

Tenth Anniversary Issue

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A Journal For Military Defense Counsel

THE ADVOCATE

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TRANSITION

THE ADVOCATE CELEBRATES TENTH ANNIVERSARY

With this issue, The Advocate begins its tenth year of publication. From its March 1969 debut as a "monthly newsletter" containing seven pages of brief unsigned articles, The Advocate has grown to become a bimonthly "Journal" of approximately 40 pages of articles, case notes and summaries, comments, notices, suggestions, samples of legal forms, and pertinent statistics. Starting as a "technical letter to military defense counsel in the field from the Chief, Defense Appellate Division," The Advocate has developed into a journal for the careful examination of military criminal law. As the depth and scope of the publication improved, the circulation list grew accordingly, so that today The Advocate is now forwarded to all Army (active and reserve), Air Force, and Navy defense counsel, numerous judicial officials, many civilian law libraries, and a number of civilian attorneys.

The Advocate was the brainchild of Captain Paul C. Saunders, a Defense Appellate Division Attorney. His proposal was supported by Colonel Daniel T. Ghent, Chief of DAD, and approved by The Judge Advocate General, Major General Kenneth J. Hodson. The newsletter that DAD was directed to publish was "designed to assist Army defense counsel [in giving] better representation in criminal cases by avoiding mistakes, using better techniques, or exploiting new developments in the law."

Volume 1, Number 1 appeared in March 1969 under the direction of the same Captain Saunders, newly designated as Editor-in-Chief. In spite of his work and the assistance of other DAD attorneys, the "newsletter" was considered as an expression of the personal opinions of the Chief of Defense Appellate Division, and early copies of The Advocate contained his signature. In fact, the names of the members of the editorial board did not appear in print until October 1972 (Volume 4, Number 4), and that listing was for one-time only. The permanent appearance in each issue of the editorial staff did not occur until January 1975 (Volume 7, Number 1).

Despite the unusual nature of the publication, it was accepted immediately by defense counsel as a valuable working tool. Circulation quickly grew, and soon included trial counsel, staff judge advocates, and civilian attorneys and law schools. Being an unofficial publication which was totally defense oriented, there were those who considered The Advocate as an "underground" newsletter. Of course, it was anything but that, for The Advocate's publication (though certainly not its content) was at the express direction of The Judge Advocate General. Perhaps because of this "approved unofficial" status, for most of its publication life The Advocate did not credit individual authors with the articles they produced. It was not until August 1977 (Volume 9, Number 4) that the authors of individual articles were specifically identified.

The Advocate was created and staffed by the junior attorneys of the Defense Appellate Division as a medium to distribute information and ideas to all military defense counsel. The staff of The Advocate continues to be drawn from the ranks of DAD, and most of the articles are authored by DAD attorneys. Participation on The Advocate is voluntary, and a significant amount of the work is done in an overtime capacity. Because of the voluntary nature of this function, demands upon the attorneys of DAD once imperiled the continuation of The Advocate. In 1974-75, the number of unbriefed court-martial cases in DAD approached 1000. As a result of this backlog, the Chief of DAD understandably ordered appellate counsel to direct their emphasis to reducing this excessive caseload. Thus, only two issues appeared in 1974 (Volume 6) and three in 1975 (Volume 7). The reduction in Army personnel strength and the subsequent decline in courts-martial enabled The Advocate to resume its regular bimonthly schedule in 1976.

Since then, The Advocate has appeared in a reasonably regular manner hampered only by the usual difficulties inherent in any publication. The editorial board is now working to enhance the quality of articles, offer more diversity of material, improve the format and printing, and strengthen administration. With this issue, The Advocate reaches yet another milestone - we now will distribute an individual copy of every issue to each Army trial defense counsel and defense section library.

In this its tenth year, the future of The Advocate looks bright. The possible organization of the Trial Defense Service will certainly impact on The Advocate, just as it will affect other aspects of defense functions

in the Army. Whatever the future has in store, The Advocate is and remains the only military legal journal devoted exclusively to military criminal law. As such, whatever the changes, it will always occupy a needed place in military law.

As The Advocate enters its tenth year of publication, the Editorial Board wishes to express its thanks to the many members of Defense Appellate Division who have contributed their time and talents to The Advocate. While we are not able to mention everyone, we would like to list the names, as best as our research has disclosed, of the past Editors-in-Chief of The Advocate.

<u>Date</u>	<u>Editor-in-Chief</u>	<u>Current Address</u>
Mar 69 to Jan 71	Paul C. Saunders	Associate with Cravath, Swain, & Moore, New York, NY
Jan 71 to Mar 71	Brian B. McMenimin	Chief Counsel, Division of Enforcement, Securities and Exchange Commission, Washington, D.C.
Mar 71 to Dec 72	Francis X. Gindhart	Clerk of Court, U.S. Court of Military Appeals, Washington, D.C.
Dec 72 to ?	Peter J. Kenney	Unknown
Aug 73 to Aug 74	John Willis	Sole practitioner, Westminster, MD
Aug 74 to Feb 75	David A. Shaw	Counsel, Senate Intelligence Committee, Washington, D.C.
Feb 75 to Jul 76	John M. Nolan	Associate with Winstead, McQuine, Sechrest & Trimble, Dallas, TX
Feb 75 to Nov 77	Robert D. Jones	General Counsel's office, Interstate Commerce Commission, Washington, D.C.

In our search for the past editors of The Advocate, two names were often mentioned as having had a major impact on its publication, but who apparently had not been Editors-in-Chief. We would therefore like to give mention to T. Berry Kingham, currently an Assistant U.S. Attorney in the Southern District of New York, and Alan Dubois who is currently in private practice in San Antonio, Texas.

PROVIDING EFFECTIVE DEFENSE SERVICES

Major General Wilton B. Persons, Jr.*

I am pleased to have this opportunity to contribute to the 10th anniversary issue of The Advocate. This publication has been a valuable source of practical and technical legal advice for military defense counsel. In this, its anniversary issue, I would like to express my appreciation to present and past members of its staff for the significant role The Advocate has played in improving defense services for soldiers.

Nothing in our practice is more important than the effective representation of accused before courts-martial. Because of this I have taken steps to improve the administration of defense services and provide more experienced defense counsel at the trial level. First, the Field Defense Services Office began operating on 1 October 1976. It was created to make the total defense structure more responsive to the needs of defense counsel in the field. Second, on 1 April 1977 "split certification" procedures were implemented so every accused is assured of being represented by an experienced counsel of proven competence. These procedures permit judge advocates graduating from the basic class to serve a reasonable apprenticeship before being detailed as primary defense counsel in courts-martial. Third, AR 27-10 was changed, effective 1 November 1977, to prohibit multiple representation by military attorneys. It was my view, and that of many senior judge advocates, that any savings of time and effort by multiple representation were illusionary. The practice only jeopardized the reputations of counsel by subjecting them to possible attack on ethical or inadequate representation grounds, gave the appearance of "compromised justice" for our soldiers, resulted in expensive appellate litigation, and in some instances actually deprived an accused of his right to effective assistance of counsel. Finally, a

* Major General Persons has been The Judge Advocate General of the Army since 1 July 1975. During his 31 years of active service, he has served in increasing positions of responsibility, including the Staff Judge Advocate of the United States Army, Vietnam and United States Army, Pacific, and as Judge Advocate, United States Army, Europe. General Persons has a B.S. from the United States Military Academy and a J.D. from Harvard University, and is a graduate of the Army War College.

fourth step was the regulatory requirement for defense counsel consultation with an accused within 72 hours of entry into pretrial confinement, and preferably before entry. This requirement was designed to eliminate the risk of an accused becoming "lost" in pretrial confinement without access to legal advice. It, like the policy barring multiple representation, was in a change to AR 27-10 which became effective on 1 November 1977.

I did not institute these changes because of doubts about the professional skills of our judge advocates. Overall, our counsel are performing in a highly professional manner, whether they be government or defense, or at the trial or appellate level. The best organization for providing defense services has been my concern.

Of course, the organization of defense services does not solve all problems and complaints. Some trial defense counsel want to pursue their cases through the appellate process. Others do not. At times appellate defense counsel want to represent clients at rehearings. I am convinced, however, that the present division of trial and appellate responsibilities is the best arrangement for obtaining skilled representation at each level. At the trial level it provides the best access to counsel, and at the appellate level the requisite specialization. The major drawback of dividing trial and appellate responsibilities is an inherent potential to make adversaries of trial defense and appellate defense counsel. This happens when there is a difference of opinion about defense strategy or when an adequacy of representation issue is raised at the appellate level. Still, the goal of our system is not to make counsel comfortable but to give an accused the best possible representation from the time of charges until completion of appellate review. Our two-tiered counsel structure achieves that goal. The elimination of tensions between trial and appellate counsel should not involve a change in structure; it can be accomplished by trial and appellate representation of the highest caliber and improved communication between both defense counsel.

A related problem occurs when trial defense counsel files an Article 69 application on the ground that he or she did not adequately represent the accused at trial. In this regard, I recommend that all defense counsel read the OTJAG Professional Ethics Committee opinion published in the June 1976 issue of The Army Lawyer. It gives the recommended procedure to be followed when a defense counsel intends to make an issue of his or her own performance at trial.

My closing observation is that a good system can always be made better. Senior judge advocates who organize and supervise the defense function can make limited improvements, but not so much as first-line defense counsel through practice and study. I adjure you to read and discuss the advance sheets, law reviews, Criminal Law Reporter, The Advocate and other professional publications so that you are always equipped to give your clients your best.

THE ADVOCATE SALUTES DAD CHIEFS

The Tenth Anniversary Issue is an appropriate place to thank another group of men who contributed significantly to The Advocate - the Chiefs of the Defense Appellate Division. As the officers ultimately responsible for The Advocate, these attorneys gave the journal direction, guidance, and support. They were:

<u>Date</u>	<u>Chief, DAD</u>	<u>Current Address</u>
Jul 66-Aug 70	COL Daniel T. Ghent	Admin Assistant, Chief Judge, Georgia Court of Appeals, Atlanta, GA
Sep 70-Feb 72	COL George J. McCartin, Jr.	Colonel, Retired 5416 Littleford Rd. Springfield, VA
Mar 72-Aug 74	COL Arnold I. Melnick	Colonel, JAGC Chief, Litigation Division, OTJAG
Aug 74-Aug 75	COL Victor A. DeFiori	Brigadier General, USA, Judge Advocate, USAREUR
Aug 75-Dec 76	COL Alton H. Harvey	Brigadier General, USA, Assistant Judge Advocate General for Civil Law, OTJAG

INSTRUCTIONS - AN UNDER-UTILIZED OPPORTUNITY FOR ADVOCACY*

Chief Judge Albert P. Fletcher, Jr.**
United States Court of Military Appeals

I am pleased to have been invited to contribute to The Advocate in this, its Tenth Anniversary Issue. Understanding the role The Advocate plays in providing information to military trial defense counsel, I have decided to take this opportunity to discuss a topic of interest to me - the trial defense counsel's role in the formulation of court (jury) instructions.

Instructions are a major part of every jury trial, yet from my view, military trial defense counsel appear to give only limited interest to them. This is understandable, in part, for military judges invariably use trial manuals which have pattern instructions that cover almost all situations that may occur in a trial. Trial defense counsel, therefore, rarely present and litigate suggested instructions. This reluctance is unfortunate, for in my opinion, this is an under-utilized opportunity for effective advocacy by trial defense counsel.

* Editors Note: The fortuitous timing of the comments by Chief Judge Fletcher in his article is most important to the Editors of The Advocate. That is because, for some time, we have been considering presenting material in The Advocate on instructions. In this issue, therefore, we begin a series of articles on sample instructions - material which has been prepared by the Field Defense Services Office of DAD. Judge Fletcher's expressed concern for the importance of instructions makes the reasons for our decision to publish these instructions even more apparent. See "Some Sample Instructions: Part 1" on other pages in this issue.

** A former Kansas state judge (1961-75) and practicing attorney (1951-61), Chief Judge Fletcher was appointed as Chief Judge of the U. S. Court of Military Appeals by President Ford in 1975. Judge Fletcher is a native of Kansas, served with the Army Air Corps during World War II, and holds degrees from Kansas State University (B.S.) and Washburn University (LL.B).

This conclusion comes from a realization that the exactitude of an opening statement, the exhaustive cross-examination and the impelling closing argument can all be lost for the want of a proper jury instruction. Among the obligations to the client, one of the highest, therefore, is to make certain that the members of the court are properly instructed regarding the law applicable to the facts of the case.

Proper instructions are clear, concise, accurate and impartial statements of the law. Anything less should be challenged. Printed pattern instructions like those found in a Trial Judge Manual are exactly that, patterns drawn to fit the general case. It may be assumed that a case worth trying before members isn't a run-of-the-mill case. Any pattern instruction must be tailored to meet the particular case and includes specific, such as dates and names.

The final determination of the issues to be instructed on and the language employed is within the sound discretion of the trial judge.^{1/} This does not mean that either the government or defense counsel should forfeit his right to request specific instructions.^{2/} The obligation to request relevant instructions falls principally upon defense counsel, for it is his client's defense that requires other than the standard instruction.^{3/} Furthermore, a trial judge generally will not abuse his discretion by refusing a proposed instruction drawn in a partisan manner.^{4/}

It should be remembered that an instruction correct in law is not subject to objection because it is not specific as to one of the theories of the defense unless a request

^{1/} United States v. Graves, 23 USCMA 435, 50 CMR 394 (1975); See United States v. Grunden, 25 USCMA 327, 54 CMR 1053 (1977).

^{2/} Paragraph 73(d), Manual for Courts-Martial, United States 1969 (Revised edition).

^{3/} Cohen v. United States, 366 F.2d 363, cert. den., 385 U.S. 1036 (1966).

^{4/} United States v. American Radiator and Standard Sanitary Corporation, 433 F.2d 174 (1970).

for a specific instruction on the theory is filed.^{5/} In most instances appellate courts give little consideration to a simple oral request for a proper instruction or to a mere exception noted on the record. All requests for instructions should be in writing and filed with the judge or his clerk. A written request for instruction which is not given as requested or is denied in toto is a red flag to an appellate court.

The law requires that all requested instructions shall "be marked for identification and appended to the record of trial for consideration on review."^{6/}The Manual for Courts-Martial provides for the submission of proposed instructions by counsel.^{7/}Counsel should be prepared to present argument on any requested instruction. This is the ideal time to reargue a prior denied motion with a mini-brief becoming part of the record.

How does a requested instruction become a mini-brief? An instruction should contain more than the requested charge; it should show the authority in the law for the specific request. Moreover, the Codal citation, or Manual provision should all be included in the request by designated number and citation. A trial judge rarely ignores a written requested instruction where a proper legal basis is cited; he feels compulsion to at least read the authorities. A reviewing court will not ignore the authorities, especially if one of the authorities cited is a decision of that court.

Defense-requested instructions can, for the most part, be drafted prior to trial. Presenting these to the trial judge at the close of all the evidence can be the stimuli which set the mind regarding necessary instructions. Psychologically, this timing also allows the trial judge an interval to correct himself if he has decided on a course of instruction that precludes the one requested. Such timing also secures

^{5/} See footnote 1; State v. Poole, 25 NC App. 715, 214 S.E. 2d 744; United States v. Howard, 23 USCMA 187, 48 CMR 939 (1974); United States v. Bryant, 3 M.J. 9 (CMA 1977).

^{6/} See footnote 2.

^{7/} See footnote 2.

one's right to argue requested instructions without having a jury waiting in an outer hall. The judge is allowed to more accurately notify them of the time the court will reconvene.

In the event the judge precludes an argument on requested instructions or merely denies them all, it is remiss of defense counsel not to request the judge to state the reasons for his refusal. There is an absolute right to a complete record regarding the law and its application to the specific case.

As many instructions and the commentary thereto in the Trial Judge Manual do not meet the test of accurately stating the current status of the law, a lawyer must properly draft them to clearly and concisely state the present law as it pertains to the case at hand. Defense counsel should, therefore, always investigate the current status of the law and, when applicable, prepare proposed instructions for the jury's interpretation of that law. Only by doing this will the trial defense counsel insure that his client receives a proper determination of guilt or innocence.

DAD PLEADINGS TO TRIAL DEFENSE COUNSEL

As was mentioned in the last issue of The Advocate, DAD has been making arrangements to forward copies of DAD briefs to the defense counsel who represented the client at trial. Beginning in March 1978, a copy of every DAD initial pleading will be stamped with the phrase "DEFENSE COUNSEL'S COPY" and will be forwarded with the "SJA'S COPY" to the installation on which the trial occurred. With this procedure, it is hoped that the trial defense counsel can be kept abreast of the appellate attorney's efforts on behalf of their client. Senior defense counsel should insure that pertinent local administrative offices are aware of this change, and monitor the delivery of copies of appellate briefs to trial defense counsel.

IMPROVING THE SYSTEM - AN IMPORTANT ROLE
FOR THE APPELLATE DEFENSE LAWYER

Brigadier General Hugh J. Clausen*

I am pleased to have been asked to contribute to the Tenth Anniversary issue of The Advocate. Since the enactment of the Uniform Code of Military Justice, the lawyers of the Defense Appellate Division have been the catalyst for many changes in the administration of military criminal law. These changes, for the most part, have brought about improvements in the system. On the other hand, many would agree that some changes have been simply that -- they have not improved the system, but rather simply have altered the ways in which certain things can or must be done.

While the system has been changing, the attitude and approach of appellate defense counsel also have been changing. In the early years under the UCMJ, appellate defense counsel tended to carry out their duties without any consultation with trial defense counsel and, perhaps, without a full understanding of the problems which confront the trial defense counsel in the heat of battle in the courtroom. One does not need a great deal of imagination to conclude that there was, in the past, some contention between trial defense counsel and appellate defense counsel. I believe that the major contributing factor to this undesirable situation was a perception by some judges and many appellate defense

* Brigadier General Clausen is presently Commander, U. S. Army Legal Services Agency and Chief Judge, U. S. Army Court of Military Review. During over 27 years of active duty he has served in a variety of responsible positions, including Staff Judge Advocate of the III Corps, Fort Hood, Texas and the 1st Infantry Division, Viet Nam, Executive of the Office of the Judge Advocate General, and Chief of the Military Justice Division, Office of the Judge Advocate General. He holds an LLB from the University of Alabama, and is a graduate of the Army War College and the Advanced Management Program at Harvard University.

attorneys that everyone at the trial defense level was, at best, unsophisticated and inexperienced - maybe even incompetent. With only a few exceptions, that conclusion was never accurate, nor is it true today. This situation was exacerbated by assigning officers to the Defense Appellate Division who had little or no trial experience. Additionally, there seemed to be virtually no communication between the defense counsel at the two levels. It was not uncommon in the early years under the UCMJ, for example, for the appellate defense counsel to allege that the trial defense counsel rendered ineffective assistance without even extending the trial defense counsel the courtesy of discussing the matter. Whether this was ethical is another matter.

I believe that this situation has improved gradually over the years and has reached the point, principally because of the cross-pollination of duties, to where this is no longer a major problem. Certainly, the current policy of The Judge Advocate General to insure that those assigned to the Defense Appellate Division have had field experience as either trial counsel or defense counsel already has had a significant impact towards eliminating the lack of understanding by appellate defense counsel of the problems, pressures and vexations of those engaged in trial defense work. I believe too, that the editorial policy of The Advocate in recent years also has contributed in large measure towards a better understanding of the obligation of defense counsel, whether he or she be at the trial or appellate level.

Any critical appraisal of the judicial activism which has characterized our appellate system at the highest level in recent years will, I believe, show that our highest court has tended to focus primarily on problems raised at the appellate level without, perhaps, a sufficient degree of regard for the problems of those whose lot is to be the first line of defense. Anyone who has been engaged in defense work at the trial level understands how difficult and frustrating this duty can be at times. If those charged with forwarding cases to trial do a good job, any defense counsel is going to "lose" many more cases than he or she "wins." I think it is important to understand that a trial defense counsel, better than any other lawyer who will ever see the case, knows what is best for the accused under the facts and circumstances peculiar to every case. The trial attorney must, therefore, be given greater latitude in conducting that case as he or she, in his or her professional judgment, believes is correct at that time. This is not to say that trial defense counsel do not make mistakes; they

do, but they should be second-guessed only reluctantly. All of us have 20-20 hindsight weeks and months, and sometimes years, after a case is tried.

I would hope that the expression of the above views are not misunderstood as a denigration of the importance of those assigned to appellate defense duties. On the contrary, I believe a proper understanding of the trial defense function should highlight the importance, and the difficulty, of the duties of appellate defense counsel who must work with records of trial that they can in no way change. This brings into focus the extraordinary opportunity which is available to those who contribute to The Advocate. Appellate defense counsel can provide guidance and assistance to trial defense counsel from a unique vantage point.

This potential of The Advocate, which is available to everyone assigned to the Defense Appellate Division, has become increasingly important in recent years. It can continue to be so. However, if this is to happen, all of those engaged in appellate defense work must be dedicated in a dual sense. First, there must be full dedication to each and every client they represent. Second, and not so obvious or well understood, they must be dedicated to the improvement of the military justice system. In this regard, they should be willing to analyze how their experience may be of benefit to those at the trial level and then to articulate these ideas in such a way that they can be understood and used by trial defense counsel when it is appropriate to do so.

I suspect that in the near future, we will see the formation of the Trial Defense Services which will, among other things, assume the responsibilities of what is now known as the Field Defense Services Office. It may even be that this new division may become responsible for the publication of The Advocate. Regardless of who ultimately has publication responsibility, it is important that those assigned to appellate defense duties continue to strive, as those before them have striven, to transfer the expertise gained from analyzing the legal issues of their clients' cases into advice and guidance to those who defend at the trial level.

THE DEFENSE COUNSEL IN USAREUR

Brigadier General Victor A. DeFiori*

Being a defense counsel is never an easy assignment. But, when viewed from the perspective of professional responsibilities, it is one of the most challenging and rewarding obligations a lawyer can undertake. In United States Army, Europe, our defense counsel face new and exacting legal problems every day. Despite unique challenges, our defense counsel perform their legal duties in a thoroughly professional manner and demonstrate singular competence and dedication in representing their clients.

To appreciate the role of defense counsel in USAREUR, it is necessary to know our jurisdictional structure, our defense resources, and our case load.

USAREUR's 180,000 soldiers are stationed throughout Europe and the Middle East, with the vast majority located in Germany. In order to cope with our wide dispersion of soldiers, court-martial jurisdiction is administered on an area basis, rather than through the normal chain of command. Accordingly, USAREUR is divided into eleven geographical areas with a major commander exercising general court-martial jurisdiction over all Army personnel assigned in that area. Each of these areas are further divided into communities, and the community commander is usually designated as a special court-martial convening authority.

Throughout the eleven jurisdictions there are 47 servicing Judge Advocate offices where 50 Judge Advocates are assigned as defense counsel. Though the majority of our defense counsels' work is related to courts-martial, they perform other duties including Article 15 counseling, administrative discharge

* Brigadier General DeFiori has been the Judge Advocate, United States Army Europe and Seventh Army since July 1975. A considerable portion of his career has been devoted to criminal law, for he has served at all levels of the military justice system - from trial attorney to staff judge advocate, from Chief of the Military Justice Division, Office of The Judge Advocate General to Chief, Defense Appellate Division. Prior to his assignment to Germany, he was Executive, Office of The Judge Advocate General. General DeFiori has a B.A. and J.D. from the University of Notre Dame, and is a graduate of the United States Army War College.

representation, and legal assistance. Accordingly, defense counsel and other Judge Advocate officers are stationed in locations where they are readily accessible to their clients and to commanders.

The "area jurisdiction" concept has resulted in more efficient and rapid processing of courts-martial and related administrative actions, and has improved the administration of military justice dramatically. As one example, the average processing time for general courts-martial has decreased from 202 days in 1972, when the area jurisdiction concept was established to 62 days in 1977.

The number and types of cases tried in USAREUR provide an indication of the responsibilities facing our defense counsel. In FY 1977, 605 general courts-martial, 269 bad conduct discharge special courts-martial, and 962 regular special courts-martial were tried in Europe. In addition, 313 summary courts-martial were tried, 34,385 Article 15's were administered, 713 soldiers were discharged under Chapter 10, and 255 were administratively discharged for misconduct.

In the last quarter of FY 1977, USAREUR tried 51% of all general courts-martial and 29% of all special courts-martial Army-wide. This high percentage of general courts-martial resulted from the general inapplicability of the O'Callahan case overseas, from a decline in the number of bad conduct discharge special courts-martial, and from the low number of cases in which host nations exercised their jurisdiction over Army personnel (only 32 of 11,996 cases subject to German primary jurisdiction in 1977). Consequently, USAREUR defense counsel are involved in more serious and complex cases than counsel in CONUS. The nature of the charges runs the full gamut of the punitive articles, with the predominant offenses being drugs, assault, larceny, robbery, rape, and murder. Counsel are seldom involved in a simple AWOL case, for there is a low incidence of AWOL in USAREUR.

At times, the duties and tribulations of defense counsel seem awesome. Although critics may sometimes question the manner in which they carry out their professional obligations, nevertheless, the pride and self-satisfaction which accompany the discharge of their duties are rarely surpassed. I have observed that USAREUR defense counsel do not consider their duties merely as a learning experience, but, rather, as a unique opportunity to exercise their professional skills. This observation is corroborated by the experiences of trial counsel in USAREUR who have learned that our defense counsel

are tenacious adversaries, demanding of proof, persuasive before the courts, and vocal on behalf of their clients. My observation is further supported by the fact that in FY 1977, USAREUR defense counsel obtained complete acquittals or dismissals in 16% of the cases after referral, not to mention numerous other cases which were dismissed or otherwise disposed of prior to referral.

In addition to a heavy and complex case load, USAREUR defense counsel are confronted with administrative difficulties not usually encountered elsewhere. For example, at present, there is only one confinement facility in Europe, Although it is somewhat centrally located in Mannheim, travel for counsel from many jurisdictions involves extensive distances and considerable time. In addition, defense counsel often find that their investigation and preparation for trial are hampered by inadequate communication systems and the unavailability of vehicles for transportation. Finally, some defense witnesses must be obtained from CONUS. All these factors combine to make preparation for trial more difficult.

Despite these impediments, the courts and the command expect counsel to dispose of cases rapidly. In USAREUR, by regulation, all special courts-martial, except in extraordinary circumstances, must be tried within 45 days from the imposition of restraint or preferral of charges, whichever is earlier. In general courts-martial, the time limits established by Burton and Dunlap are regarded as absolute maximums, and our policy is to prosecute and process cases well within these time frames. As a result, the USAREUR 45 Day Rule combined with our effort to process general courts-martial as rapidly as possible benefit both the accused and the command. On an average, regular special courts-martial are disposed of in less than four weeks from preferral of charges to convening authority action, bad conduct special courts-martial in less than six weeks, and general courts-martial in less than nine weeks.

Some of our defense counsel's burdens are ameliorated by our policies designed to improve the effectiveness of the military justice system. For example, every Judge Advocate officer in USAREUR is required to obtain a minimum of 50 hours of formal Continuing Legal Education each year. This requirement may be fulfilled by attending courses provided by the JAG School, or Continuing Legal Education programs conducted by the various divisions of my office, or periods of instruction provided by local Staff Judge Advocates. My office conducts six to eight CLE programs for counsel each year. These sessions usually vary in length from twelve to eighteen

hours during a two or three day period. Most of these programs are conducted in Garmisch or Berchtesgaden. On other occasions, programs may be conducted in Berlin, Frankfurt, or Heidelberg. Thus, each Judge Advocate officer in USAREUR may expect to attend at least two of these sessions per year. Additionally, each Staff Judge Advocate provides at least 25 of the 50 required CLE hours, using video tapes obtained from the JAG School, or periods of instruction presented by the resident Military Judge or by Judge Advocates assigned to the local Staff Judge Advocate office.

As a further aid to defense counsel, Enlisted Lawyers Assistants are provided to assist them in the performance of their duties. These assistants, who receive formal training at the 7th Army Combined Arms Training Center, have proven to be valuable assets for defense counsel in the preparation of their cases for trial. Their duties include locating and arranging for the attendance of witnesses, interviewing potential witnesses, and performing other essential investigative and administrative services. Because they have removed from defense counsel many of the time-consuming administrative tasks associated with preparation for trial, defense counsel are able to concentrate their efforts upon the more demanding tasks requiring professional skill. As a result, defense counsel are more effective, and the level of representation provided to individual clients is enhanced.

In USAREUR, defense counsel offices and operations have been set apart from the government as much as possible, short of the establishment of a separate defense service. Each general court-martial jurisdiction has a Senior Defense Counsel who assigns counsel to individual cases, acts as rating officer on efficiency reports, and provides advice and assistance to defense counsel in his jurisdiction. A Senior Defense Counsel for USAREUR is located in my office in Heidelberg. He is available to all defense counsel and provides a means of rapid access to the Field Defense Service and to me on matters of interest and concern for defense counsel. I believe the steps already taken have created a solid foundation for a Trial Defense Service. USAREUR Staff Judge Advocates favor the establishment of such a program, and we should be able to implement any new system with minimum difficulty.

In summary, USAREUR defense counsel face great challenges and exercise wide-ranging responsibilities. Through dedication, perseverance, and hard work, our defense counsel deliver highly professional services to their clients. Their principal rewards

are personal pride and a sense of accomplishment. The experience a Judge Advocate officer gains as a defense counsel in USAREUR cannot be duplicated elsewhere, and is a once-in-a-lifetime opportunity for professional challenge, service and growth.

SUPREME COURT RULES THAT JURIES WITH LESS
THAN SIX MEMBERS ARE UNCONSTITUTIONAL

As The Advocate went to press, the U.S. Supreme Court announced its decision in Ballew v. Georgia, No. 76-761, 21 March 1978. In that case, the Court held that a criminal trial with a jury of less than six members is unconstitutional. The judgement was unanimous; however, the justices split on the reasons for the decision. Justices Blackmun, Brennan, Marshall, Stewart and Stevens concluded that a jury with less than six members substantially threatens Sixth and Fourteenth Amendment guarantees. Justice White wrote that such a jury would not satisfy the fair cross-section requirement of the same Amendments. Chief Justice Burger and Justices Powell and Rehnquist stated that although the line between five and six member juries (six member juries were upheld in Williams v. Florida, 399 U.S. 78 (1970)) is difficult to justify, a line has to be drawn somewhere if the substance of a jury trial is to be preserved.

The Court did not discuss the court-martial system, and therefore the decision's impact on special and general courts-martial with less than six members is uncertain. The principal opinion did, however, discuss and reject any distinction between jury trial requirements in felony and misdemeanor cases. The Court did not indicate if the decision is retroactive, nor did it discuss whether objection to the number of jurors must be made at trial, or whether the issue can be raised for the first time on appeal.

TRIAL DEFENSE COUNSEL HAPPILY REMEMBERED

Colonel Wayne E. Alley, JAGC*

Your editor has asked for my observations about counsel, hoping some helpful pointers might emerge from the 12 years I spent in trial and appellate courts as counsel and judge. All evaluations of counsel other than win-loss figures are subjective, but it is interesting that the ones who stand out in memory and are still living have gone on to outstanding careers as judge advocates or successful practice elsewhere in government or civilian life. The ones who did well in court seem to have a general knack for success.

It goes without saying that the best counsel knew the rules, especially the rules of evidence. Their management of evidentiary issues appeared effortless, whether as proponent or opponent of evidence, whether laying a foundation or instantly stating an objection on the precisely opposite grounds. I suspect their effortless appearance represented much effort, both in general mastery of the rules and specific preparation for the case, as well as a natural or acquired poise.

They also knew the rules of substantive law. Most of them were inveterate readers of publications such as The Advocate, the Criminal Law Reporter, and law reviews. They also read books and periodicals on other subjects, for example, history, biography, and current political affairs. Although most were good conversationalists, they did not fritter away their days and evenings in endless, aimless bull sessions at the expense of reading and learning time. Probably a trial judge is subtly influenced by regarding a counsel as a learned

* One of the most experienced criminal lawyers in the Army, Colonel Alley is presently Chief of the Criminal Law Division, Office of The Judge Advocate General. He has been a civilian civil trial attorney in Portland, Oregon, for two years, a JAG trial and defense counsel for five years, a military trial judge and Chief Trial Judge for three and a half years, and a judge on the Army Court of Military Review for two years. Colonel Alley has an A.B. and a J.D. from Stanford University and attended the Industrial College of the Armed Forces.

man worth heeding because of the breadth of his interests. The same principle of transference of authority operates in favor of baseball players who endorse a brand of beer.

It is no coincidence then that the best counsel would have been outstanding teachers. A strong bar is said to make a good bench, because judges need educating, as do court members, concerning the facts of a case. The most effective technique by a counsel was educating the court as if to say, "When I present the case, you will not have to anguish over a decision. The correct decision (that is, favoring my side) will simply emerge by force of the facts and the law, not by force of my persuasion." If properly done, this technique is the highest form of persuasion, the art that conceals art.

These professional advocates weren't timid. They observed the forms of respect in court but were not sycophantic to the judge or court members. They could not be bluffed by opponent counsel. As defense counsel, they controlled their clients so that the clients were not frustrating the exercise of expert judgment about tactics. Being confident of their skills, these advocates never practiced in a posture of fearing allegations of ineffective representation. Indeed, having sound reasons for their professional decisions, they never seemed to be called upon to explain them.

The most important of these professional decisions were settling on a theory of the case and then a trial strategy. By theory I mean one legal basis for criminality or, on the other side, exoneration from criminality. By strategy I mean effective and economical ways to present the theory. The defense counsel who set up inconsistent or conflicting defenses or who could not articulate his precise positions was seldom effective. The law may allow inconsistent defenses, but no rule in the books can make the presentation of inconsistent defense palatable to a court.

Similarly, a trial counsel is not effective if he tells the court, "Maybe the accused perpetrated the act, maybe he was an aider and abettor, or maybe he fell out of the criminal scheme early enough so as to be liable only for a criminal attempt--you sort it out." A tale of Winston Churchill is that he summarily ordered a bowl of pudding removed from his table because "it lacks theme." The same disposition will usually be made of a case presentation that lacks coherent theory.

The thread that runs through these observations is that a skillful presentation has clarity. Counsel's theory, examination of witnesses, briefs, arguments, and even the unarticulated reasons for what counsel did not do are all clear. The simplest judge could follow them.

Finally, these memorable counsel were ethically sensitive and never stepped out of their role as advocate. They presented the case for one of the parties, and never developed any misconception that they were the party. They were zealous and detached at the same time. Detachment permitted better evaluation of their cases and cordial relationships between adversaries after trial. The good ones didn't sulk and weren't grumpy.

Of course no one person epitomized every positive attribute of the counsel I happily remember, just as no one judge can be always right in the view of all counsel before him. However, the dozen or so counsel whose work I most admired and enjoyed as opponent or judge will always stand out because of these attributes. Their cases are the best memories from the courtroom.

THE ADVOCATE FOR EACH TRIAL DEFENSE COUNSEL

We are pleased to announce that arrangements have been completed for the publication and distribution of one copy of each issue of The Advocate to each Army trial defense counsel. We have recently completed a survey of all Army Defense Offices in order to determine the number needed at each installation. Armed with these figures, starting with this issue we will be sending to all defense offices a copy for each defense counsel and a copy for the Defense Library. If any changes are necessary, please notify our Managing Editor.

THE ADVOCATE AND THE TRAINING
OF ADVOCATES

Colonel William S. Fulton, Jr., JAGC*

According to recent press accounts, Chief Justice Burger told the American Bar Association at its February 1978 meeting that more than one-half of trial advocates are regarded as ineffective. (I assume that he was not referring to the fact that they lose cases, a fate which usually befalls half of the lawyers in each case.) I do not believe that the same "defective assistance of counsel," to use Judge Bazelon's term, inhabits the military trial bar and I think that The Advocate has contributed to our relatively better showing. Therefore, it seems appropriate in observing The Advocate's tenth anniversary to reflect upon the training of our trial lawyers, especially defense counsel. I suppose that I was invited to do this because of my long affiliation with The Judge Advocate General's School. It is to be observed, however, that the training of defense counsel neither begins nor ends at the School.

The nation's law schools are doing a far better job of teaching trial advocacy than they were doing only a few years ago. The day has not arrived, however, when trial advocacy can be dropped from the Judge Advocate Officer Basic Course--the Army's counterpart of the so-called skills or bridge-the-gap courses that New Jersey requires and most other State bars offer new practitioners. Indeed, despite the improvement of trial advocacy training in law schools, The Judge Advocate General's School has found it necessary to increase, rather than decrease, the emphasis on trial work to meet the needs of the Corps for competence in the trial arena.

* Colonel Fulton has devoted over ten years of his career to the education of Army lawyers. He served at the U.S. Army Judge Advocate General's School as an instructor from 1956-61, as Director of the Academic Department from 1971-74, and as the Commandant from 1974-76. At the present time he is a Senior Judge of the Army Court of Military Review. Colonel Fulton attended the University of Iowa, received a J.D. from the University of New Mexico, and is a graduate of the U.S. Army War College.

Our Corps' concern for the quality of defense services became evident to me in 1952 when I was first assigned to a judge advocate office. Even in a small, five-lawyer office (the authorized strength of a division SJA office in those days), the staff judge advocate would not allow us younger lawyers, although certified by TJAG, to undertake alone the defense of accused soldiers until we had acquired experience and demonstrated competence as we progressed through the chairs of assistant trial counsel, trial counsel, then assistant defense counsel. Some 25 years later, The Judge Advocate General would effectively codify that requirement by declining to certify any defense counsel until competence in trial advocacy has been demonstrated. The point to be noticed here is that the responsibility for training defense counsel ultimately rests with the senior members of the JAG Corps, starting with the staff judge advocate.

As trial advocacy training for law students has improved, the availability of such training outside the law schools has increased as well. To the traditional prosecutors' and defenders' short courses at Northwestern Law School have been added the seminars of the National Institute of Trial Advocacy (NITA) and the Court Practice Institute (emphasizing civil litigation), increased offerings by the Practicing Law Institute (PLI) and the American Law Institute-American Bar Association Committee on Continuing Professional Education (ALI-ABA), and the curricula of whole new institutions such as the National College of District Attorneys and the National College of Criminal Defense Lawyers and Public Defenders. With the advent of mandatory continuing legal education for certain State bars (Minnesota, Iowa, Wisconsin, Washington, and North Dakota thus far), there are likely to be more State and local CLE programs available and among them programs on trial advocacy. Most recently (and perhaps to the dismay of the nonprofit purveyors of CLE) the West Publishing Company has entered the field with its brief course in evidence.

In short, there seems to be no lack of opportunities for continuing legal education in trial advocacy, including courses structured specifically for defense counsel. The wise defense attorney, therefore, will seek time and funding for his or her official attendance at any of the various seminars.

Among the most popular courses to be conducted at The Judge Advocate General's School have been the trial advocacy courses begun there a few years ago. The convenient seminar rooms and two model courtrooms of the School's new building,

occupied in 1975, may have contributed to the enthusiasm. I submit, however, that there is another reason and it is one that sets us apart--or should--from the civilian bar: Most of our young lawyers want to be trial lawyers. They desire continually to improve their trial lawyering skills. They don't have to be told to participate in advanced training (as I suspect will become a requirement for practice in Federal courts within a few years); they merely need to be given the opportunity. From the modest beginning of one course serving both prosecutors and defenders, the School now conducts a separate course for defense counsel. Apart from any pedagogical advantages, this allows more judge advocates to attend annually. Arranging for their trial lawyers to attend these courses is an absolute must for staff judge advocates.

But what has all of this to do with The Advocate? A recently published study of the work of the legal profession notes that most learning which occurs after law school is based on the shared knowledge and experience of other practitioners. What The Advocate has done, and must continue to do, is to provide a forum for that sharing of knowledge and experience within the military bar.

What about the next ten years? A unique aspect of The Advocate is that it represents a sharing of views by the appellate bar with the trial bar--perhaps in that respect the only publication of its kind. There is room, however, for more sharing of experiences by the trial bar with the trial bar and the editors should consider soliciting more articles from the field. Perhaps the Field Defense Services Office or its successor could do this as its members go about conducting seminars at field installations.

In any event, whether written by lawyers in the field or those in the Defense Appellate Division, The Advocate could provide more how-to-do-it trial technique articles. Another future role for The Advocate might be as a means of distributing in advance those materials to be considered in preparing for the Field Defense Services seminars mentioned above.

Since The Advocate began, The Judge Advocate General's School inaugurated The Army Lawyer (Department of the Army Pamphlet 27-50-series). That more widely and easily distributed publication now is available by subscription from the Government Printing Office. This seems an appropriate time to consider whether a "Defense Advocate" section of The Army

Lawyer would reach a wider readership and perhaps eliminate some duplication of administrative effort. It is at least a matter to be initially explored by the respective editors. Meanwhile, The Advocate has been of service to the Corps. It clearly has been a labor, but a "labor of love," for the many who have been involved in its production over the past ten years. Judge Charles W. Joiner has written that "to be a good judge I need good lawyers." We judges owe thanks to The Advocate for its contribution to the expertise of the military trial and appellate bar.

FINCH REPLACES RETSON AS MANAGING EDITOR

In March 1978, CPT William L. Finch succeeds CPT Nicholas P. (Chip) Retson as Managing Editor of The Advocate. Chip has worked on The Advocate for over two years, and has been primarily responsible for vastly improving the administration of the journal. Not only has he put some order into a heretofore mysterious distribution system, but he has improved the billing procedures and contributed to our improved format and publication system. Chip is completing his tour of duty in DAD and will be reassigned to Charlottesville this summer for attendance at the Advanced Course. We wish him well.

Will Finch has been an appellate attorney in DAD for approximately one year, following his assignment in Germany. He has recently had an article published in The Advocate, and now joins us in an administrative and business capacity.

DEFENSE APPELLATE DIVISION AND THE TRIAL DEFENSE COUNSEL:
THE DEFENSE TEAM

Colonel Robert B. Clarke, JAGC*

I reported for duty at the Defense Appellate Division on the day that COMA handed down its decision in United States v. Palenius. There was great interest in the case and much discussion of its practical effect. As a newcomer, I had the impression that something of far-reaching significance had occurred -- some new pronouncement which would change the course of military law for years to come. Looking back now, I can see that Palenius contained more old wine than new. The "serious technical difficulties" which were predicted have never really come to pass. The teaching of the case was something much more simple, if more subtle. In basic terms, the author judge was telling trial and appellate defense counsel to get their acts together.

Although the goal of Palenius seems obvious, unfortunately it has not been so easily attained. As all military defense counsel are aware, the representation of our clients is bifurcated between trial and appellate levels. This basic structural fact of life in the military justice system has significant impact on the work of all of us. And it has its good points and its bad. Not only does it make communication difficult between the physically separated trial and appellate attorneys, but it often times leads to a feeling that the appellate lawyers are critically, and unjustly, examining the effectiveness of the trial defense counsel.

Before I discuss these problems of communications and relations between counsel, I might note that the bifurcated system has its strengths, as well. In fact, it may come as a surprise to some that our current system coincides closely with the desired model of the National Legal Aid and Defenders Association (NLADA). NLADA's 1976 study commission recommended that "the appellate functions should be as organizationally

* Colonel Clarke has been Chief of the Defense Appellate Division since January 1977. He has held a variety of responsible positions during his career, including Staff Judge Advocate of II Field Force in Viet Nam and Legal Advisor, U.S. European Command. Colonel Clarke holds an A.B. from Ripon College and a J.D. from the University of Wisconsin, and is a graduate of the Army War College.

independent of the trial function as is feasible counsel on appeal should be different from trial counsel and capable of exercising independent review . . ." It is the client who benefits by such arrangements. At trial he is represented by a skilled practitioner; on appeal he is represented by counsel who combines both trial and appellate skills and is, moreover, engaged full-time in appellate practice.

If the goal, then, is a closer relationship between trial and appellate defense counsel, improved communications must be the means. It is for this reason that one of the first things a DAD action attorney now does on receiving a new case is to send a letter to the trial defense counsel (TDC). This letter introduces the appellate defense counsel (ADC), provides address and phone number to facilitate contact, and requests any comments that may aid in their client's appeal. While a similar introductory letter goes to the client, the TDC is usually the most useful source of information to the appellate attorney. It is a rare case where the ADC does not have to send additional letters or does not have to make additional telephone calls to the field in order to understand questions raised by the record or request documents in the preparation of the appeal. I can assure you that the TDC in any given case is regarded as a valued member of the appellate team by the Defense Appellate Division.

Although calls and letters from DAD are obvious means of initial contact, there are many ways the TDC can get his message to DAD, even though he may be leaving the Army before the record of trial arrives at DAD. First, build the record. It is amazing how many errors that are raised on appeal are first detected in the allied papers, but not mentioned in the record of trial. The problem with the allied papers is that they are not part of the record of trial and, thus, not usually suitable authority in and of themselves to cite to appellate courts. When in doubt, make a motion at trial; get that questionable pretrial advice, Article 32b report or conflicting witness statement made an exhibit at trial. In short, build the record.

If the trial is over before you recognize a potential appellate error, it is still not too late. Clemency petitions, Goode rebuttal to post-trial reviews, and Article 38c briefs are all attached to the record and are welcome gold mines of information to the DAD attorney. At times you may think these post-trial efforts are wasted or ignored by the convening authority, but they receive a great deal of attention at the appellate level. An additional and often neglected means of

post-trial communication of errors is the Request for Appellate Counsel Form. The last part of this form provides blank lines for the appellant to point out specific trial errors without the necessity of lengthy supporting arguments. This space is rarely utilized in the records received at DAD. On the other hand, the government attaches such significance to these entries that GAD files rebuttal briefs on these points whether or not DAD briefs them.

If you think of a possible appellate error after the convening authority's action, and you can not or do not want to wait for contact from the DAD assigned counsel, write or call Defense Appellate Division, U.S. Army Legal Services Agency, Nassif Building, Falls Church, Virginia 22041, AUTOVON 289-2277. The message will be passed to whomever is assigned the case when the record arrives.

Perhaps the biggest impediment to better relations between counsel is the reluctance of the TDC to have his work reviewed by someone in a far distant "ivory tower," who he feels may be overeager to cite him for ineffective performance. To begin with, the ineffectiveness issue is far more notorious than the frequency of its assignment as an error warrants. It is raised in less than one per cent of our cases. For the past couple of years DAD has been staffed with attorneys with several years of trial experience. Not only have these people "been there," they have made some of the same mistakes in the learning experience. Today the typical DAD attorney is acutely aware of the difference between a legitimate choice of trial tactics dictated by the surrounding circumstances and a provable inadequacy allegation. Many appellants blame their post-trial predicament on their TDC, and it is the DAD attorney who indirectly stops unjustified allegations against the TDC, after investigating the complaint and explaining to the client what constitutes inadequacy. Where ineffectiveness appears to be a legitimate issue, the DAD SOP requires that every reasonable attempt be made to contact the TDC and secure his or her side of the story. In addition, before this issue can be assigned, the DAD attorney must discuss the case with his immediate supervisor and either the Executive Officer, DAD or Chief, DAD. The Chief of DAD gets personally involved in every such case before it is actually filed.

There are several reasons why this issue is seldom raised. First, as I stated, actual incidents of ineffective representation are rare. Even in questionable cases, it is a difficult allegation to prove. Last, but not least, when the issue is

raised the attorney-client privilege is waived, Government Appellate Division gains access to the TDC, and DAD loses a much valued partner in the appellate team.

The relationship of the TDC and DAD is not a one-way street to the benefit of DAD. The client is the reason for the existence of both the TDC and DAD. All our combined efforts must play a supportive role to the client. Ten years ago DAD began publishing The Advocate to help the TDC help the client. The Advocate continues to be solely supported by volunteer, and mostly extra-duty efforts of DAD attorneys. In response to increasing telephonic questions from the field, the Field Defense Services Office was organized in 1976, under DAD, to supply more direct and immediate assistance to the TDC on individual problems as well as more general lecture and written materials. Field Defense Services is also staffed from DAD personnel reserves. All this exists solely to help the TDC help our clients.

In summary, DAD needs the help of the TDC and we feel DAD could help the TDC. Call us -- only the client gains from our teamwork.

ATTENTION AIR FORCE DEFENSE COUNSEL

On occasion we are notified by Air Force defense counsel that he or she has not received a particular copy of The Advocate. Please be aware that we do not mail copies directly to Air Force counsel. Instead, we deliver 207 copies of each issue of The Advocate to the Executive Services Section, Office of The Judge Advocate General, HQ, United States Air Force, Washington, D.C. 20314. That office makes distribution to individual defense counsel. Therefore, if Air Force counsel have any questions concerning receipt of The Advocate, please contact SSGT Hudson of that office (Autovon 693-5820).

OBSERVATIONS OF A SENIOR DEFENSE COUNSEL

Major Kenneth J. Leonardi, JAGC*

Few assignments in the JAGC offer the extremes of total job satisfaction and total job frustration of Senior Defense Counsel. At present, most Senior Defense Counsel do not have much more experience in the arts of "lawyering" and managing than those they supervise. Yet, these individuals are called upon to balance the personalities of their co-workers, to juggle too few assets and support personnel against a fluctuating case load, and above all, to provide the best possible defense representation for their clients. As the individual soldier becomes more conscious of his legal rights and more frequently seeks advice of counsel, the need for quality defense services continues to increase. The Senior Defense Counsel must insure that those in need of defense assistance will not be hesitant to seek it, and that those who receive it will not be disappointed.

In the following paragraphs, I will present my comments and observations on the position of a Senior Defense Counsel. They are merely personal observations and may or may not be applicable to any particular office. I hope these thoughts will benefit those who have yet to face the challenge of defense management. From those who have already been there, I invite criticism in the hope that an "approved solution", if there is such a thing, for the management of a defense section can be developed.

Who Handles What?

Just what type of assistance should the defense section provide? The following categories outline the myriad of problems frequently encountered in a defense section:

* Presently the Chief of Administrative Law, Fort Carson, Colorado, Major Leonardi formerly served as Senior Defense Counsel and Chief Trial Counsel at the same post. Following his graduation with a B.S. from the United States Military Academy, he served five years in the Field Artillery and Military Intelligence Corps. After receiving his J.D. from Fordham University, he attended the JAG Basic Class. Major Leonardi has been selected and will attend the 27th JAG Advanced Course.

1. Criminal: courts-martial, Article 15's, and advice to subjects of MPI/CID investigations.
2. Quasi-criminal: administrative boards, 15-6 investigations, reports of survey counseling, and Article 138 counseling.
3. Non-criminal: e.g., breach of contract actions OER/EER appeals, counseling for alcohol/drug abuse, bars to reenlistment, reclassification actions, conscientious objector applications, and hardship/sole parenthood discharges.

In the first two areas, the criminal and quasi-criminal, the role of the defense counsel is specifically defined. The third area, that of non-criminal personal actions involving service members, however, presents frequent problems to a defense section. The question, simply, is do the defense counsel provide assistance to these people, or do they not? Whatever the Senior Defense Counsel determines is the answer to this question, he will no doubt quickly learn that the perception of most individuals outside of the JAGC--and sometimes even within the SJA Office--is that providing assistance in these areas is a required defense function.

A first step in resolving the question of the limits of defense section representation is to determine "who handles what" within the SJA office. After this is done, the Senior Defense Counsel should attempt to educate the chain of command (from private to general), and other service-oriented agencies and sections on post (i.e., AG's office, IG's office) about the role and limits of the section. Next, the individual defense attorneys must be made aware of the type of support offered by other agencies and offices on post (i.e., debt counseling, alcohol and drug abuse, etc.).

In considering what non-criminal areas the defense section will become involved with, it is important to remember that individuals who arrive in the defense section with these type of problems come for one of two reasons:

1. They are ignorant of the proper agency or office from which to seek assistance or,

2. They have come to defense as "the court of last resort."

In all likelihood, members of the defense section may commiserate with these individuals but, due to other priorities and lack of available resources, will be in no position to render the type of assistance these individuals expect from the defense section.

For the individual who believes that a visit to the legal office is the first step in the solution of all his problems, the members of the section can and should refer that individual to the appropriate office for assistance. The second type of individual, the service member who comes to the defense section as a last resort, is much more difficult. In my opinion, if at all possible, the attorney should assist this individual. This is especially required, of course, if an attorney-client relationship has been established. If it's not possible for the defense section to help, it is imperative that the attorney explain the reasons that this can not be done and convey a sincere interest in the problem.

The reason I am so concerned with this problem is that I have found that those who leave the defense section believing they are no closer to resolution of their problems than when they arrived, will usually be inclined to take matters into their own hands. These are the same individuals who invariably end up in the section later either as defendants in courts-martial or as respondents in board proceedings. Developing a system of handling these non-criminal matters should assist in minimizing the future case load of the section.

Once responsibilities have been aligned among the various sections within the SJA Office, priorities within the defense section itself must be established. After the obvious first emphasis on providing counseling and representation in courts-martial, the scheme of priorities differs from defense section to defense section, and depends on case load and personal strength. Review of priorities and monitoring of the case load by the Senior Defense Counsel can be facilitated through the assignment of cases to defense counsel on a jurisdictional basis (i.e., each

attorney is assigned the duty of representing a particular size unit, such as brigade or separate battalion). As the number and type of cases within each jurisdiction fluctuate, attorney work load can be equalized by assigning cases outside jurisdictions.

Senior defense counsel should always remember that those actions which appear to be most important to others sometimes are the most routine for a defense counsel. Such an action is anything but routine to a client. Occasionally, defense counsel may have to be tactfully reminded of this fact. Clients do not distinguish between the various offenses. Their concern is of a limited scope. Their paramount concern is "What is my attorney doing for me?" The perception that he is receiving something less than total commitment from an attorney in a particular action can destroy the attorney-client relationship and tarnish the reputation of the defense section. Adherence to a standard of priorities by the Senior Defense Counsel and the defense section will facilitate management of the section and guarantee, as much as possible, equitable representation for all clients.

Defense Investigators

No matter how well the priorities of the defense section are delineated, however, the competent execution of the defense function rests with the attorneys and enlisted and civilian legal assistants. At the present time, there appears to be no shortage of competent attorneys to provide representation. Unfortunately, the same cannot be said for those selected to serve as paralegals/investigators. A truly experienced and well-trained defense paralegal is a rare asset. A typical defense investigator is an individual without any legal training who has been assigned to the SJA Office in a special duty status, subject to recall at the whim of the parent unit. The turbulence created by the uncertainty of their status is just the first problem with the assignment of enlisted personnel. These individuals do not and cannot be expected to possess any legal training, much less the specialized skills of an investigator. However well intentioned these people are, they must be trained on-the-job, usually by the defense attorneys or other inexperienced paralegals. Any time spent in training

necessarily must detract from the task of providing primary defense services. Formal training sessions during duty hours are usually a practical impossibility due to daily office routine and operation.

To solve this recurring problem, I think serious consideration should be given to the creation of a paralegal/investigator MOS. Members trained in this MOS could, throughout their careers, function both as prosecution and defense investigators. Ideally, all those serving as defense investigators would have had the benefit of such training. If manpower constraints prohibit this training, the establishment of such a career pattern would at least provide a professional nucleus around which each defense office could develop a competent defense investigative team.

Public Relations

The job of Senior Defense Counsel will also entail a certain amount of public relations work, both within and without the SJA Office. Defense counsel must be made to appreciate the necessity of avoiding the "Us v. Them" syndrome. They must accept the fact that defense lawyers are a suspect class of individuals in the eyes of the chain of command. Only the individual defense counsel can dispel these misconceptions. Personal visits by defense attorneys to discuss cases with commanders rather than a discussion over the telephone should be encouraged. The mere fact that the lawyer has come down from the "ivory tower" to the "pits" often times proves of immeasurable value in establishing credibility with the chain of command. Attendance at an occasional "happy hour" or unit social function again often assists in fostering understanding between commanders and defense counsel that cannot be achieved over the telephone. In my opinion, those defense attorneys who have been most successful in keeping a case out of court have been those who have established a certain rapport with the chain of command.

The law enforcement agents with whom a defense counsel frequently deals often times appear to harbor a rather natural suspicion of the defense attorneys. For the most part, this is attributable to role playing. These individuals usually appreciate and respect the responsibilities of a

defense counsel more than they will initially admit. However, if the lawyer is taken in by this role playing, a truly hostile and antagonistic relationship may ensue. The ultimate loser in such a situation is the client. Members of the law enforcement agencies consider themselves professionals and do, in most cases, possess an expertise which they are willing to share--even with defense counsel. It has been my experience that they are more than willing to discuss and demonstrate this expertise when requested. Attendance at polygraph and breathalyzer demonstrations by defense attorneys has proven a useful vehicle in establishing a working relationship with CID and MPI agents. Displaying a respect for these individuals as professionals tends to generate a reciprocal respect on their part for the defense section.

A professional legal adversary relationship should not be antagonistic and hostile. Frequently, however, it is. In my opinion, the public relations role of Senior Defense Counsel should not end at the door to the SJA building. The best efforts at establishing a rapport with the chain of command will be of little value if similar rapport and respect have not been established with the "front office" and with the prosecution section. While we do not appreciate being reminded of the fact, attorneys can let their tempers get the best of them. Zealous representation on both sides of the issue, contrasting personalities, and subjective involvement in a case can result in decisions being reached affected more by emotion than reason. The existence of conflicts may not be readily apparent to the Senior Defense Counsel because of his involvement in his own case load. But it is his responsibility to monitor the pulse of his office and to assist in the resolution of these problems. He must be able, at all times, to approach the Chief of Military Justice, as managers of their respective sections, for frank dialogue about common problems. Additionally, he must also be able to counsel his defense counsel when necessary. This is an especially difficult task, for if there is an approved solution for counseling one's peers, it has thus far escaped me. Substantive expertise and technical proficiency will matter little if the defense counsel cannot effectively communicate with the other side. Thus, a major part of the job of Senior Defense Counsel is to insure that the channels of communication within the SJA Office remain open.

The Senior Defense Counsel will periodically be required to justify the staffing of his section. While he may be very capable at orally articulating his manpower requirements, he may lack the most critical requirement of all--statistical documentation for his demands. In an era of dwindling manpower resources, ability to quantify needs has become increasingly important. Just as civilian law firms maintain statistics to assist in the billing of clients, defense sections should maintain records to justify the staffing of their section. The method of recording and maintaining such statistics is left to the discretion of each Senior Defense Counsel.

In this regard, I have found that the most important statistics are often the ones that are not usually kept. Included in such figures are the number of cases which were initiated as courts-martials but were down-graded to Article 15's, or the number of Chapter 13 actions which, through defense counsel's negotiations, resulted in a rehabilitative transfer in lieu of appearance before a board. Such matters often take every bit as much time and effort as those cases which will routinely be statistically recorded as a court-martial or board proceeding. The time and effort in maintaining such statistics will be rewarded when the Senior Defense Counsel has to argue his case for additional manpower with a file of accurate facts and figures.

The last point to be made is the necessity for each Senior Defense Counsel to continually balance his desires to remain a trial attorney with the responsibility he has assumed as an office manager. A Senior Defense Counsel who fails to properly perform his management duties is doing a disservice to those very clients for whom he is ultimately responsible. Reluctance by the Senior Defense Counsel to leave the courtroom may result in his assumption of a case load that does not provide him sufficient time to execute his management responsibilities. To some, the management aspect of the job may not be as exciting as the advocacy aspect. In my opinion, however, it is just as important, for without proper management the entire defense effort suffers.

OBSERVATIONS OF A TRIAL DEFENSE COUNSEL

Captain John O. Ellis, Jr., JAGC*

While talk continues of a separate defense corps for the Army, the defense sections of the various Staff Judge Advocate offices around the world continue to provide many needed services. During the past three years, I have served as a trial defense counsel with the 2nd Infantry Division in Korea and the 9th Infantry Division at Fort Lewis, Washington. Based upon this experience, I offer some thoughts on what we are doing well and what we might do better.

Working as a defense counsel at a major Army installation, or in an active Army Division, is an extremely demanding and time consuming job. Although recent decisions of the United States Court of Military Appeals have substantially reduced the jurisdiction of the court-martial, the number of trials, administrative boards, and Article 15 counselings by defense counsel remain high. At the same time, other decisions of the Court of Military Appeals have recognized additional responsibilities and placed higher standards on the trial defense counsel. Unfortunately, the limited number of attorneys available to provide this assistance hampers our overall effectiveness. In spite of this problem, I feel that the quality of service provided to the client by JAG defense counsel is very good.

The Present

Defense work seems to be divided into the following major areas: (1) Article 15 and administrative discharge counseling, (2) court-martial and administrative discharge board appearances, (3) interviewing clients and witnesses, (4) negotiating with commanders, prosecutors, the Staff Judge Advocate, the CID, and the Convening Authorities, (5) teaching, and (6) legal research. Obviously, the caseload of the attorney determines the amount of time he has available for each

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of these separate demands. To meet all these requirements, the defense counsel must effectively organize his available time for weeks in advance. Rigid schedules are an impossibility. Overtime is a must.

The time actually spent "in court" at court-martial trials or administrative board proceedings averages only about twenty per cent. While this may seem small, every attorney knows that most work for such a proceeding is done before the actual appearance. It is not uncommon, however, for lengthier trials to occur. One case tried at Fort Lewis this past fall required nine full trial days for both an individual and a detailed defense counsel. When a defense attorney spends a continuous period of time away from the office, his other cases remain neglected. Additionally, his absence affects the rest of the office, for his share of the day-to-day counseling must be taken up by the other attorneys, who have more than enough to do without the additional burden. While discussing counseling, I might note that Article 15 and administrative discharge counseling often-times requires a significant amount of time and effort by defense counsel - much more than one initially realizes.

The major portion (60 - 70 per cent) of a defense counsel's time is spent dealing with people. The relationship that the defense counsel maintains with not only his clients, but also the rest of the Army community can make an incredible difference in how effective he is for his clients, both inside and outside the courtroom. The variety of people with whom the defense counsel must deal requires an ability to understand and adjust to many different personalities. I have found that the better an attorney knows his client, the better job he can do for that client. Additionally, taking time to really talk to and get to know commanders is extremely important. While the transient nature of the Army community makes it difficult to get to know and keep track of people, the time spent doing so is crucial.

When the caseload is heavy, the time for case preparation and research never seems to be quite enough. Although only a relatively small number of cases require extensive legal research, it is usually impossible to accomplish this during the duty day. Leaving the office to do this research during the duty day is difficult, so time must be made before or after work. While most of what needs to be done always seems to get done, there usually remains something that is accomplished at the very last second. Law school and the Judge Advocate

General's School teach high standards of research and preparation. However, the defense counsel quickly realizes that there is never enough time to get everything done with the thoroughness he would like.

The effective functioning of a defense section requires that not only the attorneys, but also the secretaries, clerks, and investigators work together effectively. Clerks and investigators need close supervision until there is a working rapport with the attorneys. This is often neglected because the attorney seldom has the time to teach while he works. The defense counsel themselves need to have time to sit together and discuss cases as a group. Like research, this usually can be done only during non-duty hours. Talking with judges and jury members after trial is an extremely beneficial but often neglected opportunity. Keeping track of one's cases which have gone to the Army Court of Military Review and the Court of Military Appeals is difficult. Communication and coordination between the trial defense counsel and the appellate defense counsel is usually minimal. Time to keep up with recent developments and to do in-depth study is also hard to find.

Some Suggestions

While some of these problems that the defense counsel face seem to have no clear-cut solution, there are many areas where improvement can be made. A good defense office needs well-trained legal clerks to function well. Unfortunately, JAG legal clerks are not trained as investigators, so most of them must be trained by the attorneys. At Fort Lewis, we have been fortunate to have had former CID agents come to work for us as defense investigators. This, or a practice like this, should be implemented Army-wide. Just as attorneys should have experience as both trial and defense counsel, I feel that CID agents need to see and understand both sides as well. I propose, therefore, that CID agents be provided as defense investigators at major installations. If this cannot be done, then I suggest the creation of an investigator MOS within the JAG legal clerk field. Whatever method is used, I think it is essential to upgrade and professionalize the investigative assistance provided to defense counsel.

The training of the defense counsel could be improved as well. At present there are only one or two courses taught at the Judge Advocate General's School which relate specifically to the defense attorney. While these courses are excellent,

they need to be expanded and lengthened. Additionally, there should be more seminars "in the field" and at Charlottesville for defense attorneys to get together to learn and to share experiences and knowledge. The one Field Defense Service seminar we had at Fort Lewis was excellent, but they are too infrequent. Also, the opportunities for attendance at civilian and other service courses should be taken advantage of to a greater degree.

The experience level of the attorneys assigned to defense sections is less than it should be. With the new certification rules and the increased retainability of attorneys in the Judge Advocate General's Corps, the experience factor for defense counsel should improve. However, there needs to be an effort put into assigning experienced and proven trial attorneys to the defense offices in the field. The prosecutors always have the Chief of Military Justice, the Deputy, and the Staff Judge Advocate to go to for help and advice. I am certain that there are a large number of field grade officers who have demonstrated talent as a trial attorney. These attorneys need to be sent to the field where they can demonstrate (by trying cases) and assist (by holding seminars and discussions, etc.) the less experienced defense counsel.

Finally, greater cooperation between the trial and appellate defense counsel must be developed. The two groups need to coordinate their work, if possible, so that issues are properly raised at trial so that they can be successfully litigated on appeal. The trial defense counsel needs to know what is happening weekly at the Defense Appellate Division. Two former defense counsel from Fort Lewis were recently reassigned to Defense Appellate. Having someone there who we really know and who knows our problems has been a great benefit to our defense section. While trial defense counsel need to use the services of the Field Defense Services office and the Defense Appellate Division to a greater extent, these offices need to do more in making the extent of their services known. The Advocate has been and continues to be a needed and valuable publication. Each defense counsel should get his own copy. Each Defense Section should have its own subscription to the Criminal Law Reporter, whether the SJA library has one or not.

In sum, I feel that JAG defense counsel are doing a very fine job. Yet, all the training, experience, intelligence, and good intentions of these counsel mean nothing if he or she does not have the time to utilize these assets. Whether the Army establishes a separate defense service or not, the Army

must provide not only a sufficient number of defense counsel, but also the necessary administrative and logistical support for their effective assistance. When the attorney-client ratio is at a reasonable level, the attorney has time to think as well as act. When the attorney has adequate support, he can devote more of his time to using his attorney skills for his clients. At the present time, we are doing well in providing defense services to our clients, but emphasis must be placed on these two areas so that we can continue to improve.

"ALL-STAR" ARTICLES

Frequently we have considered republishing some of the more outstanding and topical articles from past issues of The Advocate. In fact, earlier issues of the journal did reproduce some of the more frequently requested articles. We have decided, however, to not do that at the present time. Instead, on occasion we will print a reminder of some of the more significant articles that have appeared on our pages -- and interested defense counsel can procure a copy of it if they desire. Thus, we list below some of our "all-star" articles of the past:

Objecting to Trial Counsel Argument	Vol 8, No 1
Pleading Guilty and Nego- tiating a Pretrial Agreement	Vol 8, No 2
Special Findings: The Overlooked Tool	Vol 7, No 3
Another Look at Article 38(c) Briefs	Vol 8, No 1

SELECTIVE SYNOPSES OF ISSUES PENDING

BEFORE COMA AS OF 1 MARCH 1978

The Court of Military Appeals has continually shown a propensity to resolve issues that are of broad concern to the military justice system. In many situations, their "resolution" has been in such a manner as to conform the military system of justice to civilian standards. Although many of the cases presently pending before the Court are of major concern to all military lawyers, some are of greater interest to appellate attorneys than they are to trial defense counsel. The following is a synopsis of cases pending decision by the Court of Military Appeals that will affect the day-to-day trial decisions that are being made by trial defense counsel. While some of the synopses contain suggestions as to possible trial tactics, it is the trial defense counsel who must weigh all of the facts and circumstances in a case before deciding upon a particular course of action. For example, a pretrial agreement is often more beneficial than pleading not guilty and forcing the government to call a chemist to testify as to the nature of a substance. These types of decisions can only be made by the trial defense counsel and the accused, after a full consideration of the issues.

Copies of the briefs of the cases mentioned in this article are available by writing or calling the Field Defense Services Office of DAD. The autovon number is 289-1390/1391.

ADMISSIBILITY OF CONFESSIONS COERCED
BY FOREIGN POLICEMEN

United States v. Bell, Docket No. 32,275, petition granted, 17 June 1976, United States v. Talavera, Docket No. 32,362, petition granted, 9 August 1976.

Both appellants were tried by courts-martial in Okinawa. Both were subject to questioning by Japanese police officials, who eventually obtained confessions under conditions that, if judged by purely American constitutional norms, would be highly suspect.

If successful, these cases could extend the rationale of United States v. Jordan, 24 USCMA 156, 51 CMR 375, M.J. (1976), to the Fifth and Sixth Amendments. At the present time, Jordan is limited to the Fourth Amendment right against unreasonable searches.

CONSTITUTIONALITY OF CONSENSUAL SODOMY STATUTE

United States v. Scoby, Docket No. 30,747, petition granted 10 September 1975; United States v. Harris, Docket No. 33,838, petition granted 18 April 1977.

These cases represent two different attacks on Article 125, UCMJ. Included within the purview of Article 125 is forcible sodomy, which is punishable by up to ten years confinement, and consensual sodomy, which is only punishable by five years confinement. Scoby attacks the consensual sodomy provisions as being an infringement on an accused's right to privacy in sexual conduct; Harris alleges that Article 125 is vague and overbroad when applied to consensual sodomy.

For obvious reasons, counsel should stress the consensual nature of a client's actions in a case where the sexual act is admitted. In a guilty plea case, if counsel can obtain a pretrial agreement which permits a plea to consensual sodomy, he minimizes the sentence limitation and preserves the constitutional issue. It should be noted that the United States Supreme Court recently upheld a Virginia statute against a privacy attack where homosexual conduct was involved. See, Doe v. Commonwealth, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901, 96 S.Ct. 1489, ___ L.Ed.2d ___ (1976).

CONSTITUTIONALITY OF NEGLIGENT HOMICIDE UNDER ARTICLE 134, UCMJ

United States v. Kick, Docket No. 31,706, petition granted 12 March 1976.

Paragraph 213f(12), MCM, 1969 (Revised edition) provides that negligent homicide is any unlawful homicide which is the result of simple negligence. No other statute has been found in the U.S. Code making simple negligence a sufficient basis for a homicide conviction. While a federal statute prohibits manslaughter (18 U.S.C. §1112), this crime requires proof of gross negligence. Similarly, decisions in state courts in several different jurisdictions have held that culpable negligence is the proper test. See Cannon v. State, 19 Fla. 214, 107 So. 360 (1926); State v. Becker, 241 N.C. 321, 85 S.E.2d 327 (1955); State v. Babbitts, 324 Mo. 1199, 27 S.W.2d 16 (1930).

If counsel should decide to raise this issue, counsel should move for a dismissal of the charges on the ground that it is the presence of a mens rea which transforms simple misconduct into a criminal violation. The contention is that any standard adopted which will permit the imposition by the government of such harsh punishment without a showing of more than simple negligence violates the rights of an accused to due process of law. If raised, the defense should also contend that simple negligence does not constitute conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

A defense counsel representing a client charged with involuntary manslaughter under Article 119(b) who is contemplating a guilty plea should consider obtaining a pretrial agreement whereby he will plead guilty by exceptions and substitutions to negligent homicide. This would put the accused in a favorable position if COMA rules that negligent homicide is not an offense under the Code, while also obtaining an immediate lowering of the sentence under paragraph 127c, Manual.

LACK OF JURISDICTION DUE TO THE COURT BEING
CONVENED BY THE DEPUTY STAFF JUDGE ADVOCATE

United States v. Newcomb, Docket No. 31,188, petition granted 21 January 1976, and United States v. Hawkins, Docket No. 31,523, petition granted 18 May 1976.

Both cases are from the same trial jurisdiction and concern various procedures used by the Staff Judge Advocate's office to detail the military judge and counsel to a court. In Newcomb, an astute military judge found that the convening orders were not signed. He then called the deputy staff judge advocate (also an Acting Assistant Adjutant General) as a witness for the court. This officer testified that the officers of the court were "[n]ot appointed as a conscious action by the convening authority. . ." The Deputy Staff Judge Advocate testified that all cases are normally referred by the convening authority to the "most current existing. . . court," which includes members, military judge, and both counsel. Shortly before trial, an order is promulgated changing the court to reflect who will actually be acting in those respective positions.

In Hawkins, an affidavit of a trial judge in that jurisdiction revealed that the only actions personally taken by the convening authority were the selection of the court members, the determination of the level of the court, and reference of the case to a court-martial order that was completely blank except for its number. From that point, a legal clerk determined who counsel and the military judge would be and inserted all of the names on the order, which was then backdated to the date of the convening authority's original referral.

Articles 16 and 27, Uniform Code of Military Justice, 10 U.S.C. §816, 827, require the convening authority to personally act when detailing counsel and the military judge. As the Court of Military Appeals stated in United States v. Singleton, 21 USCMA 432, 434, 45 CMR 206, 208 (1972), Articles 16 and 27 "must be read together, for no special or general court-martial is jurisdictionally empowered to sit in judgment until the provisions of both Articles have been complied with." The power to detail cannot be delegated." Paragraph 6a, Manual for Courts-Martial, United States, 1969, (Revised edition). United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955); United States v. Carey, 23 USCMA 315, 49 CMR 605 (1975).

As the DSJA in Newcomb indicated that the procedure he described occurred at every post to which he had been appointed, it is apparent that a trial defense counsel's discrete inquiries with the administrative officer of an SJA office or the legal clerks may turn up the same deficiencies. Many staff judge advocates will have the convening authority's initials on a selection sheet for court members, the military judge, and counsel. Some staff judge advocate's handle this chore in the pretrial advice, while others accomplish the same result by executing a memorandum that is stored in the SJA's office. In any event, counsel should consider taking the time to see if the procedures necessary to convene a court are being properly performed by the administrative section of the staff judge advocate's office.

NEUTRAL AND DETACHED MAGISTRATES

See e.g., United States v. Ezell, Docket No. 31,304, petition granted, 23 December 1975.

The Supreme Court has frequently stated, as a matter of federal constitutional law, that the person who issues a

search warrant must be a "neutral and detached magistrate." One question pending before COMA is whether commanders, who authorize most searches in the military, are "neutral and detached." The case of Shadwick v. City of Tampa, 407 U.S. 345 (1972), gives the best guidance as to who may constitute a neutral and detached magistrate for Fourth Amendment purposes. Particularly important language from that case states that: "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement," Id., at 353.

If a trial defense counsel decides to raise this issue, the commander should be cross-examined thoroughly on his obligation to enforce military justice, whether he has ever questioned suspects (particularly if he questioned or attempted to question the present accused), the fact that he preferred charges, and similar actions that show that ". . .severance and disengagement from activities of law enforcement" is not descriptive of his role. He should also be cross-examined on matters that bear on his lack of neutrality (e.g., has he ever imposed nonjudicial punishment upon the accused, has he received information in the past that the accused has committed other offenses, etc.).

The trial defense counsel should also consider urging the trial judge to rule that commanders are disqualified per se because of the inherent conflicts between his duties as commander and that of "impartial magistrate." In so doing, counsel should be aware of the decision in Wallis v. O'Kier, 491 F.2d 1323 (10th Cir. 1974), in which the 10th Circuit Court of Appeals held contrary to this position. Counsel might argue that this case is an example of the inability of the civilian court to thoroughly understand the intricacies of the role of a commander. The Wallis opinion dwells on whether the commander is partial, prejudiced, or biased, and whether he is capable of exercising good faith when issuing a warrant. It therefore totally misses the crucial argument, that prosecutors and police officers (which role, the defense contends, the commanding office has assumed) are per se incapable of "wearing two hats", and that prejudice is not the test to be applied.

SEARCHES: SUB-COMMUNITY COMMANDERS

United States v. Wilson, Docket No. 33,108, petition granted 22 November 1976; United States v. Dillard, Docket No. 33,040 petition granted 8 November 1976; United States v. Irby, Docket No. 34,087 petition granted 7 July 1977.

All three of these cases question the authority of a sub-community commander to authorize a search. Wilson and Dillard concern authorizations to search off-post quarters; Irby concerns an authorization to search a soldier's personal living area in a billet.

USAREUR Regulation 10-20 dated 25 June 1975 created a "military community" and the position of a community commander. A sub-community commander is responsible for a geographic area in the Federal Republic of Germany which is a part of the larger community. Both of these commanders are distinguishable from the traditional commander in that their authority is defined in geographic terms. The purpose for this organization is to provide for the administration of troop services, as opposed to the command of troops. The sub-community commander has no search authority, but his superior, the community commander, may "order, as required, searches of common areas (e.g., sports fields, training areas, 'public' (buildings) that are not clearly under the jurisdiction of a single commander." Additionally, USAREUR Supplement 1 to Army Regulation 190-22, 12 June 1970, empowers commanders only to authorize searches of certain off-post quarters, and carefully excludes "unit or organization billets or quarters" from those areas subject to the community commander's search-authority. In view of these regulatory limitations, it is questionable if a community commander or a sub-community commander may legally authorize a search of an accused's off-post residence or his billets area.

If litigating this issue, counsel should elicit testimony from the community commander that stresses the private nature of the area searched and the fact that the commander has no command function over the person whose area is being searched. If a sub-community commander authorizes the search, a very relevant consideration is whether or not he has been delegated the authority to authorize a search by the community commander. The defense should investigate this.

SELECTION OF COURT MEMBERS

United States v. Yager, Docket No. 31,909, petition granted 14 May 1976; United States v. Perl, Docket No. 32811 petition granted 10 October 1976; United States v. Maker, Docket No. 33,137, petition granted 22 December 1976.

Although these cases are primarily concerned with a challenge to the random selection of court members established

at Fort Riley several years ago, a corollary issue is of more direct interest to other jurisdictions. This issue involves the random system's blanket exclusion of persons in the grade of E-1 and E-2. Thus is raised for consideration one of the least used, but potentially most successful pre-trial motions - a challenge to the method by which court members are selected. Several cases have held that it is a violation of Article 25, UCMJ, for a convening authority to establish a policy of blanket exclusion of law-ranking personnel from consideration as court-martial members. United States v. Daigle, 23 USCMA 516, 50 CMR 655 (1975); United States v. Greene, 20 USCMA 232, 43 CMR 72 (1970); United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1969). If counsel decides to raise this issue, counsel should attempt to show on the record what criteria were used by the convening authority in selecting members, particularly focusing on the question of whether any persons of certain ranks were excluded. It might be advisable to also show that past courts selected by the same convening authority did not include persons of the ranks which are apparently being excluded.

SERVICE OF POST-TRIAL REVIEW ON SUBSTITUTED COUNSEL

United States v. Iverson, Docket No. 31,962, petition granted 9 June 1976.

When an accused's trial defense counsel has left active duty, transferred to another location, or action on an accused's case was taken at a different jurisdiction from where he was tried, some SJA's serve the post-trial review on a different counsel than the one who represented the accused at trial. For some suggestions on preserving this issue on appeal, see W. Finch, Actions Which Deny An Accused's Right to Counsel, The Advocate, Vol. 9, No. 6.

SJA'S CIRCUMVENTION OF GOODE TO AVOID DUNLAP PROBLEMS

United States v. Porter, Docket No. 33,301, petition granted, 12 January 1977.

Defense counsel are aware that they have five days to submit rebuttal or other matters after being served with a post-trial review. A few cases have arisen where the review has been served on counsel between the 86th and 89th day of post-trial confinement of their client. The five days the defense counsel has to prepare his comments do not extend the 90 day Dunlap requirement. Therefore, if counsel receives

the review later than the 86th day of post-trial confinement and uses his entire five day period, the charges will (absent exceptional circumstances) probably be dismissed on appeal under the Dunlap criteria.

Cases have arisen where a convening authority, recognizing that his 90 days will expire before the defense counsel makes his rebuttal to the SJA review, purposefully violates Goode to save the case from being dismissed on appeal. Although there is little that the defense counsel can do to keep the convening authority from taking such action, the defense counsel should resist any attempts to rush the defense rebuttal so that the convening authority may comply with Dunlap.

SUFFICIENCY OF PROOF: DRUGS

United States v. Santiago-Rivera, Docket No. 34,242, petition granted, 5 July 1977.

The government has traditionally met its burden of proving the nature of a suspected drug by introducing into evidence as business entries the chain of custody receipt form and the report of the chemical analysis. See United States v. Miller, 23 USCMA 247, 49 CMR 380 (1974); United States v. Evans, 21 USCMA 579, 45 CMR 353 (1972). Santiago-Rivera raises two issues concerning this procedure:

(1) These "business entries" may not be considered as evidence because of their hearsay nature, and because they are not within any exception to the hearsay rules found in paragraphs 140-145, Manual for Courts-Martial, United States, 1969, (Revised edition).

(2) Even if the lab reports are considered an exception to the hearsay rule, they violate the accused's right to confront the chemist.

The initial defense position is that these entries are hearsay. The question is whether or not the business entry exception to the hearsay rule is properly invoked. It must be remembered that the government has the burden of laying a proper foundation for the admissibility of business entries.

United States v. Wilson, 24 USCMA 139, 51 CMR 329, M.J. (1976). Historically, the only foundation necessary for the admission of a laboratory report has been a "certificate" that is attached to the report. The appellant contends in Santiago-Rivera that a witness must appear to testify. See 30 Am.Jr.2d Evidence §947; paragraphs 143b(1), (2) and (3), Manual, supra; paragraph 143b(3), Department of the Army Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition) (28 July 1970); and United States v. Gladwin, 14 USCMA 428, 34 CMR 208 (1964). As the means for laying a proper foundation is not "otherwise prescribed" by the Manual, the defense contends that §803(b) of the Federal Rules of Evidence, is applicable to the military by way of paragraph 137, Manual, supra. Section 803(b), Federal Rules of Evidence, requires a witness to testify in order to lay a proper foundation.

GEORGETOWN L.J. EXAMINES CRIMINAL LAW
IN U.S. COURTS OF APPEAL

Defense counsel might be interested in reviewing Georgetown Law Journal's annual issue on Criminal Law and Procedure in the U.S. Courts of Appeal. The December 1977 issue examines federal appellate cases involving criminal law which were decided during the 1976-77 term. Copies of the Circuits Note issue may be obtained from the Georgetown Law Journal Association, 1117 14th Street N.W., Washington, D.C. 20005, at a cost of \$6.15.

SOME SAMPLE INSTRUCTIONS: PART 1

Editors Note: For some time now, many of the attorneys in DAD have been concerned with the apparent relative lack of interest by trial defense counsel with jury instructions. This conclusion results from examinations of many records of trial - examinations which reveal that trial defense counsel infrequently take advantage of their opportunity to present instructions of their own to the military judge for consideration. Actual litigation in support of these proposed instructions is even rarer.

As a result of this concern, during the past several months the Field Defense Service (FDS) Office has been preparing a compilation of selected instructions used in other jurisdictions. These instructions have been included in the seminar book distributed to each participant in the 1978 FDS Seminars. The Editors of The Advocate have decided to use some of these sample instructions to inaugurate a series of articles on instructions.

In light of our own concern, the article in this issue by Chief Judge Fletcher of the United States Court of Military Appeals is most timely. He has emphasized that the instructions in the trial judges manuals (e.g., DA Pamphlet 27-9) are only guides, and that they do not necessarily reflect the ever-changing status of the law in a particular area. Judge Fletcher also properly discusses the important role that trial defense counsel play in the development of the instructions that will be used in each case.

In order to facilitate defense counsel with their preparation of instructions, we offer this first in a series of sample instructions. So as to be quite clear, neither the following instructions or those that will appear in subsequent issues have been reviewed by Chief Judge Fletcher. His comments about the importance of instructions should in no way be interpreted as approval or disapproval of any particular language or instruction.

As always, the Editors welcome comments, and encourage the forwarding to us of instructions that have been used in the field.

In this issue: Admissions/Confessions
Identification
Alibi

Admissions/Confessions

An admission as applied to criminal cases is the avowal of a fact or circumstance by the defendant, not amounting to a confession of guilt but tending to prove the offense, and from which guilt may be inferred. An incriminating statement is one made by the defendant which tends to establish the guilt of the accused, or one from which, together with other proven facts, if any, guilt may be inferred, or one which tends to disprove some defense set up by the accused.

Admissions and incriminating statements are not direct but circumstantial evidence and should be scanned with care and received with great caution. The jury may believe admissions or incriminatory statements in whole or in part, believing that which they find to be true and rejecting that which they find to be untrue.

Reference: Millwood v. State, 102 Ga App 180,
115 S.E.2d 829, 833 (1960)

* * * * *

Evidence has been introduced to show the defendant made certain admissions appearing in evidence. Verbal statements or admissions should be received by you with great caution, as they are subject to much imperfection and mistake, owing to the person speaking not having clearly expressed his own meaning, or the person spoken to not having clearly understood the speaker. It frequently happens, also, that the witness, by unintentionally altering a few words or expressions really used, gives an effect to the statement entirely at variance with what the speaker actually did say. But when such verbal statements are precisely given, and identified by intelligent and reliable witnesses, they are often entitled to great credit.

References: State v. Long, Criminal Court,
Marion County, Indiana, No. 42885
State v. Jackson, 156 Ia 588,
137 NW 1034, 1037 (1912)
State v. Friend, 210 Ia 980,
230 NW 425, 429 (1930)
State v. Davis, 212 Ia 131,
235 NW 759, 761 (1931)
Bourne v. State, 116 Neb 141,
216 NW 173, 180-81 (1927)

* * * * *

In this case, the accused says that when he made the statement which has been introduced in this case as his signed confession, that he made other statements as a part of the confession which the officers taking the statement would not incorporate into the written statement. You are instructed that the law is that if a defendant makes a confession, that the statements made by him in explanation of the crime, or other statements made by him at the time appearing favorable to him, and intended by him to be a part of the confession, must all be included in the confession introduced as evidence. So if you find that the defendant made certain statements at the time which were not included in the written confession, you shall consider them as a part of the confession offered in evidence, even though such statements appear favorable to the defendant.

Reference: Smith v. State, 218 Ark 725,
238 SW2d 649, 654 (1951)

* * * * *

Where a confession of the prisoner charged with a crime is offered in evidence, the whole of the confession so offered and testified to must be taken together, as well as that part which makes against him. If the part of the statement which is in favor of the defendant is not disproved by other testimony in the case, and is not improbable or untrue, considered in connection with all the other testimony of the case, then that part of the statement is entitled to as much consideration from the jury as the parts which make against the defendant.

Reference: Burnett v. People, 204 Ill 208,
68 NE 505 (1903)

* * * * *

Where the verbal admission of a person charged with a crime is offered in evidence, the whole of the admission must be taken together, that part which makes for the accused as well as that which may make against him; and if the part of the statement in favor of the defendant is not disproved, and is not apparently improbable or untrue, when considered with all the other evidence in the case, then such part of the statement is entitled to as much consideration from the jury as any other part of the statement; but the jury are not obliged to believe or disbelieve all of such statement. They may disregard such parts of it, if any, as are inconsistent with the other testimony,

or which the jury believe from the facts and circumstances proved on the trial are untrue.

Reference: State v. Novak, 109 Ia 717,
79 NW 465 (1899)

* * * * *

Identification

The defendant has raised the question of misidentification. Whether or not the witnesses have identified the right person is a question solely for you jurors as triers of facts in this case. You may take into consideration all of the circumstances surrounding the in court identification of the accused as was elicited from the examination of the identifying witnesses.

You must be satisfied beyond a reasonable doubt of the identification of the defendant before you may convict him. If the circumstances of the identification are not convincing beyond a reasonable doubt, you must find the defendant not guilty.

Reference: Barber v. United States, 412 F.2d 775,
777 (5th Cir. 1969)

Query: Is the defendant entitled to an instruction commenting on the fallibility or unreliability of eye-witness testimony. Compare McGee v. United States, 402 F.2d, 434 (10th Cir. 1968), cert. denied, 394 US 908 (1969); United States v. Moss, 410 F.2d 386 (3rd Cir. 1969); and Cullen v. United States, 408 F.2d 1178 (8th Cir. 1969) with United States v. Hulen, 3 MJ 275 (1977) and the implications of Judge Perry's concurring opinion.

* * * * *

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight - but this is not necessarily so, and he may use other senses.)

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

(You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.)

(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

References: United States v. Telfaire,
469 F.2d 552 (DC Cir. 1972)
United States v. Hodges,
515 F.2d 650 (7th Cir. 1975)
United States v. Holly,
474 F.2d 1400 (4th Cir. 1973)
United States v. O'Neal,
496 F.2d 368, 375 (6th Cir. 1974)
Instruction taken from Federal
Jury Practice and Instruction by
Dewitt and Blackman (West Publish-
ing Company, 1970)

* * * * *

Alibi

The defendant sets up an alibi in this case, and the burden of proof is not changed when he undertakes to prove it. If by reason of the evidence in relation to such alibi, when considered with all other evidence, you entertain a reasonable doubt as to defendant's guilt, he should be acquitted, although you may not be able to find that the alibi has been fully proved.

Reference: Price v. State, 20 Ala App 201,
101 S 300 (1924)

* * * * *

An alibi simply means that the accused was at another place at the time the crime charged is alleged to have been

committed, and therefore could not have committed it. All the evidence should be carefully considered by you, and, if the evidence on this subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him. The accused is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed. And you will understand, also, that the attempt of the accused to prove an alibi does not shift the burden of proof from the prosecution, but that the prosecution is bound to prove his presence beyond a reasonable doubt.

Reference: People v. Long, 142 Cal 482,
76 P 232, 234 (1904)

* * * * *

An effective alibi is a perfect defense and all effort to make it effective is entitled to the same serious and earnest consideration upon the evidence that you are expected to give to any other material element of the case involved. The defense of an alibi stands upon the same footing as any other defense which the law recognizes as a legitimate one. The fact that it may sometimes, as has been said, be the last desperate resort of the guilty, and may be easily concocted, does not in the least affect its essential character, for it may also often be the first and only refuge of the innocent.

Reference: State v. Cianflone, 98 Conn 454,
120 A 347, 353 (1923)

* * * * *

If a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi.

Such defense is proper and all evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence, the jury believe the defendant was in some place other than where the crime was committed, or if the jury have a reasonable doubt of his presence when and where the crime was committed, they should

give the defendant the benefit of the doubt, and find him not guilty.

As regards the defense of an alibi, the jurors are instructed that the defendant is not required to prove that defense beyond a reasonable doubt, to entitle him to an acquittal. It is sufficient, if the defense upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, and if it does, it is your sworn duty, under the law to give the benefit of the doubt to the defendant and to find him not guilty.

Reference: People v. Pearson, 19 Ill.2d 609,
169 N.E.2d 252, 255-56 (1960)

* * * * *

The defense in this case is what is known in law as an "alibi"; that is, that the defendants were not present at the time and place of the commission of the offense charged in the indictment, if any such offense has been committed, but that they were at that time at another and different place. As to this defense, you are instructed that it is not necessary for defendants to prove an alibi to your satisfaction, beyond a reasonable doubt, nor by a preponderance of the testimony, but if, after a full and fair consideration of all the facts and circumstances in evidence, you entertain a reasonable doubt as to whether or not the defendants were present at the time and place of the commission of the offense charged in the indictment, if such offense has been committed by any one, it will be your duty to give the defendants the benefit of such doubt and acquit them.

Reference: State v. Hale, 156 Mo 102,
56 S.W. 881, 882 (1900)

* * * * *

CLE CREDIT FOR FDS SEMINARS

All attorneys who have attended the 1978 Field Defense Services Seminars should be aware that several states have approved attendance at the seminars for Continuing Legal Education credits. Iowa and Wisconsin have authorized eight hours credit, while Minnesota has authorized seven hours. An FDS request for CLE credit is pending with the State of Washington.

"SIDE-BAR"

or

Points to Ponder

1. Jurisdiction by Language. In their apparently unending desire to retain military jurisdiction over off-post drug offenses, some CID agents have turned to the use of specific words or phrases to insure that "service-connection" exists. This has occurred in certain jurisdictions where law enforcement personnel have apparently been specifically advised to state, when purchasing drugs off-post, that they need the drugs to take back on-post, or, that they are going to take the drugs to an on-post party. During litigation at trial, the government agents have testified that they have used this language solely to establish military jurisdiction over the offenses.

So far, this tactic has been successful at the trial level, but has met with mixed results at the Army Court of Military Review. In a recently decided case, one panel held that such language imparts to the seller the intended use by the purchaser and "it was with this knowledge . . . that appellant formed the criminal intent to commit the offenses. This criminal intent clearly represents a threat to the military post." United States v. Chambers, CM 436388 (ACMR 11 January 1978) (unpublished). However, another panel held that the fact that one of the informants had advised the seller, after the sale, that he intended to sell the drugs on post was not sufficient to meet the criteria set forth in Relford. United States v. Accord, CM 436574 (ACMR 3 March 1978). It may be possible that there is a difference of opinion developing between the ACMR panels. Or the disparity may be explained by the different fact situations of the two cases; that is the fact that the sentences were uttered before or after the sale. Whatever the Court's reasoning, the area appears fertile for continued litigation.

If trial defense counsel are faced with such a situation, and choose to contest the jurisdiction, counsel should argue that such tactics amount to "jurisdiction by trick." In litigating the issue, the agent or informer should be extensively cross-examined to determine why such phrases are used, what its purpose is, what (SOP, memorandum, directive from superiors, etc.) requires the agent to use the language, and whether the tactic is now a part of standard police practice and procedure

at that installation. In argument on the motion, defense counsel can point out a serious weakness in such a "jurisdiction by language" tactic. That is, if the government can procure jurisdiction by using specific words and phrases, can the service member destroy military jurisdiction by the use of any particular language? For example, suppose when a GI sells some drugs off-post, he cautions the purchaser not to take it back on-post, not to transfer it to any other soldier, and not to use it while on duty? Would this be sufficient to deprive the military of "service-connection?" Of course, the government would argue that it would not. But they should not be permitted to have it both ways. Defense can point out that both situations are equally ludicrous - for the uttering of a couple of sentences by or to an undercover agent should not be the basis for creating or denying jurisdiction.

2. Multiplicious Drug Offenses. A frequent occurrence in cases in which a servicemember has allegedly sold drugs is for the accused to subsequently face charges of possession, transfer, and sale -- all of which stem from a single transaction. If convictions result, it is clear law that the offenses are multiplicious for sentencing purposes. A recent trend of the appellate courts has been to dismiss the multiplicious charges so that the accused's record only reflects guilt of the most serious offense. United States v. Stowers, CM 436422 (ACMR 8 March 1978) (unpublished); United States v. Sample, CM 436375 (ACMR 31 January 1978) (unpublished); United States v. Albrecht, 4 MJ 573 (ACMR 1977). See also United States v. Williams, 18 USCMA 78, 39 CMR 78 (1968); United States v. Walters, 47 CMR 93 (ACMR 1973). Trial defense counsel should consider asking the military judge to take such action at the trial level. This would be especially appropriate where the accused pleads guilty and has requested a jury for sentencing. The judge's granting of defense's motion in this regard would limit the number of charges and specifications to which the jury would be exposed. The jury then would be sentencing the accused for his single transaction, and could not be influenced by a string of multiplicious charges that arise from that single act.

3. Update on Search Warrants. In the last issue of The Advocate, the editors reported on several cases which involve a new attack on military search warrant procedures. The contention in the cited cases is that the current military practice of issuing a search warrant which is not supported by an oath or affirmation and which is not in writing is improper. As reported, this procedure appears to violate the constitutional requirements of the Fourth Amendment.

Recently, the Court of Military Appeals granted review on these issues in United States v. Hood, Docket No. 35,211, petition granted 15 February 1978 (oath or affirmation) and United States v. Fimmano, Docket No. 35,152, petition granted 13 February 1978 (requirement for a written application for a search warrant and a written warrant). The crux of the appellant's position in both cases is that, in light of the Army's requirement for sworn affidavits and authorizations prior to a search being authorized by a military judge and by commanders in Europe, the current military practice, which applies to other commanders is unreasonable. Additionally, the defense argues that Rule 41(c), Federal Rules of Criminal Procedure, is applicable to Army search warrants. For further discussion and trial strategy see "Watchtower," The Advocate, Vol. 9, No. 6, November-December 1977, p.46-47.

4. Maximum Imposable Sentence to Confinement for Drug Offenses. Is the maximum imposable sentence to confinement for possession, sale, transfer or use of marijuana or heroin two years under Article 92 or five/ten years under Article 134? Under the latest change to Army Regulation 600-50, the government contends that these offenses are punishable under Article 134 and that the resultant higher punishment is proper. However, this position is being constitutionally challenged in United States v. Castrillon-Moreno, 3 MJ 894 (ACMR 1977), petition granted 27 October 1977; and United States v. Dillard, 4 MJ 577 (ACMR 1977), petition granted 10 February 1978.

The initial attack in Castrillon-Moreno and Dillard is an equal protection challenge based on footnote 2 of United States v. Jackson, 3 MJ 101 (CMA 1977). As pointed out by the dissent in Dillard, the Navy punishes the possession of these two drugs differently than the Army. Therefore, the defense contends that Army appellants are being denied the equal protection of the law.

Should this argument be accepted by the Court of Military Appeals, the next question concerns the effect on a guilty plea of the military judge's advice that the maximum imposable sentence to confinement is the higher punishment under Article 134. The easier approach is arguing that the accused's misapprehension is "substantial" within the meaning of United States v. Harden, 24 USCMA 76, 51 CMR 249, 1 MJ 258 (1976). The more difficult argument is the contention that any misapprehension, no matter how slight, results in a per se improvident plea. This argument is based on Rule 11, Federal Rules of Criminal Procedure, and McCarthy v. United States, 394 U.S. 459,469, 89 S.Ct. 1166, 22 L.Ed.2d 418,427 (1969); United

States v. Watson, 548 F.2d 1058,1062 (C.A.D.C., 1977); United States v. Crusco, 536 F.2d 21,24-25 (5th Cir. 1976); Wade v. Wainwright, 420 F.2d 898,900 (5th Cir. 1969).

If this "automatic prejudice" test is adopted by the Court of Military Appeals, it would of necessity result in the overruling of the "substantial misunderstanding" rationale of Harden. Of additional importance, the Court may be willing to apply this "automatic prejudice" rationale to areas other than those which involve drugs. See United States v. Kilpatrick, Docket No. 34,993, petition granted 27 December 1977.

Although counsel should be aware that this issue is pending on appeal, he or she should be wary about raising this issue at trial. If raised, the client will surely be informed by the military judge that the maximum sentence to confinement may be less than that under Article 134. If the accused then persists with his plea after being informed of this fact, the federal courts have held that there is no "automatic prejudice" since the accused voluntarily accepted the greater risk of punishment. See United States v. Woodall, 438 F.2d 1317 (5th Cir. 1970) (en banc); Cooks v. United States, 461 F.2d 530,532 at note 3 (5th Cir. 1972). Since these issues of automatic prejudice and waiver have yet to be presented to the military appellate courts, it is uncertain whether the Court of Military Appeals will adopt these positions. Nevertheless, counsel should be aware that the issues are pending and of the potential problems that exist in the area. For other suggestions on this issue, see S. Napper, Equal Protection and Drug Cases, The Advocate, Vol. 9, No. 6, November-December 1977, p. 3.

5. Right to Defend Oneself. Currently being raised before both ACMR and COMA is the issue of whether the military judge, during the inquiry into the accused's understanding of his rights to counsel mandated by United States v. Donohew, 18 USCMA 149, 39 CMR 149 (1969), should also be required to advise the accused of his right to defend himself. This issue is based on the language in Faretta v. California, 422 U.S. 808, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in which the Court stated that the accused's right to counsel stems from the accused's right to defend himself. The question for resolution before the military courts, then, is why should the military judge advise an accused of his secondary right to counsel without also advising him of his primary right to defend himself? To date, COMA has yet to grant review on this issue.

"ON THE RECORD"

or

Quotable Quotes From Actual
Records of Trial Received in DAD

MJ: Mr. _____ (civilian defense counsel), have you been discharged from the case by the accused?

IDC: Not formally, Your Honor.

ACC: You are fired.

TC: Your honor, there is a policy in effect which gives Colonel _____ the authority to excuse members in this particular case and the only time that he is not allowed to excuse members is when a member is short. For short members, it takes General _____ himself.

MJ: What happens with tall members?

Q: Any time during the act of sexual intercourse, did you say to the accused "Am I being raped"?

A: I asked him that and he said "No".

IDC: Your Honor, we request the court make Special Findings in this case . . . On the issues that are raised by this motion.

MJ: Well, actually I don't think there's any issues raised. I mean you know, Captain _____ apparently was willing to violate military due process, but he went on leave before he could.

Q: How bad is your hearing?

A: I don't know, sir, I just know that I have a hearing problem.

Q: Does it ever keep you from hearing normal conversation?

A: What?

MJ: Does any member of the court wish to have any witness called who may not have been called or any witness who has testified recalled to testify?

Court

Member: At what time do we get to question the Trial and the Defense Counsels?

DC: Could we have 15 minutes for lunch? I've got a sandwich downstairs. I don't want to gurgle all through the proceedings.

MJ: How does the accused plead?

DC: The accused pleads guilty, your honor.

MJ: To all Specifications and Charges: Guilty?

DC: To all Charges and Specifications.

ACC: I'm not pleading guilty, sir.

DC: What!

ACC: I'm not pleading guilty.

DC: May we have a recess for a moment, sir?

MJ: Yes, take a moment and discuss it.
