18</sup> and stop-work order clauses.<sup>19</sup> The last provision may also be included in cost-reimbursement contracts, if desired.<sup>20</sup> In addition to these specific delay clauses, other clauses also have delay provision that may provide the contractor an equitable adjustment for government-caused delay. Examples are differing site conditions,<sup>21</sup> changes,<sup>22</sup> and termination for convenience of the government clauses, in those cases where a partial termination is directed.<sup>23</sup> These provisions have been developed largely to overcome unfavorable case law interpreting earlier clauses. Two cases illustrate the point.

In *Choteau v. United States*, 95 U.S. 61 (1877), the Supreme Court addressed the issue of delay costs. Choteau and his partners had a fixed-price incentive contract for \$386,000 to build a civil war ironclad monitor gunboat for delivery in eight months. The incentive clause provided the builder would receive \$4500 per month as a bonus for earlier delivery but would forfeit \$4500 per month for each month of delay. The contract incorporated a changes clause that permitted the Navy Department to make alterations to the plans at any time and provided that extra expenses caused by such changes would be paid by the government at fair and reasonable rates to be determined at the time the changes were made. It was understood that the Navy would waive penalties for delays its changes might cause, and would grant sufficient extensions of the delivery date as might be required to accomplish any changes.

Delivery of the gunboat took eighteen months beyond the original delivery date due to the number of changes requested by the Navy Department during construction. The Court of Claims held the direct cost of the changes to be \$172,000, but the Supreme Court found an accord and satisfaction in the amount of \$116,000. The Court of Claims also determined that the lengthy periods of delay for the modifications had another effect on costs. During the period of performance (from July 1863 to

November 1865), the cost of labor and materials had skyrocketed due to wartime inflation and shortages, causing the unmodified work on the ship to cost \$118,000 more than it would have cost had the ship been completed on schedule, *i.e.*, without the eighteen-month delay caused by the changes. The Supreme Court held that because the contractor was on notice that changes could be made, with attendant delays, it was a matter of business judgment to take such matters into account in arriving at his bid on the project. Absent a contract clause specifically obligating the government to pay increased costs for unmodified work caused by the government delay, the Court held that it could find no basis to assess such costs against the government, and implied that such costs were a normal risk of doing business.

Escalator clauses to offset inflation were unheard of in those times and, having no contract adjustment board to bail him out, the contractor went bankrupt. The Court established a rule that delays could be cured by time extensions to avoid penalties, and that the cost of changes was not to include costs attributable to delay, but was limited to the direct costs of the change itself. It was not clear from the opinion of the Court whether unabsorbed overhead was even considered as a cost factor in a delay situation, but the holding effectively barred recovery as not being an "actual cost" of the changes.

In *United States v. Rice*, 317 U.S. 61 (1942), the Supreme Court again addressed the issue of delay costs. In *Rice*, an electrical contractor on a veteran's home construction project timely reported to the worksite in May, but found unexpected subsoil conditions causing the government to stop the work. Work resumed in October in a new location. The contractor had overhead expenses from May to October that were not absorbed by any work on the government contract. Once work had recommenced, his performance was slowed by winter weather, as he had based his bid planning for work to be completed during the warm months. He sued for breach of contract, claiming damages of

\$26,000 in excess costs attributable to the government-caused delay. The Court of Claims approved \$9349 of the unabsorbed overhead but denied the remainder due to faulty estimates by the contractor and his own delays.

The Supreme Court held that there was no breach, as the contract contained a changed conditions clause that, in case of unexpected sub-soil conditions, permitted the government to invoke the changes clause of the contract to draw up new plans for the work, including relocating the building site. The changes clause provides for an equitable adjustment to be made if the changes caused an increase or decrease in the amount due under the contract, or if it took longer to complete. The Court held that because the government gave additional time to do the work, and because the changes actually reduced the amount of work required by \$1000, Rice owed the government \$1000 as an equitable adjustment (which had already been withheld) and had suffered no damage which could be compensated by the government. The court followed *Choteau* in finding that payment required under the changes clause was only for the direct cost of actual changes (reduced cost in this case) and that delay costs were not payable under the changes clause as never having been contemplated by the parties. Thus, in its holding the Supreme Court firmly rejected the finding of the Court of Claims that \$9349 of unabsorbed overhead should be paid as an equitable adjustment for delay under the changes clause.

The hardships to contractors as a result of the *Choteau* and *Rice* cases have been alleviated by the adoption of delay clauses permitting adjustments, and particularly by the changed wording of the changes clause in supply and construction contracts. The old wording referred to the "amount due" under the contract and to the time required for performance.<sup>24</sup> The Supreme Court held that such language limited redress for delays to a time extension and excepted delay costs from the "amount due" for the cost of the changes.

Under the language of the 1967 clause for cost-type supply contracts<sup>25</sup> and the 1968 clause for construction contracts,<sup>26</sup> payments may now be made by equitable adjustment for increases in cost or time required for performance of any part of the work, whether or not changed by the change order. What is paid in an equitable adjustment depends upon the facts of the individual case, but should include not only the direct costs of the changes but also applicable overhead (indirect costs) and profit,<sup>27</sup> unless profit is excluded by the clause that permits the adjustment.<sup>28</sup> The "Rice Doctrine" has been overcome by contract language and interpretation, but delay costs must still be shown to be reasonable, allocable, computed in accordance with prescribed cost standards or general accounting principles, and not proscribed by DAR § 15-205.

Professor Nash<sup>29</sup> describes three types of delay for which an equitable adjustment may be made under the changes clause or the suspension of work clause. A contractor delay while the government is deciding whether to issue a change order may be prudent business practice, as the cost of delay may be less than the cost of converting work already done to meet new specifications. But such delays are based on a business judgment which is in turn based upon conjecture as to whether the government will actually issue a change. Unreasonable delays of this nature are not compensable, for they are based upon speculation and are a risk of doing business. An equitable adjustment is allowed if the delay pending a change order is based upon defective specifications.<sup>30</sup>

A second type of delay described by Professor Nash is the delay to effectuate the change. This has two aspects, one being the need to stop work to change the assembly line or work process, to retrain workers, and to acquire new materials; the other being a need to correct the work already done to meet the new requirements. This is the *Choteau* situation.

The third type of delay involves the need to

go beyond the original delivery date due to delays of the second type or because the changed process simply requires more time. Both the second and third types are compensable by equitable adjustment under the changes clause. The contractor has a duty to hold down delay expenses to the extent possible, whether by reassigning personnel to other work, laying off workers temporarily, or finding other uses for idle equipment.<sup>31</sup>

Unabsorbed overhead is a distinct possibility in cases of delays of the first and second types. In the third, work is being done, giving an overhead absorption basis during the period of delay beyond original delivery date. Allowable delays of the first type, whether based on defective specifications, suspension of work order, differing site conditions clause, or other permissible basis, entail a situation where the work cannot proceed until the government acts affirmatively to remove the cause of the work stoppage. Clearly the government should pay unabsorbed overhead costs or terminate for convenience, as the contractor is powerless in this situation to do anything except mitigate damages. In delays of the second type, the government has acted, and the contractor must comply with the change directed. Delays of the second type put the burden of going forward on the contractor and claims for equitable adjustment should perhaps be scrutinized more closely than in the first type, for here the contractor may be able to do more to cut the delay time than in the first type.

In *Laburnum Construction Corp. v. United States*<sup>32</sup> the contract was for the construction of a two-mile long, high pressure steam pipeline on Norfolk Naval Base. The pipeline was to be above ground except for short underground stretches to cross roads or tie in with preexisting lines. When the contractor hired surveyors to mark the route, it became apparent that the government's specifications were in error. Insufficient quantities of materials were on hand, part of the route was over swampy land that would not support the pipeline pedestals, road crossings were depicted in-

accurately, and so forth. On each occasion when the contractor pointed out the errors to the government, he was told to proceed in another area while the government worked out what was to be done. Delays by the government in furnishing modified specifications and in issuing proceed to work orders added about 184 days to the job. The court found the government responsible for the delay and allowed the contractor the costs of the delays, including both the cost of idled workforce and indirect costs.<sup>33</sup> Because the burden of going forward was on the government, the court allowed all reasonable expenses to the contractor for the delay period, and permitted payment of unabsorbed overhead for equipment on site as a delay cost by using a daily value of rental less depreciation rate.

In view of the great difficulty in actually pinning down true overhead costs by using past experience and last year's ratio of costs as a guide in obtaining an overhead rate, relying on the contractor's accounting methods than in use (which might not be in accord with Section XV of DAR), how is unabsorbed overhead to be calculated in cases of government-caused delay? In *Laburnum*, the trial commissioner who originally heard the case calculated delay

$$\text{normal rate} = \frac{\text{overhead costs, regular period } (\$10,000)}{\text{base mfg. costs, regular period } (\$100,000)} = \frac{1}{10}$$

$$\text{delay rate} = \frac{\text{overhead costs, delay period } (\$5,000)}{\text{base mfg costs, delay period } (\$5,000)} = \frac{10}{10}$$

$$\text{delay note} - \text{normal rate} = \text{excess rate} = 9/10$$

$$\text{excess rate } (9/10) \times \text{K base costs for delay period } (\$5000) = \text{unabsorbed overhead} = \$4500$$

In other words, the ASBCA allowed all the excess overhead by breaking down total overhead into two periods with separate overhead rates, the normal rate for normal production and the delay rate for periods of delay. This system worked equitably in that particular case because no allocation problems arose as there was only one contract involved. Had there been two or more contracts under performance in the plant, the unabsorbed overhead on the delayed contract would as a prerequisite require a finding of what the normal overhead appor-

costs by deducting the contract price from the overall direct costs and allowing 50 percent of the excess costs.<sup>34</sup> But this method, in addition to being arbitrary, omitted indirect overhead costs and wiped out the original profit on the contract as well. The court held that not only should indirect costs be compensated, but also the original profit should be allowed to the extent that it was not negated by delays attributable to the contractor.

Three methods of computing unabsorbed overhead costs have been used with varying degrees of success. In *Carteret Work Uniforms*,<sup>35</sup> the contractor's entire production was under a government contract during the period in question. A government-caused delay in delivery of material idled plant and labor capacity. The contractor had computed a normal production overhead rate and also had computed the amount of actual overhead incurred during the delays. The Armed Services Board of Contract Appeals computed the higher rate for overhead during the delay period (when overhead costs were the same but the work base was smaller) and subtracted the normal overhead rate from this higher delay rate to find the excess rate to be applied during the period of delay.

tionments between the contracts would be, then the delay rate could be computed based upon the apportioned normal rate for the government contract and the actual overhead costs.

In the *Allegheny Sportswear*<sup>36</sup> case, the government caused a delay in the manufacture of field jackets during the Korean War by late deliveries of materials to the contractor. The government's 161 day delay caused the contractor to go 154 days beyond the original delivery date. Several computations of delay costs were

made. The contractor claimed his delay costs were to be found by applying his regular projected contract overhead rate to regular weekly contract production for a dollar figure per week, and claiming that dollar amount for each week of delay. He claimed \$47,000, less some amount for substituted commercial production. The Army Audit Agency compared actual overhead rates of the predicted performance period with the actual performance period and found, excluding direct costs, that unabsorbed overhead came to \$7,426. The Army Audit Agency was again requested to review the matter by a successor contracting officer, and by juggling overhead figures for the commercial production of the plant with the military contract production,

determined that the delay was so beneficial to commercial production that the contractor suffered no loss, but benefitted by a \$4556 decrease in overhead allocable to his commercial production. The board rejected both the contractor's proposed computation and that of the second Army Audit Agency review, finding that the original Army Audit Agency method of computing the actual overhead rate over the entire performance period inclusive of the delay period minus the expected overhead rate during the original estimated contract performance period disregarding the delay would give the excess rate to be applied to the contract work done to compensate for unabsorbed overhead.

$$\frac{\text{actual overhead, total period } (\$15,000)}{\text{actual mfg base, total period } (\$105,000)} - \frac{\text{actual overhead, projected period } (\$10,000)}{\text{est mfg base, projected period } (\$100,000)}$$

$$= \text{excess rate, overhead} = \frac{428}{10,000}$$

$$\text{excess rate} \left( \frac{428}{10,000} \right) \times \text{base costs } (\$105,000) = \text{unabsorbed overhead } \$4494$$

The excess rate would be lower if the contractor mitigated his delay costs by using his military contract production line during the delay for commercial purposes, as Allegheny did. Professor Nash cautions that this computation method may inadequately compensate the contractor for delay costs, but is useful as a tool to insure that the contractor does not claim overhead costs against the delayed government contract which should be apportioned to substituted commercial production during the delay.<sup>37</sup> If civilian output is increased during a government-caused delay by switching labor, materials, and production capacity from the government line to the civilian line, that increase in civilian output should absorb its pro-

portionate share of the overhead originally allocated to the government line.

In the *Eichleay*<sup>38</sup> case, the ASBCA did an about-face and allowed a variant of the method proposed by the contractor in *Allegheny*. The computation proposed in *Allegheny* involved the contractor's weekly projected rate of overhead based on his bid estimate for the regular weekly performance of the contract. He would have applied this weekly overhead figure in dollars to each week of delay. In *Eichleay*, the ASBCA approved taking the actual apportioned overhead during the entire period of performance and computing from it a daily dollar rate for overhead which would be applied across the board to each day of performance and delay alike.

$$\frac{\text{K billings or K mfg cost}}{\text{total billings or total mfg cost}} \times \text{total overhead} = \text{overhead allocable to K } (\$15,000)$$

$$\frac{\text{allocable overhead } (\$15,000)}{\text{days of K pfmc } (150)} = \text{overhead allocable to K per day } (\$100)$$

$$\text{daily overhead in } \$ (\$100) \times \text{days of delay } (50) = \text{unabsorbed overhead} = \$5000$$

The effect of this method is to ignore the problem of a fluctuating work base that gives rise to unabsorbed overhead during a delay period by using as a base the work of the entire period of contract performance. The underlying assumption of this method is that the overhead costs are stable and remain unaffected by substitute work. This normally will be true of general and administrative expenses, but not necessarily so with regard to manufacturing or engineering overhead. Thus, this method should be used with caution. Professor Nash states that it is particularly appropriate for construction contracts, where almost all overhead is fixed, rather than variable as may be the case in a manufacturing facility.<sup>39</sup> If any work is being done on the contract during the delay period, this method will over compensate the contractor in comparison to the *Carteret* and *Allegheny* methods.

What method is best? *Carteret* provides two rates, but allows payment of all overhead because only one government contract was being performed. *Allegheny* allows only the difference in comparative overhead rates between performance with delay and expected performance without delay, so that if the overall rate with delay is lower than a rate computed on the projected performance period, no recovery is allowed, even though actual overhead costs have been higher over the longer period. *Eichleay* allows the payment of all apportioned overhead incurred during the entire period including delay. Both the *Carteret* and *Eichleay* methods fully compensate the contractor for unabsorbed overhead, *Carteret* by using an excess delay rate and *Eichleay* by eliminating the problem of a diminished computation base during periods of delay. As the goal of the contracting officer in negotiating an equitable adjustment in cases of government-caused delay is to fairly compensate the contractor for his delay expenses, it would appear that the *Carteret* method of computation would be most appropriate. The *Carteret* method will work as well as the *Eichleay* method, without making the assumption of stable overhead costs over the period in question.

The *Allegheny* method appears too artificial to be of practical use by the contracting officer, and in the final analysis, any method that can be successfully applied by the contracting officer with results satisfactory to both the government and the contractor will be more economical in the long run than the use of involved artificial accounting theories that confuse all concerned and may lead to widely disparate results.

#### Footnotes

<sup>1</sup> Defense Acquisition Regulation § 15-201.2 (1976).

<sup>2</sup> DAR § 15-201.3.

<sup>3</sup> DAR § 15-201.4.

<sup>4</sup> DAR § 15-203(b). "Indirect costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring the costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives."

<sup>5</sup> 10 U.S.C. § 2306(f) (1976).

<sup>6</sup> DAR § 3-807.3(d)

<sup>7</sup> DAR Appendix O, Defense Procurement Circular 76-9, 30 August 1977.

<sup>8</sup> 50 App. U.S.C. § 2167.

<sup>9</sup> DAR § 15-201.2.

<sup>10</sup> DAR § 15-205.

<sup>11</sup> DAR § 15-309.

<sup>12</sup> Monroe, *Government Contract Costs—An Introduction*, The Army Lawyer, February 1977, at 7.

<sup>13</sup> *Id.*, at 8.

<sup>14</sup> 35 Comp. Gen. 434 (1956).

<sup>15</sup> DAR § 7-204.16.

<sup>16</sup> DAR § 3-701.2.

<sup>17</sup> DAR § 7-602.46.

<sup>18</sup> DAR § 7-104.77.

<sup>19</sup> DAR § 7-105.3.

<sup>20</sup> DAR § 7-205.6.

<sup>21</sup> DAR § 7-602.4.

<sup>22</sup> DAR §§ 7-203.2, 7-602.3.

<sup>23</sup> DAR §§ 7-203.10, 7-602.29.

<sup>24</sup> United States v. Rice, 317 U.S. 61 at 66, note 1.<sup>25</sup> DAR § 7-203.2.<sup>26</sup> DAR § 7-602.3.<sup>27</sup> ASBCA No. 5223, Conway Electric Co., 59-2 B.C.A. para. 2315.<sup>28</sup> The suspension of work clause, for instance, excludes profit (DAR § 7-602.46).<sup>29</sup> R. Nash, Government Contract Changes 386-390 (1975).<sup>30</sup> DAR § 7-203.11.<sup>31</sup> DAR § 15-205.12(C).<sup>32</sup> 325 F.2d 451 (Ct. Cl. 1963).<sup>33</sup> *Id.*, at 459.<sup>34</sup> *Id.*, at 458.<sup>35</sup> ASBCA No. 1647, 6 C.C.F. 61561 (1954).<sup>36</sup> ASBCA No. 4163, 58-1 B.C.A. para 1684 (1958).<sup>37</sup> Nash, *supra* note 29 at 393.<sup>38</sup> ASBCA No. 5183, 60-2 B.C.A. para. 2688 (1960).<sup>39</sup> Nash, *supra* note 29 at 394.

## A Matter of Record

### Notes from Government Appellate Division, USALSA

*A Matter of Record is a monthly feature from the Government Appellate Division. It consists of errors, or potential errors gleaned from records of trial pending appeal before the Army Court of Military Review and the Court of Military Appeals. This article is not intended to highlight any individual's actions; its only purpose is to provide information for the improvement of court-martial prosecutions. If any assistance can be provided along this line, or if there are any comments concerning this column, contact CPT John T. Meixell, USALSA-GAD, Nassif Building, Falls Church, VA 22041, Autovon 289-1271/1272.*

1. In A Matter of Record published in the June 1979 issue of The Army Lawyer, the topic headed "Arrangement" was printed incorrectly. It should read: "Trial counsel *should* update his 'flyer' or 'arraignment sheet' before giving it to the court members after the military judge dismissed several charges or amended specifications."

#### 2. Argument:

In a recent larceny case, the accused was found in possession of a large number of coins. The trial counsel in argument on findings mentioned that the accused was arrested in a bank, and explained to the members that "unit fund" transactions would be the only ones involving

so many coins. No evidence had been introduced on either point. The argument was unnecessary and raises a potential ground for reversal. In closing argument, counsel must only argue facts on the record, and inferences reasonably supported by the same. United States v. Nelson, 1 M.J. 235, 238 (CMA 1975).

#### 3. Cross-Examination of Accused:

a. At trial, the accused made an exculpatory statement. On cross-examination, trial counsel asked why this statement had not been given at the time of arrest (the record did not indicate whether the accused had been advised of his rights or questioned at the time of apprehension). While trial counsel may cross-examine an accused as to inconsistencies between or omissions from prior statements, it is error to ask a question or to make any comment about the prior silence of the accused. United States v. Noel, 3 M.J. 328 (CMA 1977).

b. Trial counsel is allowed significant freedom in cross-examining an accused. He must be careful, however, not to bring out uncharged misconduct unless there is an exception allowing it (Para 138g, MCM, 1969 Rev.). Thus an accused may not be cross-examined about prior drug sales unless he has first opened the door to such questions.

**4. Evidence:**

Every element of the offense must be proven. If the charge is violation of a regulation, the Government must prove the regulation is applicable to the accused. Thus in a prosecution for violation of a usury regulation covering loans of one to three months, trial counsel must show that the loan involved fell within the specified time frame. Similarly, in a larceny prosecution, the Government must prove that the property was taken from some one who had a superior interest in it.

**5. Impeachment:**

Trial counsel should establish on the record the good faith of his questioning. In one recent case, a defense witness testified as to the good reputation of the accused. In testing the basis of this witness' knowledge, trial counsel asked if the witness was aware of the accused being involved in any similar misconduct. In such a situation, trial counsel should set forth in a 39(a) session the good faith basis for his question. ABA Standards Relating to The Prosecution Function, para 5.7d. Trial counsel should also insure that a proper limiting instruction is given to the members.

**6. Instructions:**

Trial counsel must protect the record. This includes insuring that the proper limiting instructions are given by the military judge. If the Government presents testimony of a co-conspirator, bringing out his conviction for the same offense, trial counsel must insure that the military judge instructs on the limited purpose for which the conviction may be considered.

**7. Motions:**

It is important to fully develop the record to sustain the Government's burden on motions. A last minute defense motion justifies a request for continuance. Several cases have arisen where the defense raises a motion with little advance notice. As a result, the Government has attempted to meet the motion with little or no evidence. While the Government may win at the trial level, appellate review will be limited to evidence on the record, and that may not be

enough to sustain the Government's burden. The better course is to request a continuance and obtain the necessary witness, or work out a detailed stipulation, thus presenting all available evidence.

**8. Prior Conviction:**

Be aware of *Cannon*, 5 M.J. 198, which sets forth the effective date of *Booker* as 11 October 1977. All summary courts-martial tried after that date must meet the requirements of *Booker* before they will be admissible in any subsequent trial.

**9. Review:**

As part of his guilty plea agreement with the special court-martial convening authority, a key Government witness had agreed to testify truthfully in the general court-martial of a SP4 M. The general court-martial convening authority was aware of this arrangement, and it was mentioned in M's post-trial review, yet the general court-martial convening authority took the action in M's case. This is error, as a convening authority will be disqualified from reviewing a case if he has taken any action to vouch for the credibility of a witness or is aware that any subordinate has taken such action. *United States v. Sierra-Albino*, 23 USCMA 63, 48 CMR 534 (1974).

**10. Witnesses:**

a. If a defense witness on cross-examination invokes his right under Article 31, the Government can and should move to strike the direct testimony of that witness. *United States v. Rivas*, 3 M.J. 282 (CMA 1977).

b. The victim of a threat testified at trial, and was subsequently cross-examined. The cross-examination did not actually impeach the witness. The trial counsel then attempted to bolster his testimony by introducing into evidence a hand-written statement prepared by the victim. This was error, as the proponent of a witness may not rehabilitate his witness unless that witness has actually been impeached. Mere cross-examination of a witness is not enough to allow for bolstering. *United States v. Kellum*, 1 USCMA 482, 4 CMR 74 (1952).

## Vacation Of Suspended Sentences In Regular Special Courts-Martial

*Criminal Law Division, OTJAG*

In a recent application for relief under Article 69, Uniform Code of Military Justice (UCMJ), The Judge Advocate General was presented with the issue of whether due process requirements for vacation of suspended sentences in regular special court-martial had been met where a special court-martial convening authority did not personally conduct the vacation hearing. The applicant had been tried by special court-martial and was convicted of selling and possessing marijuana. The approved sentence included, *inter alia*, confinement at hard labor for three months, suspended for five months.

During the period of suspension, the applicant was discovered to be in possession of two tablets of amphetamines. Based on that, his company commander recommended that the suspension of sentence be vacated. The applicant was given notice of the claimed violations and the hearing. A lawyer was provided to advise him. A formal hearing was conducted by a hearing officer designated by the special court-martial convening authority. Applicant was represented by counsel at the hearing, was provided the opportunity to confront the witnesses against him, and had an opportunity to be heard. A written report summarizing the evidence in support of the suspension violation was forwarded by the hearing officer to the special court-martial convening authority who reviewed the report and concluded that, based on the report, the applicant had violated his probation. The convening authority ordered that the suspended sentence be vacated.

In his application for relief under Article 69, UCMJ, the applicant asserted that the vacation procedure was invalid because the special court-martial convening authority did not personally conduct the hearing. The Judge Advocate General denied the application for relief.

The procedure used to vacate the suspension of sentence to confinement in this case fully met or exceeded the due process requirements estab-

lished in *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1972); and as applied by the U.S. Court of Military Appeals in *United States v. Bingham*, 3 M.J. 119 (CMA 1977). Article 72, UCMJ, sets forth the procedures to vacate a suspended sentence to confinement. Article 72(a), UCMJ, provides that the officer having special court-martial jurisdiction over a probationer is required to hold a hearing on the alleged violation of probation before vacating a suspended sentence which as approved includes a bad conduct discharge, or of any general court-martial sentence.

Unlike Article 72(a), Article 72(c) does not require a hearing prior to the vacation of a suspension of sentence. Specifically, Article 72(c), UCMJ, states that "the suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence." Similarly, paragraph 97b, Manual for Courts-Martial, 1969 (Revised edition) (MCM), provides that "[t]he suspension of . . . a sentence by special court-martial which does not include a bad conduct discharge, may be vacated (without a hearing) by any authority competent to convene . . . a court of the kind that imposed the sentence."

Although neither the UCMJ nor the MCM require a hearing to vacate suspended sentences to confinement in regular special courts-martial, paragraph 2-36, AR 27-10 states that a hearing *similar* to that required by Article 72, UCMJ, is to be held prior to the vacation of any suspended sentence to confinement, regardless of the type of court adjudging the sentence. This recognizes, however, that less onerous hearing procedures may be used to vacate suspended sentences to confinement in regular special courts-martial.

It is the position of the Criminal Law Division that due process requirements for vacation of a suspended sentence to confinement are satisfied in the case of regular special courts-

martial, where the special court-martial convening authority, as the statutorily authorized decision maker, makes his decision based on the report of a neutral and detached hearing officer whom he had appointed to conduct the "formal" hearing. Although the special court-martial

convening authority is not required to personally conduct the vacation hearing, a written statement must be executed at the time of the action, "as to the evidence relied on and the reasons for vacating the sentence." *United States v. Hurd*, 7 M.J. 18 (CMA 1979).

### USARB Update

Since publication of "The U.S. Army Retraining Brigade: A New Look," in the June 1979 *Army Lawyer* the author of that article, Captain John L. Ross, has advised that the Brigade's new suspension policy, referred to in footnote 27 of the article, has been rescinded by the new USARB commander. Effective on or about 1 August any forfeitures uncollected as of the date of graduation from the program will be suspended for a period of seventy days, as is

presently the policy with respect to confinement.

Counsel should note that since forfeitures do not take effect until ordered into execution pursuant to Article 57(c) of the UCMJ, this return to the old policy has the effect of further substantially mitigating the impact of the court-martial sentence for those who successfully complete the program. See Moore and Nyman, "Finances and the Convicted GI," 11 *The Advocate*, 122 (1979).

19 Jul 1979

### Exercise of Independent Professional Judgment by Defense Counsel

#### *US Army Trial Defense Service*

*The following letter and inclosures were dispatched to all senior defense counsel of general court-martial jurisdictions on 20 July 1979:*

1. The inclosed memorandum from The Judge Advocate General provides guidance concerning the exercise of independent professional judgment by defense counsel. It requires a report whenever a defense counsel believes he or she has been subjected to improper influences or pressures.

2. You should insure that all defense counsel in your jurisdiction, whether or not assigned to the U.S. Army Trial Defense Service, read and fully understand this memorandum. You should also review Canon 5 of the Code of Professional

Responsibility and Ethical Considerations 5-1 and 5-21, extracts of which are inclosed.

3. The U.S. Army Trial Defense Service and the Field Defense Services Office are available at all times to provide assistance and advice to trial defense counsel in the field. Reports as required by The Judge Advocate General's memorandum may be made to any supervising Senior or Regional Defense Counsel, or directly to my office when appropriate.

Signed

ROBERT B. CLARKE

Colonel, JAGC

Chief, Trial Defense Service/  
Field Defense Services Office

19 July 1979

**MEMORANDUM THRU ASSISTANT JUDGE GENERAL FOR CIVIL LAW  
FOR CHIEF, US ARMY TRIAL DEFENSE SERVICE/FIELD DEFENSE SERVICE OFFICE  
SUBJECT: Exercise of Independent Professional Judgment by Defense Counsel**

1. In one recent instance brought to my attention, a trial defense counsel, perceiving improper influence in the performance of his duties, failed to report that matter to proper

authorities. Canon 5 of the American Bar Association's Code of Professional Responsibility, applicable under paragraph 2-32, AR 27-10, requires every defense counsel to exercise inde-

pendent professional judgment on behalf of a client. The attendant Ethical Considerations make it clear that this duty can not be compromised or diluted by persons outside of the attorney-client relationship. They enjoin counsel to be alert to factors or circumstances which might impair the exercise of free judgment. Articles 37 and 98, UCMJ, insulate defense counsel from improper influences as a matter of law, and provide penalties for those who attempt such action.

2. Under the law and Army Regulations, I am charged with staff supervision of our military justice system. In carrying out this duty, I want to insure that each defense counsel understands the ethical and legal responsibilities in this sensitive area. I expect every judge advocate to adhere strictly to the requirements of the UCMJ and the Code of Professional Responsibility. Specifically, I expect and require any defense counsel who feels he or she has been subjected to pressures which restrain or impair the full exercise of independent professional judgment to report that fact promptly to appropriate authority.

3. The Assistant Judge Advocate General for Civil Law is my representative in supervising the defense function. Every report of an attempt to improperly influence a defense counsel must ultimately be forwarded to him for disposition. Such reports may be made directly to the Chief, US Army Trial Defense Service/Field Defense Services Office, to the Assistant Judge Advocate General for Civil Law, or to me personally. One of us will, in each case, determine the nature and extent of inquiry or investigation necessary to resolve the matter. Local judge advocates will not attempt to dispose of these matters in a manner inconsistent with this memorandum.

4. While I am confident that "reportable" incidents will be few, even one instance, unreported and unresolved, is unacceptable. I re-

quest that you bring the contents of this memorandum to the attention of all defense counsel.

Signed  
ALTON H. HARVEY  
Major General, USA  
The Judge Advocate General

### Code of Professional Responsibility\*

#### CANON 5

"A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

#### ETHICAL CONSIDERATIONS

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

\* \* \* \* \*

EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

\* As adopted by the House of Delegates of the American Bar Association.

### Corresponding with The JAG School

When corresponding with offices at the JAG School, please insure that the appropriate office symbol is used. This saves routing time and pre-

cludes delays in response. TJAGSA office symbols are found in AR 340-9 and on TJAGSA correspondence.

## Reserve Affairs Items

*Reserve Affairs Department, TJAGSA*

1. **Reserve Workshop.** The Judge Advocate General's Workshop will be held on 6, 7 and 8 December at The Judge Advocate General's School. MLC Commanders, ARCOM SJA's, and GOCOM SJA's will be invited to attend.

2. **Mobilization Designee Vacancies.** A Number of installations have recently had new mobilization designee positions approved and applica-

tions may be made for these and other vacancies which now exist. Interested JA Reservists should submit Application for Mobilization Designation Assignment (DA Form 2976) to The Judge Advocate General's School, ATTN: Lieutenant Colonel William Carew, Reserve Affairs Department, Charlottesville, Virginia 22901.

Current positions available are as follows:

<i>Grd</i>	<i>Para</i>	<i>Lin</i>	<i>Seq</i>	<i>Position</i>	<i>Agency</i>	<i>City</i>
LTC	05B	02	01	Deputy Chief	USA Claims Svc	Ft Meade
LTC	05B	03	01	Clms JA	USA Claims Svc	Ft Meade
LTC	05B	03	02	Clms JA	USA Claims Svc	Ft Meade
MAJ	04	02	01	Asst Stf JA	HQ MTMC	Bayonne
CPT	01	05	01	JA	Gulf Outport	New Orleans
MAJ	04	01A	01	Asst SJA	MTMC	Oakland
MAJ	34	01A	01	JA	USA Dep	Sacramento
LTC	04H	02	01	Deputy SJA	HQ USA CERCOCOM	Ft Monmouth
CPT	08	03A	01	Asst JA	172d Inf Bde	Ft Richardson
CPT	57	02A	01	Asst JA	172d Inf Bde	Ft Richardson
LTC	09	03	01	Asst Mil Aff Off	First US Army	Ft Meade
LTC	09	04	01	Mil Justice Off	First US Army	Ft Meade
LTC	09	05	01	Asst Stf JA	First US Army	Ft Meade
LTC	09	05	02	Asst Stf JA	First US Army	Ft Meade
MAJ	03	04	01	Asst SJA	USA Garrison	Ft Ord
MAJ	03	04	02	Asst SJA	USA Garrison	Ft Ord
CPT	03A	04	02	Def Counsel	USA Garrison	Ft Ord
CPT	03B	02	01	Asst SJA	USA Garrison	Ft Ord
CPT	03B	02	02	Asst SJA	USA Garrison	Ft Ord
CPT	03B	02	04	Asst SJA	USA Garrison	Ft Ord
CPT	03B	03	01	Trial Counsel	USA Garrison	Ft Devens
CPT	03C	06	01	Adm Law Off	USA Garrison	Ft Devens
CPT	04B	02A	02	Asst JA	USA Garrison	Ft Meade
MAJ	03A	01	01	Ch, Trial Counsel	101 Abn Div	Ft Campbell
CPT	03A	02	01	Trial Counsel	101 Abn Div	Ft Campbell
CPT	03A	02	04	Trial Counsel	101 Abn Div	Ft Campbell
MAJ	03B	01	01	Ch, Defense Counsel	101 Abn Div	Ft Campbell
CPT	03B	02	01	Defense Counsel	101 Abn Div	Ft Campbell
CPT	03B	02	02	Defense Counsel	101 Abn Div	Ft Campbell
CPT	03B	02	03	Defense Counsel	101 Abn Div	Ft Campbell
CPT	03B	02	04	Defense Counsel	101 Abn Div	Ft Campbell
MAJ	03C	01	01	Ch, Admin Law Br	101 Abn Div	Ft Campbell
CPT	03C	02	01	Asst Stf JA	101 Abn Div	Ft Campbell

<i>Grd</i>	<i>Para</i>	<i>Lin</i>	<i>Seq</i>	<i>Position</i>	<i>Agency</i>	<i>City</i>
MAJ	03D	01	01	Ch, Crim Law Br	USA Garrison	Ft Stewart
CPT	03D	05	01	Asst SJA-DC	USA Garrison	Ft Stewart
CPT	03D	05	02	Asst SJA-DC	USA Garrison	Ft Stewart
MAJ	03E	01	01	Chief	USA Garrison	Ft Stewart
CPT	03E	03	01	Asst SJA	USA Garrison	Ft Stewart
CPT	52B	03	01	Asst SJA-DC	USA Garrison	Ft Stewart
CPT	52C	01	01	Asst SJA	USA Garrison	Ft Stewart
CPT	52C	01	02	Asst SJA	USA Garrison	Ft Stewart
CPT	04	08	02	Asst SJA	USA Garrison	Ft Sam Houston
MAJ	03B	01	01	Ch, Defense Counsel	5th Inf	Ft Polk
MAJ	03B	02	01	Ch, Trial Counsel	5th Inf	Ft Polk
CPT	03B	03	01	Defense Counsel	5th Inf	Ft Polk
CPT	03B	03	02	Defense Counsel	5th Inf	Ft Polk
CPT	03B	03	03	Defense Counsel	5th Inf	Ft Polk
CPT	03B	03	04	Defense Counsel	5th Inf	Ft Polk
CPT	03B	04	02	Trial Counsel	5th Inf	Ft Polk
CPT	03B	04	03	Trial Counsel	5th Inf	Ft Polk
CPT	03B	04	04	Trial Counsel	5th Inf	Ft Polk
MAJ	03B	04	01	Legal Asst Off	USA Garrison	Ft Sheridan
CPT	03D	01A	01	Asst SJA	USA Garrison	Ft Sheridan
MAJ	02A	02	01	Ch, Defense Counsel	1st Inf Div	Ft Riley
MAJ	02B	02	01	Asst JA	1st Inf Div	Ft Riley
MAJ	02B	03	01	Ch, Leg Asst	1st Inf Div	Ft Riley
CPT	02B	04	01	Asst JA	1st Inf Div	Ft Riley
CPT	02C	02	01	Asst JA	1st Inf Div	Ft Riley
CPT	01H	02A	01	JA	Ft McCoy	Sparta
CPT	01H	02A	02	JA	Ft McCoy	Sparta
CPT	01H	02A	03	JA	Ft McCoy	Sparta
CPT	01H	02A	04	JA	Ft McCoy	Sparta
CPT	01I	02	01	JA Leg Asst Off	Ft McCoy	Sparta
CPT	01I	02	02	JA Leg Asst Off	Ft McCoy	Sparta
MAJ	03B	01	01	Ch, Trial Counsel	9th Inf Div	Ft Lewis
MAJ	03C	01	01	Ch, Defense Counsel	9th Inf Div	Ft Lewis
MAJ	03D	01	01	Ch, Admin Law Br	9th Inf Div	Ft Lewis
CPT	03D	02	01	Asst SJA	9th Inf Div	Ft Lewis
CPT	03D	03	01	Asst Stf SJA	9th Inf Div	Ft Lewis
MAJ	03E	01	01	Ch, Legal Asst Br	9th Inf Div	Ft Lewis
CPT	03E	03	01	Leg Asst Off	9th Inf Div	Ft Lewis
CPT	03E	03	02	Leg Asst Off	9th Inf Div	Ft Lewis
CPT	21J	01	01	JA	9th Inf Div	Ft Lewis
CPT	62C	05	01	Asst Crim Law Off	USA FORSCOM	Ft McPherson
LTC	04A	02	01	Asst Ch Mil Jus	USA Inf Ctr	Ft Benning
MAJ	04A	03	01	Sr Defense Counsel	USA Inf Ctr	Ft Benning
CPT	04A	05	01	Defense Counsel	USA Inf Ctr	Ft Benning
CPT	04A	07	01	Trial Counsel	USA Inf Ctr	Ft Benning
LTC	04B	02	01	Asst Ch MALAC	USA Inf Ctr	Ft Benning
CPT	04B	04	01	Admin Law Off	USA Inf Ctr	Ft Benning
CPT	04B	05	01	Admin Law Off	USA Inf Ctr	Ft Benning

<i>Grd</i>	<i>Para</i>	<i>Lin</i>	<i>Seq</i>	<i>Position</i>	<i>Agency</i>	<i>City</i>
CPT	04B	05	02	Admin Law Off	USA Inf Ctr	Ft Benning
CPT	04B	07	01	Legal Asst Off	USA Inf Ctr	Ft Benning
CPT	04B	07	02	Legal Asst Off	USA Inf Ctr	Ft Benning
CPT	04B	07	03	Legal Asst Off	USA Inf Ctr	Ft Benning
CPT	04B	08	01	Claims Off	USA Inf Ctr	Ft Benning
MAJ	28B	02	01	Mil Jus Off	USA Ad Center	Ft Bliss
MAJ	28B	04	01	Trial Counsel	USA Ad Center	Ft Bliss
CPT	28C	03	01	Defense	USA Ad Center	Ft Bliss
MAJ	28D	02	01	Proc/Fis Law Off	USA Ad Center	Ft Bliss
MAJ	28D	03	01	Admin Law	USA Ad Center	Ft Bliss
MAJ	12	02	01	Assist JA	ARNG TSA	Cp Atterbury
MAJ	12	02	02	Assist JA	ARNG TSA	Cp Atterbury

## Judiciary Notes

### *U.S. Army Judiciary*

Staff judge advocates are requested to review initial promulgating orders to assure that they conform *exactly* to the proceedings as shown in the record of trial. For the month of July, it was necessary for the Army Court of Military Review to issue fifteen Court-Martial Order Correcting Certificates. Seven of these involved errors in the PLEAS paragraph alone. Most of these corrections concerned an amendment of the specification to reflect the pleas of the accused or a dismissal of the specification by the military judge. These actions should be set forth in the promulgating order to reflect the proper sequence of events as they occurred during the course of the trial. The following

examples were taken from Court-Martial Order Correcting Certificates:

a. Adding *before* the PLEAS paragraph the following: "Charge IV and its specification dismissed by military judge *prior* to pleas."

b. Adding *after* the PLEAS paragraph the following: "Additional Charge I and its specification dismissed by military judge *after* pleas."

c. Adding *after* the PLEAS paragraph the following: "The specification of Charge I was amended by excepting the word 'fists' and substituting the word 'hand'."

## CLE News

**1. Contract Attorneys' Advanced Course.** The 10th Contract Attorneys' Advanced Course will be held 7-11 January 1980. The theme for this year's offering will be RECENT AND PROPOSED CHANGES AFFECTING GOVERNMENT CONTRACT LAW. Any questions relating to the Contract Attorney's Advanced Course should be directed to Major Gary L. Hopkins, Contract Law Division, FTS 937-1309, AUTOVON 274-7110 and ask for commercial number 293-3938.

**2. Contract Attorneys' Two Day Workshop.** As announced in last month's *Army Lawyer*, the 3d Contract Attorneys' Workshop will be held at TJAGSA on 4-5 December 1979. Letters have recently been sent to contract attorneys' offices outlining the procedures on submitting problems for discussion. The deadline for problem submission is drawing near, so contract attorneys still interested are encouraged to send their problems in immediately. Limited quotas are also available for attendees who will not present problems for discussion.

**3. TJAGSA CLE Courses.**

October 9-12: Judge Advocate General's Conference and CLE Seminars.

October 15-18: 3d Litigation (5F-F29).

October 22-December 21: 91st Judge Advocate Officer Basic (5-27-C20).

October 22-26: 7th Defense Trial Advocacy (5F-F34).

October 29-November 9: 82d Contract Attorneys' (5F-F10).

November 13-16: 10th Fiscal Law (5F-F12).

November 14-16: 4th Government Information Practices (5F-F28).

November 26-30: 50th Senior Officer Legal Orientation (5F-F1).

December 4-5: 3d Contract Attorneys' Workshop (5F-F15).

December 10-13: 7th Military Administrative Law Developments (5F-F25).

January 7-11: 10th Contract Attorneys' Advanced (5F-F11).

January 7-11: 13th Law of War Workshop (5F-F42).

January 14-18: 1st Negotiations, Changes & Terminations (5F-F14).

January 21-24: 9th Environmental Law (5F-F27).

January 28-February 1: 8th Defense Trial Advocacy (5F-F34).

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

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

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

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

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

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

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

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

April 8-9: 2d U.S. Magistrate's Workshop (5F-F53).

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

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

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

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

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

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

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

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

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

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

June 16-27: JAGSO.

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

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

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

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

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

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

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

August 18-22 May: 29th Judge Advocate Officer Graduate (5-27-C22).

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

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

**4. Civilian Sponsored CLE Courses.**

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

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

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

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

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

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

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

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

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

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

**NJC:** National Judicial College, Reno, NV 89557. Phone: (702) 784-6747.

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

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

### OCTOBER

2-5: FPI, The Contracting Officer, Sheraton National Hotel, Arlington, Va. Cost: \$600.

4-6: ALI-ABA, The New Federal Bankruptcy Code, Chicago, IL.

4-5: PLI, Warranties in the Sale of Goods—1979, The Ambassador West Hotel, Chicago, IL. Cost: \$200.

5-6: PLI, Hospital Liability, Barbizon Plaza Hotel, New York, NY. Cost: \$185.

7-12: NJC, Criminal Evidence—Graduate, University of Nevada, Reno, NV.

9-13: NCDA, Trial Techniques, Anaheim, CA.

11-12: ALI-ABA, Creative Tax Planning for Real Estate Transactions, Denver, CO.

11-12: FPI, Freedom of Information, Marriott\*Inn/Berkley Marina, San Francisco, CA. Cost: \$450.

11-12: PLI, Estate Planning Institute, The Roosevelt Hotel, New York, NY. Cost: \$200.

15-19: AAJE, The Alcohol and Drug Offender (for judges), Hilton Airport Plaza Inn, Kansas City, MO.

18-19: PLI, Warranties on the Sale of Goods, The Roosevelt Hotel, New York, NY. Cost: \$200.

21-24: NCDA, Prosecuting Crimes of Violence, Orlando, FL.

22-23: PLI, Hospital Liability, The Ambassador West Hotel, Chicago, IL. Cost: \$185.

24-26: PLI, Fundamental Real Estate Transactions, Hyatt Regency Hotel, New Orleans, LA. Cost: \$250.

24-26: PLI, Real Estate Valuation and Condemnation, The Statler Hilton Hotel, New York, NY. Cost: \$225.

26-27: PLI, Defending Criminal Cases, New York Sheraton Hotel, New York, NY. Cost: \$175.

28-2 Nov: NJC, Minorities in the Courts, University of Nevada, Reno, NV.

29-30: FPI, Freedom of Information, Sheraton National, Washington, D.C. Cost: \$450.

### NOVEMBER

4-7: NCDA, Management in the Prosecutor's Office, Houston, TX.

4-7: NCDA, Organized Crime, Miami, FL.

4-9: NJC, Alcohol and Drugs, University of Nevada, Reno, NV.

4-9: NJC, Court Management—Managing Delay, University of Nevada, Reno, NV.

8-10: ALI-ABA, Estate Planning for Retiring or Dying Clients, Atlanta, GA.

12-13: PLI, Practical Will Drafting, The Brown Palace Hotel, Denver, CO. Cost: \$185.

27-30: ICM, Space Management, New Orleans, LA.

28-29: NCDA, Prosecution of Arson, Denver, CO.

29-30: PLI, Post Mortem Estate Planning, Los Angeles Bonaventure Hotel, Los Angeles, CA. Cost: \$190.

30-1 Dec: ALI-ABA, Unfair Competition, Trademarks and Copyrights, Philadelphia, Pa.

### DECEMBER

2-14: NJC, Decision Making: Process, Skills, and Techniques University of Nevada, Reno, NV.

9-14: NCDA, Advanced Prosecutor's Investigators School, Huntsville, TX.

13-14: PLI, Hospital Liability, Los Angeles Bonaventure Hotel, Los Angeles, CA. Cost: \$185.

## JAGC Personnel Section

## PPTO, OTJAG

## 1. AUS Promotions

## COLONEL

ADAMS, Allen D.	5 Jul 79
FUGH, John L.	6 Jul 79
HENSON, Hugh E.	4 Jul 79
LASSETER, Earle F.	7 Jul 79
MOONEYHAM, John A.	5 Jul 79
MOWRY, Richard E.	7 Jul 79
O'ROARK, Dulaney L.	8 Jul 79
RABY, Kenneth A.	4 Jul 79
SCHEFF, Richard P.	4 Jul 79
SUTER, William K.	9 Jul 79
THORNOCK, John R.	4 Jul 79
TICHENOR, Carroll J.	11 Jul 79
TRACY, Curtis L.	4 Jul 79
WASINGER, Edwin P.	4 Jul 79
WITT, Jerry V.	7 Jul 79
WOLD, Pedar C.	3 Jul 79

## LIEUTENANT COLONEL

BARNES, Holman J.	11 Jul 79
BRANDENBURG, Andrew	12 Jul 79
BURNS, Thomas P.	11 Jul 79
CORRIGAN, Dennis M.	13 Jul 79
DEMETZ, Robert A.	13 Jul 79
DEVLIN, Terrence E.	12 Jul 79
DUNN, John P.	12 Jul 79
GILLEY, Dewey C.	13 Jul 79
GREEN, Herbert J.	13 Jul 79
HIGGINS, Bernard F.	11 Jul 79
KAPLAN, Harvey W.	12 Jul 79
LANE, Jack F.	13 Jul 79
MANN, Richard G.	12 Jul 79
NICHOLS, John J.	13 Jul 79
SIMS, Benjamin A.	12 Jul 79
STEINBERG, Barry P.	11 Jul 79
TAYLOR, Warren P.	13 Jul 79

TIEDMANN, John J.	12 Jul 79
WEINBERG, Paul	13 Jul 79

## MAJOR

AILEO, William A.	11 Jul 79
ALVAREY, Joel R.	12 Jul 79
BARRY, Bruce C.	6 Jul 79
BEST, Sharon E.	10 Jul 79
BROWNBAC, Peter E.	13 Jul 79
BYLER, Charles A.	6 Jul 79
CARDEN, Grifton E.	7 Jul 79
CARTER, Victor S.	10 Jul 79
CATHEY, Theodore F.	5 Jul 79
CORNELISON, Joseph	11 Jul 79
COSTELLO, Raymond K.	6 Jul 79
CURTIS, Howard G.	13 Jul 79
DODSON, Roy L.	6 Jul 79
DOWELL, David R.	10 Jul 79
GARRETT, Robert W.	11 Jul 79
HUNT, Arthur L.	6 Jul 79
JUDD, Kim K.	10 Jul 79
KARJALA, John G.	7 Jul 79
LANTZ, William H.	6 Jul 79
LESLIE, Robert L.	13 Jul 79
MC CONNELL, Robert M.	14 Jul 79
MOGRIDGE, James D.	6 Jul 79
MONROE, Glenn E.	7 Jul 79
NARDOTTI, Michael J.	12 Jul 79
NOREEN, Robert S.	13 Jul 79
O'MEARA, Richard M.	3 Jul 79
REYNOLDS, George D.	14 Jul 79
SCHWENDER, Craig S.	13 Jul 79
SHELTON, Sam W.	8 Jul 79
SMITH, Brian K.	9 Jul 79
SMITH, Michael E.	13 Jul 79
STEARNS, James N.	4 Jul 79
STEPP, Terry A.	14 Jul 79
TAYLOR, Vaughan E.	11 Jul 79

## 2. Reassignments

## Lieutenant Colonel

BERRY, Robert H.

McHUGH, Richard

## FROM

USALSA

USALSA, w/ dty  
FT Benning, GA

## TO

FT Knox, KY

USATDS, w/ dty  
Heidelberg, Germany

MOONEYHAM, John <i>Major</i>	USALSA, w/ dty FT Amador, Canal Zone	USALSA, w/ dty FT Benning, GA
SMITH, Peter M.	Germany	USALSA, w/ dty Frankfurt, Germany
WILLIAMS, William E. <i>Captain</i>	USALSA	FT McNair, DC
CASKEY, Ralph M.	FT Bliss, TX	ASBCA, Wash, DC
EDWARDS, James	Germany	FT Sheridan, IL
FOREMAN, Linda	Ft Sill, OK	USATDS, w/ dty FT Sill, OK
GARCIA, Gilbert	Ft Sill, OK	USATDS, w/ dty FT Sill, OK
GRIFFIN, Thomas	Korea	FT Gordon, GA
HANSEN, Karl E.	Germany	USATACOM, Warren, MI
KLAR, Lawrence	Korea	NGB, Wash, DC
McBRIDE, John P.	Germany	FT Ord, CA
MILLER, William	Germany	USAMTMC, Oakland, CA
MOSIER, Jerome	USALSA, w/ dty FT Leavenworth, KS	USALSA, w/ dty Nurenberg, Germany
PUPKO, Walter H.	Korea	FT Lee, VA
SCHWARZ, Paul W.	FT Ord, CA	Yuma Proving Ground, AZ
UDLAND, Robert	Germany	USATDS, w/ dty FT Sill, OK

### 3. Reassignments of Senior Legal Clerks and Senior Court Reporters

<i>NAME</i>	<i>FROM</i>	<i>TO</i>
<i>E8</i>		
MSG BURTON, James R.	Fort Riley	Korea
MSG CHITI, Fred A.	Fort Bragg	Germany
MSG CROUCH, William	Korea	SGM Academy Fort Bliss
MSG CUMMINGS, William C.	Presidio SF	Korea
SFC(P) ADELEE, Jack D.	Fort Carson	Germany
SFC(P) CADE, Sponce A.	Germany	Fort Harrison
SFC(P) Davis, Willis R.	Japan	Fort Lewis
SFC(P) RAY, You-Lan	Fort Knox	Germany

## E7

SFC BARNES, Gerald	Fort Hood	Hawaii
SFC BURKE, Billy R.	Germany	Fort Hood
SFC CAMBERN, Joseph M.	Germany	Fort Hood
SFC CASE, Patrick R.	Fort Stewart	Korea
SFC DURDEN, Lawton	Germany	Fort Harrison
SFC GIDDENS, Bobbie	Germany	Fort Harrison
SFC HILLEBRAND, Joseph	Germany	Fort Riley
SFC KERR, Peter S.	Fort Carson	Germany
SFC LOCKE, Glenn W.	Germany	Fort Campbell
SFC MASHBURN, John S.	Fort Meade	Germany
SFC MEENTS, Terry L.	Korea	Fort Knox
SFC MEGARGEE, Glen W.	Fort Huachuca	Germany
SFC MUESKE, Conrad C.	Germany	Fort Leonardwood
SFC NEW, Josph	Hawaii	Fort Eustis
SFC PEARSON, Charles D.	APG	Germany
SFC POSTON, Carl L.	Fort Hood	Okinawa
SFC REILLY, William F.	Fort Ord	Germany
SFC RINGSTAD, Michael T.	Fort Lewis	Japan
SFC SAENZ, Jesus M.	Korea	Fort Stewart
SFC SALLEE, Gary F.	Germany	Fort Gordon
SFC SHEEHAN, William M.	Fort Bragg	Germany
SFC SIGNA, Thomas G.	Fort Riley	Fort Leavenworth
SFC THOMPSON, Clarence H.	Fort Benning	Germany
SFC TOMLINSON, Robert O.	Germany	Fort Hood
SFC WEST, Michael G.	Fort Ord	USACC
SFC YEATES, John V.	Fort Huachuca	Korea
SFC YOUNG, John A.	Korea	Fort Sill

4. FY 80 Advanced Noncommissioned Officer Course (ANCOC) Selections. The following legal clerks and court reporters listed below were selected by the FY 80 ANCOC board to attend ANCOC training. Tentative class dates are 26 May-30 July 1980 and 7 September-17 October 1980. Both courses will be conducted at Fort Benjamin Harrison, Indiana.

Armstrong, Murray F.  
 Askew, Kenneth E.  
 Atkins, Ada R.  
 Bagley, Paulette  
 Barrett, John D.  
 Bearden John W.  
 Best, Hobart E.  
 Billingsley, Glenn  
 Black, Frances L.  
 Bolden, Warren

Bond, Merdia J.  
 Bowers, Dacil L.  
 Bowles, Peter T.  
 Bowman, Devier L.  
 Bowman, Larry W.  
 Box, Charles C.  
 Bradley, Lorenzo Ch  
 Bryant, Robert W.  
 Bryce, Michael D.  
 Bunton, Gary G.  
 Burch, Paul A.  
 Burgess, William L.  
 Canfield, Robert F.  
 Cape, Ronald G.  
 Carlile, George W.  
 Cherry, Charles W.  
 Chiguina, Willie Ch  
 Clowers, Richard A.  
 Cooper, Dewitt Jr.

Crabbe, Ronald D.  
Cruse, Ronnie L.  
Cuha, Thomas R.  
Deaton, Bernard E.  
Dexter, Stephen A.  
Dobias, David A.  
Dodge, Gary W.  
Domoney, Jack E.  
Doucet, Dean W.  
Dull, Eleanor T.  
Estrada, Robert B.  
Finch, Donald L.  
Fitzgerald, Leonard  
Flowers, Charles W.  
Garces, Danilo A.  
Gardner, William T.  
Garner, Carl T.  
Giddens, Freddie L.  
Glowski, Joe E.  
Grubel, Frederick  
Gruben, Danny L.  
Harviel, Clifton E.  
Haugen, Loren E.  
Helton, Harry M.  
Hensley, David G.  
Henson, Lewis A.  
Hickman, Calvin S.  
Hicks, Marion  
Hoffman, Rudolph H.  
Holder, Michael D.  
Isaacs, Steven W.  
Ivins, James J.  
Jackson, Terry E.  
Johnson, Claude L.  
Johnson, George R.  
Johnson, Ronald H.  
Jordan, George D.  
Jordan, Michael R.  
Journey, William J.  
Judge, Michael P.  
Keene, Jimmy S.  
Lancaster, Stanley  
Lawson, Walter E.  
Leary, Richard H.  
Ledford, Lonnie D.  
Leonard, Larry L.  
Levin, Thomas  
Lewis, Kenneth H.  
Lindsey, William J.  
Lindval, Frank A. Jr.  
Lomeli, Bruno P.  
Lotman, Harold B.  
Magallon, Pilar L.  
Maidel, Paul A.  
Martin, John L.  
Mason, William R.  
Mastrogiuseppe, Ric  
McGuinness, George  
McManus, James A.  
McMurray, Robert L.  
Miller, Donald A.  
Miller, Donald K.  
Miller, Frederick J.  
Mitchell, Van L.  
Moore, Samuel E.  
Morgan, Andrew  
Morgan, William A.  
Morisheta, Yoshio  
Myers, David H.  
Norwood, Ronald L.  
Ochoa, Pedro Jr.  
Parker, Larry W.  
Parker, Michael E.  
Pauli, Peter P.I.  
Peterson, Robert A.  
Pieratti, Alan H.  
Piper, Patricia J.  
Price, Thomas D.  
Price, Verle L.  
Proctor, Peter A.  
Pursche, Bruno  
Reichelderfer, Roge  
Renfro, Paul C.  
Ritchie, Henry J.  
Robertson, Judy C.  
Rocque, Steven P.  
Root, Jerome L.  
Ryder, Clinton J.  
Salinas, Rojelio  
Sanchez, Leroy  
Sannicolas, Joseph  
Sawatzky, Michael P.  
Scarborough, Howard  
Scott, George Jr.  
Sevaaetasi, Robert  
Sharpsteen, David A.  
Shaw, John F.

Shillcutt, William  
 Shockey, Robert E.  
 Sicard, Lawrence E.  
 Sickling, Ricky C.  
 Sitton, Neil A.  
 Smith, Paul F.  
 Smith, Richard A.  
 Somora, Frank D.  
 Speights, Howard F.  
 Stange, Derald M.  
 Sturdivant, William  
 Sullivan, David W.  
 Todd, Jeffrey A.  
 Trende, Marilyn R.  
 Vernati, James L.  
 Wallen, James W.  
 Warnick, David L.  
 Warren, James E.

Waterman, Mark E.  
 Webb, Alvin C.  
 Wiley, Timothy M.  
 Wilhite, Randall W.  
 Williams, Alan D.  
 Williams, Michael K.  
 Chilton, Thomas E.  
 Demars, Raoul A.  
 Gravlee, Kenneth J.  
 Jines, Jackie L.  
 Johnson, Webb M.  
 Kass, Robert S.  
 Rogers, Robert C.  
 Scott, Ronald L.  
 Sheridan, Martin P.  
 Strand, Russell W.  
 Todd, Mario B.  
 Alves, Judith A.

### Current Materials of Interest

#### Articles

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*Claims against the United States: The Impact of Stencel upon Sovereign Immunity under the Exclusive-Remedy Provision of the Federal Employees Compensation Act*, 30 JAG J. 209 (1979).

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#### Training Circular

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By Order of the Secretary of the Army:

Official:

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

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

