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New TJAG: Wilton B. Persons, Jr.

Major General Wilton B. Persons, Jr., became The Judge Advocate General, United States Army, on 1 July 1975. The 51-year old native of Tacoma, Washington, assumes his new duties after serving the past four years as Judge Advocate, US Army, Europe and Seventh Army, Heidelberg, Germany. General Persons studied aeronautical engineering for two years at Alabama Polytechnic Institute (now Auburn University), served six months as an aviation cadet in the Army Air Corps, and was then appointed to the United States Military Academy, West Point, New York. He graduated from West Point with a Bachelor of Science degree in June 1946, and was commissioned a second lieutenant of cavalry in the Regular Army. Following a student assignment at the Armor School, Fort Knox, Kentucky, he was assigned for three years to the European Command where he served as Platoon Leader and Assistant Squadron S-3 in the 24th Constabulary Squadron in Austria, and Platoon Leader, Company E, 6th Armored Cavalry and Assistant SGS, Headquarters, European Command, in Germany.

General Persons returned to the United States in July 1950 and entered the School of Law, Harvard University, from which he received the J.D. degree in June 1953. The new TJAG spent his last two years of law school also as a member of Harvard's Legal Aid Bureau, serving as Vice President of that organization. He was then assigned to the Military Affairs Division, Office of The Judge Advocate General, Department of the Army, Washington, DC. From July 1953 to July 1955 he served in the General Law Branch and as Chief of the Research Branch. He served the following two years in the newly established Legislation Branch, participating in the drafting of many legislative proposals. From August 1957 to June 1958, Persons attended the US Army Command and General Staff College, Fort Leavenworth, Kansas. Upon graduation he reported to Germany for a three-year tour of duty with the 8th Infantry Division, where he served as defense counsel, trial counsel and deputy staff judge advocate.

In September 1961, General Persons began a three-year duty assignment at The Judge Advocate General's School, Army, Charlottesville, Virginia, serving first as School Secretary, then as an Instructor in the Military Justice Division of its Academic Department and, from July 1963 to June 1964, as Chief of that Division. In 1964 he was selected to attend the US Army War College, Carlisle Barracks, Pennsylvania. After graduation in 1965, he returned to the Office of The Judge Advocate General, with duties in the Military Affairs Division, as Chief of the General Law Branch from July 1965 to July 1966, as Assistant Chief of that Division from August 1966 to October 1967 and, thereafter, as Chief of the Military Affairs Division until June 1969. During much of his OTJAG tour, General Persons was the JAGC representative on the Army Civil Disturbance Planning Group providing legal support for Army civil disturbance operations.

The new TJAG served as Staff Judge Advocate, US Army, Vietnam, from July 1969 until July 1970. In August 1970 he reported for duty as Staff Judge Advocate, US Army, Pacific, Fort Shafter, Hawaii. General Persons was named Judge Advocate, US Army, Europe and Seventh Army, Heidelberg, Germany, in June 1971. He and his wife Christine have three children: two daughters and a son.

New Assistant TJAG: Lawrence H. Williams

Major General Lawrence H. Williams, Assistant Judge Advocate General for Military Law for the past four years, assumed new duties as The Assistant Judge Advocate General, US Army, on 1 July 1975. He was born on 20 May 1922, in Salem, Massachusetts. After two years of pre-law

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course work at the University of Minnesota, he volunteered for the Aviation Cadet Program in 1942. He was commissioned a second lieutenant on 13 November 1943 and rated as a navigator the same day. Williams served in North Africa, Italy, England and France, participating in 26 combat missions which included service as the Deputy Lead Navigator for the 9th Troop Carrier Command dropping paratroopers for the D-day invasion of Normandy. In January 1946, he left the armed forces and returned to the University of Minnesota where he received a Bachelor of Science degree in law the following year. In 1948 he received a Juris Doctor degree from the University of Colorado.

In 1948 Williams applied for and was recalled to active duty in the Office of The Judge Advocate General as a competitive tour officer. He received his commission in the Regular Army one year later. The new Assistant TJAG served in the Military Affairs Division, OTJAG, from October 1948 to August 1952. From 1952 to 1953, he was an Instructor in Military Affairs at The Judge Advocate General's School, Charlottesville, Virginia. From 1953 to 1956 he served as Assistant Staff Judge Advocate, United States Army Caribbean, in the Canal Zone. In 1956 General Williams was assigned to the Office of the Deputy Chief of Staff for Logistics, Department of the Army, as Assistant Legal Advisor. The following year he was again assigned to the Military Affairs Division, OTJAG, serving as Deputy Chief and Chief, Personnel Law Branch, and Deputy Chief and Chief, General Law Branch, until 1960. In July 1960 he was assigned to the Office of the Assistant Secretary of Defense (Manpower and Reserve Forces) as Legal Advisor to a Personnel Task Force. Upon completion of that tour in February 1961, he was reassigned as the Chief, Personnel Law Branch, Military Affairs Division, OTJAG, until July 1961 when he was assigned as Staff Judge Advocate, 3d Armored Division, Frankfurt, Germany. Williams served in that position until August of 1963, when he was reassigned as the Assistant Chief of Staff, G-1, 3d Armored Division. Upon completion of that assignment in June 1964, he again returned to the Office of The Judge Advocate General, as the Assistant Chief, Military Affairs Division, serving in that position or as Acting Chief until the summer of 1966.

General Williams attended the Industrial College of the Armed Forces from August 1966 to June 1967, graduating with highest honors. He was thereafter assigned as Staff Judge Advocate, Headquarters III Corps and Fort Hood, Fort Hood, Texas, from 1967 to 1969. Following those duties, in July of 1969, he was reassigned as the Staff Judge Advocate, Headquarters, Military Assistance Command, Vietnam, where he served for one year. In August 1970, General Williams was assigned as Chief, Military Affairs Division, Office of The Judge Advocate General, and remained in that position until his appointment as Assistant Judge Advocate General for Military Law on July 1, 1971. He is married to the former Margaret Josephine Anderson of Clarksville, Tennessee. They have one daughter.

Juvenile Delinquency on Military Installations

By: Lieutenant Colonel William K. Suter, JAGC, Fort Campbell, Kentucky

I. Introduction.

This article will review the juvenile delinquency problem in the United States and focus on the situation found in the military community. Legal and command management aspects will be emphasized. Child abuse,[1] soldier delinquency [2] and juvenile delinquency by American youth in overseas areas [3] will not be addressed.

II. The Juvenile Delinquency Problem.

A. *Background.*

Juvenile delinquency is not a recent phenomenon. It has existed for centuries. Even the Puritans in colonial America were faced with the problem. Massachusetts, in adopting the *Body of Liberties* in 1641, saw fit to provide that:

> If any child . . . above sixteen years old, and of sufficient understanding, shall curse or smite their natural father, or mother, he or they shall be put to death, unless it can be sufficiently testified that the parents have been very unchristianly negligent in the education of such children: so provoked them by extreme and cruel correction, that they have been forced thereunto, to preserve themselves from death or maiming.[4]

Juvenile delinquency is a socio-legal matter that has been dealt with in many ways, usually with unsatisfactory results. The term itself is confusing. It includes juveniles who commit felonies and misdemeanors, disobedient and runaway children and youthful traffic offenders. State and federal governments have their own definitions.

It is estimated that one-half of all major crimes in the United States are committed by juveniles less than 18 years of age.[5] Juveniles are responsible for 51 percent of the total arrests for property crimes, 23 percent for violent crimes, and 45 percent for all serious crimes. During the period 1960 to 1974, arrests for juveniles under 18 for violent crimes, such as murder, rape and robbery, increased 216 percent. During the same period, arrests of juveniles for property crimes increased 91 percent. Between 1960 and 1970, total juvenile arrests increased almost seven times faster than adult arrests and for violent crimes increased almost three times faster. Recidivism rates for juvenile offenders are estimated to range between 60 and 75 percent.[6] The causes of this sad commentary are many-fold. Poor education, inadequate parental discipline, poverty, permissiveness, motion pictures, television, heredity, environment and emotional insecurity have been suggested as some of the root causes.[7]

Delinquency is not the only manifestation of the juvenile problem. Teenage suicides in the United States have tripled in the last decade to an estimated 30 a day and more than one-half the patients in psychiatric hospitals are less than 21 years of age.[8] One authority asserts that part of the blame for the suicides is attributable to "The American Fairy Tale." This myth has five themes: (1) more possessions mean more happiness; (2) a person who does or produces more is more important; (3) everyone must belong and identify with a larger group; (4) perfect mental health means no problems; and (5) a person is abnormal unless constantly happy.[9]

B. *Juvenile Court Movement.*

Juvenile courts first appeared in the United States at the end of the 19th century. Designed by reform-minded citizens who felt that the criminal law operated to harm children, these courts functioned under the English chancery law doctrine of *parens partiae*. That doctrine recognizes a residual power in the sovereign to protect children from others and from themselves. Under this concept, the state is *parens patriae* rather than prosecuting attorney and judge. The juvenile courts operated informally and used civil procedures which did not include criminal law safeguards such as the right to notice of charges, the right to counsel, the right to confront witnesses and the privilege against self-incrimination. Charges were not filed "against" an accused youth, but a petition was filed "in his interest." Juvenile courts were not to punish, but to protect children by removing them from their adverse environment and placing them in new ones and using the institution of probation.[10]

It was not until 1966 that the Supreme Court of the United States decided a juvenile court case. In *Kent v. United States*, [11] the Court ruled that a juvenile court judge could not transfer the case of a 16 year old to an adult criminal court without holding a hearing, making findings and giving reasons for the action. In addition, the social and medical reports used by the juvenile court in making its findings should have been available to the juvenile's counsel for examination as requested. In Kent, Justice Fortas observed that:

> There is much evidence that some juvenile courts . . . lack the personnel, facilities, and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitious care and regenerative treatment postulated for children.[12]

In 1967, the Supreme Court decided the landmark case of *In re Gault*,[13] involving a 15 year old who was declared a delinquent by an Arizona juvenile court for allegedly making an obscene telephone call. Neither Gault nor his parents were notified of the charge or informed of the rights to counsel and confrontation or his privilege against self-incrimination. The juvenile court judge questioned Gault, but no other testimony was taken and no transcript of the proceedings was made. The Supreme Court held that a juvenile court's exercise of the power of *parens patriae* was not unlimited. Juvenile respondents and parents are entitled to written notice of the allegations and must be accorded the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses. Although the opinion was criticized by many because it tended to treat juveniles as criminals, it is interesting to note that had Gault been an adult he could have only been punished by a $50 fine or two months in jail. As a juvenile, he was committed to an institution for six years.[14]

Since the decision in *Gault*, the Supreme Court has held that juveniles are entitled to the standard of proof of guilt beyond reasonable doubt,[15] but they are not constitutionally entitled to a trial by jury.[16]

Thus, although the Supreme Court has placed some of the traditional criminal law trappings on the juvenile court system, these proceedings are still informal and non-adversary in nature.

C. *Trends in the Treatment of Juvenile Delinquents.*

The juvenile court system has been ineffective in deterring juvenile crime or rehabilitating youthful offenders. The traditional system of sending delinquents to juvenile centers, jails, foster homes or back to their own homes has not worked. One writer has caustically observed that:

> Our juvenile courts constantly violate the simple truth that the love of a parent or other concerned adult is as vital as food to a child's growth. Yearly, these courts tear hundreds of thousands of non-criminal children from home, school and friends. After secret hearings, which would not be tolerated for adults, many are packed off to 'state training schools,' which often are no more than maximum-security prisons for the young. In

> many states, any minor under 18 who is adjudicated 'an habitual truant' or 'beyond the control of his parents' or 'incorrigible' may be locked up until he reaches 21. 'The juvenile-justice system does not correct. It does not even meet ordinary standards of human decency in some cases,' the U.S. Law Enforcement Assistance Administration has said.[17]

In addition to being a failure, the system is quite expensive. It costs $12,400 a year to keep a juvenile in an institution in Rhode Island; [18] in New York the cost is $24,000.[19]

Not all juveniles who run afoul of the law are dealt with in formal juvenile proceedings. Quite often a child is handled informally by parents, school authorities, police officials, domestic and family counselors or social workers. Most counseling and treatment, of course, take place in the home in a family oriented setting. The family, sometimes referred to in this sense as "God's reformatory" or the "laboratory of life," is the appropriate place to stem juvenile delinquency. In an incalculable number of instances these informal procedures are successful. When these efforts fail, the next traditional step is the juvenile court. However, not all children who are referred to these courts have committed crimes. In fact, about 40 percent of them, roughly one-half million a year, have not committed any offense at all.[20]

In 1967, the President's Commission on Law Enforcement and Administration of Justice reported that:

> Delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of the actions of any judge, probation officer, correctional counselor or psychiatrist.[21]

The Commission found that delinquency should be combatted with social and economic weapons rather than attempting to change individual behavior. It recommended better schools, housing, employment, training programs and strengthening the family. The Commission found that juvenile courts should be used only as a last resort. It urged the establishment of youth service bureaus to be located in neighborhood centers that would receive and treat delinquent and non-delinquent children referred by parents, school and police officials and other agencies.[22]

In 1973 the National Advisory Commission on Criminal Justice Standards and Goals reported that:

> The highest attention must be given to preventing juvenile delinquency, to minimizing the involvement of young offenders in the juvenile and criminal justice system and to reintegrating delinquents and young offenders into the community.[23]

Several communities, heeding the advice of various groups empaneled to study the juvenile delinquency problem, have found an alternative to the "incarceration versus release" dilemma. The Youth Service Bureau of Kokomo, Indiana, established with the aid of federal grants, is an example. There, parents, teachers and police refer juveniles to case workers for interview and analysis. A community council, made up of representatives from schools, the police and social agencies, evaluates cases and, when required, places children in local foster homes for training and rehabilitation. The juvenile court case load in Kokomo has been reduced by one-half since the program began.[24] Massachusetts has also been successful in closing its major juvenile institutions and opening community-based homes.[25]

III. Juvenile Delinquency Control in the Civilian Community.

A. *Juvenile Court Procedures.*

For this portion of the article, it is assumed that the informal handling of delinquents by parents, police, social agencies and school officials was not effective or the juvenile misconduct was too serious to treat informally. Juvenile courts now enter the picture.

Police arrest juveniles for the same reasons they arrest adults. Apprehension of runaways and neglected or dependent children is also justified. Most states require police to handle juvenile arrests with special care and to notify parents of the children arrested.[26] After arrest, police officers must make some disposition of the juvenile. Of all cases referred to juvenile courts, about 90 percent are made by police.[27] They are first required to

study the case and consider informal actions such as notifying parents or referring the case to other agencies. This screening process, often referred to as "intake," is important but has been criticized because police often lack the training or information to make informed decisions, especially when legal questions are involved, and impermissible criteria, such as race or social status, might be used.[28] These dangers are reduced, however, when it is realized that fewer than half of all cases referred to juvenile courts ever result in a formal adjudication.[29] Many are disposed of informally by referral to an agency or counseling. The final decision of whether a case will go to court usually rests with the petitioner (police or victim), the prosecutor or the judge. Although there is no specific criteria to assist the decision makers, state statutes generally speak of the "best interests of the child and public." [30]

The jurisdiction of juvenile courts is limited by age. About two-thirds of the states set the maximum age at 18 and in the remainder, the age is 16, 17 or 21.[31] Federal law defines a juvenile as one who is not yet 18.[32] The states conflict on the question of whether the maximum age in the statutes is determined by the age at the time of the misconduct or the time of court action. Federal law and the Uniform Juvenile Court Act provides that a youth can be judged a delinquent if he is under 18 or is under 21 and committed an act of delinquency before reaching the age of 18.[33] In general, juvenile court jurisdiction is limited to four types of cases: (1) where a youth has committed an act which if done by an adult would be a crime; (2) where a child is beyond the control of his parents; (3) where a child's parents will not care for him; and (4) where a child's parents are unable to care for him. Generally speaking, the first two classes define a "delinquent" and the latter two define a "neglected" child and a "dependent" child, respectively.[34] States vary in use of labels. Kansas, for instance, uses the following general definitions: (1) a "delinquent child" is a person under 18 who commits a felony; (2) a "miscreant child" is one under 18 who commits a misdemeanor; (3) a "wayward child" is one under 18 whose behavior is injurious to his welfare, has deserted or is habitually disobedient; (4) a "traffic offender" is one under 16 who commits a traffic offense; (5) a "truant" is a child who absents himself from school; and (6) a "dependent or neglected child" is one under 18 whose parents refuse or are unable to care for him.[35] All are subject to the jurisdiction of the juvenile court. In many states the most serious felonies such as rape and murder are not within the jurisdiction of juvenile courts, and in a great majority of states a juvenile court judge, after a hearing, can waive jurisdiction and transfer serious cases to a regular criminal court if the child is of a minimum age, generally between 13 and 18.[36]

Once jurisdiction of the court has been established, juveniles are proceeded against in hearings where they enjoy most of the privileges enjoyed by adult defendants.

If a juvenile is found to be a delinquent or is otherwise adjudicated to be in need of supervision, the juvenile court judge usually holds a hearing to determine what disposition should, in the interests of the child and society, be made. The judge normally consults social reports concerning the child before making a decision. He has a wide range of discretion.[37] As an example, in Kansas a juvenile court judge can order delinquent or miscreant children: (1) placed on probation in the custody of their parents; (2) placed in the custody of a probation officer; (3) placed in a detention home, parental home, farm or in the custody of a children's aid society; (4) committed to the state secretary of social and rehabilitation services; or (5) committed to an industrial school. Wayward or truant children can be dealt with in the same manner except they can not be committed to an industrial school.[38]

In essence, the juvenile court judge has the choice of placing "guilty" children on probation or committing them to an institution. If probation is used, the judge can attach conditions which the child must meet. The conditions normally concern school attendance, curfew, driving motor vehicles, avoiding unsavory characters, abstinence and similar matters. Another measure that is gaining popularity concerns restitution. Some states provide by statute that the child[39] or the parent[40] is liable for malicious or willful property damage caused by the minor. A juvenile court judge can make restitution a condition of probation, regardless of statutory authority to recover damages in a civil suit.

B. *Recent Federal Legislation.*

The 20th century has witnessed a great deal of legislative experimentation by the states in the field of juvenile delinquency. Enlightened social legislation, however, has been ineffective, and, as observed earlier, juvenile delinquency is a phenomenon that is growing at an abnormal rate.

The federal government has not been an activist in the field of legislation concerning juvenile delinquency. Although many federal panels have studied the problem exhaustively, the Federal Juvenile Delinquency Act was, until 1974, virtually unchanged for 35 years. That Act,[41] along with the Correction of Youthful Offenders Act,[42] Federal Youth Corrections Act,[43] and Juvenile Delinquency Prevention Act,[44] did little more than reflect the federal concern about problems local governments were encountering and provide machinery to proceed in federal court juvenile cases. Legislation designed to provide grants for juvenile delinquency and control programs was enacted in 1961, 1968, 1971, and 1972, but inadequate appropriations and weak administration led to failures.[45]

In 1974, Congress recognized that there was no central leadership in the area of prevention of juvenile delinquency and enacted the Juvenile Justice and Delinquency Prevention Act of 1974 [46] (hereinafter referred to as the "Act"). This comprehensive Act provides for evaluation of juvenile delinquency, technical assistance and research and amends the standing federal law in the area. The Act is so important that it is worthwhile to review some of its contents.

The purpose of the Act is to provide federal leadership and coordination of resources to prevent and treat juvenile delinquency.[47] Although those youth who commit serious crimes should be dealt with in the formal processes of the juvenile justice system, the Act concedes that custodial incarceration of juveniles in large statewide institutions has not proved effective as a treatment method.[48]

In 1974, there were 116 separate federal programs in the juvenile delinquency and related youth development areas.[49] Youth programs existed in the Departments of Health, Education and Welfare; Agriculture; Interior; Justice; Labor; and Transportation and in the Civil Service Commission.[50] In 1972, the federal government made 120,000 different grants in this area.[51]

In prior federal legislation, the Department of Health, Education and Welfare (HEW) was charged with the responsibility of overseeing juvenile delinquency programs. HEW reportedly performed poorly in its mission. Now, the Law Enforcement Assistance Administration (LEAA), an element of the Department of Justice, focuses on the juvenile correctional system and HEW is responsible for programs concerning preventing delinquency and providing rehabilitation.[52]

The Act created the Office of Juvenile Justice and Delinquency Prevention within the LEAA.[53] That office provides grants, advice and assistance to the states through its network of 50 state planning agencies.[54] States receive assistance after developing comprehensive community-based plans to prevent and control crime and delinquency. The Act also created the Coordinating Council on Juvenile Justice and Delinquency Prevention,[55] National Advisory Committee for Juvenile Justice and Delinquency Prevention,[56] National Institute for Juvenile Justice and Delinquency Prevention,[57] and National Institute of Corrections.[58] It also amended legislation pertaining to runaway youths and HEW programs. Title II of the Act, which deals with LEAA juvenile justice and delinquency prevention programs for the states, authorizes an appropriation of $75 million for fiscal year 1975, $125 million for fiscal year 1976 and $150 million for fiscal year 1977.

The Act also made important changes to the Federal Juvenile Delinquency Act, the body of law that governs juvenile proceedings in federal courts. Now included within the definition of juveniles are those under 21 who committed an offense prior to age 18.[59] One of the major changes provides that juveniles can not be proceeded against in federal court unless a state court refuses jurisdiction or the state does not have adequate services available.[60] Juveniles over 16 who commit certain felonies can be prosecuted as adults if, after a hearing, a district court allows transfer. Previously, the United States attorney could, in his discretion, choose juvenile or adult trial. Although not a change, the Act now specifically states that juveniles must be tried in a dis-

trict court. United States magistrates have no jurisdiction.[61] Juveniles in detention must be brought to trial within 30 days and, unless prosecuted as an adult, juveniles can not be fingerprinted or photographed without consent of the judge.[62]

The thrust of the changes to juvenile proceedings in federal courts is clear. Congress wants to place the matter in the hands of the states. One well-known U.S. attorney made these remarks about the changes:

> (I)t appears to be the intent of Congress to get the Federal Government out of the business of prosecuting juveniles and to establish limited definable circumstances for the exercise of Federal jurisdiction.... (I)t is quite clear from the new law that *Congress does not want Federal time devoted to the prosecution of Juveniles.*[63]

IV. Juvenile Delinquency Control in the Military Community.

A. *The Problem.*

The Army does not maintain statistics on acts of juvenile delinquency committed on military installations.[64] Therefore, it is impossible to determine the extent of the problem. The number is probably not too high, however, due to the structured environment on Army posts, the absence of poverty, slum dwellings and unemployment, and the presence of intact families. In conducting research for this article the author conducted a survey by submitting questionnaires to the staff judge advocates of selected major Army installations in the United States.[65] The questionnaire is set out at Appendix A and a statistical abstract of the affirmative responses is at Appendix B. Although most installations responded that they had between 25 and 100 reported incidents in 1974, one reported that it had 560.[66] No effort has been made by the author to determine anything such as a "rate per thousand population." It is doubtful that any such rate would be accurate and, more importantly, it would not be meaningful. The important thing is that regardless of its size, there is a juvenile delinquency problem in the military community. One staff judge advocate of a large installation responded: "This post has ignored the problem of juvenile delinquency in the past.... (W)e are only beginning to perceive the nature of the problem and have done little or nothing to resolve it."[67] That installation reported 49 juvenile offenses in January 1975. A majority of the cases involved larceny, disorderly conduct, housebreaking and destruction of property. These are typical of the types of offenses committed by juveniles on military installations.

As there is no Army-wide regulation or guidance document concerning juvenile delinquency, local commanders have been permitted—or forced—to handle the problem individually. Although installation commanders have many community-oriented resources such as police, religious and health care services, they have nothing akin to a youth services bureau or child welfare department.

B. *Responsibilities of Installation Commanders.*

The installation commander is responsible for the operation and administration of the installation, including maintenance of law and order.[68] Although he has no general statutory authority to issue orders and regulations having the force of law to other than military personnel, his inherent authority has been judicially recognized. For instance, he can exclude a civilian from the installation if some reasonable basis exists for the exclusion.[69] A person who reenters an installation after having been excluded commits a petty federal offense.[70]

In addition, the installation commander is charged with establishing a Human Self Development Program to assist him in his civic, ethical and professional responsibility to promote healthy mental, moral and social attitudes on the installation.[71] This program, under the staff responsibility of the chaplain,[72] envisions such things as racial councils and preventive programs.[73] The Army Community Service Program is designed to include child care services, child abuse and neglect programs, youth and family counseling programs and other youth services.[74]

Several categories of juveniles can be found on Army installations. Included are guests, visitors, military dependents residing on and off post, and dependents of government employees and civilian

contractors. The installation commander has a law enforcement responsibility for acts of delinquency committed on post by any of these juveniles, but his social welfare responsibility extends only to those delinquents who are military dependents, primarily those who reside on post.

C. *Jurisdiction.*

An understanding of jurisdiction is critical to the problem under consideration. Jurisdiction has several meanings. The term "legislative jurisdiction" means the authority to legislate and exercise executive and judicial powers within a land area. When the federal government has legislative jurisdiction over a land area, such as it has over many military installations, it has the power to enact, execute and enforce general legislation within the area.[75] In other words, the federal government is serving in the role that is normally performed by state and local governments. This is called "area jurisdiction." It is different from the other authority of the federal government which is dependent on subject matter and purpose, rather than land area, and must be predicated upon some specific grant in the Constitution.[76] For example, the federal government has Constitutional authority to enact laws regulating interstate commerce, naturalization and bankrupticies, establishing post offices and governing and regulating the land and naval forces.[77] This is called "subject matter jurisdiction."

Federal jurisdiction must be distinguished from ownership of land. The federal government, like any person, can own land. Ownership, however, does not confer jurisdiction. The United States can have area jurisdiction over land and not own it. Portions of the District of Columbia are examples of this situation. Conversely, the United States can own property over which it has no area jurisdiction. This is the situation in a vast majority of lands owned by the United States.[78] The proverbial fence around a military post leads many to conclude erroneously that the United States both owns and exercises area jurisdiction over the land.

All land occupied or owned by the United States is subject to one of the following four types of jurisdiction: (1) exclusive–where the federal government has the authority to legislate for all matters; (2) concurrent–where both the federal government and the state have legislative authority; (3) partial–where the state reserves the authority to legislate over a particular matter such as taxation; and (4) proprietorial–where the United States has only the rights of a land owner.[79] On any one military installation, the type of jurisdiction can vary, depending on the particular parcel of land involved and how and when it was acquired. Thus, some installations might include lands where all four types of jurisdiction apply. A large number of Army lands are under exclusive jurisdiction,[80] often referred to as "federal enclaves."[81]

Residents of areas subject to exclusive federal jurisdiction have in the past been considered to be "stateless" in many respects. Frequently they were denied the right to vote in state elections, receive relief benefits for the poor, hold local office, attend state schools, use state courts when domicile in the state was required for jurisdiction and other state benefits. The reason for such results is that these areas are not considered "part of the state." Since the enclaves are "outside the state," state laws, including criminal laws, can not be enforced by the state thereon,[82] except to the extent the federal government permits it.[83]

The current trend is away from denying federal enclaves residents rights that are based on state laws. In 1970, the United States Supreme Court, in *Evans v. Cornman*,[84] held that residents of an exclusive federal jurisdiction area in Maryland were entitled to vote in state elections. The Court rejected the "state within a state" fiction and found that the residents had an interest in Maryland affairs because: (1) the state could affect them through the Assimilative Crimes Act which makes state criminal laws applicable to the enclave; [85] (2) the state could enforce certain state taxation laws on the enclave; (3) the residents were required to have state vehicle registrations and drivers' permits; and (4) the state residents could use state courts in divorce and adoption proceedings and enroll children in state schools. State courts have held that enclave residents can hold state office [86] and receive relief benefits [87] and that state statutes on guardianship for dependent children and hospitalization of the mentally ill apply to enclaves.[88] In addition, Congress has enacted "impacted area" legislation that provides financial aid

to state educational agencies in areas where a federal activity substantially increases school attendance.[89] By accepting such funds, the states agree to provide education to children residing on federal enclaves.

For those lands under exclusive jurisdiction, there is considerable question concerning what civil laws are applicable. The federal government has not enacted any comprehensive body of civil law covering such matters as commercial or family law. Federal courts generally apply some semblance of state law in civil cases arising on enclaves.[90] Congress has, however, enacted a body of criminal law applicable to exclusive and concurrent jurisdiction areas. Major felonies are covered by specific statutes and lesser offenses are adopted from state law via the Assimilative Crimes Act.[91] Under it, acts made punishable by law in the state in which the enclave is situated are also federal offenses if committed on the enclave.

Because of the many disadvantages involved in exercising federal jurisdiction over lands, it is the policy of the Army not to seek jurisdiction and to retrocede to the states unnecessary jurisdiction.[92] The Secretary of the Army has the statutory authority to relinquish jurisdiction over Army lands to the states,[93] but the states must accept jurisdiction for the retrocession to be effective.[94]

The concept of jurisdiction has an important effect in the area of juvenile deliquency control. If juvenile proceedings are viewed as criminal in nature, it is clear under the general principles of jurisdiction that a state juvenile court can not hear a case that occurred on a federal enclave, a place "outside the state." If the proceedings are viewed as civil in nature, either transitory or local,[95] there seems to be no reason that a state juvenile court can not hear a case precipitated by misconduct on an enclave. Accepting jurisdiction in such an instance would be consistent with the cases just discussed where enclave residents were held to be entitled to rights and privileges of the state surrounding their enclave. It should be recalled at this point that not all juvenile delinquency cases are based on acts of misconduct. Wayward, runaway, and truant children have committed no crimes and therefore jurisdiction can not be based on the situs of a crime. In addition, as we saw earlier, only about one-half of those cases referred to a juvenile court result in a formal adjudication. In other words, half of the cases heard in juvenile courts are not based on criminal jurisdiction at all.

It is the author's contention that state juvenile courts are more civil than criminal in nature and that they have jurisdiction in cases where the child is a resident of a federal enclave or commits acts of delinquency on such lands. It is the child and his status, not the crime or where it was committed, that is in issue. The question is whether the court has jurisdiction over the child. Under this theory, it would appear that most state juvenile courts could accept jurisdiction over children who reside on military installations subject to exclusive federal jurisdiction or commit offenses there. For instance, Kansas law provides that county juvenile courts shall have:

> Exclusive original jurisdiction in proceedings concerning the person of a child living or *found within the county* who appears to be a delinquent, miscreant, wayward, a traffic offender, a truant or dependent and neglected....[96]

There is no reason why a child who fits one of the categories in the statute and resides on Fort Leavenworth, Kansas, an area subject to exclusive federal jurisdiction, could not be considered within the jurisdiction of the Leavenworth County juvenile court. The quoted statute does not speak of where the act or misconduct occurred. If the child is presented to the juvenile court, he would be "found within the county" and subject to the jurisdiction of the court.

This view is apparently not shared by one U.S. Attorney. In a recent letter concerning changes brought about by the Juvenile Justice and Delinquency Act of 1974, he stated:

> (T)here will be no change in prosecuting juveniles within the exclusive jurisdiction of the United States. Prosecutions arising, therefore, on Federal reservations will be proceeded against in the same manner....[97]

The survey conducted by the author revealed only two installations where state authorities routinely use the "civil procedure" theory and accept juvenile court jurisdiction over children who

commit offenses on exclusive jurisdiction lands.[98] In others, state authorities normally refuse to accept jurisdiction. In fact, some installations subject to concurrent jurisdiction reported that state authorities would not accept jurisdiction over delinquent children who lived on post even though they clearly had the authority. The reason for refusal usually was related to overburdened state facilities and resources.

If the juvenile courts do accept jurisdiction over children who commit offenses on enclaves, a problem arises if the child elects to be tried as an adult or the court waives jurisdiction to the adult court. In these cases, the state criminal court would have no jurisdiction and the case would have to be tried in a United States district court. These courts also are overburdened and do not wish to try petty offenses.

D. *Disposition of Juvenile Cases.*

1. *Military Police Investigations.* Military authorities are normally made aware of on-post delinquency through routine military police reports. Military police report and investigate criminal conduct, whether committed by juveniles or adults. Reports pertaining to juvenile offenders are, however, filed separately from those involving adults.[99] Comprehensive guidelines and procedures concerning investigations involving juveniles are available to military police personnel.[100] Minor offenses such as disturbing the peace are normally disposed of by the military police warning a child and his parents.[101] The author's survey revealed that those installations with a juvenile section in the provost marshal office are far ahead of others in handling and preventing juvenile delinquency.

2. *Informal Administrative Actions.* After the installation commander, or a designated official such as the chief of staff or deputy post commander, is aware that an act of juvenile delinquency has occurred, he will request staff recommendations for actions to be taken. Procedures vary and some installations, according to responses to the author's survey, have no procedures at all. Ideally, no action is taken until a trained social worker, or similarly skilled individual, has interviewed the child, his parents, and other interested parties, and made recommendations. At Fort Leavenworth, Kansas, a juvenile officer in the provost marshal office oversees juvenile cases. He refers cases to a social worker in the Human Resources Center for a social family history report. The investigation and social history reports are then forwarded to the chief of staff for action. Before taking action, he consults with the staff judge advocate.[102] Similar procedures exist at Forts Gordon and Benning, Georgia, and Fort Bliss, Texas, but with more authority vested in the juvenile officer.[103] At Fort Gordon, a juvenile officer can place a youth on "unofficial probation" for up to 90 days in cases involving minor or initial offenses.

One installation reported that military police reports concerning juvenile offenses are forwarded to the unit commander of the sponsor. He has discretion to deal with the problem himself or to refer it to an appropriate staff section for action.[104] This approach seems undesirable for several reasons. Small unit commanders are normally not trained in juvenile delinquency control and it is not a commander's responsibility to discipline dependents.

If a case is not disposed of by an informal police reprimand, the installation commander can take any of a variety of actions. He can send a letter of admonishment to the child and parents and, if appropriate, the letter can recommend that assistance be sought from the chaplain or medical facility. In more serious cases, a restriction letter can be issued that limits the hours that a child has unsupervised access to the post and restricts his use of certain facilities such as teen clubs.

The difficulty with these informal actions is that they are just that—informal. If a restriction is breached, there is little authority to do anything about it. Informal actions should not be avoided, however, because they lack teeth. They are useful and quite often serve the rehabilitative and preventive purposes intended.

3. *Formal Administrative Actions.* In cases involving serious juvenile delinquency, or where informal actions have been ineffective, the installation commander has a number of formal options available. Some of them are: (1) revocation of privileges pertaining to the commissary,[105] recreation services,[106] post exchange,[107] thea-

ter,[108] bowling,[109] golf course,[110] and driving on post; [111] (2) removal or barring from post; [112] and (3) terminating government quarters assignment.[113] Before revoking privileges in some instances, regulations require a hearing. Hospital and dental care are statutory privileges [114] and can be denied only in extraordinary cases.[115] Removal of a child from post is impractical if the child's parents reside on-post and, for military dependent children who reside off-post, removal from post is difficult to enforce in view of its effect on the child's ability to use on-post facilities. Although government quarters can be terminated based on misconduct of the sponsor or when dependents are involved in misuse or illegal use of quarters or other misconduct contrary to safety, health or morals, the misconduct must be related to maintenance of law and order on post.[116] For instance, the misconduct of a dependent off-post is normally not a basis for termination of quarters. It is the opinion of many that termination of quarters should be used only as a last resort. In one response to the author's survey, a senior staff judge advocate noted:

> It is all well and good to say we'll terminate government quarters, but when you have a. . . (serviceman) who appears to be making every good faith effort to control his children and when you have other children in the family who are not getting into trouble, it bothers me to advise termination of quarters just because of one bad apple in the barrel.[117]

The author's survey revealed that most formal administrative actions are tailored to the offense. For example, a child apprehended for shoplifting will usually have his exchange privileges suspended for a definite period.

These administrative actions are effective in cases involving military dependents, especially those residing on-post, but they are relatively useless in cases involving juveniles who are not military dependents. The only sanction realistically applicable to such juveniles is the bar from post. As we will see later, this is a rather empty threat.

4. *Juvenile Court Proceedings.* a. *General.* In cases involving serious juvenile offenses or repeated offenders who have not responded to administrative actions, resort to a juvenile court is in order. Cases can be referred to a court by parents, police and other officials.

b. *State Juvenile Court.* For offenses committed off-post or upon other than exclusive jurisdiction areas on-post, state authorities have jurisdiction under even the most traditional definition of that term. The author's survey revealed, however, that state and county authorities are extremely reluctant to accept a case concerning an offense that occurred on-post, even though the offense was committed on land subject to state jurisdiction. As state officials usually have inadequate resources to handle their own juvenile problems, their indifference to the military community is understandable, albeit not appreciated. In these cases, where jurisdiction is not a factor, it is appropriate for military officials to vigorously solicit the cooperation of state authorities, especially in those areas where LEAA funds are provided under the Juvenile Justice and Delinquency Prevention Act of 1974.[118] If a local juvenile agency is receiving federal funds for its programs, it should accept "federal children" into them.

As stated earlier,[119] only two installations replying to the author's survey—Fort Belvoir, Virginia, and Fort Carson, Colorado—have been successful in routinely referring cases occurring on exclusive jurisdiction areas to state authorities. Again, especially where LEAA funds are being received, military officials should strongly encourage state officials to accept the "civil procedure-status" theory [120] and handle juveniles who commit offenses on-post. The ability to refer cases to state or county authorities has several advantages. First, it places teeth in the commander's administrative actions because it provides a sanction for breach of restriction or continued misbehavior. Second, it places those youth who need it in a system designed to treat juveniles. The military is ill-equipped to properly perform the functions of child welfare agencies and is without authority to create legally sanctioned juvenile courts. Although it is noble for the Army to "take care of its own," it is doubtful under present legal restrictions that it can adequately take care of its juvenile delinquents. This is especially so in those instances where health care is required. Personnel shortages in that field are acute. In addition, it is believed by

some that it is detrimental to the child and his family to have neighbors, superiors, subordinates, and others in the close-knit military community, aware of a delinquent's problems.

c. *Federal District Court.* The federal district court is the other forum available to handle juvenile cases. The author's survey revealed, not surprisingly, that numerous staff judge advocates have great difficulty in convincing local U.S. Attorneys to assume jurisdiction of serious juvenile cases arising on installations. U.S. Attorneys are frequently located over 100 miles from an installation and crowded federal court calendars are typical. An additional obstacle, in the eyes of some military officials, was brought about by legislation in 1974. Before proceeding in a juvenile case, it must now be certified to a federal district court that a state juvenile court does not have jurisdiction or refuses to assume jurisdiction or does not have available programs and services adequate for the needs of juveniles.[121] This will undoubtedly create more reluctance on the part of federal officials to take military referrals. The situation is aggravated by the inability of magistrates to try juvenile cases. In this regard, the author's survey disclosed, rather startlingly, that on several installations magistrates are hearing juvenile [122] cases even though the past [123] and present [124] statutes provide for trial by the district court. One installation reported that on a few occasions a magistrate conducted "informal trials" attended by the juvenile, his parents and a military prosecutor.[125] The magistrate counseled the child and parents and warned them of the consequences of future misconduct. At Fort Ord, California, the U.S. magistrate "handled" approximately 400 juvenile cases in 1974. As he had no jurisdiction in such cases, he informally placed all juveniles on probation or deferred prosecution.[126]

Several additional comments regarding magistrates are worth mentioning. Magistrates routinely hear cases involving certain traffic offenses that occur on post,[127] but even this efficient system, which includes paying fines by mail, is tarnished because of the lack of authority of a magistrate to try juveniles. A juvenile who commits a traffic offense on an enclave can be tried only by a federal district judge. It is difficult to imagine a more absurd situation. Such a juvenile can be awarded points under the uniform military traffic point system,[128] but this does little to deter a juvenile, especially one who is an infrequent visitor to the installation. Likewise, a juvenile who has been barred from post because of misconduct [129] can not be tried by a magistrate, even though this is precisely the type of offense that magistrates were created to hear.[130] In the case of juveniles who are not military dependents, issuing a letter barring reentry to the installation is not really a threat in view of the improbability of ever prosecuting a violator.[131]

At least one installation—Fort Huachuca, Arizona—has developed a unique alternative to federal court proceedings. There, a deferred prosecution plan, modeled after the Department of Justice "Brooklyn Plan," is used in selected cases.[132] The staff judge advocate has been given authority by the U.S. Attorney to grant deferrals. A juvenile offender and his parents are counseled regarding the meaning of deferral and a "contract" defining the terms of "probation" is entered into. A civilian employee trained in sociology and psychology acts as probation officer and supervises the delinquent. The plan works, but the survey response conceded that because the district court judge "does not have the time to hear cases involving juveniles," extreme caution is used in placing juveniles in the program. If a juvenile violates probation, the only sanction realistically available is barring from post. At Fort Ord, California, the U.S. magistrate uses an informal "Brooklyn Plan" and requires juveniles to communicate with the magistrate for one year.[133] Fort Rucker, Alabama, has developed a comprehensive youth assistance program that provides for rehabilitation services as an alternative to prosecution. The program, under the staff supervision of the Staff Judge Advocate, is outlined in detail in local regulations.[134]

Although some view with disdain the new requirement of obtaining certification that a state court will not assume a case as a prerequisite to federal court jurisdiction, the author is of the opinion that this could be an effective tool to encourage state courts to accept cases. If U.S. Attorneys would formally present military dependent juvenile cases to the state courts for trial, there is a probability that increased state cooperation will

come about, especially where LEAA funds are being received.

V. Conclusions and Recommendations.

Installation commmanders appear to be coping with their juvenile delinquency problems as well as can be expected. Some, however, are making much more of an effort than others. Although uniformity of effort and procedures is not required or necessarily desirable, it is apparent that some installation commanders should take action to establish procedures and commit more resources to the problem.

It is recommended that installations experiencing more than a minimum juvenile delinquency problem should:

A. Issue a directive establishing procedures for controlling and preventing delinquency. The directive should be tailored to the situation and cover such things as investigating offenses, staffing recommendations for actions, liaison with civilian agencies and use of a juvenile control council.

B. Establish a juvenile section in the provost marshal office.

C. Encourage state and federal authorities at the local level to be more cooperative in dealing with juveniles.

At Department of the Army level, it is recommended that the following actions be considered:

A. Issue a directive providing guidelines to field commanders concerning responsibilities and procedures for preventing and controlling juvenile delinquency.

B. Seek legislation to retrocede jurisdiction to the states over military lands for the purposes of the exercise of authority pertaining to juvenile delinquency.

C. Extend the application of state juvenile codes to lands owned, held or possessed by the United States.[135]

D. Seek legislation to amend the Juvenile Justice and Delinquency Prevention Act of 1974 to provide that federal assistance will not be provided unless state agencies accept referral of military dependent juveniles for treatment and adjudication.

E. Request the LEAA to encourage state agencies to accept military juvenile cases.

F. Seek legislation to permit U.S. magistrates to hear all juvenile cases or at least traffic cases committed by juveniles.

G. Recommend that the President appoint a Department of Defense representative to the Coordinating Council on Juvenile Justice and Delinquency Prevention.[136]

Footnotes

[1] Child abuse is discussed in Lehman, *Suffer the Little Children: Child Maltreatment in the Military Community* (1973), an unpublished thesis written at The Judge Advocate General's School, U.S. Army. The thesis analyzes reporting laws, welfare agency capabilities, and the battered child syndrome. In addition, it reviews a recent four and one half year study of child abuse conducted at Fort Bliss, Texas. That study revealed that military and civilian communities experience similar child abuse incidence rates. For active duty and retired personnel residing on and off the Fort Bliss installation, there were 24.2 cases per 10,000 population per year during the period of the study.

[2] Young soldiers who commit offenses punishable under the Uniform Code of Military Justice and are tried by courts-martial are not entitled to the more lenient treatment a juvenile receives under the Federal Juvenile Delinquency Act. United States v. Thieman, 33 C.M.R. 560 (1963).

[3] Juvenile dependents of military personnel are normally subject to the criminal court jurisdiction of the country in which offenses are committed. Because of language differences and embarrassment factors, few American military dependents are prosecuted in foreign courts. In many instances, youthful offenders are quickly returned to the United States.

[4] HAWES, CHILDREN IN URBAN SOCIETY 13 (1971).

[5] Mills, *The War Against Children*, LIFE, 19 May 1972, at 56.

[6] Senate Report (Judiciary Committee) No. 93-1011, 16 July 1974, U.S. Code Congressional and Administrative News, 93d Congress, 2d Session, at 4237 (hereinafter referred to as "SENATE REPORT").

[7] Yeksavich, *An Army Installation Plan for Dealing With the Juvenile Problem* 4 (1974), an unpublished thesis written at The Judge Advocate General's School, U.S. Army.

[8] *Teen Suicides on Increase*, The Leavenworth Times, 22 January 1975, p. 1.

[9] *Id.* (Quoting Dr. Darold Treffert, Director of the Winnebago Mental Health Institute, Oshkosh, Wisconsin.)

[10] Paulsen and Whitebread, *Juvenile Law and Procedure* 1-6 (1974); Yeksavich, *supra*, note 7, at 6.

[11] 383 U.S. 541 (1966).

[12] 383 U.S. at 555-56.

[13] 387 U.S. 1 (1967).

[14] Paulsen and Whitebread, *supra*, note 10, at 19.

[15] In re Winship, 397 U.S. 358 (1970).

[16] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[17] Velie, *Take Me Home*, READER'S DIGEST, June 1972, at 195-96.

[18] *Id.* at 196.

[19] MILLS, *supra*, note 5, at 60.

[20] VELIE, *supra*, note 17 at 196; SENATE REPORT, *supra*, note 6, at 4239.

[21] PAULSEN AND WHITEBREAD, *supra*, note 10 at 6.

[22] *Id.*

[23] SENATE REPORT, *supra*, note 6, at 4237.

[24] VELIE, *supra*, note 17, at 198.

[25] SENATE REPORT, *supra*, note 6, at 4251.

[26] PAULSEN AND WHITEBREAD, *supra*, note 10, at 73-79, 99. For example, in Kansas, neither the fingerprints nor photographs can be taken of a child under 18 without judicial consent. Kansas Stat. Anno. 38-815(f) (1973).

[27] PAULSEN AND WHITEBREAD, *supra*, note 10, at 124.

[28] *Id.* at 124-25.

[29] *Id.* at 123.

[30] *Id.* at 129.

[31] *Id.* at 40.

[32] 18 U.S.C. 5031 (1975 Supp.).

[33] PAULSEN AND WHITEBREAD, *supra*, note 10, at 43; 18 U.S.C. 5031 (1975 Supp.).

[34] *Id.* at 32.

[35] Kansas Stat. Anno. 38-802 (1973).

[36] PAULSEN AND WHITEBREAD, *supra*, note 10, at 35, 132-33. For example, in Kansas a child over 16 who is not amenable to rehabilitation through facilities available to the juvenile court can be prosecuted as an adult. Kansas Stat. Anno. 38-808(b) (1973).

[37] PAULSEN AND WHITEBREAD, *supra*, note 10, at 167-82.

[38] Kansas Stat. Anno. 38-826 (1973).

[39] PAULSEN AND WHITEBREAD, *supra*, note 10, at 176.

[40] Kansas Stat. Anno. 38-120 (1973). One writer observed as follows: "In regards to punishing parents for misconduct of their children, it has been reported Soviet law allows for punishment of parents based upon 'indecent conduct and street hooliganism' of their children. A similar provision in the ordinances of Baker, Oregon, reduced juvenile delinquency by an estimated 90%." YEKSAVICH, *supra*, note 7, at footnote 21.

[41] 18 U.S.C. 5031-37 (1970).

[42] 18 U.S.C. 5001-03 (1970).

[43] 18 U.S.C. 5005-26 (1970).

[44] 42 U.S.C. 3811-91 (1970).

[45] SENATE REPORT, *supra*, note 6, at 4244-45.

[46] P.L. 93-415, 88 Stat. 1109 (approved 7 September 1974).

[47] SENATE REPORT, *supra*, note 6, at 4235.

[48] *Id.*, at 4241.

[49] *Id.*, at 4243.

[50] *Id.*

[51] *Id.*

[52] *Id.*, at 4244-48.

[53] Sec. 201, P.L. 93-415.

[54] SENATE REPORT, *supra*, note 6, at 4248.

[55] Sec. 206, P.L. 93-415. The Council is composed of the Attorney General, Secretary of Health, Education and Welfare, Secretary of Labor and other notable officials. No representative of the Department of Defense is named to the Council by the statute.

[56] Sec. 207, P.L. 93-415.

[57] Sec. 241, P.L. 93-415.

[58] Sec. 521, P.L. 93-415, 18 U.S.C. 4351-52 (1975 Supp.).

[59] 18 U.S.C. 5031 (1975 Supp.).

[60] 18 U.S.C. 5032 (1975 Supp.).

[61] *Id.*

[62] 18 U.S.C. 5036, 5038(d) (1975 Supp.).

[63] Letter from George Beall, U.S. Attorney, District of MD., to the Baltimore Military Police Field Office, subject: Juvenile Justice and Delinquency Prevention Act of 1974, dated 3 Dec 1974 (emphasis supplied). Fewer than 700 juveniles are annually processed through federal courts. SENATE REPORT, *supra*, note 6, at 4264.

[64] A representative of the Law Enforcement Division, Human Resources Development Directorate, Office of the Deputy Chief of Staff for Personnel, Department of the Army, advised the author on 6 February 1975 that such statistics are not kept and there are no plans to keep them.

[65] References to the survey will be cited as "Survey Response No. ___"

[66] Survey Response No. 20.

[67] Survey Response No. 19.

[68] Army Reg. No. 210-10, paras. 1-5, 1-13 (30 Sep. 1968, as changed). The authority of the installation commander is thoroughly analyzed in Dept. Army Pam. No. 27-21, sec. V, chap. 6 (Oct. 1973).

[69] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). In Flower v. United States, 407 U.S. 197 (1972), the Supreme Court held that a commander can not

exclude civilians from main arteries running through an installation that are open to the public.

[70] 18 U.S.C. 1382 (1970) (conviction carries a maximum punishment of a $500 fine and six months imprisonment).

[71] Army Reg. No. 600-30, para. 1(19 Oct. 1971).

[72] *Id.*, at para. 5.

[73] *Id.*, at para. 2.

[74] Army Reg. No. 608-1, para. 3-7 (15 Nov. 1973).

[75] Army Reg. No. 405-20, para. 3a (1 Aug 1973, as changed). For a thorough discussion of all aspects of jurisdiction, see Dept. Army Pam. No. 27-21, sec. 3, chap. 6 (Oct 1973).

[76] Army Reg. No. 405-20, para. 3a (1 Aug 1973, as changed).

[77] U.S. Constitution, art. I, sec. 8.

[78] Dept. Army Pam No. 27-21, para. 6.7a (Oct. 1973).

[79] Army Reg. No. 405-20, para. 3b (1 Aug 1973, as changed).

[80] YEKSAVICH, *supra*, note 7, at 51.

[81] Dept. Army Pam. No. 27-21, para. 6.10c (Oct. 1973).

[82] *Id.*, at para. 6.11a; Army Reg. No. 405-20, para. 4a (1 Aug. 1973, as changed).

[83] For example, Congress has enacted legislation permitting the states to impose motor vehicle fuel taxes, use and sales taxes and income taxes on federal enclaves. Dept. Army Pam. No. 27-21, para. 6.11c (Oct. 1973).

[84] 398 U.S. 419 (1970).

[85] 18 U.S.C. 13 (1970).

[86] Adams v. Londeree, 139 W. Va. 748, 83 S.E.2d 127 (1954).

[87] County of Arapahoe v. Donoho, 144 Colo. 321, 356 P. 2d 267 (1960).

[88] Board of Chosen Freeholders v. McCorkle 98 N.J. Super. 451, 237 A.2d 640 (1968).

[89] 20 U.S.C. 236-41 (1970).

[90] Dept. Army Pam. No. 27-21, para. 6.11d. This situation should not be confused with the one where federal courts hear a civil suit, based on diversity of citizenship or other grounds, where the court deals with state laws. In such situations, the law applicable on federal enclaves is not in question.

[91] 18 U.S.C. 13 (1970).

[92] Army Reg. No. 405-20, para. 5 (1 Aug. 1973, as changed).

[93] 10 U.S.C. 2683 (1970); Dept of Defense Dir. No. 5160.63 (6 July 1972).

[94] Dept. Army Pam. No. 27-21, para. 6.9c (Oct. 1973); Army Reg. No. 405-20, para. 9 (1 Aug. 1973, as changed).

[95] Transitory actions can be enforced in any court having jurisdiction over the civil defendant, regardless of where the cause of action occurred. Local actions must be enforced in the court having physical jurisdiction over the place where the cause of action arose. Contract and personal injury actions are transitory. Divorce and adoption actions are local. Dept. Army Pam. No. 27-21, para. 6.10d (Oct. 1973).

[96] Kansas Stat. Anno. 38-806 (1963) (emphasis supplied).

[97] Letter from George Beall, U.S. Attorney, District of Maryland, *supra.*, note 63.

[98] Survey Response Nos. 8 and 32.

[99] Army Reg. No. 190-45, para. 2-1 (4 Nov. 1974).

[100] Army Field Manual No. 19-20, chap. 30 (Oct. 1971). The author's survey revealed that most installation provost marshaloffices have detailed local procedures on handling juvenile investigations. Forts Gordon and Benning, Georgia, and Fort Bliss, Texas, have model policies and procedures.

[101] *Id.*, at para. 30-6a.

[102] Interviews at Fort Leavenworth, Kansas, with the following officials: Captain Jack Sattler, Social Work Officer, Human Resources Center, 10 Feb. 1975; Major Harry Johnson, Provost Marshal, 14 Feb. 1975; and Colonel Joseph Conboy, Staff Judge Advocate, 6 Feb. 1975.

[103] Survey Response Nos. 11, 12, and 16.

[104] Survey Response No. 22.

[105] Army Reg. No. 31-200, para. 11-94 (13 Feb. 1968, as changed).

[106] Army Reg. No. 28-1, para. 1-6 (15 Oct. 1973, as changed).

[107] Army Reg. No. 60-20, para. 3-13 (21 Mar 1974).

[108] Army Reg. No. 28-62, para. 2-3 (3 Apr. 1972, as changed).

[109] Army Reg. No. 28-56, para. 2 (8 Jan. 1975).

[110] Army Reg. No. 28-16, para. 8 (19 Sep. 1967).

[111] Army Reg. No. 190-5, para. 2-2 (1 Aug 1973, as changed) (Uniform Traffic Point System).

[112] 18 U.S.C. 1382 (1970).

[113] Army Reg. No. 210-50, para. 10-28a (9 Jul 1973, as changed).

[114] 10 U.S.C. 1076 (1970).

[115] JAGA 1962/4104, 20 Jun 62, digested in 106 Judge Advocate Legal Ser. 5 (refusing medical treatment).

[116] JAGA 1963/3601, 15 Feb. 1963, digested in 123 Judge Advocate Legal Ser. 10; Hines v. Seaman, 305 F. Supp. 564 (D. Mass. 1969) (theft and assault by stepson were grounds for termination).

[117] Survey Response No. 5.

[118] See text accompanying footnotes 46-52, *supra.*

[119] See text accompanying footnote 98, *supra.*

[120] See text accompanying footnotes 95-96, *supra.*

[121] 18 U.S.C. 5032 (1975 Supp.).

[122] Survey Response No. 11, 13 and 24.

[123] 18 U.S.C. 5033 (1970).

[124] 18 U.S.C. 5032 (1975 Supp.) The statute provides that

juveniles may be proceeded against in "an appropriate District Court of the United States." This appears to preclude juvenile proceedings before a magistrate. *See* Wingo v. Wedding, 418 U.S. 461 (1974).

[125] Survey Response No. 5.

[126] Survey Response No. 20.

[127] Army Reg. 190-29 (22 Jul. 1971).

[128] Army Reg. No. 190-5 (1 Aug. 1973, as changed).

[129] 18 U.S.C. 1382 (1970). This subject is discussed in Lloyd, *Unlawful Entry and Re-Entry Into Military Reservations in Violation of 18 U.S.C. sec. 1382*, 53 MIL. L. REV. 138 (1971).

[130] House Report (Judiciary Committee) No. 1629, 3 Jul 1968, U.S. Code Congressional and Administrative News, 90th Congress, 2d Session, at 4256; Franks, *Prosecution in Civil Courts of Minor Offenses Committed on Military Installations*, 51 MIL. L. REV. 85 (1971).

[131] In Weissman v. U.S., 387 F.2d 271 (10th Cir. 1967), a woman who was ordered not to reenter an installation after disrupting a court martial was convicted for reentry.

[132] Survey Response No. 2. The plan is described in *Juveniles Get a Second Chance*, Army Times, 24 Oct. 1973, p. 26.

[133] Survey Response No. 20.

[134] Survey Response No. 14.

[135] Legislation now exists for such matters as state use and sales taxes, income and motor vehicle fuel taxes. Dept. Army Pam. No. 27-21, para. 6.11c (Oct. 1973).

[136] Sec. 206, P.L. 93-415, provides that the President can name members to the Council in addition to those named by statute.

Appendix A

1. Installation name:
2. Type of jurisdiction *(e.g.*, exclusive; concurrent, mixed):
3a. Approximate number of incident reports of juvenile delinquency on your post in 1974:
b. Approximately how many of these reports were brought to your attention for action:
4a. Approximately how many juveniles who committed offenses on your post were prosecuted in 1974 by state authorities:
b. By federal authorities:
c. What types of offenses were involved:
5a. Approximately how many formal actions *(e.g.*, bar from post, terminate quarters, deny privileges) were taken in 1974 on your post as a result of juvenile delinquency:
b. How may informal actions *(e.g.*, letters of admonition) were taken:
c. How many offenders were turned over to state juvenile authorities:
6. Describe in detail the procedures and personnel used at your installation to handle juvenile delinquency problems (include information on relationships with state and federal authorities:
7. What are the major problems you have in dealing with juvenile delinquents:
8. Please include any local regulations or SOPs you have concerning handling of juvenile delinquents.
9. Comments:

Appendix B

1974 Juvenile Delinquency Statistical Abstract[a]

Name of Installation	Type of Jurisdiction	Acts of On-Post Juvenile Delinquency	Juveniles Prosecuted By		Administrative Actions		Referred to State Juvenile Authorities
			State	Federal	Formal	Informal	
Ft Huachuca	Exclusive	30	0	0	26	2	0
Ft Monmouth	Exclusive	50	2	0	5	10	1
Redstone	Exclusive	35	0	0	11	0	0
White Sands	Exclusive	25	0	0	12	4	0
Ft Knox	Exclusive	50	2	20	60	UNK	0
Ft Belvoir	Exclusive	27	5	0	7	22	29
Ft Lee	Exclusive	39	0	2	31	2	0
Ft Eustis	Exclusive	43	0	25[b]	2	25	0
Ft Gordon	Exclusive	64	0	5[b]	UNK	UNK	5
Ft Benning	Exclusive	456	12	0	4	23	15

Name of Installation	Type of Jurisdiction	Acts of On-Post Juvenile Delinquency	Juveniles Prosecuted By		Administrative Actions		Referred to State Juvenile Authorities
			State	Federal	Formal	Informal	
Ft McClellan	Exclusive	10	0	3[b]	0	2	0
Ft Rucker	Mixed	45	0	2	23	25	0
Ft Jackson	Exclusive	22	0	0	16	6	0
Ft Leavenworth	Exclusive	15	0	0	6	9	0
Ft Bliss	Exclusive	50	5	5	23	8	0
Ft Polk	Mixed	20	10	1	0	0	5
Ft Sill	Mixed	55	0	3	11	8	4
Ft Wood	Mixed	UNK	0	0	1	UNK	0
Ft Ord	Exclusive	560	0	400[b]	10	24	0
Ft Hamilton	Exclusive	25	0	1	15	10	0
Ft Meade	Exclusive	64	0	0	17	UNK	0
Ft Devens	Exclusive	37	0	0	3	10	1
Ft Bragg	Mixed	114	0	5	5	25	0
Ft Stewart	Exclusive	20	0	3	2	2	0
Ft Riley	Mixed	0	0	0	5	UNK	0
Ft Campbell	Exclusive	115	1	UNK	6	UNK	2
Ft Hood	Exclusive	26	0	0	1	UNK	UNK
Ft Sheridan	Exclusive	18	0	1	1	3	0
Ft Carson	Exclusive	90	1	0	4	UNK	1
Ft Lewis	Mixed	135	0	6[b]	1	6	10

[a] All figures are approximate.
[b] U.S. magistrate "handled" informally.
UNK=unknown.

Bicentennial Series

Crossed Sword and Pen—And Other Trade Marks of the Judge Advocate

By: 1st Lieutenant Edward F. Huber, JAGD (1945)

This light but enlightening piece marks the second installment in our bicentennial series of historical Corps writings. It has been reproduced, with permission, from the March 1945 issue of *The Judge Advocate Journal.* The author is now engaged in the private practice of law in New York City, and is still active in the Judge Advocates Association.

* * *

The recent products of the tender [1] ministrations of Staff and Faculty of The Judge Advocate General's School at Ann Arbor usually find in the course of that wonderful delay in route in the interest of the public service [2] that their insignia comes in for some close scrutiny. The people who stop for another look are really not arrested by the newness of the lieutenancy shining forth from the shoulders, but by the emblem below the notch in the lapel. Questions often follow, and then comes the pleased explanation that the sword and pen, crossed and wreathed, denote The Judge Advocate General's Department. A well-bred explainee responds with a respectfully intoned Ohh! [3]

1. My memory is really not so short.
2. Cf. Par. 21, AF 605-115, 17 June 1944.
3. Of course, cognoscenti in fair numbers *do* properly[3.1] recognize the insignia.
   [3.1] Not all *properly* do. For example, one of my so-called friends recently forwarded a packing company advertisement which showed a luscious roast of beef behind a crossed sword and quill pen, and some scribbled comment that this would be appropriate for JAs if assigned to K. P. Vulgarians still abound, unfortunately.[3.11]
   [3.11] I have always longed to use a footnote to a footnote, or

This sort of thing continues to happen to men old and new in the Department, and usually results in the nice feeling of being part of a small but distinctive organization. If there appears to be a taint of smugness in this, let me hasten to say that any smugness is usually dissipated in the first three days of the first duty assignment, and is soon displaced by a continuing pride which the achievements of the Department, both present and past, fully justify. Certainly the insignia, or distinctive mark, fosters *esprit de corps.*[4]

But the JA was not always a marked man, and when he was, the mark was not always the same as at present; and in this lies the tale to be told.

For considerable periods there were no statutory Judge Advocates, nor Judge Advocate General.[5] At other times Judge Advocates were not in uniform.[6] The first distinguishing mark came in 1857, when the Army Regulations required that JAs sometimes wear a white pompon.[7] But when the Regulations were revised in 1862, reference to the distinguishing pompon was omitted, and it was not until 1918 that there were again specially prescribed colors.[8]

The colors of The Judge Advocate General's Department are now dark blue piped with white.[9] Before these were adopted, they were the colors of the Inspector General's Department, which switched with the JAGD by adopting the latter's colors, dark blue piped with light blue.[10]

In the period 1872–1890, although without special colors or device, officers of the Judge Advocate General's Department,[11] or the Bureau of Military Justice,[12] were distinguished by the letters "J A" in Old English characters embroidered on the shoulder knot.[13]

The present authorized insignia is prescribed for collar and lapel of coat, and described: "A sword and pen crossed and wreathed 11/16 inch in height."[14] This design was first adopted in 1890.

Its original execution was rather fancy. General Order 53, 23 May 1890,[15] provided that the insignia for officers in The Judge Advocate General's Department should be worn on shoulder knots, and should be

> "...of gold cord, one-fourth of an inch in diameter, Russian pattern, on dark blue cloth ground; insignia of rank embroidered on the cloth ground of the pad...with sword and pen crossed and wreathed, according to pattern, em-

sub-footnote, and the Dewey Decimal System used elsewhere in the Army presents limitless possibilities of exploitation in this field.

4. One of the main purposes of insignia. For example, certain British regiments have adopted the coat of arms of their great leaders of earlier days. Colors and insignia have long served the same function. In addition to the morale factor, there was originally a very practical purpose as well–distinction from troops of the enemy.
5. E.g., 1802–1812; 1821–1849.
6. Although there were then no statutory Judge Advocates, both the General Regulations of 1821 and of 1825 included among those to be attached to general headquarters "the superior judge advocate." But par. 865 of the 1825 Regulations stated: "Chaplains, judge advocates, commissaries of purchases, and store keepers, have no uniform." The duties of judge advocates were prescribed in the General Regulations of 1841, although no judge advocate was included in the staff corps. General Holt, Judge Advocate General from 1862 to 1875, is always pictured in civilian clothes.
7. Par. 1433, Army Regulations of 1857. Par. 1430 provided: "The pompon will be worn by all officers whenever the epaulettes are worn." The pompon was a tuft of cloth material which looked like an undersized tennis ball and protruded from the hat.
8. Distinctive colors antedate distinctive insignia in American military history. The oldest insignia is the flaming bomb of the Ordnance Department, adopted in 1832. But the Corps of Artillery formed during the Revolution by the Continental Congress was both the first "regular" (as distinguished from sectional, or militia) army group, and the first to have a designated color, scarlet–for a coat lining. The skirt of the coat was hooked back so that the lining would show. Scarlet is still the Artillery color.
9. Par. 87n. AR 600–35, 31 March 1944; par. 63m, AR 600–35, 10 Nov 1941; par. 3k, AR 600–38, 17 Aug 1938. Most appropriate of all are the colors of the Finance Department–gold and silver.
10. Sec. II, Cir. 70, 1936; par. 49-o, AR 600-35, 31 Dec 1926; par. 48-o, AR 600-35, 25 Nov 1924; par. 45-o, AR 600-35, 14 Oct 1921; S. R. 42, 15 Aug 1917. Par. 49½, C. 5, 17 July 1918, S. R. 42, provided for piping on the overseas cap in "dark blue with light blue threads."
11. Par. 1779, Army Regulations, 8 Feb. 1889.
12. Par. 2646, Army Regulations, 17 Feb 1881. G. O. 29, 1888; G. O. 92, 1872; G. O. 76, 1872.
13. The Calvalry can claim the most unique identification, other than colors or insignia. For a considerable period (1841–1857) Army Regulations provided that "mustaches," or "moustaches," would not be worn, *except by cavalry regiments*, "on any pretense whatever." (A. R., 1841; A. R., 1847).
14. Par. 26b (2) (o), AR 600–35, 31 Mar 1944.
15. This was an amendment to the Uniform Regulations then in force, as promulgated in the Army Regulations of 1889.

broidered in silver on the cloth ground of the pad (except for a colonel and assistant judge advocate general,[16] who will wear the device made of solid silver on the knot midway between the upper fastening of the pad)."[17]

The Heraldic Section of the Quartermaster Corps, which is charged with knowing about such things, is authority for the explanation of the significance of the design: the pen is to denote the recording of testimony; the sword, the military character of the Department's mission; and the wreath, the traditional symbol of accomplishment.[18]

In 1894 the JAG insignia was required to be embroidered in gold on "undress coats."[19] In 1899 silver insignia were prescribed for the Judge Advocate General, to be worn on epaulettes.[20] In 1902 there was a return to the gold standard, but gilt was an authorized substitute for the royal metal.[21] In 1907 there was a complete revision of the Uniform Regulations, which, so far as the JA insignia was concerned, related to position, and not design. Insignia were prescribed to be worn on the sleeves of the full dress coat and overcoat, and on the collar of the dress, service, and white coat; gold or gilt embroidery or metal for the full dress coat; gold or gilt metal for the dress and white coats; and dull finish bronze metal for the service coat and overcoat.[22]

Thus matters continued until World War I, when the size of the insignia was prescribed as one inch in height. It was worn on the collar of the uniform coat. It could be of gold, or gilt, or bronze metal.[23]

When the current series of Army Regulations was promulgated in 1921, the previously existing provisions of the old Regulations relating to JA insignia were adopted without change and included in AR 600-35, 14 October 1921.[24] But the period of post war unrest was having its effect. Another revision of the uniform was agitated. This time it affected not only uniform design, but JA insignia design as well! Some may consider this merely as an interesting aberation; for it was obscurely documented, promptly repented, and largely forgotten.[25]

The complete revision of AR 600-35, 14 October 1921, was undertaken in 1923. Now the revision of Army Regulations is no light matter, particularly when they relate to the uniform, where opinions and tastes may differ widely, and at a time when there are no urgencies of war to restrict a natural desire for latitude of expression.[26] Army channels were busy thoroughfares of memoranda, concurrences, counter proposals and indorsements. Added to this stream was a proposal to change the JA insignia which had been basically the same since 1890.

In the files of the National Archives[27] there is a page proof of a revision of AR 600-35 proposed to be promulgated 7 June 1924, which provided that, effective 1 July 1924, the JA insignia should be: "A

16. The absence of a prescribed device for the Judge Advocate General is probably explained by the fact that at the time the incumbent was suspended from rank (GCMO 19, Hq of the Army, 24 Feb 1885) and the only Assistant Judge Advocate General was Acting Judge Advocate General. Cf. Fratcher, Notes on the History of the JAGD, 1 JA Journ. 10.
17. At this point it is appropriate to note a curious parallel in the development of the insignia of the Inspector General's Department and the JAGD. The design of the present insignia of both Department was authorized in the same year, 1890, by the same General Order. Both insignia were wreathed, which resulted in some similarity of appearance. Whether the IG insignia was equally appropriate will be left for personal deduction, but there is no dispute about its inclusion of the faces, or bundle of sticks and an axe, which at that time at least must have been thought to have some significance. No provision was made for the wearing of the JA insignia, as there was for that of the IG, on the forage cap badge. Forage is defined by Webster both as "to search for provisions," and "to ravage." Obviously JAs would have no need for a forage cap.
18. There are noteworthy examples of perhaps more appropriate army insignia. Consider that of Chemical Warfare Service, with its chemical retorts held together by organic chemistry's basic hexagon, the benzene ring; and music's traditional lyre, for the army band; and the Medical Corp's mythological caduceus, or snake-twine staff of Aesculapius, the Greek god of medicine. But of all, the writer personally liked best the down to earth World War I insignia for cooks–a pot.
19. Cir. 7, 1894.
20. G. O. 144, 1899.
21. G. O. 81, 1902, as amended by par. 53(b), G. O. 132, 1902.
22. Par. 57(b), G. O. 169, 1907.
23. Paragraphs 34 and 36, Uniform Specifications, 1917, as published in Special Regulations 42, 15 Aug 1917.
24. Par. 13(b)(2)(q).
25. In fact, the writer hopes the following disclosures will be generally a surprise.
26. As a matter of bibliographical interest, the pertinent files at the National Archives fully bear this out.
27. National Archives' file, A. G. 300.33 (5-8-24).

balance upheld by a Roman sword and ribbon blindfold, 1 inch in height. Scales and sword hilt to be gold, blade of sword and ribbon silver." Accompanying the page proof is an unauthenticated check list purporting to show the authority for all changes. This states uninformatively, relative to the above, "Approved by Staff." Voluminous as was the discussion of other changes, for whatever reason this change has no discussion or comment officially preserved.

The actual publication of the revision of AR 600-35 was delayed until 1925, although it appeared under date of 25 November 1924. In paragraph 15(b)(2)(q) the changed JA insignia was described as above quoted. The picture at the beginning of this article shows what it looked like.

It is a strange thing that the official records of JAGD should be so meager on the subject; but they disclose nothing as to the origin of the change; or who proposed it; or why; or who designed the new insignia. The Quartermaster Corps Heraldic Section, which had no trouble furnishing information about the 1890 design, could throw no light on a change thirty-four years later. Colonel Henry Harmeling, now Judge Advocate at Mitchel Field, New York, and Major G. M. Chandler, of the Army War College Historical Section, have kindly provided the explanation.

If you have been following the footnotes carefully up to this point, you will recall that in note 17 reference was made to the IGs. They are in again. It seems that in the last war the JAGD was very small,[28] and greatly outnumbered by the IGD. The latter's insignia naturally became better known. But because there was the common element of the wreath in both,[29] occasionally confusion of the two occurred. It was all right in some cases, but not when a JA was mistaken for an Inspector. This evidently happened too frequently for too many JAs.[30] However, changes come slowly, for it was more than five brooding years after the armistice that anything was done to remedy the situation.[31]

In addition to the confusion of IG and JAG insignia, a more fundamental reason for the change was held in some quarters. A few officers of the Department considered the crossed sword and pen not sufficiently symbolic of the JA'S functions, and hoped for a more appropriate replacement. Among them was General Walter A. Bethel, then The Judge Advocate General. Major Chandler, at that time with G-4 and in charge of the army's heraldry, was consulted. It was he who designed the Roman sword and balance inisgnia.

The sword again indicated the military character of the Department. It was a Roman sword, because Romans were great law-givers. The balance,[32] or scales, has its origin as a symbol of justice in antiquity.

The change was not popular. A few officers procured the new insignia; most did not. Shortly upon the retirement of General Bethel on 15 November 1924 the JAs were canvassed for their views on the new insignia.[33] Most of them wanted the crossed sword and pen.

One of the first acts of General John E. Hull, as new TJAG, was to procure the rescission of the change. Exactly when this was effected is not clear, except that it was some time between 15 November and 29 December 1924. On the latter date a letter went forward "To: All Judge Advocates (Regular Army, National Guard, Reserve Corps)" announcing that AR 600-35, 25 November 1924, was soon to be issued; that it promulgated a change in JA insignia from sword and pen to Roman sword and balance; that the change had been authorized since 1 July 1924, but had not theretofore been published; that subsequent to the printing of AR 600-35, 25 November 1924, but

28. Seventeen officers at the beginning of the war, 426 just after the armistice. Cf. Fratcher, Notes on the History of the JAGD, 1 JA Journ. 11.
29. The Interpreters Corps also had a wreathed insignia, but the letters INT, which the wreath surrounded, apparently looked like neither axe nor sword nor pen, and no confusion is reported.
30. Col. Harmeling states: "It entailed a lot of explanation."
31. Col. Harmeling puts it, "to avoid this *embarrassment*."
32. The design of the balance is interesting. It is taken from one of the magnificent bronze zodiac signs which ornament the floor of the main reading room of the Library of Congress.
33. According to Col. Harmeling: "Some took no stock in the inability to distinguish between the old insignia and the Inspector General's Department; others thought The Inspector General should have been the one to do the changing." Bravo! At any rate, it was peace-time, officers were customarily not in uniform, thus insignia were so rarely worn that confusion was virtually impossible.

prior to its promulgation, "...the order for the change in insignia was revoked by the War Department[34] and the old insignia restored at the request of this office."

And so, quietly, before the change from the time-honored sword and pen was even officially published, it was rescinded. Here was a case of Army Regulations repudiated first and promulgated later. But then many another paradox, before and since, has given the JAGD but little difficulty.

AR 600-35, 24 November 1924, was superseded by AR 600-35, 31 December 1926. The sword and pen crossed and wreathed again became publicly, as well as officially, the insignia of the Judge Advocate General's Department.[35] It has so remained ever since, and is proudly worn by officers in every theater of operations and in every part of the globe where American troops are stationed—the respected trade-mark of the JA.

34. The War Department General Orders, Bulletins and Circulars for 1924 are stonily silent on the matter.

35. Par. 16 2 q. AR 600-35, 31 Dec. 1926. Two sizes of the device were authorized, one 11/16 inch in height for "lapel collar coat and olive drab shirt," and the other one inch in height for the "standing collar coat." When the "standing collar coat" was abolished, the one inch insignia went too. The 11/16 inch device has been the only one authorized since just before Pearl Harbor. Par. 24 2 n. AR 600-35, 10 Nov 1941. However, a few old-timers are still displayed.

Attorney General's Law Day Address

Remarks of The Honorable Edward H. Levi, Attorney General of the United States, before the Law Day Dinner sponsored by the University of Nebraska at Lincoln and the Lincoln Bar Association, 1 May 1975

This is a special day for law and for the legal profession. The day has added meaning for the Nebraska bar and the University of Nebraska-Lincoln College of Law. You have dedicated a new law school building to the service of the profession, a building where new attorneys will be introduced to what Sir Edward Coke called "the artificial Reason and Judgment of the law." And as they master it, they will become members of a proud and great profession.

But Law Day is not solely a celebration of the legal profession. It is intended for our entire society because law by its virtues and by its defects affects all of us—the powerful and the weak, the learned and the unlearned. We recognize this universality of the law when we speak of the sovereignty of the rule of law under which we all live.

The law which is sovereign is not complete, and it is not perfect. If we measure law by justice, we find it wanting, for we know there are many injustices. Also there is great cynicism about the law now, as there has been at other times. Some see it as merely an instrument in the hands of the powerful for accomplishing their personal aims. Even if we think of law as a noble instrument of society for maintaining civility, we must pause at lack of success. Crime rates, a measure of our lack of civility, have been continuously on the rise. The Federal Bureau of Investigation's latest figures show that the rate of serious crime—murder, forcible rape, robbery, aggravated assault, burglary, larceny, and auto theft—was 17 percent higher in 1974 than in 1973. The Bureau has been keeping those figures for 42 years, and it has never computed a greater annual increase than that. The FBI figures do not tell the whole story of crime, and the whole story is by no means more pleasing. A study by the Law Enforcement Assistance Administration has indicated that much crime still goes unreported; that is, it does not even appear in the figures I have cited. And the statistics do not accurately reflect the growing fear the increasing crime rate has inspired.

Of course, the law is imperfect. It is made by man. It reflects his failings, his human weaknesses. But it also reflects his powers and wisdom. It is made by man, and it must contend with the forces man sets against it. It must contend with our conflicting desires and ambitions for power and material goods. It exists in a human society where each man does not necessarily judge correctly in his own cause, where resources for which men compete cannot satisfy them all, where factionalism is probably the inevitable price of diversity.

It is not necessarily a reproach that our society has not fulfilled all its aspirations. In many ways we have progressed far beyond the dreams of the founders who set our law into motion—in our size and numbers, in the distribution of material advantages, in the access to education and in the cultivation of the arts. In many ways our aspirations have changed and will continue to change. Even the good society—perhaps because it is good—cannot ever be wholly satisfied. Indeed the good society must have ideals beyond its attainment. A vital society inevitably has problems which must be solved. It is the responsibility and the joy of the lawyer to try to solve them.

Our society and its law have difficult problems to face today. Not the least of the problems is the increasing resort to the law to settle differences among individuals and organizations once resolved by informal relations of trust and comity. The courts clog with lawsuits brought either because people don't believe they can make their grievance known any other way or because they don't want to give up a single chip in the process of bargaining for an advantageous settlement of their claim. The lawsuit is no longer the last resort. For those who think they are powerless in the face of impersonal and indifferent institutions, the lawsuit is the only resort. And for those who are well-schooled in the resolution of disputes, the lawsuit is a method, not so much for having a tribunal resolve an issue as for forcing a resolution out of court.

As the system of civil justice has become cluttered, the criminal justice system has fallen into incredible disrepair. The burden of increasing crime has put pressures upon the system which it is incapable of supporting. Criminals have learned to use the inefficiency of the system to their own advantage and the result is grave. An unpublished study conducted in one major American city showed that only four percent of the persons arrested for a felony were actually convicted of that felony. Even fewer ever went to prison. FBI statistics show that there are only 19 arrests for every 100 serious crimes reported. The lesson for potential criminals in this is clear: that they can use the law's weakness to avoid being punished. The deterrent force of the law falters upon that lesson. The crime problem spirals upon itself. If the criminal justice system weakens the deterrent force of the law, then there is more crime. And that extra crime puts its burden directly back on the already overwhelmed system.

The law has also outgrown many of its traditional categories as we have called upon it to solve complex, technological problems. For example, while once the law of nuisance served as the bulwark of environmental protection, today its easy maxims are not nearly enough. The law is now called upon to discover what may harm us, strike a subtle balance of harms and benefits, and recognize that the conduct of any one of us may be trivial individually but devastating in the aggregate. The law must concern itself with events so great as an accidental burn-out at a nuclear power plant and so small as the tiny bursts of vapor from the nozzles of aerosol cans. Of course, the law has always been general, has always applied to the great and the small. But the burden put upon our law by scientific knowledge about the consequences of our acts and the technological advances that raise ever more complicated questions of control cause some to yearn for the return of innocence. They might wish for the return of an era in which the threat to our environment might again be as obvious as a chimney belching black smoke now seems to us. But that era will not return. Rather what we must now reach for is a much more delicate balance of interest.

There are problems, indeed, and it is because of these problems, not in spite of them, that the rule of law is so central in maintaining progress. For the rule of law requires that we meet these problems by applying to them our deepest human values. What then is the rule of law?

It is often said upon solemn occasions such as this that ours is a system of laws and not of men. The idea of the rule of law developed in the Middle Ages in an otherworldly context that could distinguish laws from men. In the 13th century in England Bracton argued that since a universal law rules the world, even kings and rulers were subject to the law. British history gave content to Bracton's abstract argument, and by the 16th century the medieval idea that a universal law governed the world supported the growing belief in the supremacy of the common law.

That belief is really quite extraordinary. Its development was hardly irresistible. Lord Coke himself resisted it while Attorney General only to advance it powerfully when he became a judge. On a Sunday late in 1608 in Whitehall Palace Coke, then Chief Justice of Common Pleas, stood before King James I as the King assured him that the King would "ever protect the common law." But Coke replied, you will recall, "The common law protecteth the King," and James flew into a rage, calling Coke's argument traitorous for it set law above the monarch. By Coke's own report, the King proclaimed that since the law was founded upon reason, the King's reason could be the final source of law. To that Coke replied that the King had natural reason as well as any man but that "his Majesty was not learned in the Laws of his Realm of England; and abuses which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects are not to be decided by natural Reason but by the artificial Reason and Judgment of the Law, which requires long Study and Experience before that a man can attain to the cognizance of it."

The King's reply was explosive. He threatened to strike the Chief Justice, and Coke fell prostrate before the King's majestic wrath.

But the next day, from the Bench, Lord Coke issued an order under his seal which again asserted the supremacy of the common law.

Over time Coke's views as to the supremacy of law prevailed and even the Crown's prerogatives became so circumscribed by Parliamentary and judicial limitations that those which remained could only be described as existing as an aspect of the common law exercised by the Crown only because the law allowed it. What does the rule of law mean today? It cannot mean that the law operates independently of men. It must mean that there is some common center of agreement that informs the conduct of all men who work with the law. Sometimes the rule of law is taken to prohibit discretion in the application of government power. But the law works through words, and words themselves invite discretion in their application. The rule of law, if it means anything in this regard, refers to the disciplined application of words or ideas to the situations they are called upon to influence. No rule is automatic in its application. To a greater or lesser degree the step of determination is always required.

As I said at the outset, the idea of the sovereignty of the rule of law recognizes the universality of the law's effect. It also recognizes the universality of the manner in which law develops. Law is not only the product of lawyers. The whole society uses and interprets the law. And because of that, the law expresses something deep and important about the values we hold as a people. It expresses our strongest commitments and the highest aspirations. Law is not everything in society. The law is only one of a number of institutions through which we express ourselves and which in turn influence us, maintain our customs and change our habits. Thus law takes a place along with family structures, religious beliefs, the expressions of art and the explanations of science. Law embodies the values common to many of those institutions. Law, as the custodian of the historic rights mankind has developed for itself, must never be regarded as the tool of the power of the moment.

The public, the press, the academic community, the artists, all by their assertions and conduct inform and develop the law. As new human values and ideas make their way into common acceptance, they also make their way into the law which translates them into words by which common conduct may be governed. By guiding common conduct, by speaking in words, the law has its own power to educate, to alter commonly held views, to shape the thinking of the public whose thinking in turn shapes the law.

As the law is the custodian of historical value, the legal profession has a special role as the trustee of the law. But what is the nature of the legal profession? It has many different roles.

If one reaches back into legal history the difference between courts and legislatures was much less marked than it is today. Parliament still functions as a high court, a reminder of the time when the distinct functions of legislatures and courts were seen as one. Today the courts and the legislatures operate quite differently, representing separate aspects of the legal system. Nevertheless, the distinction between judging and legislating is quite old. Even though legislatures do sometimes merely restate the law and even though judges sometimes change it, there is a central difference between applying the law as a judge and changing it in the public interest as a legislator.

The legislators are guided, of course, by their vision of the Constitution's meaning and by a sense of duty to lead and to speak for their constituents as the constituents would speak were they present to be informed by debate in the public forum. The question of change is before the legislator and the fashioning of the public will must be their goal. Legislatures in large part are the forum for public involvement in its most immediate, changing and diverse form.

Courts recently have on occasion been places of high public drama, and modern procedures allow great diversity of interest to be represented in cases which would at one time have included only the two primary parties in dispute. Still the courts have a different goal than legislatures. Theirs is not primarily to shape the public will although they do this somewhat. And they must display a different sort of reasoning to support their judgment. The power of judges to resolve disputes and speak the law depends in large part upon the unique tone in which they render their judgments. More than any other lawgivers, they derive their power from the acquiescence of others in their judgments. Confronted with the duty of resolving a particular dispute based upon a particular set of facts, the judges must meet the duty by applying resonant rules of general and lasting application so that their decisions will be seen as legitimate. Thus they determine finally the rule of law as it applies among the parties before it, but they state the law knowing that their statement will bear heavily in resolution of future disputes. Though the courts use the language of principle, principles change over time as society reassesses its values and comes to accept new ways of looking at its problems.

Because they phrase their judgments in terms of the reasoned application of principle, too often what courts say has been mistaken for the single voice of the law. Lately the practice has been to go to the judges when legislators and officials of the executive branch fail to live up to their responsibilities. The apportionment of legislatures, the operation of public schools, even the conduct of the war in Vietnam have all been brought to courts by those who would have the judges state the single rule of law. Sometimes the judges have wisely declined to comment. Sometimes they have not. In any case, the appeal to the judges as the only spokesmen of justice results from a failure to recognize the more subtle nature of the rule of law in this nation.

Throughout the history of Anglo-American law there has been a debate over the meaning of justice and its relationship with the law. The two have been seen as, in some ways, distinct. Justice has many forms. Justice is one of the virtues, to be sure, but in some sense it is all of the human virtues viewed collectively. Justice is the name we give our values, and as such it is the source all members of the legal profession must draw upon.

The lawyer's job is to translate these values into rules. It is to make those rules consistent one with the other in a craftsmanlike manner. It is to try to clarify the ambiguity of words, to use language in the service of values. The lawyer has an enormous responsibility in this regard—to face the most complex and demanding problems that our society faces, to treat them dispassionately but not without feeling, to work with words which demand constant interpretation. Yet it is also his pleasure to do so. It is what distinguishes him from others in the system of law he shares with everyone.

The purpose of this day is to honor the law, and the purpose of the law is to try to create the conditions for the just society, for the continual reexamination of our values and the way they are reflected in our actions. It is to the aspirations of the law that, whatever its inevitable current failings and weakness, we may rightly and unhesitatingly pay tribute today.

The Privacy Act of 1974

By: Captain Robert E. Gregg, Administrative Law Division, OTJAG

I. Introduction.

On 31 December 1974, the Privacy Act (PL 93-579, 5 U.S.C. 552 a) became law with its provisions becoming effective on 27 September 1975. The wrong which Congress hoped to right by the Privacy Act was the threat to an individual's right

to privacy by the collection, maintenance, use and dissemination of personal information by the federal government. This threat is magnified by the increasing use of computers and sophisticated information technology. The purpose of the Privacy Act is to provide certain safeguards for an individual against an invasion of his personal privacy by placing restrictions on the collection, maintenance, use and dissemination of personal information.

To appreciate the scope and the impact of the Act, one must first understand the meanings of "record" and "system of records" as these terms are used in the Act. A "record" means any item of information about an individual that contains his name or other identifying particular assigned to him, such as a fingerprint or voiceprint. A "system of records" means a group of any records from which information about an individual is retrieved by his name or other identifying particular. The concept of a "system of records" is of primary importance because most of the provisions of the Act apply only to records which are in a system of records.

II. Major Provisions of the Act.

A. *Conditions of Disclosure*

Perhaps the most important provision of the Act is in Section 552a(b) which involves the conditions imposed on the disclosure of records contained in a system of records. The general rule is that no record contained in a system may be disclosed by any means to any person or other agency except pursuant to a written request by, or with prior written consent of, the person to whom the record pertains. Clearly such a rule, without exceptions, would substantially impede the functioning of the government. There are, therefore, 11 exceptions to the general rule (5 U.S.C. 552a(b)(1)–(11)). The first three exceptions are the most important. The first and the third will be discussed in this section, and the second will be discussed later.

The first exception (Sec. 552a(b)(1)) permits the agency to use the records internally in the performance of its business without obtaining an individual's permission on every occasion when his record will be disclosed to the officers and employees of the agency. The third exception (Sec. 522a(b)(3)) introduces the concept of the "routine use". Disclosure can be made without the individual's permission when the disclosure is for a routine use. To become a routine use under the Act, a use must be for a purpose compatible with the purpose for which the information was initially collected, and it must be published in the *Federal Register* as a routine use of the information. The offices, divisions, and field operating agencies within the Office of The Judge Advocate General have reviewed the systems of records for which they are proponents and have prepared the annual systems notices required to be published in the *Federal Register* by Section 552a(e)(4). These notices contain the routine uses of the records within these systems which are subject to the Act. (In that some of the records systems for which systems notices have been prepared are decentralized (*e.g.*, prosecutor's files), those staff judge advocate offices that maintain systems which are subject to the Act will be required to comply with the requirements of the Act. Further guidance as to those systems which are subject to the Act and the routine uses that can be made of these systems will be forthcoming.) It is by means of identifying routine uses that interagency transfers of records, as well as transfers outside the federal government, may be made without obtaining the individual's consent.

B. *Accounting of Certain Disclosures.*

Section 552a(c) requires that, except for disclosures to agency personnel in the performance of their duties and disclosures required by the Freedom of Information Act, (5 U.S.C. 552) the agency must keep an accurate accounting of the date, nature, and purpose of each disclosure, as well as the name and address of the person or agency to which the disclosure was made. The accounting must be kept for five years or the life of the record, whichever is longer, and except for disclosures made for law enforcement purposes, the accounting must be made available to the individual named in the record on his request. Finally, the agency must notify any person or agency to which a disclosure has been made, for which an accounting was made, of any correction or notation of dispute made to the record after that disclosure. This requirement insures that the copy of the record that was disclosed is kept timely and accurate.

C. *Access to Records*

Section 552a(d) gives the individual the right to review any record pertaining to him that is within a system of records, to have a copy made of the record for a fee for duplication only, and to request correction or amendment of the record. While there are no time limits within which the agency must respond to a request for access or a copy of his records, the agency must acknowledge the receipt of an individual's request for the amendment of a record pertaining to him within 10 working days, and either make the correction requested or inform him of the reasons why it refuses to amend his record and the procedures available to him to appeal this refusal to the head of the agency. The head of the agency must complete the review of the agency's refusal to amend the record within 30 working days and either make the correction or permit the individual to file a concise statement setting forth his reasons for disagreeing with the agency's refusal to amend his record and notify him of his rights for judicial review provided for by the Act. In any disclosure containing information about which an individual has filed such a statement, the agency must note the portion of the record in dispute, provide a copy of the individual's statement, and if deemed appropriate, provide a statement explaining the agency's position. Finally, none of the rights granted an individual under this section of the Act allow him access to any information compiled in reasonable anticipation of a civil action or proceeding.

D. *Agency Requirements*

Section 552a(e) sets forth specific records management restrictions and standards which apply to all agencies which maintain systems of records. With respect to the collection of information, an agency shall maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose required by statute or executive order, and it must collect personal information to the greatest extent possible, directly from the individual, when the information may result in an adverse determination. The agency must provide the following information to the individual from whom it seeks personal information: the authority which authorizes solicitation of the information, the purpose for which the information is intended to be used, the routine uses and the effects of not providing the information. With respect to the maintenance of information, the agency must publish annually a notice of the existence and character of all systems of records subject to the Act and permit public comment. The most important records keeping standard of the Act is the requirement that the agencies maintain all records which they use in making any determination about an individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in the determination. Prior to disseminating any record to any person other than an agency, except for releases under Freedom of Information Act, the agency must make a reasonable effort to assure that such records are accurate, complete, timely and relevant for agency purpose. No agency may maintain records on how an individual exercises his First Amendment rights, and it must make a reasonable effort to notify the individual when a record pertaining to him is released under compulsory legal process when such process becomes part of the public record. The Act also requires that each agency train its records management personnel in the requirements of the Act and establish administrative, technical and physical safeguards to protect the confidentiality of the systems. Finally, the agencies must publish in the *Federal Register* notice of any new routine uses which were not included in the annual system notice.

E. *Agency Rules*

Section 522a(f) requires agencies to promulgate rules, in accordance with 5 U.S.C. 553, to carry out the provisions of the Act. The rules must establish procedures whereby an individual can be notified in response to his request whether a named system of records contains a record pertaining to him, define the requirements for identifying an individual requesting his records or information pertaining to him, establish procedures for disclosure of an individual's records to him, establish procedures for an individual to request an amendment to his records and for review of the agency's refusal to amend his records, and establish fees to be charged for duplication of an individual's records.

F. *Civil Remedies*

Section 552a(g) establishes four civil causes of actions designed to give the individual a remedy against an agency which fails to comply with certain provisions of the Act.

1. The first cause of action lies whenever an agency fails to amend an individual's record or fails to review the initial refusal within 30 working days. The court, based upon a de novo review, may order the agency to amend the record and may grant attorney's fees and costs in those cases where the complainant substantially prevails. The award of fees and costs is not to be automatic.

2. The second cause of action lies whenever any agency refuses to comply with an individual's request to have access to a record pertaining to him. Based upon a de novo review of the records in camera, the court can enjoin the agency from withholding the records and order production. Fees and costs will be awarded only when the complainant substantially prevails.

3. The third cause of action lies whenever an agency fails to maintain any record concerning any individual with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual. If the court determines that the agency acted in an intentional and willful manner, the United States shall be liable for the actual damages resulting to the individual, but in no case less than $1,000, plus court costs and attorney's fees.

4. The fourth cause of action lies whenever an agency fails to comply with the provisions of the Act or the rules promulgated thereunder in such a way to have an adverse effect upon an individual. As with the third cause of action, if the court determines that the agency acted in an intentional and willful manner, the United States shall be liable for the actual damages resulting to the individual, but in no case less than $1,000, plus costs and attorney's fees.

G. *Criminal Penalties*

Section 522a(i) provides that any agency employee who knowingly and willfully discloses a record, the disclosure of which is prohibited by this Act, or who willfully maintains a system of records without meeting the notice requirements of the Act, and any person who knowingly and willfully requests or obtains any record concerning an individual under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

H. *Exemptions*

The Act provides for certain exemptions to its provisions. These exemptions are not, however, automatic, as are the exemptions in the Freedom of Information Act. The head of the agency must publish in the *Federal Register* those systems for which he is claiming an exemption, those sections of the Act from which the records systems will be exempt, and the reasons why he is claiming the exemptions. It should be noted that the exemptions are very limited and that no system of records can be exempted from all the provisions of the Act.

1. *General Exemptions*: Section 552a(j) provides that the head of the agency can exempt certain systems of records from almost all the provisions of the Act. The only types of records systems which the Army maintains for which a general exemption can be claimed are those systems which pertain to the enforcement of criminal laws. These systems extend from the police and prosecutor's files through the confinement authority's files. The provisions of the Act from which these systems cannot be exempted are: the conditions of disclosure, the accounting of disclosures, publication of the notice of the existence and nature of the systems, certain of the records management standards and the criminal penalties.

2. *Specific Exemptions*: Section 552a(k) provides that the head of the agency may exempt certain systems of records from some of the sections of the Act. Unlike the general exemption, most of the provisions of the Act apply to records systems that are exempted under the specific exemption. Examples of some types of records systems which can be exempted from the access requirement of the Act are systems which are properly classified in the interest of national defense under Executive Order 11652, 8 March 1972, and systems which contain evaluation material used to determine potential for promotion, to the

extent that disclosure would reveal the identity of a confidential source.

III. Relationship of the Freedom of Information Act to the Privacy Act.

One of the exceptions to the general rule that records cannot be released without the consent of the individual to whom it pertains is for those disclosures that are required by the Freedom of Information Act (see 5 U.S.C. 552a(b)(2)). This exception is the result of a compromise between the House and Senate bills. The compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under the Freedom of Information Act. Because the Privacy Act permits disclosure without consent for those disclosures which are *required* by the Freedom of Information Act, it precludes the release of any record subject to the Privacy Act which is exempt from the mandatory disclosure requirements of the Freedom of Information Act. The Act therefore provides agencies no discretion to release exempted information. Thus Congress appears to have determined there is always a legitimate governmental purpose served by withholding information exempt under the Freedom of Information Act unless the individual to whom it pertains consents to its release.

While the substantive provisions of the Privacy Act and the Freedom of Information Act are complementary, the procedural aspects of the two Acts appear somewhat inconsistent. The major problem is whether a person can request a copy of a record pertaining to him under the Freedom of Information Act. If he does, the 10 working-day time limit applies, and he can be charged the costs of search and duplication. If he made the same request under the Privacy Act, there is no time limit for agency response, and he must pay only for cost of duplication. If the agency fails to release the record, the individual has a cause of action under both acts and can be awarded fees and costs if the court determines that he has substantially prevailed. From the agencies' point of view it would be preferable if the Privacy Act were considered the exclusive authority for requesting one's own records from an agency. The first draft of the DoD directive implementing the Privacy Act provides that any request by an individual for records pertaining to him shall be treated as a Privacy Act request not a Freedom of Information Act request. This approach will mean that the Army can respond to the great number of requests from individuals for their own records in a timely and responsible fashion and not be compelled to answer within 10 working days.

IV. Impact on OTJAG.

Pursuant to the requirement that each agency publish a notice in the *Federal Register*, OTJAG has determined that there are 18 systems of records for which OTJAG is the proponent and which are subject to the Act. The offices, divisions and agencies of OTJAG and field legal offices that maintain these systems will be responsible for complying with the requirements of the Act. The Administrative Law Division is involved in the preparation of regulations necessary to implement the Act. The Litigation Division will be involved in any civil or criminal cases arising under the Act. Further impact on OTJAG is not apparent at this time.

V. Implementation.

A draft DoD Directive is currently being staffed with the services, and while it appears that extensive implementation of the directive will be unnecessary, it is anticipated that an Army regulation will be forthcoming.

Litigation Notes

From: Litigation Division, OTJAG

Medical Malpractice Litigation. The Army Surgeon General has received a number of letters and inquiries concerning the amount and type of governmental protection medical personnel can expect in the event they are the subject of a malpractice claim arising from the performance of

their official duties. Major Jim Price and Captains Bob Finlayson and Mark Feldheim of the Tort Branch, Litigation Division, prepared a Fact Sheet to assist in answering those questions. That information may assist local judge advocates in advising and assisting the medical personnel on their installation. This Fact Sheet is reproduced below.

Liability of Army Medical Personnel for Malpractice.

Everyone is expected to behave with ordinary care to their fellows. The absence of such care is termed "negligence" which is a basis for civil liability. "Malpractice" is the branch of negligence law applicable to professionals, such as doctors and lawyers who are expected to bring an appropriate level of skill, advice and treatment to their clients and patients.

Medical malpractice concerns negligent acts or omissions of medical personnel that cause personal injury to others. In military medical malpractice, the most common form of lawsuit is against the United States under the provisions of the Federal Tort Claims Act (28 U.S.C. 1346b). Most frequently the suit is against the United States alone and involves no individual defendants. The reason is obvious. The ability of the government to pay judgments, regardless of the amount, is greater than any individual or group of individuals. The government is thus a desirable target for plaintiffs and their lawyers. The FTCA is not, however, applicable for claims arising in foreign countries.

Whether government medical personnel (physicians, dentists, nurses and ancillary personnel) can be individually liable, that is, can be responsible to pay a judgment from their personal finances, is a difficult question. At the present time, the courts have reached no unanimous opinion as to individual liability. One U.S. Circuit Court of Appeals has held that a military physician can be individually liable if there is a finding of negligence. There are likewise courts that have held the military physician immune from suit, regardless of negligence. The state of the law at this time, therefore, is that the possibility of individual liability does exist. It is important to note, however, that to date no military or civilian medical practitioner employed by the federal government has had to pay a judgment based on individual liability. A military physician in residency at a civilian hospital is likewise subject to possible malpractice liability and, depending on the particular circumstances, may be covered by the hospital's insurance, considered a military source of medical care for U.S. Government liability purposes, or neither.

There are limitations as to who may bring suit. This limitation refers to the so-called *Feres* Doctrine established by the Supreme Court of the United States in 1950 to the effect that active duty military personnel may not recover damages from the government for the alleged malpractice (*Feres* v. *United States*, 340 U.S. 135). Under this doctrine or rule, active duty military personnel may not sue either the government or the individual. The class of eligible claimants is consequently limited to civilian dependents of military personnel, retired military personnel (for treatment after retirement) and their dependents, and other civilians who might obtain medical care from a military source.

Policy of Department of Army and Department of Justice Concerning Malpractice Suits.

Malpractice claims can be one of three types. They can be against the United States only, against the United States and medical personnel jointly, or against medical personnel only. The type of action or claim will dictate how the matter is to be handled and who will pay any judgment or settlement.

For medical treatment other than in foreign countries, if a claimant decides to proceed against the United States, he must begin by filing an adminstrative claim under the Federal Tort Claims Act. The claim will be investigated under applicable regulations and processed by the U. S. Army Claims Service. If it is determined to settle the claim, the settlement will be paid with government funds. If the claim is denied and the claimant then sues the United States under the Federal Tort Claims Act, any resulting judgment will be paid by the General Accounting Office with government funds.

If the claimant sues the United States and medical personnel jointly, and there is a resulting joint

judgment, it will be paid in total by the General Accounting Office from public funds, under present Department of Justice policy. It is possible for the United States to have a defense while the individual does not. For example, in unusual situations, the United States could defend on the Statute of Limitations for the FTCA, while the individual could not.

If medical personnel are sued alone, or if the United States succeeds in a separate defense, there is a possibility for sole personal liability. As far as we are aware, *to date no federal civilian or military medical personnel have been required to pay a malpractice judgment.* Should a judgment be rendered against an individual in the future, he or his insurance company, if any, would be responsible for payment. Reimbursement for any such payment not covered by insurance could be sought through private relief legislation. The Surgeon General and The Judge Advocate General would assist to the fullest extent of their ability in processing such legislation.

The reasons why medical personnel are sued alone when the government with its ability to pay judgments of any amount is available as a defendant are not clear. Some suits may be premised on individual feelings of malice by the claimant against the medical personnel. Others may be based on a lack of knowledge that the government can be sued. There may be other less apparent reasons. Nonetheless, medical defendants are faced with potential personal liabilities.

If Army medical personnel are sued alone or jointly with the U.S. for alleged malpractice in the performance of their regularly assigned duties, they may, upon request, be represented by the U.S. Attorney. If the defendants are insured, however, the insurance company has financial interest in the outcome and will want to protect that interest. Accordingly, the insurance carrier will be expected to provide legal representation. Finally, the defendants may employ private counsel to represent them. There is no provision for reimbursing the fees of private counsel in such cases.

Regardless of who represents individual defendants, they are entitled to advice and assistance from the lawyers in the Tort Branch, Litigation Division, Office of The Judge Advocate General and the doctor-lawyers in the Armed Forces Institute of Pathology.

Policy of Department of Army Concerning Malpractice Insurance.

The Department of the Army considers the question whether military medical personnel should buy medical malpractice insurance to be one for each individual to decide on the basis of his own circumstances. There is no reimbursement by the U.S. for payment of premiums. Only after the results of more cases are known will a stronger recommendation, pro or con, concerning insurance be possible.

In favor of purchasing malpractice insurance is the basic consideration of the peace of mind which is afforded by complete protection against malpractice liability. Each should decide whether to buy insurance based on his own personal circumstances. These circumstances include the potential risk of exposure in his specialty or practice versus the availability of insurance against such risk at a price he can afford for the relative peace of mind the insurance would provide.

Factors against the purchase of malpractice insurance are initially its cost and availability. As the amount of malpractice litigation is rising dramatically in the United States, the cost for insurance against such claims increases. Moreover, there are locations where insurance is unavailable. Another factor weighing against the purchase of insurance is the fact that the Justice Department normally will not undertake representation if there is a third party interest as represented by the financial responsibility of the private insurance company. This separates the individual from the government defense. Another possible objection to malpractice insurance is the so-called "target" effect, which basically means that, if an individual is capable of paying a settlement by way of insurance, he becomes a more attractive target for suit. And finally, the most persuasive objection to malpractice insurance is the fact that in the overwhelming percentage of cases, the United States is named a defendant and covers any adverse judgment, thus becoming an insurer for the individual physician.

From the foregoing, it is believed that the scales are tipped against military medical personnel buying malpractice insurance.

Preventive Measures.

The best defense against malpractice liability is proper treatment daily recorded. The physician keeping good records and good rapport with his patients is not a likely target. Time and again, defense of military malpractice suits has been frustrated by illegible or incomplete medical records. Commonly, the progress notes are weak or even absent for days at a time. These notes are essential to show that the treatment rendered was in accordance with the accepted medical standards and are essential in refreshing the treating physician's memory prior to testifying at trial. Every physician who signs an order or is called on consultation should be identified by printed name if his signature is scribbled. Charts must be carefully reviewed for proper documentation before being closed. Without good records to contradict the plaintiff's alleged malpractice, it is impossible to properly defend the lawsuit.

The second point is good rapport with the patient. As indicated above, some malpractice suits may be initiated as punitive action against the system or a doctor. When things go wrong, that is the time to give extra consideration and time to the patient and family. If there is a true grievance, and the possibility of a malpractice suit is recognized, the chief of the service should be notified immediately. All records, x-rays, slides and other documentation should be reviewed and preserved. If death is involved, an autopsy should be requested. AFIP should be notified prior to the autopsy if possible. Also, the case should be discussed with the local claims judge advocate to determine what further steps are necessary.

Thirdly, the risks attendant to medical and surgical treatment must be carefully explained to all patients, spouses, parents, sponsors, and guardians, as may be appropriate under the circumstances. A full record of such advice should be maintained by the physician and annotated in the medical records.

Pending Legislation.

At the present time, only government physicians employed by the Veterans' Administration and the Public Health Service have statutory immunity from suit in their individual capacities. There are four bills before Congress that would in one way or another afford protection to military physicians. Congressman Gonzales has submitted H.R. 3954 which brings military physicians under the same immunity enjoyed by the Veterans' Administration and the Public Health Service physicians. Congressman Chapel has introduced H.R. 387. This is the so-called "omnibus" bill giving all federal employees immunity from suit. In the Senate, two broader bills which address the problem of malpractice in the civilian community as a whole have been introduced; they would provide an umbrella under which the military physician could practice also. The Inouye-Kennedy bill, S.215, would establish a system comparable to Workmens' Compensation, avoiding court litigation to pay damages incurred by an individual undergoing medical treatment. Senator Nelson has introduced S.188 which would provide a combination of private malpractice insurance and governmental coverage, with the government paying damages incurred over a fixed amount. The Gonzales bill, if passed, would most directly relieve the military physician from the considerable uncertainty under which he now works.

JAG School Notes

New TJAGSA Building Dedicated. The new Judge Advocate General's School Building became a reality at 1400 hours on Wednesday 25 June 1975, when the $5 million structure was formally dedicated by the Honorable Norman R. Augustine, Under Secretary of the Army. Colonel William S. Fulton, Jr., TJAGSA Commandant, welcomed the many visitors who heard the opening address by University of Virgina President Frank L. Hereford, Jr., and the response of Major General George S. Prugh, The Judge Advocate General, US Army. The invocation and benediction were given by The Reverend Arie D. Bestbreurtje. In attendance at the dedication ceremonies were

representatives of the various professional legal organizations such as the American Bar Association, the Federal Bar Association and the Judge Advocates Association. Various legal educators, active and retired military personnel and former officers of the JAG Corps also were present, as were representatives of the TJAGSA Board of Visitors, former Commandants of the School, past and present general officers of the Corps, faculty of the University of Virginia School of Law and the UVA academic community, and the Army Corps of Engineers involved in the planning, design and construction of the building.

Legal Assistance Items

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

1. Items of Interest.

Change of Name—Statutes and Administrative Regulations. In recent years an increasing number of women have been seeking to retain or reassume their pre-marriage name, however, they frequently have been confronted by statutory, judicial or administrative difficulties. The difficulties stem in some instances from a court's assertion of its "discretionary" power to disallow a change of name or from the recalcitrance or confusion of administrative and regulatory agencies. There have been many excellent articles recently written on this subject, but a few deserve particular attention and will be noted below.

The English common law rule that any person may adopt any surname by consistent use provided the new name is not being so adopted for fraudulent or otherwise wrongful purposes has not been consistently followed in this country. One commentator has noted that "some courts seem to have enunciated a common law rule that a woman assumes her husband's name at marriage by operation of law" in a manner similar to the "consequential domicile" rule. Note, "Pre-Marriage Name Change, Resumption and Reregistration Statutes," 74 COLUM. L. REV. 1508, 1509 (December 1974). In fact, however no state statutorily requires that a married woman "assume" her husband's name upon marriage, and the "tradition and custom" of assuming the husband's surname appears to be "based on custom, not law...." MacDougall, "The Right of Women to Determine Their Own Names Irrespective of Marital Status," 1 FAM. L. REP. 4005, 4006 (December 10, 1974). Until recently Hawaii did have such a statute (HRS 574-1), but it was recently held to be violative of the adopted Equal Rights Amendment and the state constitution's equal protection clause. (*Cragun v. Hawaii*, Hawaii 1st Cir. Ct., Jan. 27, 1975.)

The exact dimension of the right to choose one's own name and the procedures for effectuating a change of name vary from state to state, although every state provides a court petitioning procedure. A few states have interpreted this type of statute as preemptive of the common law rule, but most states have held that this procedure merely provides an alternative to the common law right of adoption through usage. Many states have further provisions in their divorce statutes regarding the resumption of one's maiden name and have additional administrative statutes requiring reregistration upon any change of name. For a current listing of relevant statutes, cases, and attorney-general opinions *see* Note, "Pre-Marriage Name Change....," 74 COLUM. L.REV. 1508, 1521-1525 (December 1974). *See also* Daum, "The Right of Married Women to Assert Their Own Surnames," 8 U. MICH. J.L. REFORM 63 (Fall 1974) (Discussion of name change problems in the context of elections, voting rights, passports, licensing boards, automobile registration and drivers licenses).

There are clearly certain state interests (avoidance of confusion, fraud, administrative inconvenience, etc.) which have been articulated to justify a degree of "state control" over the right to change one's name, but increasingly these statutes and regulations have been challenged upon constitutional equal protection and due process

grounds and the judicial interpretations have been attacked on appeal as being wrongful or "unintended" departures from the common law rule.

The military LAO should be prepared to counsel clients who wish to change their name or to retain or reassume a maiden name. The counseling, if appropriate, should include state procedures, reregistration statutes and potential administrative difficulties. With regard to the procedure and necessary supporting evidence for change of name on the military records of members of the Active Army, the Army National Guard and the Army Reserves, *see* Army Regulation 600-2, "Name and Birth Date, . . . ," 16 April 1973. [Ref: Ch. 24, DA Pam 27-12].

Domicile—In-State Tuition Rates. The Office of The Judge Advocate General of the Navy (Legal Assistance and Taxes Division) has prepared a chart detailing, by state, the eligibility of service members and dependents for in-state tuition rates. Arrangements have been made to distribute the chart as an attachment to the next issue of *The Legal Assistance Counselor. See also,* Navy Legal Assistance Newsletter 75-2, p. 5 (19 May 1975). [Ref.: Ch. 25, DA Pam 27-12].

Legal Assistance Administration—Notarial Acts. In certain instances it is difficult to ascertain—for federal and nonfederal purposes—the legal effectiveness of notarial acts performed by US armed forces members. Although "[t]he legal effectiveness of any notarial act generally is dependent on the laws of the jurisdiction[s] in which the instrument . . . .is to be used," (para. 2c, Army Regulation 600-11, "Authority of Armed Forces Personnel to Perform Notarial Acts," 20 April 1973), and although many states have statutorily provided (*see* Attachment 1, AR 600-11) that designated armed forces members can provide notarial services, it is generally recommended that individuals use locally appointed civilian notaries whenever possible. *See also,* Calif. Civil Code Sec. 1183.5 (State statute revised since the promulgation of the regulation so that, *inter alia,* "[a]ny officer on active duty in the armed forces having the general powers of a notary [pursuant to 10 U.S.C. § 936] may perform all notarial acts for any person serving in the armed forces of the United States, wherever they may be, or for any spouse of a person serving in the armed forces, wherever they may be, and for any person serving with, employed by, or accompanying such armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands"). [Ref: Ch. 1, DA Pam 27-12].

Veterans Benefits—Terminal Date of "Vietnam Era"—Presidential Proclamation. Congress has provided that the entitlement to certain veterans benefits is based upon active military, naval or air service during the period beginning August 5, 1964, referred to as the Vietnam era. Congress further provided that the President should fix the appropriate terminal date. In accordance with that authorization the President, by Proclamation No. 4353 (40 F.R. 20257), designated May 7, 1975, as the last day of that "Vietnam era" for purposes of 38 U.S.C. § 101(29). [Ref: Ch. 44, DA Pam 27-12].

Community Property—Family Law—Military Retired Pay. Recently there have been a number of cases regarding the disposition of military and military-related emoluments incident to a divorce or a dissolution of marriage in a community property jurisdiction. Most cases have involved the characterization of one particular military emolument—military retired pay.

A thorough examination of the attendant problems has been written recently in the context of a case analysis. *See,* "Community Property—Deferred Compensation: Disposition of Military Retired Pay Upon Dissolution of Marriage—*Payne v. Payne,* 82 Wn.2d 573, 512 P.2d 736 (1973)," 50 WASH. L. REV. 505 (February 1975).

The note analyzes three primary issues: (1) the problems of vesting ("[t]he point of demarcation between classification as an expectancy and judicial recognition [of military retired pay] as property. . . ." p. 515); (2) assuming the retired pay is to be treated as property subject to division, there exists the issue of characterization of the emolument as either community or separate property and the alternate approaches under either the "inception of right" doctrine or the "proportionate ownership" method; and (3) assuming the existence of a "community portion," issues remain concerning the method of distribution of the community portion of the pay.

The threshold question of vesting is whether military retired pay is judicially-cognizable "property" subject to division or is merely an expectancy right. The significance of determining a "discrete point of vesting" is that if the divorce should occur prior to the time at which the military retired pay would be "judicially recognizable as property," then "the nonemployee spouse will be deprived of a common share of deferred compensation for services performed during the existence of the community." Note, at 518.

The three principal situations in which the vesting issue may arise are as follows: (1) at the time of the divorce retired pay is being received by one spouse; (2) at the time of the divorce one spouse has served the statutory number of years, but has not yet elected to retire; and (3) at the time of the divorce one spouse is on active duty but has not met the period of service requirements. In most community property jurisdictions the military retired pay will be treated as property "where the service person has retired or is eligible to retire at the time of divorce," however, in *Payne* the Washington Supreme Court held that the *expectant* military retired pay was also distributable as property. (Note, at 511, n.34.) *See also, Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App. 1972).

Even assuming the retired pay is characterized as "property" there is the further issue as to what extent the retired pay is community property. One method of characterization is the "inception of right" doctrine in which the property's characterization is wholly dependent "upon the marital status at the time the [property] rights in the benefit are deemed to be acquired." Note, at 523 (footnote omitted). The arguably preferable and more exacting approach is to calculate the community property "share" by the "proportionate ownership" formula (Note, at 524):

$$\text{Community Interest in Military Pay} = \text{Military Retired Pay} \times \frac{\text{Years of Military Service While In A Community Property Jurisdiction During Marriage}}{\text{Total Years In Military Service [But in No Case More Than 30]}}$$

This approach more accurately reflects the "community nature" of the asset, however, it would inevitably precipitate difficult evidentiary inquiries regarding the domicile of the parties during the course of the marriage.

The military pay increases in the last several years have heightened the monetary significance of the military retired pay community asset, and the division thereof will continue to be a source of litigation. While the discussed Note contains some problems with regard to proposals for military domicile determinations and does not discuss the implications of the new garnishment bill by which retired pay can now be garnished for alimony and child support purposes, it is highly recommended as a documented and well-reasoned analysis of the issues briefly outlined above. *See also*, MacMillan, "Domestic Relations: Community Property: Treatment of Retired Military Pay in a Divorce Action," 27 JAG J. 392 (Summer 1973); Goldberg, "Is Armed Services Retired Pay Really Community Property?," 48 CAL. S.B.J. 13 (Jan-Feb 1973); Note, "Military Retirement Benefits as Community Property: New Rules from the Supreme Court," 24 BAYLOR L. REV. 235 (Spring 1972); Note, "Unsettled Question of the Military Pension: Separate or Community Property," 8 CALIF. W.L. REV. 522 (Spring 1972), Crow, "Emoluments of Military Service as Community Property" (Thesis) (21st Adv. Course) (1973). [Ref: Ch. 37, DA Pam 27-12..]

2. Articles of Interest.

Legal Research Papers—Legal Assistance Subject—Loan Copies. As a part of the Advanced Correspondence Course, legal research papers are written by JAG Reserve Officers. Many of these papers concern aspects of state and federal law which are particularly relevant to military Legal Assistance Officers. Listed below are those papers which are either presently on file or are in the process of being completed. A limited number of copies of these papers are or will be made available to JAG officers upon request. Written requests should be mailed to the Deputy Director for Nonresident Instruction, The Judge Advocate General's School, Charlottesville, Virginia 22901.

Presently on File:

Armstrong, "The Estate of Tenancy by the Entirety in North Carolina," (1975) (25 pp.).

Davison, "The Right of the Soldier to State Services in Colorado," (1974).

Gordon, "Prisoner of the Federal Income Tax (The Federal Income Tax Significance of Being a POW or MIA)," (1974) (22 pp.).

Latt, "The Legal Assistance Area Dealing with Various Aspects of Life Insurance in Estate Planning," (1975) (21 pp.).

O'Brien, "A Critical Analysis of the Military-Related Opinions of the Attorney-General of Nevada," (1974) (17 pp.).

Presently Being Completed (Exact Titles Subject to Change):

Baker, "Critical Analysis of the Military-Related Opinions of the Attorney-General of South Carolina."

Bennett, "Soldiers' and Sailors' Civil Relief Act."

Cleaveland, "Analysis of the Federal Family Support Act As It Relates to the Garnishment of Federal Wages."

Cohen, "The Uniform Support of Dependents Law of New York and the Military."

Coleman, "The Right of the Soldier to State Services in Ohio."

Gillum, "How Kentucky's No-Fault Divorce Affects the Soldier."

Hood, "Oklahoma's Common Law Marriages—A Survey."

Johnson, "The Right of the Soldier to State Services in Missouri."

Little, "The Right of the Soldier to State Services (Voting, Courts, Bonus, Taxation, etc.) in the State of Oklahoma."

Shoff, "The Texas Serviceman, His Rights and Privileges."

Timm, "California Garnishment Law–Its Provisions and Procedures."

Walker, "Divorce Law in Tennessee as It Affects Servicemen."

Criminal Law Items

From: Criminal Law Division, OTVAG

1. Article 15 Forfeitures. A recent Inspector General's report states that many Article 15 forfeitures are never deducted from a soldier's pay. Spot checks revealed that the frequency of this omission may be as high as 40 percent. The cause appears to be that forfeiture orders never reach finance and accounting offices, or arrive without the proper letter of transmittal.

The next change to AR 27-10 will change the distribution for Article 15 orders and should alleviate this problem in the future. However, in the interim, staff judge advocates should alert their commanders to this problem and encourage them to make every effort to see that all Article 15 forfeitures are processed and the forfeitures collected as required by regulation.

2. Constitutionality of the Army's "Haircut Regulation." In several recent cases the constitutionality of the Army's "haircut regulation" has been raised. The threshold question in such an attack is whether the determination of constitutionality is to be made by judge or jury. The following article, extracted from a brief presented by the trial counsel, Captain Vaughan E. Taylor, in the case of *United States v. Breese*, asserts the position that the constitutionality of the Army's "haircut regulation" is a question of law, to be decided by the military judge.

In order to resolve the question of whether the military judge or the court should determine the constitutionality of the Army's "haircut regulation," it is necessary to determine whether the issue is one of pure law, or a mixed issue of law and fact. In the case at hand, there is no factual dispute because the regulation itself sets out the policy for and the reason behind its promulgation.[1]

The constitutionality of a statute, for example, is a question of law for the judge and generally involves a construction of the statute including its terms, objects, purpose, practical operation, and effect as a whole.[2] Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted.[3] Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probably a basis for sustaining the conclusion reached, its findings are not subject to judicial review. Where the constitutional validity of a statute depends upon the existence of facts, the courts cannot, where the question of what the facts establish is a fairly debatable one, set up their opinions with respect to it against the opinion of the legislature.[4]

> As a general rule it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is usually regarded as conclusive unless an abuse of discretion can be shown, and that the courts do not generally have jurisdiction or power to reopen the question or make new findings of fact, although they may consider facts appropriate for judicial notice.[5]

The same judicial restriction applies to regulations promulgated by agency heads. In deciding an issue concerning a police chief's order regulating standards of appearance, the United States Court of Appeals for the Eighth Circuit stated:

> If Chief Anderson misjudges, as plaintiff suggests, what necessary measures should be taken to achieve community respect, this basically must be the department's concern, not ours.
>
> One may argue that how one wears his hair has little to do with whether an officer might effectively apprehend criminals or otherwise fulfill his assigned mission as a policeman. This misses the mark. The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline, he be required to maintain a neat appearance. The degree of that appearance, so long as it is not arbitrary or unreasonable, should not be the court's concern.[6]

All relevant information can be extracted directly from the Army's "haircut regulation," including the promulgating authority, his policy for the regulation, and the appearance prescribed. There is, therefore, no need to call witnesses on the issue of the constitutionality of the "haircut regulation." Just as a civilian court would not allow testimony on the merits that a one-way street should be two-way, a military judge should not allow a witness to inform the court that the Army haircut policy is "wrong." Where the testimony by an officer was frank and clear about an order he gave, and his reasons for giving it, a Board of Review has held that there is no factual issue of lawfulness to be determined.[7] In the instant case there is no factual dispute, and therefore the issue is one of pure law. "Because every inquiry into the constitutionality of a statute involves only a question of law . . . the validity of an enactment cannot be made to depend on facts found on the trial of the . . . case involving the validity of such statute." [8]

The military judge in a court-martial rules finally on all questions of law.[9] The *Military Judges' Guide* provides that "[w]hen it is clear as a matter of law that the . . . regulation was lawful, this should be resolved as an interlocutory question," and the court should be so advised.[10] Only if there is a *factual* dispute as to whether or not a regulation is lawful should the lawfulness issue be resolved by the court, in connection with their determination of guilt or innocence.[11]

There is one situation in which the courts may independently look at the facts behind a legislative determination. This happens when the existence of a rational basis for the legislation, whose constitutionality is under attack, depends upon facts beyond the sphere of judicial notice. The leading case in this area held that the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing the judge that those facts have ceased to exist.[12] "There is no right to a trial by jury as to facts within the scope of legislative determination," [13] but such facts may properly be made the subject

of judicial inquiry.[14] The Court of Military Appeals has held that:

> in a prosecution for disobedience of an order...the court-martial must determine whether the order was given to the accused, but it may not consider whether the order was legal or illegal in relation to a constitutional or statutory right of the accused.[15]

Therefore, the *Military Judges' Guide*'s requirement that factual disputes concerning lawfulness be submitted to the jury is erroneous when the issue is constitutionality. Only the judge has the necessary expertise and training to determine whether a regulation is constitutional. Cases involving the constitutionality of the "haircut regulation," with its self-contained policy statement, do not require the military judge to look at facts outside the sphere of judicial notice.

The Supreme Court has defined the constitutional requirement of reasonableness of a regulation, stating:

> [w]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[16]

When a legislature or an agency head promulgates a regulation, there is a presumption of its constitutionality which stems from respect for the wisdom, integrity, and patriotism of the decision-making body.[17] The party that challenges the constitutionality of a regulation has the burden of substantiating his claim [18] by clear and convincing evidence which establishes unconstitutionality beyond rational doubt.[19] Where there is mere doubt in the judge's mind about whether or not a regulation meets the constitutional test, it should not be invalidated.[20] Therefore, in order for a judge to hold the Army's haircut regulation unconstitutional, its unreasonableness would have to be clearly and unquestionably apparent.[21]

Footnotes

1. Paragraph 5-39a, AR 600-20 (28 Apr 71, as changed).
2. 16 CJS *Constitutional Law* § 97 (1956).
3. Daniel v. Family Security Life Ins. Co., 336 US 220 (1949); Sonzinsky v. United States, 300 US 506 (1937).
4. Radice v. New York, 264 US 292 (1923); *see* Norman v. Baltimore & O.R.R., 264 US 240 (1934).
5. 16 Am Jur 2d *Constitutional Law* § 170 (1964).
6. Stradley v. Anderson, 478 F. 2d 188, at 190-191 (8th Cir., 1973); *see* Marshall v. District of Colombia, 43 USLW 2418 (D.D.C., April 1, 1975).
7. United States v. Buttrick, 18 CMR 622 (AFBR, 1954).
8. Note 5, *Supra.*
9. Paragraph 57b, *Manual for Courts-Martial, United States, 1969 (Revised edition).*
10. Paragraph 4-27, DA Pamphlet 27-9 (19 May 1969, as changed); *see also* United States v. Carson, 15 USCMA 407, 35 CMR 379 (1965); United States v. Voohees, 4 USCMJ 509, 16 CMR 83 (1954).
11. Paragraph 4-27, DA Pamphlet 27-9 (19 May 1969, as changed).
12. United States v. Carolene Products Co., 304 US 144 (1938).
13. 16 Am Jur 2d *Constitutional Law* §171 (1964); *see also* Sisson v. Buena Vista County, 128 Iowa 442, 104 NW 454 (1905).
14. United States v. Carolene Products Co, *supra.*
15. United States v. Carson, 15 USCMA 407, 408, 35 CMR 379, 380 (1965).
16. United States v. O'Brien, 391 US 367 (1968).
17. Davies Warehouse Co. v. Bowles, 321 US 144 (1944).
18. Morey v. Doud, 354 US 457 (1957); Queenside Hills Realty Co. v. Soxl, 328 US 80 (1945).
19. Adkins v. Children's Hospital, 261 US 525 (1923), *rev'd on other grounds.* West Coast Hotel v. Parrish, 300 US 379 (1937); 16 Am Jur 2d, *Constitutional Law* §§174-175 (1964).
20. Eubank v. Richmond, 226 US 137 (1912); Euclid v. Ambler Realty Co., 272 US 365 (1926).
21. *See* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 US 582 (1949).

MONTHLY AVERAGE COURT-MARTIAL RATES PER 1000 AVERAGE STRENGTH JANUARY-MARCH 1975

	General CM	*Special CM BCD*	*NON-BCD*	*Summary CM*
ARMY-WIDE	.16	.13	.92	.47
CONUS Army commands	.14	.14	.99	.57
OVERSEAS Army commands	.20	.11	.80	.30
U.S. Army Pacific commands	.15	.06	.92	.13
USAREUR and Seventh Army commands	.22	.14	.78	.37
172d Infantry Brigade (Alaska)	.14	—	.50	.11
193d Infantry Brigade (Canal Zone)	.09	—	1.31	.45

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

NON-JUDICIAL PUNISHMENT MONTHLY AVERAGE AND QUARTERLY RATES PER 1000 AVERAGE STRENGTH JANUARY-MARCH 1975

	Monthly Average Rates	*Quarterly Rates*
ARMY-WIDE	19.16	57.48
CONUS Army commands	19.95	59.85
OVERSEAS Army commands	17.75	53.27
U.S. Army Pacific commands	17.87	53.62
USAREUR and Seventh Army commands	18.58	55.75
172d Infantry Brigade (Alaska)	11.45	34.36
193d Infantry Brigade (Canal Zone)	11.67	35.00

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

Judiciary Notes

From: U.S. Army Judiciary

1. Recurring Errors and Irregularities.

a. *Convening Authorities' Actions.*

(1) When the approved sentence indicates that the record of trial will be forwarded to the U.S. Army Judiciary for examination under Article 69, UCMJ, the ACTION should include the following provision: "The record of trial is forwarded to The Judge Advocate General of the Army for examination under the provisions of Article 69, Uniform Code of Military Justice."

(2) When the approved sentence of a special court-martial includes a bad-conduct discharge, the ACTION should include the following provision: "The record of trial is forwarded to The Judge Advocate General of the Army for review by a Court of Military Review." It is inappropriate to state that the record of trial is forwarded for action under Article 65(b).

b. *May 1975 Corrections by ACOMR of Initial Promulgating Orders.*

(1) Failing to show the SSN or correct SSN—three cases.

(2) Failing to show the correct number of previous convictions by the courts-martial—three cases.

(3) Failing to show in the PLEAS paragraph that a plea of guilty had not been accepted by the military judge.

(4) Failing to use the correct language in the specifications of a charge.

(5) Failing to include in the PLEAS paragraph that certain charges and their specifications had been withdrawn by order of the convening authority.

(6) Failing to show that the sentence was adjudged by a military judge.

(7) Failing to reflect the correct date when the sentence was adjudged.

The Opening Statement—Setting the Stage for a Successful Defense

A Note from Defense Appellate Division

By: Captain David A. Shaw, Defense Appellate Division, USALSA

The duty of trial defense counsel representing a client in a court-martial proceeding is to defend his client to the utmost of his ability with the ultimate objective in every case of serving the best interest

of that client. Paragraph 48*i*, *Manual for Courts-Martial*, states that defense counsel may make an opening statement of the issues to be tried and what the defense expects to prove. This statement can be made immediately following the opening statement of trial counsel or after the prosecution has rested. DA Pamphlet 27–10, *Military Justice Handbook, The Trial Counsel and The Defense Counsel*, at paragraph 74*a* describes the opening statement as encompassing a statement of the case and evidence, and should emphasize the defense theory of the case. DA Pamphlet 27–173, *Military Criminal Law: Trial Procedure* at paragraph 15–4 indicates the opening statement is particularly important in a complicated case. The statement alerts the judge and court members to the evidence counsel will present and the order in which it will be presented. The *Manual* thus provides defense counsel in courts-martial the opportunity to utilize this historically engrained jury trial practice of making an opening statement.

The general purpose of an opening statement is to inform the jury of the facts relied upon to establish the defense, to apprise the jury of the nature of the issues involved in the case and to prepare the jury at the outset of the case to understand in a general way what will be presented during the course of the trial. The impression counsel conveys to the jury during the opening statement is very important. As first impressions are lasting and difficult to change, the rapport, or lack thereof, that counsel establishes with the jury during the remarks can last throughout the entire trial and during deliberations. Thus, the opening statement is inherent with great risks and enormous opportunities.

Prior to trial counsel's opening argument, defense counsel should insure that all witnesses who will testify are excluded from the courtroom. This will prevent the witnesses from hearing a synopsis of the case, and how their testimony will fit into the case. Paragraph 53*f*, *Manual*, states that witnesses should be excluded from the courtroom except when they are testifying. Defense counsel must closely monitor this procedural rule.

Under paragraphs 48*i* and 44*g*(2), *Manual*, the opening statement is limited to discussing issues and intentions of proof. During the opening statement, use terms which the jury will remember during the case-in-chief. Show confidence and be predictive as to what will be presented. This will also add persuasive power to the closing argument when it relates back to the opening statement.

Try to minimize what the trial counsel has conveyed in his opening statement. Explain to the members that this is but one of many cases prosecuted by the trial counsel, but to your client it is a matter of grave importance. Prepare the jury for the strong points of the government's case and "cushion the blow" for the evidence to be introduced. This will lessen the "shock effect" of some piece of particularly damaging government evidence. When this is done, also highlight the strong points of the defense and the evidence that will be presented on behalf of your client. Never overstate the case, but forcefully argue the strong aspects.

Place the burden of proof squarely on the government and reiterate the fact that the government has the heavy burden of proof *beyond a reasonable doubt*. Instill in the minds of the jurors the importance of their duties as members and the fact it is their obligation to require that the government has completely performed its job. Convince the jurors that it is their duty to protect the client's rights, insure he is given a fair trial, and that the government has proven him guilty beyond a reasonable doubt.

Acquaint the jury with the procedural rules. The government will present its case first, then the defense will present its case. Prepare the members to maintain an open mind and reserve judgment until all the evidence has been presented.

Personalize the client. If possible, persuade the members to identify with the client and his plight, and to view the evidence from the client's point of view. Persuade the members to give the client the benefit of the doubt.

The opening statement must be thoroughly prepared, structured to fit each individual case, and well delivered. It has been stated in "Criminal Defense Techniques," edited by Robert M. Cipes, at §22[01] that "a skillfully prepared and delivered

opening statement can create in the jury's mind a psychological propensity in favor of your client that will serve as subliminal support throughout the trial buttressing the presumption of innocence." The importance of an opening statement to ultimately favorable disposition of your client's cause is a trial tactic which should be carefully considered in every case.

Reserve Affairs Items

From: Reserve Affairs, TJAGSA

1. JAG Units Undergo Mission-Oriented Training. Throughout the year Judge Advocate General Service Organization Detachments undergo mission-oriented training at various military installations throughout the continental United States. This training is designed to improve a detachment's skill in its area of assigned specialization by acquainting unit personnel with real life problems associated with active duty military units. Representative of this training is the recent AT completed by members of the 156th Judge Advocate General Detachment, based in Baltimore, Maryland. This Procurement Law Team, commanded by Lieutenant Colonel John E. Faulk of Manassas, Virginia, was assigned to Fort Monmouth for its annual training. During this period the team concentrated on assisting in and reviewing Army contractual proceedings. In addition to Colonel Faulk, three other detachment officers were on duty: Major James D. Campbell of Camp Hill, Pennsylvania; Captain Marvin M. Amernick of Randallstown, Maryland and Captain Monte Fried of Baltimore. Three enlisted men, Sergeant Jeffrey D. Comarow, Specialist Four Kenneth C. Moore and Specialist Four Michael P. Waxman, accompanied the detachment during its annual training tour. Typical of many USAR unit training programs, this is the third straight year in which the 156th JAG Detachment has returned to the Fort Monmouth Staff Judge Advocate Office. Programs of this type permit units to become acquainted with the operations and procedures of a particular office and in certain areas of unit expertise. The programs also provide for a greater measure of assistance to the local Staff Judge Advocate Office in which a unit may be placed. The degree of training the unit receives is likewise increased by the elimination of time required to become acquainted with a new facility. In addition to its annual training tour, the 156th engages in a mutual support program with the Post Judge Advocate Office at Fort Meade, providing legal assistance one week a month to that installation.

2. TJAGSA—Schedule of Continuing Legal Education (Reserve Component Personnel).

Number	*Title*	*Dates*	*Length*
	USAR School (Civil)	7 Jul 75–18 Jul 75	2 wks
7A–713A	5th Law Office Management Crs	22 Sep 75–26 Sep 75	4½ days
5F–F2	3d Reserve Senior Officer Legal Orientation Crs	20 Oct 75–23 Oct 75	3½ days
5F–F10	64th Procurement Attorneys' Crs	10 Nov 75–21 Nov 75	2 wks
5F–F11	6th Procurement Attorneys' Advanced Crs	5 Jan 76–16 Jan 76	2 wks
512–71D20/50	3d Military Lawyer's Assistant Crs (Criminal Law)	19 Jan 76–23 Jan 76	4½ days
512–71D20/50	4th Military Lawyer's Assistant Crs (Legal Assistance)	19 Jan 76–23 Jan 76	4½ days
5F–F10	65th Procurement Attorneys' Crs	8 Mar 76–19 Mar 76	2 wks
5F–F10	66th Procurement Attorneys' Crs	26 Apr 76–14 May 76	2 wks
5F–F31	1st Military Justice II Crs	21 Jun 76–2 Jul 76	2 wks
5F–F20	1st Military Administrative Law Crs	21 Jun 76–2 Jul 76	2 wks
	USA Reserve School BOAC and CGSC (Procurement Law and International Law, Phase VI Resident/Nonresident Instruction)	11 Jul 76–24 Jul 76	2 wks

Procurement Law Notes

From: Procurement Law Division, OTJAG

Outline of Army-Industry Integration Committees; Defense Production Act of 1950, as Amended. The Army, through the years, has made extensive use of an unusual statutory authority—*i.e.*, Section 708 of the Defense Production Act of 1950, as amended (50 U.S.C. Appendix 2158). This authority permits federal agencies to enter into certain voluntary agreements and programs involving consultations with representatives of industry, business, financing, agriculture, labor and other interests to further the objectives of the Defense Production Act. Among the objectives of the Act are the development of preparedness programs and the expansion of productive capacity and supply beyond the levels needed to meet the civilian demand, in order to provide for the national defense and national security.

Pursuant to this statutory authority, the Army, after appropriate approvals by other federal officials and agencies—especially the Attorney General—has currently in existence five Industry Integration Committees consisting of members from Army and private industry and covering the following fields: improved conventional munitions; ammunition loading (except small arms ammunition); propellants and explosives; small arms ammunition; cast armor for track-laying type vehicles (in a stand-by status). In earlier years, the number of such industry integration committees reached as high as 24—principally in the fields of munitions and tank-automotive items. The Army-Industry Integration Committees are primarily concerned with updating production techniques, improving quality standards, and increasing productive capacity.

The unique feature of this statutory authority is that no act, or omission to act pursuant to such voluntary agreement or program—here embodied in the industry integration committees—if found to be in the public interest as contributing to the national defense, shall be construed to be within the prohibitions of the antitrust laws or the Federal Trade Commission Act.

An annual report is made by the federal agency organizing such committees on the activities of the committees to the Attorney General, who, in turn is required by statute to report to the Congress and the President on such activities. The continuation of any such committee requires a determination by the Army that such continuation is in the public interest; *i.e.*, that the actual and potential contribution to the national defense and preparedness program continues to be substantial.

The Attorney General, in turn, after consulting with the Federal Trade Commission, must determine that the actual or potential contributions of the committees outweigh any anticompetitive effects from their operations and thus warrant their continuation. The Army, recognizing the sensitive nature of such committees—but at the same time the importance of such committees to the national defense under the safeguards of the Act—retains such committees only as long as necessary.

CLE News

1. East Coast JAGC CLE Conference. The 1975 Regional Continuing Legal Education Conference for the East Coast will be held at Fort Belvoir, 28–29 July 1975. This conference is patterned after the Captains' Advisory Council conference held at Fort Meade in 1974. It will consist of seminars and workshops on items of interest to all military lawyers. The conference will coincide with the Dining-In to be held on 29 July 1975. All interested personnel should contact Captain Dave Schlueter, Autovon 354–4031 or 5202, Commercial (703) 664–4031 or 5202.

2. CLE Calendar.

JULY

6–25: National College of District Attorneys Course, Career Prosecutor Course, Houston, TX.

7–9: Federal Publications Inc. Government Contract Program, Government Contract Costs, Sheraton-National Hotel, Arlington, VA.

7–11: Federal Publications Inc. Government Contract Program, Government Construction Contracting, Los Angeles Marriott, Los Angeles, CA.

7–12: Northwestern University Short Course for Defense Lawyers, Northwestern University School of Law, Chicago, IL.

8–10: U.S. Civil Service Commission CLE Program, Management Seminar for Chief Administrative Law Judges, Washington, DC.

10–11: PLI Workshop, Preparation of US Fiduciary Income Tax Return, Delmonico Hotel, New York, NY.

13–19: Association of Trial Lawyers of America Presentation, The National College of Advocacy, University of Southern California, Los Angeles, CA.

13–Aug 1: National Institute for Trial Advocacy, Second National Session, 1975, Boulder, CO.

16–17: U.S. Civil Service Commission CLE Program, Freedom of Information/Privacy Acts Seminar, Washington, DC.

16–18: New York Law Journal Seminar on Practice Under the New Federal Rules of Evidence, Lodge At Vail, Vail, CO.

17–18: Practising Law Institute Annual Forum on Defending Criminal Cases, Americana Hotel, New York, NY.

20–Aug 1: National College of the State Judiciary, Graduate Session in New Trends in the Law, the Trial and Public Understanding, Judicial College Building, University of Nevada, Reno, NV.

20–Aug 15: National College of the State Judiciary, Regular Four Week Session (Session II), Judicial College Building, University of Nevada, Reno, NV.

21–24: University of Denver College of Law, Criminal Law Institute, Denver, CO.

21–25: Fourth Annual Institute on Law Office Administration, presented by Institute of Continuing Legal Education, Ann Arbor, Michigan, and Continuing Legal Education, Minneapolis, Minnesota, Marquette Inn, Minneapolis, MN.

21–Aug 1: National College of Criminal Defense Lawyers and Public Defenders, Advanced Criminal Practice Course, University of Houston, Houston, TX.

23–25: PLI Workshop, Preparation of Federal Estate Tax Returns, Delmonico Hotel, New York, NY.

23–27: Judicial Conference on Tenth US Circuit Court of Appeals, Santa Fe Hilton, Santa Fe, NM.

24–26: The Lawyer's Assistant: PLI Workshop for the Law Office Administrator, Paraprofessional and Secretary, Los Angeles Hilton Hotel, Los Angeles, CA.

24–27: National College of Criminal Defense Lawyers and Public Defenders, Miami Regional Institute, Miami, FL.

25–26: PLI Program, Constitutional Litigation, Barbizon Plaza Hotel, New York, NY.

25–27: Federal Publications Inc. Government Contract Program, Construction Contract Modification, Holiday Inn-Golden Gateway, San Francisco, CA.

28–29: JAGC East Coast CLE Conference, Fort Belvoir, VA. Contact CPT David Schlueter, Autovon 354–4031 or 5202 or Commercial (703) 664–4031 or 5202.

28–29: PLI Workshop, Discovery Techniques, Delmonico Hotel, New York, NY.

28–Aug 1: Federal Publications Inc. Government Contract Program, Concentrated Course in Government Contracts, Orpheum Palace—MGM Grand Hotel, Las Vegas, NV.

29–31: U.S. Civil Service Commission CLE Program, Seminar for Attorney Managers, Washington, DC.

30–Aug 1: PLI Annual Prosecutor's Workshop, St. Regis Sheraton Hotel, New York, NY.

30–Aug 1: Federal Publications Inc Government Contract Program, Government Contract Costs, Holiday Inn-Golden Gateway, San Francisco, CA.

31: Virginia Bar Association, midyear meeting, Greenbrier Hotel, White Sulphur Springs, WV.

31–Aug 1: PLI Workshop, Preparation of U.S. Partnership Income Tax Return, Sir Francis Drake Hotel, San Francisco, CA.

AUGUST

3–8: National College of District Attorneys Course, Prosecutor Intern Course, Houston, TX.

3–15: National College of the State Judiciary, Regular Two Week Session (Session II), Judicial College Building, University of Nevada, Reno, NV.

4–9: Northwestern University Short Course for Prosecuting Attorneys, Northwestern University School of Law, Chicago, IL.

7–8: PLI Program, Practical Will Drafting, Americana Hotel, New York, NY.

7–14: ABA Annual Meeting, Montreal, Canada.

8–10: National Association of Women Lawyers, annual meeting, Montreal, Canada.

11–12: PLI Workshop, Preparation of US Fiduciary Income Tax Return, Hyatt Regency Hotel, Los Angeles, CA.

14–15: PLI Program, Land Use and Environmental Regulations, Stanford Court Hotel, San Francisco, CA.

14–16: The Lawyer's Assistant: PLI Workshop for the Law Office Administrator, Paraprofessional and Secretary, Barbizon Plaza Hotel, New York, NY.

15–16: PLI Program, Constitutional Litigation, Sir Francis Drake Hotel, San Francisco, CA.

15–23: National Institute for Trial Advocacy, Northeast Regional Session, Part One, Cornell Law School, Ithaca, NY.

17–23: Association of Trial Lawyers of America, National College of Advocacy, Roscoe Pound Building, Cambridge, MA.

17–24: National Institute for Trial Advocacy, Southeast Regional Session, Part One, University of North Carolina, Chapel Hill, NC.

18–20: PLI Annual Prosecutor's Workshop, Sir Francis Drake Hotel, San Francisco, CA.

18–22: Federal Publications Inc. Government Contract Program, Government Contract Claims, Colosseum Unus-Caesars Palace, Las Vegas, NV.

28–30: West Virginia Bar Association, annual meeting, Greenbrier Hotel, White Sulphur Springs, WV.

SEPTEMBER

Rhode Island Bar Association, annual meeting.

Bar Association of Puerto Rico, annual meeting.

The Missouri Bar, annual meeting.

Wyoming State Bar, annual meeting.

Washington State Bar Association, annual meeting.

2–4: New York University School of Law Program, Bankruptcy Law and Practice Workshop I, Vanderbilt Hall, New York University, New York, NY.

2–5: New York University School of Law Workshop, the Graduate Tax Workshop VI, Vanderbilt Hall, New York University, New York, NY.

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

7–10: National College of District Attorneys Course, Consumer Fraud Seminar, Nashville, TN.

9–13: Federal Bar Association, annual meeting, Hyatt Regency Atlanta, Atlanta, GA.

10–12: Federal Publications Inc. Government Contract Program, 22d Annual Institute on Government Contracts, Quality Inn/Pentagon City, Washington, D.C.

17–19: State Bar of Michigan, annual meeting, Detroit, MI.

18–19: Vermont Bar Association, annual meeting, Basin Harbor Club, Vergennes, VT.

18–20: ALI–ABA Program, Municipal Law and Government Finance, New York, NY.

19–21: National Task Force on Higher Education and Criminal Justice, First National Conference on Alternatives to Incarceration, Sheraton-Boston Hotel, Boston, MA.

21–25: State Bar of California, annual meeting, Los Angeles, CA.

21–25: National College of District Attorneys Course, Trial Techniques Seminar, St. Paul, MN.

22–25: Federal Publications Inc. Government Contract Program, Fundamentals of Government Contracting, Washington, DC.

23–25: US Civil Service Commission CLE Program, Law of Federal Employment Seminar, Washington, DC.

24–26: Federal Publications Inc. Government Contract Program, Risk Management in Construction Contracting, San Francisco, CA.

24–27: Oregon State Bar, annual meeting, Vancouver, B.C.

26–27: ALI-ABA Program, Defense of White Collar Crime: Recent Federal and State Developments, Los Angeles, CA.

27–Oct 3: Inter-American Bar Association, XIX Conference, Cartagena, Columbia.

28–Oct 3: National College of the State Judiciary, Specialty Session in Probate Law, Judicial College Building, University of Nevada, Reno, NV.

28–Oct 3: National College of the State Judiciary, Specialty Session in Sentencing Misdemeanants, Judicial College Building, University of Nevada, Reno, NV.

29–Oct 1: Federal Publications Inc. Government Contract Program, Construction Contract Modifications, Twin Bridges Marriott, Washington, DC.

29–Oct 3: Federal Publications Inc. Government Contract Program, The Skills of Contract Administration, Anaheim, CA.

TJAGSA—Schedule of Continuing Legal Education (Active Duty Personnel)

Number	*Title*	*Dates*	*Length*
5F–F9	14th Military Judge Crs	14 Jul 75–1 Aug 75	3 wks
5F–F3	19th International Law Crs	21 Jul 75–1 Aug 75	2 wks
5F–F11	63d Procurement Attorneys' Crs	28 Jul 75–8 Aug 75	2 wks
5F–F1	2d Management for Military Lawyers Crs	4 Aug 75–8 Aug 75	4½ days
7A–713A	5th Law Office Management Crs	22 Sep 75–26 Sep 75	4½ days
5F–F22	12th Federal Labor Relations Crs	29 Sep 75–3 Oct 75	5 days
5F–F23	3d Legal Assistance Crs	6 Oct 75–9 Oct 75	3½ days
5F–F1	22d Senior Officer Legal Orientation Crs	28 Oct 75–31 Oct 75	3½ days
5F–F10	64th Procurement Attorneys' Crs	10 Nov 75–21 Nov 75	2 wks
5F–F25	2d Military Administrative Law Developments Crs	8 Dec 75–11 Dec 75	3½ days
5F–F11	6th Procurement Attorneys' Advanced Crs	5 Jan 76–16 Jan 76	2 wks
5F–F27	3d Environmental Law Crs	12 Jan 76–15 Jan 76	3½ days
512–71D20/50	3d Military Lawyer's Assistant Crs (Criminal Law)	19 Jan 76–23 Jan 76	4½ days
512–71D20/50	4th Military Lawyer's Assistant Crs (Legal Assistance)	19 Jan 76–23 Jan 76	4½ days
5F–F1	23d Senior Officer Legal Orientation Crs	26 Jan 76–29 Jan 76	3½ days
5F–F10	65th Procurement Attorneys' Crs	8 Mar 76–19 Mar 76	2 wks
5F–F1	24th Senior Officer Legal Orientation Crs	5 Apr 76–8 Apr 76	3½ days
5F–F10	66th Procurement Attorneys' Crs	26 Apr 76–7 May 76	2 wks
5F–F52	6th Staff Judge Advocate Orientation Crs	10 May 76–14 May 76	4½ days
5F–F24	1st Civil Rights Crs	17 May 76–20 May 76	3½ days
5F–F22	13th Federal Labor Relations Crs	24 May 76–28 May 76	5 days

Number	*Title*	*Dates*	*Length*
5F-F32	2d Criminal Trial Advocacy	28 Jun 76-2 Jul 76	1 wk
5F-F33	15th Military Judge Course	19 Jul 76-6 Aug 76	3 wks
5F-F1	25th Senior Officer Legal Orientation Crs	26 Jul 76-29 Jul 76	3½ days
5F-F51	3d Management for Military Lawyers Crs	9 Aug 76-13 Aug 76	4½ days

JAGC Personnel Items

From: PP&TO, OTJAG

1. Retirements. On behalf of the Corps, we offer our best wishes for the future to the following individuals who retired 30 June 1975.

Major General George S. Prugh
Major General Harold E. Parker
Colonel Kenneth A. Howard
Colonel Winchester Kelso, Jr.
Colonel Thomas C. Oldham

2. Orders Requested as Indicated.

Name	*From*	*To*
	COLONELS	
CLARKE, Robert	Europe	OTJAG, Wash DC
MEENGS, Philip	Inspector General, Wash DC	USA Air Defense Center, Ft Bliss, TX
VINET, William	USALSA, Falls Church, VA	HQ, MTMC, Wash DC
WATSON, Henry J	MTMC, Wash DC	USALSA, w/sta Ft Bliss, TX
	MAJORS	
DOMMER, Paul P	OTJAG, Wash DC	USA Elm OJCS, Wash DC
ROGERS, Jack D	TRADOC, Ft Monroe, VA	USA Trans Center, Ft Eustis, VA
	CAPTAINS	
ANDERSON, Richard	2d Armored Div, Ft Hood, TX	USA Log Mgmt Center, Ft Lee, VA
BRAGAW, Rexford	USA Armor Center, Ft Knox, KY	Europe
FRYER, Eugene D	Europe	Stu Det, Georgetown Univ Wash DC
KLAR, Lawrence	USATCI, Ft Ord, CA	USA SW Recruiting, San Antonio, TX
LINEBARGER, James	Europe	OTJAG, Wash DC
LORENCE, David	9th Inf Div, Ft Lewis, WA	USALSA w/sta Baumholder, Germany
SAUER, John G	7th Sp Forces Group Ft Bragg, NC	4th Inf Div, Ft Carson, CO
WONNELL, Donn T	172d Inf Bde, Alaska	WRAMC, Wash DC

3. Advanced Course. Officers wishing to volunteer for the 1976-77 Advanced Course (August 1976 to May 1977) at The Judge Advocate General's School should submit a written request to PP&TO by 31 December 1975. A selection board will meet in the January-February 1976 time frame to select approximately 35 Judge Advocates for attendance at that course. A minimum of three years active duty is required prior to attendance (para 3.3d, *Your JAGC Career*). Volunteers will be notified of selection or nonselection.

4. Graduate Schooling. It is anticipated that PP&TO will receive a total of approximately 10 quotas for graduate schooling at government expense to cover the periods of FY 7T (1 July 76–30 September 76) and FY 77 (1 October 76–30 September 77). Officers desiring consideration for such schooling, leading to an LLM degree in a shortage discipline, should submit a written request to PP&TO by 31 December 1975. A selection board will convene in January 1976 and volunteers will be notified of selection or nonselection. It is anticipated that quotas will be available in the following disciplines: Criminal Law, Procurement Law, Administrative Law, International Law, Labor Law, Environmental Law and Patent Law. Officers must advise PP&TO of their desired area of study; final determination of the discipline to be studied will be made by The Judge Advocate General. The period of schooling is for one year and a three year active duty commitment is incurred upon graduation (AR 621–1). This commitment must be served in a utilization tour. It is the officer's responsibility to secure admission to an accredited law school in the United States offering a graduate program in his specified discipline.

5. Language Training. PP&TO has unused quotas for training in the following languages for FY 76 (1 July 75–30 Jun 76): German (8 quotas); Japanese (1 quota); and French (1 quota). The training is conducted at the Defense Language Institute, Presidio of Monterey, California, and is of six months duration for French, eight months for German, and 11 months for Japanese. A language aptitude test must be taken (*see* AR 611–6) and the results thereof submitted to PP&TO with the officer's written request for consideration for language training. Following graduation, the officer is sent to either Europe, Japan or Okinawa for a utilization tour. Service obligation incurred IAW AR 611–6. Interested officers should contact PP&TO.

6. FBA Supports Military Pro Pay. The letter reproduced below was sent to TJAG by the Federal Bar Association on 20 May 1975.

Maj. Gen. G. S. Prugh
The Judge Advocate
Department of Army
Washington, D.C. 20310

Dear General Prugh:

At the May 3, 1975, meeting of the National Council of the Federal Bar Association held in Washington, D.C. a Resolution was adopted to support professional pay for lawyers in military service, and sent to the President of the United States, the Chairman of the Senate Armed Services Committee, and the Chairman of the House Armed Services Committee, urging action as quickly as possible to remedy inequities that exist with respect to the professional pay for attorneys serving our nation in uniform.

The Resolution, adopted unanimously, read as follows:

"WHEREAS, the Armed Services have experienced difficulty in recruiting qualified attorneys and, in particular, in retaining such attorneys for a full military career, and

"WHEREAS, it appears that this problem may in large measure be redressed by the authorization of professional pay for attorneys comparable with that provided for other professional services, and

"WHEREAS, the Federal Bar Association has in the past expressed its strong support of such professional pay,

"NOW THEREFORE, BE IT RESOLVED, that the Federal Bar Association renew and reiterate its continuing support for professional pay for attorneys in the Armed Services, and

"BE IT FURTHER RESOLVED, that the President advise the President of the United States and the appropriate committees and members of Congress of this position."

Sincerely,

/s/
David H. Allard
President

7. Senior Trial Lawyers. Eighteen more JAGC captains have been designated Senior Trial Lawyers. They are:
Captain Orrin K. Ames, III
Captain John R. D. Baxendale
Captain Demmon F. Canner

Captain Andrew J. Chwalibog
Captain Charles Clark
Captain Gordon R. Denison
Captain Daniel R. Grills
Captain John P. Halvorsen
Captain Robert H. Jackson
Captain Lawrence F. Klar
Captain Daniel C. McCarthy
Captain Edward C. Newton, IV
Captain John K. Northrop
Captain William C. Porter
Captain Robert W. Schivera
Captain Edwin C. Scott
Captain Robert C. Wert
Captain Charles A. Zimmerman

8. Drug and Alcohol Abuse Pam. All Judge Advocate officers should be aware of DA Pam 600-102, *Alcohol & Drug Abuse Interchange-Lessons Learned + Other Information* (1 May 1975). Of particular interest are articles on US Army Alcohol and Drug Abuse Team Training at the Academy of Health Sciences, Fort Sam Houston, and Fort Campbell's training videotapes, one of which deals with the role of the SJA in drug abuse prevention.

Current Materials of Interest

Articles.

Gilligan, "The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?" 66 J. CRIM. L. & CRIMINOLOGY 1 (March 1975). Major Francis A. Gilligan, JAGC, discusses the 1974 amendment to § 2680(h) of the Federal Tort Claims Act.

The Spring 1975 issue of THE AIR FORCE LAW REVIEW contains several articles and comments of note: (1) "Aspects of Malingering," (2) Part II (1921-1966) of a two-part offering on "A History of the Structure of Military Justice in the United States," (3) Medical Malpractice Under the Tort Claims Act: Limitations Problems," (4) "Social Security Disability and the Administrative Law Judge," and others.

Singer, "The ABA Standards: A Valuable Resource for the Defense Attorney" *Criminal Defense*, Volume 2 Number 3 (June 1975) p. 14.

Baker, "Procedural and Jurisdictional Aspects of Seeking a Tax Refund" 10 TULSA L.J. 362 (1975).

Abernathy, "Sovereign Immunity In A Constitutional Government: The Federal Employment Discrimination Cases," 10 HARV. CIV. R. CIV. LIB. L. REV. 322 (Spring 1975).

Lewis, "Defending Criminal Cases Under the Federal Rules of Evidence," *Criminal Defense*, Volume 2 Number 3 (June 1975) p. 4.

Note, "The Admissibility of Lie Detector Evidence," 51 N. DAKOTA L. REV. 679 (Spring 1975).

Note, "Legal Specialization and Certification," 61 VA. L. REV. 434 (March 1975).

Comment, "Fear of Firing: *Arnett v. Kennedy* and the Protection of Federal Career Employees" 10 HARV. CIV. R. CIV. LIB. L. REV. 472 (Spring 1975).

Friloux, "Death? When Does It Occur?" 27 BAYLOR L. REV. 10 (Winter 1975). One of some 19 articles in this symposium issue on euthanasia.

Falk, "A New Paradigm for International Legal Studies: Prospects and Proposals," 84 YALE L.J. 969 (April 1975).

Comment, "Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?" 69 NEV. L. REV. 887 (January-February 1975).

Errata.

The masthead for the June 1975 issue of *The Army Lawyer* incorrectly reflects that it is DA Pamphlet 27–50–29. That issue is actually DA Pamphlet 27–50–30, as is reflected on all other upper corner page references throughout. Appropriate corrections should be made on face of that issue to avoid confusion with the May 1975 issue.

By Order of the Secretary of the Army:

Official:

VERNE L. BOWERS
Major General, United States Army
The Adjutant General

FRED C. WEYAND
General, United States Army
Chief of Staff