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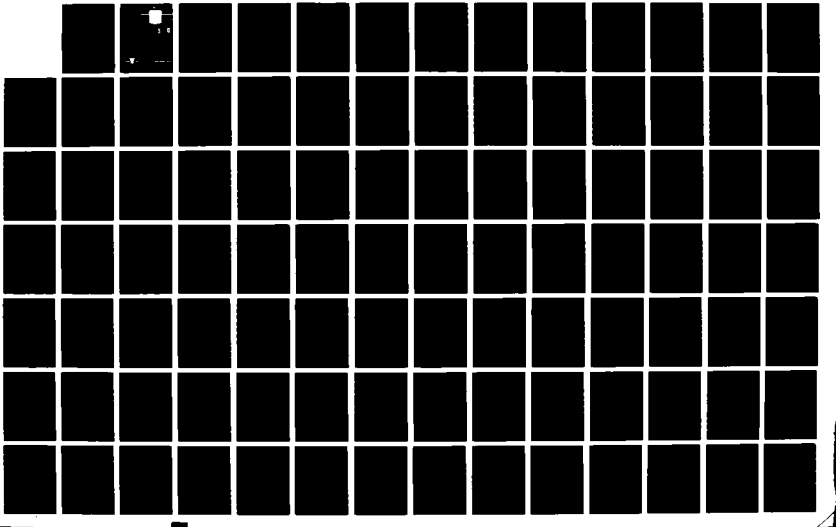

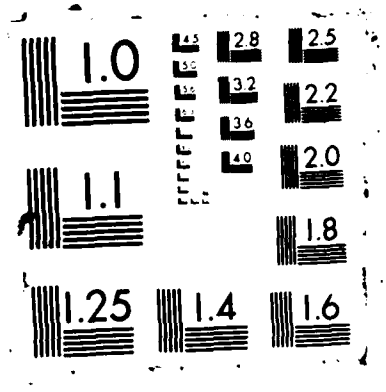
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STUDY PROJECT

THE LIMITED USE POLICY: REVIEW, ANALYSIS AND PROPOSALS FOR CHANGE

BY

COLONEL ALBERT E. VERNON III

2 JUNE 1987

US ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013

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The Limited Use Policy, contained in Army Regulation 600-85, limits the manner in which breath tests and urinalysis evidence may be utilized in Courts-martial and administrative separation proceedings. The present version of the policy is the culmination of an evolutionary process which began 18 years ago. Since its inception, the policy has been plagued by difficulties in articulation frequent changes brought about by shifts in policy and adverse rulings in the courts and failure to properly coordinate related regulations. This project

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traces the evolution of the policy, explains why changes occurred and explains the meaning and effect of the policy as it now exists. Changes in the law which impact upon the policy are then analyzed to determine the latitude available for change. Last, the Limited Use Policy is analyzed and specific changes are proposed.

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USAWC MILITARY STUDIES PROGRAM PAPER

THE LIMITED USE POLICY: REVIEW, ANALYSIS AND PROPOSALS FOR CHANGE

VOLUME I

AN INDIVIDUAL STUDY PROJECT

by

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ABSTRACT

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The Limited Use Policy, contained in Army Regulation 600-85, limits the manner in which breath tests and urinalysis evidence may be utilized in Courts-martial and administrative separation proceedings. The present version of the policy is the culmination of an evolutionary process which began 18 years ago. Since its inception, the policy has been plagued by difficulties in articulation, frequent changes brought about by shifts in policy and adverse rulings in the courts and failure to properly coordinate related regulations. This project traces the evolution of the policy, explains why changes occurred and explains the meaning and effect of the policy as it now exists. Changes in the law which impact upon the policy are then analyzed to determine the latitude available for change. Last, the Limited Use Policy is analyzed and specific changes are proposed.

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CHAPTER I

INTRODUCTION

THE NATURE OF THE PROBLEM

The Limited Use Policy, a limitation on the purposes for which certain types of evidence of drug and alcohol abuse may be used, is an important feature of the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). Most of the thousands upon thousands of breathalyzer and urinalysis tests conducted armywide each year raise issues concerning the applicability and effect of the Limited Use Policy. However, contacts with commanders at brigade, battalion, and company level; administrative specialists; and ADAPCP personnel have frequently revealed both a lack of comprehension of the policy's underlying rationale and an inability to apply the policy's rules to the facts of specific cases and arrive at correct results.

These difficulties arise from several sources. First, the policy was originally conceived and implemented in an atmosphere of crisis, as was the entire drug and alcohol program. Naturally, in so large and complex an effort there were some mistakes and omissions. Second, periodic revisions of the program not only reflected efforts to refine and improve the system, but often revealed substantial policy shifts. Failures to clearly articulate these shifts and their underlying rationales have made difficult the interpretation of promulgating regulations, pamphlets, and circulars. Third, the language of

related regulations has not been synchronized. Last, frequency of policy changes, personnel turnover and lack of access to relevant background materials have denied practitioners the historical perspective and understanding of the policy which would have enabled them to overcome the previously mentioned difficulties.

PURPOSE OF THE PROJECT

This project has two purposes. The first is to trace the development of the Limited Use Policy from its origin in the "amnesty" program of the late 1960's, through the Exemption Program in its various forms, to the present. The other is to suggest areas in which restrictions in the policy have outlived their original legal or philosophical underpinnings and ought to be changed.

CAVEATS

Several caveats are appropriate at this point. First, this study is limited to a narrow aspect of the Army's drug and alcohol program. Although the program will be discussed to the extent necessary to set the stage for a complete understanding of the Limited Use Policy, an analysis of the entire program is far beyond the scope of this paper.

Furthermore, it has been clear since at least the early 1970's that the Exemption Policy and, later, the Limited Use Policy applied to both alcohol abuse and drug abuse. However, the abuse of alcohol is different from the abuse of drugs and the

latter has always been a matter of far greater concern than the former. The driving force behind the evolution of the program has been the need to deal with the drug problem and this study focuses primarily on that aspect until the time comes to propose changes in the current version of the Limited Use Policy. At that point, it is necessary to consider the program with respect to both types of substance abuse. Last, the numerous criticisms of regulatory policy and language contained herein are intended only to point out areas which caused, and continue to cause, difficulty in understanding and implementing the drug and alcohol program and, more specifically, the Limited Use Policy and its predecessors. It is not the author's intention to flog the thinkers, drafters, or practitioners who, often under very difficult conditions, developed, implemented and administered an excellent program.

THOUGH THIS BE MADNESS, YET THERE IS METHOD IN'T[1]

This paper is organized to trace, in chronological order, the evolution of the present-day Limited Use Policy from its origin to its present form, with analysis of the causes behind the changes in the policy as well as observations concerning the problems encountered in its various stages. This historical material is contained in Chapters II through VI. Chapters VII through IX contain a discussion of the content of the Limited Use Policy as it now exists, analysis of the extent to which the program does or does not accomplish its intended purposes, proposals for change and a statement of the actions which must be taken to accomplish the proposed changes. These last chapters

are designed to "stand alone" for the reader whose interests deal only with an understanding of the present program and the proposals for its improvement.

Many of the materials necessary for proper treatment of this subject have become very difficult to obtain. Consequently, they have been reproduced as appendices for the benefit of readers who wish to review the subject in greater detail. Nevertheless, lengthy excerpts from various plans, circulars and regulations appear throughout this paper. This method of presentation is intended to provide the reader all of the information necessary to appreciate the accompanying analysis without resort to blind faith or the appendices for the relevant provisions of the materials under discussion.

ACKNOWLEDGMENTS

The encouragement, knowledge and patience of Colonel William G. Eckhardt, JAGC, are gratefully acknowledged. His careful review and valuable observations have been of great assistance throughout the lengthy research and drafting of this paper. In addition, special thanks are hereby given to Mrs. Helen D. Gouin (GM-15), Director, US Army Drug and Alcohol Operations Activity, for providing the benefit of her historical perspective and for her generosity in making available for research and reproduction the store of program-related documents which she has accumulated through the years.

Of course, the analysis, conclusions and recommendations contained herein are those of the author who accepts full responsibility for any deficiencies.

CHAPTER 1

ENDNOTES

1. William Shakespeare, "Hamlet," Act 2, Scene 2, Lines 207-208 Britannica Great Books - Shakespeare II, 1952, Vol. 27, p. 42.

CHAPTER II

THE EARLY DAYS

BACKGROUND

During the late 1960's and early 1970's, the use of drugs in the Armed Forces grew to levels which were alarming to military leaders and to Congress. This was particularly true of heroin use in Vietnam. Investigations conducted within the Department of Defense (DOD) and by congressional committees revealed that, although there was abundant evidence of widespread drug use, there was insufficient data to determine the percentage of military personnel using drugs or which drugs were being used.

The summer and fall of 1971 saw the culmination of a variety of related efforts. On 11 June 1971, President Nixon directed a series of actions related to testing and treatment of personnel departing Vietnam (Appendix A). On 17 June 1971, the Secretary of Defense directed the Secretary of the Army to develop a plan which, among other things, would provide for identification, treatment and the opportunity for rehabilitation. On 7 July 1971, a memorandum from Deputy Secretary of Defense Packard advised the Secretaries of the Military Departments and the Chairman, Joint Chiefs of Staff, that it was the policy of the Department of Defense to encourage military drug abusers to volunteer for treatment and rehabilitation (Appendix B). The memorandum further stated that no evidence developed through involuntary urinalysis or solely as a result of a servicemember's

volunteering for treatment could be used in a disciplinary proceeding under the Uniform Code of Military Justice (UCMJ) or in a proceeding resulting in a discharge under other than honorable conditions.[1]

On 28 September 1971, Congress passed Public Law 92-129, which directed that a program for identification and treatment for drug dependent personnel be developed and implemented within DOD. However, the Army had already been preparing to formally address this problem and, on 3 September 1971, had distributed the Army's Alcohol and Drug Abuse Prevention and Control Plan (also abbreviated ADAPCP).

THE ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PLAN

Policies and Objectives

The Headquarters, Department of the Army, Alcohol and Drug Abuse Prevention and Control Plan (hereafter referred to as the "Plan") responded to the previously mentioned instructions from the Secretary of Defense concerning identification and treatment of servicemembers in Southeast Asia, development of reliable estimates concerning drug use in the Army and, ultimately, development and implementation of procedures for identification and treatment of servicemembers worldwide. Initially, Department of the Army's philosophy appeared to lean heavily toward paternalistic concern as may be seen from the following excerpts from the Plan. Paragraph 1e of the Plan announced the following Department of the Army (DA) policy:

> (1) Prevent and control alcohol and drug abuse, and rehabilitate members who evidence a capacity to undergo such rehabilitation.

(2) Acknowledge a particular responsibility for counseling and protecting its members against alcohol and drug abuse and for disciplining members who promote the use of drugs in an illegal or improper manner.

(3) Encourage Army personnel to submit themselves voluntarily for treatment and rehabilitation. The act of volunteering for treatment or evidence developed by urinalyses administered for the purpose of identifying drug users may not be used in any disciplinary action under the UCMJ or as a basis for supporting, in whole or part, an administrative discharge under other than honorable conditions. Similarly, a member of the Army may not be subject to disciplinary action under the UCMJ or to administrative action leading to a discharge under other than honorable conditions for drug use solely because he volunteered for treatment under the DOD Drug Identification and Treatment Program. This policy does not exempt members from disciplinary or other legal consequences resulting from violations of other applicable laws and regulations, including those laws and regulations relating to the sale of drugs or the possession of significant quantities of drugs for sale to others, if the disciplinary action is supported by evidence not attributed to a urinalysis administered for identification of drug users and not attributable solely to their volunteering for treatment under the DOD Drug Identification and Treatment Program.

(4) Base disciplinary and administrative actions in cases of drug abuse upon the circumstances of each case, including consideration of the degree of involvement with drugs and whether the individual involved is a drug experimenter, drug user, drug dependent individual, supplier, or casual supplier (as defined herein).

(5) Provide treatment and rehabilitative services to Army dependents, retired personnel and DA civilian employees overseas who volunteer for such, when active duty Army requirements have been met and resources are available.

(6) Recognize alcoholism as a treatable disease and to make available rehabilitative facilities and service.

In addition, paragraph 2 set out the following Plan objectives:

> a. To prevent alcohol and drug abuse among members of the Army, their dependents and DA civilian employees.
>
> b. To identify alcohol abusers and drug users.
>
> c. To detoxify and to provide necessary treatment and counseling to identified drug users.
>
> d. To rehabilitate alcohol and drug dependent personnel through short term Army rehabilitation programs or through referral to VA or other civilian treatment agencies for long-term rehabilitative treatment.
>
> e. To suppress illegal drug supply through law enforcement.
>
> f. To collect alcohol and drug abuse statistics for analysis and dissemination of lessons learned in furtherance of objectives above.

Several of the foregoing provisions merit attention. First, this was billed as an effort to encourage personnel to volunteer for treatment (third item of policy). Toward that end, the Plan (tracking DOD instructions) announced Department of the Army's policy that evidence obtained from disclosures incident to voluntary submission for treatment could not be used in criminal proceedings or to support a discharge under other than honorable conditions.[2] However, as did the DOD memorandum of 7 July 1971 (Appendix B), it applied the same rule, without explanation, to situations in which soldiers were identified as drug abusers through involuntary urinalysis. Readers of the Plan, trying to understand and implement an entirely new program, were immediately confronted with difficulties of interpretation.

This somewhat inartfully worded provision obscured several legal and policy considerations. The first of these was the issue of how much protection should be given to volunteers. The policy of protecting true volunteers from both disciplinary consequences and discharge under other than honorable conditions was far broader than the "amnesty" provisions previously contained in paragraph 2-5, US Department of the Army, Army Regulation 600-32 (AR 600-32) (Appendix E), but was entirely consistent with one of the major purposes of the program, encouraging volunteerism. The requirement that soldiers involuntarily identified by urinalysis receive the protection from disciplinary action was based upon a reasonable application of the law as it existed at the time. However, the provisions of the DOD memorandum, and the corresponding part of the Plan precluding use of this evidence to support separation under other than honorable conditions, appear to have been motivated by a desire to ensure that soldiers were not denied access to treatment and rehabilitation services in Veterans Administration facilities after discharge.[3]

The second point which should be made is that the policy statement concerning rehabilitation of "members who evidence a capacity to undergo such rehabilitation" did not indicate any intention to be selective about those to whom rehabilitative services would be made available. It simply indicated which soldiers would be rehabilitated (and retained), rather than separated and offered rehabilitation by the Veterans Administration.[4]

Last, the protections described above were only [illegible] those who abused drugs or possessed drugs incident to personal use. They did not cover sale of drugs, possession of drugs with intent to sell or offenses committed while under the influence of drugs.

The Exemption Program

The Plan of September 1971 (Appendix D) also contained the first iteration of the Exemption Program. It is set forth, in part, below:

APPENDIX 1 (EXEMPTION PROGRAM) to ANNEX B (EXPLANATION OF TERMS)

1. Purpose: To prescribe policy for Army personnel who consider that they have a drug problem and voluntarily submit themselves to appropriate authorities for treatment and rehabilitation.

2. General: The term "amnesty" is replaced by the term "exemption" to preclude misunderstanding regarding the scope and limitations of the former. The following provisions apply:

a. The objective of the exemption program (sic) is to encourage disclosures of drug use and possession incident thereto for the purpose of treating and rehabilitating the user.

b. Exemption means protection from punitive action under the UCMJ or from administrative action leading to a discharge under other than honorable conditions for drug use solely because of a volunteering for treatment under the DOD Drug Identification and Treatment Program. This policy does not exempt soldiers from disciplinary or other legal consequences resulting from violations of other applicable laws and regulations, including those laws and regulations relating to the sale of drugs or the possession of significant quantities of drugs for sale to others,

if the disciplinary action is supported by evidence not attributable solely to the individual volunteering for treatment under the DOD Drug Identification and Treatment Program. Commanders are required to grant exemption in accordance with this Appendix.

c. Exemption does not preclude commanders from taking the following administrative actions:

(1) Suspension of access to classified information or the denial or revocation of security clearances.

(2) Reclassification or withdrawal of Military Occupational Specialties (MOS).

(3) Suspension or revocation of hazardous duty orders.

(4) Administrative discharge from the Army under honorable conditions when the degree or type of drug involvement precludes rehabilitation and restriction (sic) to full duty and the overall character of service, aside from drug abuse, warrants it.

(5) Adverse line of duty determination until and if relief is obtained from existing Federal statutes.

(6) Other administrative actions, including investigation of criminal activity not directly related to drug use or possession incident to a member's voluntary disclosures.

d. Exemption will be granted only for the illegal use and possession incident to such use of marijuana, narcotics, inhaled substances, or other controlled substances occurring prior to the grant of exemption and revealed through a member's voluntary disclosures at the time of his request for exemption. An individual will usually be granted exemption only once; however, further

exemptions may be granted in exceptional circumstances as determined by the commander. In any event the member will be afforded all appropriate rehabilitative measures in accordance with applicable annexes to this plan.

e. Exemption applies only to disclosures which are voluntary and which are made prior to the time a member is apprehended for the drug offense in question or is officially warned by military or civilian authorities that he is suspected of that offense.

f. Identification by urinalysis screening is not a part of this program; however, evidence developed by, or as a direct or indirect result of urinalysis administered for the purpose of identifying drug users may not be used in any disciplinary action under the UCMJ or as a basis for supporting, in whole or part, an administrative discharge under other than honorable conditions.

3. Implementation:

. . . . . .

d. A grant of exemption does not protect the Army member from prosecution in other jurisdictions. Therefore, information obtained incident to a grant of exemption shall not be disclosed outside the military jurisdiction without prior approval of HQ DA, or the designated commanding officer in accordance with AR 27-50, in foreign areas under a Status of Forces Agreement.

e. In the event of resultant administrative processing for separation, evidence of the member's grant of exemption, including the disclosures preceding the grant, may be considered only for purpose of deciding whether the member shall be retained or separated and not as a basis for characterizing the type of discharge. This rule will apply to boards of officers as well as discharge authorities.

It is immediately apparent that the Exemption Program, per se, did not apply to evidence developed through urinalysis administered for the purpose of identifying drug abusers (see subparagraph 2f, quoted above). However, such evidence was subject to similar limitations. The problems raised by this distinction without an explanation were discussed earlier with respect to paragraph 1e(3) of the Plan and at Endnote 1, with regard to the underlying Secretary of Defense Memorandum.

Notice also that the exemption granted was, in fact, transactional immunity. Otherwise stated, a soldier was protected from prosecution or issuance of an other than honorable discharge for an act of drug use or possession of drugs incident to personal use, even if sufficient independent evidence (that is, evidence not covered by paragraphs 2 d, e, or f) existed to obtain a conviction or support such a discharge. Furthermore, the exemption was only required to be provided once and it covered only incidents occurring prior to the granting of the exemption. Last, it applied only to incidents occurring "prior to the grant of exemption and revealed through a member's voluntary disclosures at the time of his request for the exemption" (emphasis added).

On the other hand, the provision concerning urinalysis evidence (2 f) dealt only with a limitation on the use of evidence. Therefore, if sufficient independent evidence existed, the government could presumably prosecute a soldier for drug use even though it also had urinalysis results proving the same use. However, it could not use the urinalysis evidence in the

disciplinary proceeding or to characterize his or her discharge as other than honorable.

CONCLUSION

Few first efforts at dealing with large, complex problems are completely successful and the Plan was no exception to the general rule. Nevertheless, it reflected considerable work and imagination and moved the Army well forward in dealing with a problem for which no other agency, military or civilian, had a solution. The task of refinement would have to await the insight provided by further experience.

CHAPTER II

ENDNOTES

1. There is an obvious logical disconnect in this memorandum. Providing protection concerning the disciplinary or administrative uses of evidence provided involuntarily hardly furthers a policy intended to encourage voluntary submission for treatment. If anything, it reduces the deterrent effect of the urinalysis program by assuring soldiers who elect to continue drug use that, if caught through the involuntary urinalysis program, they will be shielded from the more severe consequences of their misconduct.

That is not to say that this program was unreasonable. It was entirely consistent with the advice of the DOD General Counsel (Appendix C). The point is that the policy statement did not square with the statement of rationale and this choice of language (with its attendant logical difficulties) reappeared repeatedly in Army program directives.

2. Notice that this evidentiary limitation, insofar as it concerned use of evidence in discharge proceedings, precluded use in proceedings resulting in separation under other than honorable conditions (Undesirable Discharge). An Honorable or General Discharge, both of which were under honorable conditions, might still be awarded.

3. Valuable insight into the emotional climate of the times and the extent of DOD's concern that drug-abusing soldiers be provided rehabilitative services is afforded by the actions of the Secretary of Defense on 13 August 1971 (Appendix F) and 28 April 1972 (Appendix G) extending the opportunity for a discharge under honorable conditions to those discharged prior to (or with cases in progress on) 7 July 1971 as a result of either administrative elimination or court-martial sentence based solely on drug use or possession of drugs incident to personal use.

4. This interpretation is supported by paragraph 2d of the Plan. See also: US Department of the Army Message DCSPER-DACD 19124Z Jun 71, Subject: Drug Abuse Counter Offensive; US Department of the Army Message DAPE-DDD 101745Z Sep 71, Subject: Transfer of Drug Dependent Personnel to VA Facilities; and US Department of the Army Message DAPE-DDD 161641Z Oct 71, Subject: Drug Abuse Exemption Policy (Appendix H).

CHAPTER III

THE ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM

GENERAL

Ten months after publication of the Alcohol and Drug Abuse Prevention and Control Plan, US Department of the Army, Circular 600-85, hereafter referred to as DA Cir 600-85, announced its successor, the Alcohol and Drug Abuse Prevention and Control Program (also abbreviated ADAPCP) (Appendix I). The stated policy of the new program was:

> "to make a sustained effort to prevent alcohol abuse, alcoholism, and abuse and dependency on other drugs; to attempt to restore to effective and reliable functioning all individuals with problems attributable to alcohol and other drugs; and to eliminate from the service those who cannot be effectively restored within a reasonable period."[1]

The drug-use picture had not improved and the statistics being developed were not comforting. The ease of access to drugs (particularly high grade heroin in Vietnam), together with a generally rebellious approach to society among the young, produced many experimenters and, subsequently, a number of addicts or, at least, regular users. Drug use in both civilian society and the military establishment had reached what was frequently described as "epidemic proportions."[2]

It seemed apparent that the solution to the problem was not to be found in the traditional law enforcement approach, but in

education, prevention, treatment and rehabilitation. Whatever the merits of this approach, it was wholeheartedly embraced within the upper echelons of Department of Defense. The lengths to which Department of the Army was willing to go in order to attempt rehabilitation were extraordinary for the military establishment. For example, paragraph 4d, DA Cir 600-85, envisioned the establishment of "live in" halfway houses, "rap centers," and "sustained and sincerely helpful efforts" to help hostile soldiers overcome their resistance.

THE EXEMPTION POLICY

A product of its environment, the new program continued to adhere to the philosophy that the best way to identify drug abusers was through voluntary self-referral. Its drafters sought to remove perceived obstacles to voluntary efforts by enacting several substantial changes in the Exemption Policy (previously entitled "Exemption Program"). Portions of DA Cir 600-85 necessary to an understanding of these changes appear below:

> 4b. Identification.
> (1) The desired method of identifying individuals who abuse alcohol or other drugs is by their asking for assistance. Command policies should encourage soldiers to volunteer for treatment and should avoid actions that would discourage soldiers from seeking help. The DA Exemption Policy stipulates that a soldier who volunteers for treatment will not be subject to any disciplinary action under the Uniform Code of Military Justice (UCMJ) for his past use or incidental possession of drugs. Further, if he cannot be effectively treated and rehabilitated within the service, any discharge resulting solely from his past use or incidental possession of drugs will not be under other than honorable conditions (sec. IV, app. E).

(2) Some individuals with drug related problems will not volunteer for treatment. One method of involuntary identification is by biochemical analysis of urine specimens for drugs or their by-products, followed by clinical evaluation of the individual. The provisions of the Exemption Policy apply to soldiers identified as a result of involuntary urinalysis (sec IV, app. E)

. . . . . .

B-2q. Exemption. A policy to encourage men to seek help for drug problems. Once a soldier asks for help he will not be subject to disciplinary action under the Uniform Code of Military Justice (UCMJ) for his prior use or incidental possession of drugs. Nor, if his later inability to respond to rehabilitative efforts leads to his administrative separation from the service, will he be discharged under other than honorable conditions solely for such use or possession. The provisions of this policy also apply to men involuntarily identified as drug abusers through urinalysis and clinical evaluation (sec. V, app. E).

. . . . . .

APPENDIX E

SECTION IV. OTHER DRUGS-VOLUNTARY: EXEMPTION

E-10. PURPOSE. To prescribe policy and provide guidance for the voluntary identification of soldiers with drug problems.

E-11. OBJECTIVE. To encourage soldiers to volunteer for treatment for drug problems under the exemption policy (sic).

E-12. CONCEPT. a. Concern over legal reprisals keeps some people from seeking help for their drug problems. Voluntary participation in a treatment program enhances the chances of restoration to full and effective duty; the exemption policy (sic) supports that voluntary treatment.
b. The commander has the most important role in implementing the exemption policy (sic). Where soldiers do not seek treatment the commander should examine the administration of the exemption policy (sic) within his organization.

E-13. EXPLANATION OF EXEMPTION. a. A soldier who asks for help for a drug problem will not be subject to any disciplinary action not already instituted under the UCMJ for his use or incidental possession of drugs which occurred before he volunteered for treatment.

b. A soldier who has volunteered for treatment and whose drug involvement subsequently leads to an administrative discharge will not be discharged under less than honorable conditions solely as a result of that drug involvement. However, evidence of such drug involvement may be used to support discharge under honorable conditions.

c. Exemption is automatic. It is not "granted." Each time a drug user seeks assistance for his drug problem, he is exempt in accordance with paragraph E-12. Such exemption cannot be vacated or withdrawn.

d. Under this policy a soldier is not exempt from disciplinary or administrative action for any offense or misconduct other than his prior use of drugs or incidental possession for his own use. Other offenses or misconduct, even though they have been committed concurrent with or motivated by drug abuse, will be subject to normal disciplinary or administrative action.

. . . . . .

E-14. IMPLEMENTATION. A soldier with a drug problem should be permitted to seek help through a variety of means, including the installation medical treatment facility, halfway house or rap center. He may go on sick call or he may contact any officer or noncommissioned officer in the chain of command. The provisions of the exemption policy (sic) become effective when the soldier asks for help from any of these sources.

. . . . . .

SECTION V. OTHER DRUGS--INVOLUNTARY

E-17. CONCEPT. a. Many individuals involved with drugs will not volunteer for treatment and must be identified by other means.

b. Biochemical testing of urine is an aid in identifying individuals who are using drugs of abuse. Because of errors in any laboratory test system and the medical use of

drugs, a physician will determine drug abuse based on his clinical evaluation.
c. Conducting tests on a random, unannounced basis will increase their deterrent quality and provide more accurate information.
d. The provisions of the exemption policy (sic) apply to men identified as drug abusers by involuntary urinalysis and clinical evaluation by a physician.

One of the more obvious and far-reaching changes was the institutionalized second (or third, or fourth) chance (para E-13c, above). Unlike its predecessor, this version of the policy specifically provided for application of the exemption "each time a drug user seeks assistance for his drug problem." This provision revealed a realistic recognition that most drug users could not terminate physical or psychological dependence on drugs simply by virtue of enrolling in a program. However, it also created a marvelous opportunity for manipulation through a revolving door series of confessions and absolutions.

In a related matter, the circular did a much better job of making clear the nature of the transactional immunity involved, although the description of the exception to the exemption ("disciplinary action . . . already instituted") left some room for interpretation (para E-13a).

In addition, the circular removed the distinction between voluntary self-referral and identification through urinalysis. Both were now covered by the Exemption Policy, and transactional immunity applied to both. However, this is the point at which, by this joinder, the distinction became lost entirely. In other words, since that time we have had two completely different aspects of the ADAPCP bound together in a single policy statement

and supported by a rationale completely irrelevant to one of them. This has caused considerable difficulty for personnel attempting to interpret the circular (and related regulations) and apply it to "grey area" cases.

Last, a minor change in language produced unexpected results. The language of the new circular, (paragraph E-13a) promoted a "race to the courthouse door." Soldiers who had been identified as drug abusers by a variety of means could apply for help and thereby avoid "any disciplinary action not already instituted under the UCMJ for his use or incidental possession of drugs" occurring prior to the time of his application. This unintended result was soon remedied by a message change to the circular.[3]

CHAPTER III

ENDNOTES

1. US Department of the Army, Department of the Army Circular 600-85, para 2.

2. William J. Taylor, "Army Drug Treatment Programs and the Doctrine of Military Necessity: Committee for G.I. Rights v. Calloway and United States V. Ruiz," Harvard Civil Rights - Civil Liberties Law Review, Winter 1975, pp. 216-217. See Also: Honorable Richard S. Wilbur, M.D., Statement of the Assistant Secretary of Defense (Health and Environment) before the Special Studies Subcommittee of the House Committee on Government Operations, 28 June 1973, pp. 1-3.

3. US Department of the Army Message DAPE-HRA 051936Z Dec 72, Subject: Interim Change to DA Circular 600-85 (Appendix J). Paragraph E-13a of the circular was amended to include the following language:

> The Exemption Policy is not applicable in those instances where the member has been identified as the subject of any drug abuse investigation, or has been apprehended for a drug offense or offenses, or has been charged under the UCMJ, with a drug offense or has been offered nonjudicial punishment for a drug offense under the provision (sic) of Article 15, UCMJ.

CHAPTER IV

THE BEST LAID PLANS OF MICE AND MEN ...

THE DISASTER - UNITED STATES V. RUIZ

In the summer of 1974, the Army's drug and alcohol program was almost three years old. The Army was developing the information it needed, had a functioning identification and rehabilitation program, and was screening out soldiers who could not or would not be rehabilitated. Nevertheless, significant levels of drug abuse still existed within the ranks. Although considerable emphasis was still placed on voluntary self-referral, identification through urinalysis was recognized as essential to the success of the program.

Disaster struck on 5 July 1974 in the form of a Court of Military Appeals opinion in the case of United States v. Ruiz.[1] Ruiz was a soldier in Vietnam who had been identified as a drug abuser through command-directed urinalysis and sent for rehabilitation to a detoxification center. Two weeks after his return from the center, he was ordered, in accordance with normal procedures, to provide a specimen for follow-up urinalysis. He refused to do so and was court-martialed for, and convicted of, failure to obey his commander's order to provide the specimen. The issue on appeal was whether the order to provide the urine specimen was a lawful order. The Court of Military Appeals held that it was not.

The essence of the Court's reasoning was that Article 31a, Uniform Code of Military Justice (UCMJ)[2], prevented Ruiz's commander from compelling Ruiz to incriminate himself (it was accepted that the specimen would have been positive) regardless of the fact that the commander had no intention of using any positive test results against Ruiz in a court-martial. The Court expressed its concern over the commander's admitted intention to use a positive test result "in an administrative proceeding at which the accused could be subjected to a general discharge."[3] Finally, the Court acknowledged the impact its ruling would have upon the Army's drug rehabilitation program and suggested that "the answer lies not in depriving the accused of his rights, however inadvertent that might be, but in assuring either his voluntary cooperation or separating him from the service without penalty."[4]

Whatever the merits of the Court's legal analysis and holding (subjects of considerable discussion at the time), it was the law in the Armed Forces that an order to provide a urine specimen was an unlawful order, at least when given to a soldier who knew that his specimen would test positive. On 18 July 1974, the Secretary of Defense suspended the involuntary urinalysis program.[5]

THE RESPONSE

Development of a course of action took six months, despite the Court's gratuitous suggestion of a possible cure. There was some doubt that corrective action might be as easy as the Court implied. There was even more doubt that the Court's suggestion

was the best way to solve the problem. Within the Army, at least, the prospect of guaranteeing an Honorable Discharge (a General Discharge under honorable conditions having been found unacceptable by the Court) to everyone against whom the results of involuntary urinalysis were used was too large a pill to choke down all at once. In any event, the Department of Defense continued to wrestle with the problem while anxiety increased both in the field and in the Special Action Office, Office of the President (Appendix K).

On 7 January 1985, Office of the Secretary of Defense directed the services to resume testing in a manner that would not violate the Ruiz decision (Appendix L). On 13 January 1975, the Army announced resumption of the urinalysis program, promised detailed instructions in the near future, and provided the following guidance concerning the "revised Exemption Policy";[6]

> A. Evidence developed by or as a direct or indirect result of a member's having volunteered for treatment, or by or as a direct or indirect result of urinalysis administered for the purpose of identifying drug abusers (either for purposes of entry into a treatment program or to monitor progress during rehabilitation or follow-up), may not be used in any disciplinary action under the Uniform Code of Military Justice or as a basis for characterizing a member's discharge as other than an honorable discharge.
>
> B. To minimize the reluctance of possible drug overdose victims (or their associates) to seek immediate medical care from a military treatment facility out of fear of subsequent disciplinary action, the provisions of this exemption policy apply to members who receive emergency medical treatment under such conditions.
>
> C. This policy does not exempt military members from disciplinary or other legal

consequences resulting from violations of other applicable laws and regulations, if the disciplinary action is supported solely by evidence not attributable to their volunteering for treatment and not attributed to a urinalysis administered for identification of drug users under the ADAPCP.

D. The provisions of this exemption policy also apply to members who volunteer for treatment of an alcohol problem.

This message announced a concept born too soon. It was short-lived and, consequently, analysis is relegated to Appendix M. Its importance in the sequence of evolutionary changes was established only insofar as it announced implementation within the Army of two Department of Defense decisions. The first was to capitulate on the issue of discharge characterization and guarantee that, when evidence (and, by implication, conduct) covered by the Exemption Policy was utilized in an administrative separation proceeding, the respondent could receive only an Honorable Discharge (thereby eliminating the previously existing option of a General Discharge under honorable conditions).

The second decision was to provide the protections of the Exemption Policy to soldiers receiving medical treatment for possible drug overdose. Evidence derived from such treatment could not be used in a disciplinary proceeding under the UCMJ or as a basis for separating the soldier with other than an Honorable Discharge. This extension of the Exemption Policy was not based on any legal requirement, but represented a decision to forego the opportunity to prosecute or characterize discharges in an effort to eliminate a substantial barrier to medical treatment

-- and thereby save some of the lives being lost each year as a result of drug overdoses.

On 14 February 1975, the "detailed implementing instructions" promised on 13 January were provided in a lengthy message which, at the onset, rescinded all of the provisions of the Exemption Policy in the earlier message. The message is reproduced at Appendix N. Its relevant provisions are summarized below.

a. The nature of the exemption changed insofar as it related to administrative discharge proceedings. It shifted from a form of transactional immunity (that is, the acts of drug use or possession incident to personal use could not be considered for the purpose of characterizing service as other than honorable) to a limitation on the use of evidence. Consequently, evidence covered by the Exemption Policy could not be considered in a separation proceeding unless an Honorable Discharge was awarded. However, any independently developed evidence (neither covered by the Exemption Policy nor derived from evidence so covered) of the acts could be considered without losing the ability to characterize the discharge as Honorable, General, or Other Than Honorable, depending upon the respondent's overall performance [para B-2q(1)].

b) As announced in the 13 January 1975 message, if evidence covered by the Exemption Policy were utilized in a separation proceeding, the respondent had to be given an Honorable Discharge, if separated (para B-2q(1), E-13a).

c) The status of involuntary urinalysis changed again. Paragraph E-17d, DA Cir 600-85, had stated, "the provisions of

the exemption policy (sic) apply to men identified as drug abusers by involuntary urinalysis and clinical evaluation by a physician." This provision was rescinded. The substitute provisions, appearing as paragraph E-13b, follow:

> The provisions of the Exemption Policy apply to members identified as drug abusers by involuntary urinalysis. Specifically, evidence of the use of drugs or possession incident thereto, developed by or as a direct or indirect result of a urinalysis administered for the purpose of identifying drug abusers (either for the purpose of entry into a treatment program or to monitor progress during the rehabilitation or follow-up stages of the program), will not be used in any disciplinary action under the UCMJ or as a basis for separating the member with other than an honorable discharge.

This remarkable provision purported, in its opening sentence, to apply the Exemption Policy to situations involving identification by involuntary urinalysis. If that were true, those so identified would be protected from prosecution for all incidents of drug use or possession occurring prior to their identification. However, the following sentences went on to articulate only a limitation on the use of evidence rather than an immunity, thereby creating a serious difficulty in interpreting the new provisions.

d) The limitation on the use of evidence resulting from emergency medical treatment was continued (para E-13c).

e) The message added a great deal of clarity concerning situations when the Exemption Policy did not apply (para E-13f):

> It is not the intent of the Department of the Army that the provisions of the exemption policy (sic) be exploited by personnel who have no real interest or motivation to seek help for their drug problem. Accordingly,

> the exemption policy (sic) is not applicable in those instances where the member has been identified as the subject of any drug abuse investigation, or has been apprehended for a drug offense, or has been charged under the UCMJ with a drug offense, or has been offered nonjudicial punishment for a drug offense under the provisions of Article 15, UCMJ. It is not necessary that the member have been informed that he is the subject of a drug abuse investigation.

f) Paragraph E-13e continues the confession and absolution policy. "Each time a drug user seeks assistance for his drug problem, he is exempt in accordance with E-13a above."

g) Last, the protections for personnel receiving emergency medical care were continued (para E-13c).

This comprehensive program appeared to respond to the concerns of the Court of Military Appeals while permitting the Army, once again, to operate an effective identification program.

IF AT FIRST YOU DON'T SUCCEED ...

Another message followed within a week. On 20 February 1975, the following message (Appendix O) made a number of clerical changes and added a provision making it clear that personnel who received emergency medical treatment as a result of apprehension by law enforcement officials did not receive the protections of the Exemption Policy.[8]

Next, on 26 September 1975, the Army issued a message[9] which superseded both of the February messages and all of DA Cir 600-85 pertaining to the Exemption Policy (Appendix P). In an effort to clarify the Exemption Policy, it provided a revised version of the basis for the policy, stating that:

> 3. The objective of exemption is to facilitate effective identification, treatment and rehabilitation by eliminating the barriers to successful communications between alcohol or other drug abusers and ADAPCP counselors, physicians supporting the program, or the service member's unit commander.

The message provided vastly improved explanations concerning when the Exemption Policy applied and when it did not. On the other hand, the explanation of the Exemption Policy itself remained plagued with difficulties.

Once again, the explanation failed to provide any rationale relevant to extending the coverage of the policy to involuntary urinalysis, thereby leaving that portion of the program unexplained. In addition, this message was the first attempt to reduce the provisions of the Exemption Policy to a tabular format. It was a medium ill-suited to such a purpose (the table could not be transmitted, but had to be described by a listing of the contents of each row and column) and it failed to eliminate the confusion caused by the apparently conflicting explanations in the 14 February 1975 message.

For example, a "note" at the end of the message defined "exemption" as follows:

> Definition of exemption. Exemption is an immunity from disciplinary action under the UCMJ, or separation with less than an Honorable Discharge, as a result of certain occurrences of alcohol abuse, or drug use, or incidental possession described herein.

At the risk of belaboring the obvious, this definition stated that the exemption granted <u>immunity</u> from disciplinary action or separation with less than an Honorable Discharge. By implication, the Army could not proceed against a soldier in

either of these two manners even if it could establish its case based entirely upon evidence not covered by the Exemption Policy. However, the heading to Column B of the table (Column A listed the methods by which drug or alcohol abusers might be identified) included the following text:

> Evidence of past use or incidental possession of drugs, or abuse of alcohol will not be used as a basis for any disciplinary action under the UCMJ. Further, such evidence will not be used as a basis for discharge of the member with other than an Honorable Discharge. These exemptions become effective as indicated below:

Obviously, this column described the times at which the exemption became effective, depending upon the method used to identify the drug or alcohol abuser. Unfortunately, it described the protection provided in terms of a limitation on the use of evidence, apparently in conflict with the "note" previously quoted.

Column C had no heading, but simply contained a text which stated that "information of past use or incidental possession of drugs or abuse of alcohol" (emphasis added) revealed to a variety of specified personnel during active or follow-up treatment or interviews could not be used to support action under the UCMJ or as a basis for discharging the soldiers with other than an Honorable Discharge. So, both column headings described a limitation on the use of evidence while the "note", intended to appear at the foot of the table, clearly described immunity.

This articulation of the Exemption Policy hardly provided users in the field with the same degree of enlightment afforded Saul on the road to Damascus. Nevertheless, it was the guidance

under which the Army operated until the publication of a completely revised directive in May 1976.

CHAPTER III

ENDNOTES

1. United States v. Ruiz, 23 USCMA 181, 48 CMR 797 (1974).

2. United States Code, 1982, Title 10, Sec. 831(a), p. 158.

3. 48 CMR at 499.

4. Ibid.

5. Secretary of Defense Memorandum to Secretaries of the Military Departments, Chairman, Joint Chiefs of Staff, Subject: Department of Defense Drug Testing Program, 18 July 1974.

6. US Department of the Army Message DAPE-ZA 132214Z Jan 75, Subject: Urine Testing in Support of the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) - Copy at Appendix M.

7. US Department of the Army Message DAPE-HRA 142345Z Feb 75, Subject: Alcohol and Drug Program Exemption Policy - Copy at Appendix N.

8. Compare with paragraph E-13c, US Department of the Army Message DAPE-HRA 142345Z Feb 75, Subject: Alcohol and Drug Program Exemption Policy (Appendix N). At the risk of belaboring the obvious, the original purpose of applying the Exemption Policy to emergency medical care situations was to induce soldiers to seek medical care (or induce their friends to seek it for them) in overdose situations. Law enforcement personnel discovering such a situation were duty-bound to seek medical care for a distressed soldier. Therefore, the exemption would have provided no additional incentive to save the soldier's life and would have barred prosecution or separation with an other than honorable discharge in appropriate cases -- nothing gained, everything lost.

9. US Department of the Army Message DAPE-HRL-A 262200Z Sep 75, Subject: Alcohol and Drug Abuse Prevention and Control Program (ADAPCP)-Exemption Policy.

CHAPTER V

AR 600-85: ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM

On 1 May 1976, US Department of the Army, Army Regulation 600-85 (AR 600-85), was published with an effective date of 1 September 1976 (Appendix Q). This superseded DA Cir 600-85, and several related regulations and messages, and consolidated information on the operation of the ADAPCP. It contained no significant policy changes, as may be seen below:

> 1-3 Objectives. The objectives of the ADAPCP are to:
>
> a. Prevent alcohol and other drug abuse.
> b. Identify alcohol and other drug abusers as early as possible.
> c. Restore both military and civilian employee alcohol and other drug abusers to effective duty or identify rehabilitation failures for separation processing from Government service.
> d. Provide for program evaluation and research.
>
> 1-5 Policy.
>
> a. Department of the Army will make a sustained effort to prevent alcohol abuse, alcoholism, and abuse of and dependency on other drugs; attempt to restore to effective and reliable duty all individuals who are failing to function properly in a military environment because of problems attributable to abuse of alcohol and/or other drugs; and process for discharge or termination those who cannot be effectively restored to duty within a reasonable period of time.
> b. Commanders at all levels are responsible for the ADAPCP implementation and accomplishment of objectives, including evaluation of the program and its impact within their organizations.
> . . . . . .

f. Commanders are prohibited from taking certain administrative and disciplinary action against service members who are voluntarily or involuntarily referred to the ADAPCP. (See Sec V, chap. 3.)

Review of the Exemption Policy, set out in Section V, Chapter 3, and Table 3-1, revealed some modification, once again attempting to improve the clarity of language and quality of explanations.

The tabular display of the Exemption Policy was incorporated into the regulation with minor format changes. However, some problems seemed to defy solution. Confusion continued to surround identifications by involuntary urinalysis, the source of the Ruiz problem. Line 3 of Table 3-1, Columns A and B, clearly stated that a soldier identified as a drug user by urinalysis administered to identify drug users for entry into ADAPCP would not be subject to disciplinary action under the UCMJ (or separation less than an Honorable Discharge). Column C went on to provide the same protection with respect to urinalysis results obtained after entry in the ADAPCP program. So, the Exemption Policy appeared, once again, to give immunity in cases where there had previously only been a limitation on the use of evidence. However, Column D clouded the issue by discussing the same situation in terms of a limitation on the use of evidence. It is almost impossible to conclude that this portion, at least, of Column D had any meaning at all. It either provided a superfluous protection or it conflicted with the other provisions.

Reference to the brief narrative discussion of the terms of the Exemption Policy failed to resolve this dilemma. Paragraph

3-15 adopted, almost verbatim, the language of the 26 September 1975 message which stated that the objective of exemption was to "facilitate effective identification, treatment, and rehabilitation by eliminating barriers to successful communications." Paragraph 3-16 defined "exemption" in the following terms:

> a. An immunity from disciplinary action under the UCMJ, or administrative separation with less than an honorable discharge, as a result of certain occurrences of alcohol abuse, or drug use or possession of drugs incidental to personal use.
>
> b. An immunity from use of evidence obtained directly or indirectly from the member having been involved in the ADAPCP, as described in paragraphs 3-17 and 3-18 and in table 3-1.

The paragraphs cited in the provision above contained the well-established exceptions to the policy (at the time that the Exemption Policy became effective it did not apply to offenses for which the soldier was the subject of an investigation, etc.) and implementing instructions. Paragraph 3-18d pointed out that a soldier "protected" by the Exemption Policy could be eliminated and receive any appropriate type of discharge if no evidence utilized was exempt evidence and the decision to eliminate was in no way based upon knowledge of exempt evidence or knowledge of the soldier's enrollment in ADAPCP. Although at first glance this may appear to have been relevant to resolution of problems raised by Table 3-1, the purpose of paragraph 3-18d was simply to point out that soldiers, who on completely separate and independent grounds deserved to be discharged, could be separated with any character of discharge so long as the proceeding (or the

decision to initiate it) was in no way tainted by knowledge of protected evidence or activity.

In summary, the text of the regulation skirted the problem, but provided no assistance in its resolution.

This iteration of the program survived, unchanged in any substantial part, for over five years. The small volume of message traffic related to the program, as well as an Interim Change Number I01, dated 25 June 1981 (Appendix R) made no consequential changes to either the policy underlying the ADAPCP or to the Exemption Policy.

CHAPTER VI

THE EMPIRE STRIKES BACK - BELATEDLY

MILITARY RULES OF EVIDENCE

On 1 October 1980, the new Military Rules of Evidence went into effect for use in trials by court-martial. For the most part identical to the Federal Rules of Evidence used in federal courts, they did, in some cases, address uniquely military issues. Military Rule of Evidence 313 specifically included a provision providing for the admission in evidence of "bodily fluids" taken as part of an inspection. The analysis of the rules made no mention of an order to produce bodily fluids as part of an inspection. However, unless such an order were legal, the Armed Forces would have been in the ridiculous position of holding that urine specimens could not be compelled by order, but could be taken from a protesting subject by medical personnel under the same circumstances. Consequently, although this rule had yet to be tested in the courts (it was conceivable that a court might still hold that an order issued in reliance on this rule was unlawful because it violated Article 31, UCMJ) it was a step toward a less restrictive approach.

UNITED STATES V. ARMSTRONG

On 27 October 1980, the Court of Military Appeals announced its decision in United States v. Armstrong.[1] Although the facts in Armstrong were different from those in Ruiz,[2] the holding in

the case, by implication, overruled Ruiz. After considerable analysis, all three judges agreed on a very significant point: there was no reason to extend the protections of Article 31 to bodily fluids. The net result of this case (which, incidentally, was not decided on the basis of the recently enacted Military Rules of Evidence) was that an order to provide a urine specimen was not barred by either the Fifth Amendment or Article 31. This meant that future situations involving orders to produce urine specimens would be evaluated from the standpoint of the Fourth Amendment right to be free from unreasonable searches and seizures, rather than from the standpoint of the Fifth Amendment/Article 31 protection against compelled self-incrimination.

SLOWLY BUT SURELY

Army Regulation 600-85, 1 December 1981

On 1 December 1981, AR 600-85 was republished (Appendix S). There were no significant changes in either the purpose of the regulation or the objectives of the program.[3] Although the discussion of the Exemption Policy[4] and the tabular display[5] changed slightly, again no changes of substance were made in the Exemption Policy.[6]

Department of Defense Moves Forward

On 28 December 1981, Deputy Secretary of Defense Carlucci issued a memorandum entitled, "Alcohol and Drug Abuse" (Appendix T). This memorandum was addressed to Secretaries of the Military Departments and Directors of Defense Agencies. It commenced by

observing that drug abuse was a continuing problem in the military and stating, "We must take immediate action to reduce the effects of drug and alcohol abuse on our forces."

The memorandum rescinded or modified a number of previously issued Department of Defense memoranda and instructions and it announced a major lifting of restrictions on the use of evidence taken by compulsory urinalysis. Enclosure 2 to the memorandum noted that mandatory urinalysis testing could be conducted as part of an inspection (under Military Rule of Evidence 313), a search and seizure (under Military Rules of Evidence 311-317) or as part of an examination for valid medical purposes (under Military Rule of Evidence 312f). In addition, it provided that, subject to certain exceptions (listed below), the results of such urinalysis could be used to take appropriate disciplinary action or "to establish a basis for a separation and characterization in a separation proceeding," or for other administrative purposes.

The language of paragraph 2.a. (3) of Enclosure 2 to the memorandum was important. It stated that mandatory urinalysis for controlled substances could be required during,

> An examination for a valid medical purpose under Military Rule of Evidence 312f to determine a members fitness for duty; to ascertain whether a member requires counseling, treatment, or rehabilitation for drug abuse; or in conjunction with a member's participation in a DoD drug treatment or rehabilitation program.

Paragraph 3 of Enclosure 2 went on to provide the limitations on the use of evidence in the terms set forth below.

> 3. Limitations on Use of Urinalysis Results.
> a. Results obtained from urinalysis under Section 2.a.(3) may not be used against the

member in actions under the Uniform Code of Military Justice and on the issue of characterization in separation proceedings.

As a result of these changes, the rules concerning use of mandatory urinalysis test results had changed radically. Only that evidence described in paragraph 2.a.(3) (quoted above) was subject to the prohibition against use in disciplinary proceedings or to characterize service. In essence, the Department of Defense was moving to permit the use of urinalysis test results to the maximum extent permitted by the law.[7]

The Army Responds

In April 1982, the Army implemented these changes by publication of Interim Change 101 (IC 101) to AR 600-85 (Appendix X). This change altered the Exemption Policy to the extent that it clearly recognized that the policy did not apply to evidence taken as part of an appropriately conducted search under the Military Rules of Evidence. It deferred action on the question of removing the restrictions on the use of urinalysis evidence taken as part of an inspection. It failed to make any mention of the types of tests described in paragraph 2.a.(3) of the 28 December 1981 Department of Defense Memorandum or the limitations on the use of such tests.

On 11 February 1983, Interim Change 102 was published and Section II, Chapter 6, AR 600-85 was completely overhauled (Appendix Y). The Exemption Policy was renamed the Limited Use Policy and the thrust of the policy became to limit the manner in which certain types of evidence might be used rather than to

grant immunity from prosecution (or characterization of discharge) for the underlying conduct involved.

This iteration of the Limited Use Policy is essentially the one in use today. For that reason, and because of the importance of the wording in several provisions, it is reproduced at length below.

Section II. Limited Use Policy

6-2. Objective. The objective of the limited use policy (sic) is to facilitate the identification of alcohol and drug abusers through self-referral, and the treatment and rehabilitation of those abusers who desire to be rehabilitated and who demonstrate the potential for retention. It is not intended to protect a member who is attempting to avoid disciplinary or adverse administrative action.

6-3. Definition of the Limited Use Policy.

a. Limited use prohibits the use of the following evidence against a member in actions under the Uniform Code of Military Justice (UCMJ), or on the issue of characterization of service in separation proceedings:

(1) Mandatory urine or breath test results taken to determine a member's fitness for duty (Paragraph 3-16 b(1)(a)1); to ascertain whether a member requires counseling, treatment, or rehabilitation for drug abuse; or in conjunction with a member's participation in ADAPCP (Paragraph 3-16b (1)(a)2 (see Table 6-1).

(2) A member's self-referral to ADAPCP;

(3) Admissions and other evidence concerning illegal drug or alcohol use or possession of drugs incidental to personal use occurring prior to the date of initial referral to ADAPCP provided voluntarily by a member as part of his initial entry into ADAPCP;

(4) Admissions made by a member enrolled in ADAPCP to a physician or ADAPCP counselor at a scheduled interview, concerning illegal drug or

alcohol use or possession of drugs incidental to personal use occurring prior to the date of his initial referral to ADAPCP; and

(5) Evidence obtained as a result of a member's emergency medical care for an actual or possible drug or alcohol overdose, unless such treatment resulted from apprehension by law enforcement officials, military or civilian.

b. The limited use policy (sic) does not grant total immunity. It does not prevent the counselor from revealing, to the appropriate authority, knowledge of illegal acts. These would be acts which may have an adverse impact on mission, national security, or the health and welfare of others. The reporting in such an instance is from counselor, to clinical director, to ADCO, to the client's commander. The commander will report the information to the appropriate authority. Likewise, information that the client presently possesses illegal drugs or that the client committed an offense while under the influence of illegal drugs or alcohol is not covered under this policy.

. . . . . .

6-4. Implementation.

. . . . . .

d. A service member protected by the limited use policy (sic) may be recommended for administrative discharge on the basis of evidence other than information obtained directly or indirectly from the member's involvement in the ADAPCP. Such a member may receive a discharge characterized as honorable, general, or under other than honorable conditions. (See AR 635-100, AR 635-200, and other regulations authorizing separation with less than an honorable discharge certificate.) The member will receive an honorable discharge certificate, regardless of his overall performance of duty, if discharge is based on a proceeding where the Government initially introduces evidence prohibited above. The Government includes the following:

(1) The commander (in his or her recommendation for discharge or in documents forwarded with his or her recommendation).

(2) Any member of the board of officers adjudicating the service member's case before the board.
(3) The investigating officer or recorder presenting the case before the board.

e. Alternatively, if the prohibited evidence is introduced by the Government before the board convenes, the elimination proceedings may be reinitiated, excluding all references to information protected by the Limited Use Policy. If the prohibited evidence is introduced by the Government after the board convenes, only a general courts-martial convening authority who is a general officer may set aside the board proceedings and refer the case to a new board for rehearing. The normal rules governing rehearings and permissible actions thereafter will apply in accordance with AR 635-100 or AR 635-200, as appropriate.

f. On the other hand, if the service member (respondent) or his counsel initially introduces such evidence, the type of discharge certificate issued is not restricted to an honorable discharge certificate.

As noted above, the Limited Use Policy was clearly intended to be a limitation on the use of evidence, not a grant of any type of immunity with respect to the underlying misconduct. Moreover, the regulation clearly explained both the scope of the limitation and the type of evidence to which it applied. The limitation was only that evidence subject to limited use could not be used in an action under the UCMJ or to characterize discharge. The limitation applied only to evidence taken in the manners described and for the purposes listed. Otherwise stated, "What you saw was what you got." If the evidence did not meet all the criteria established by the regulation, the Limited Use Policy did not apply. If the Limited Use Policy did not apply,

the evidence was admissible in any proceeding, for any purpose, subject only to the normal rules governing the type of proceeding in which it was to be introduced.

One obvious consequence of this was that a soldier subjected to urinalysis as a part of a unit inspection (knowing that his specimen would test positive) could not avoid disciplinary action (or characterization of discharge) by voluntarily seeking assistance (and thereby, under the Exemption Policy, being granted immunity) before the test results were returned and the commander initiated an investigation or disciplinary action which would prevent the policy from coming into play.

In addition, the limitation on the use of admissions made during initial entry to the ADAPCP [para 6-3a(3)] or to a physician or counselor during a scheduled interview [para 6-3a(4)] related only to admissions concerning use, or possession incident to personal use, occurring prior to initial entry or referral, respectively, to ADAPCP. Admissions concerning use while in the program were not protected and could, other evidentiary requirements being met, be used in proceedings under the UCMJ or to characterize discharge.

Next, at the risk of "flogging a dead horse," it must be emphasized that a soldier could be prosecuted or have his discharge characterized based upon evidence of the use of drugs (or possession of drugs incident to personal use) for acts concerning which there was also evidence covered by the Limited Use Policy. To illustrate, consider the following scenario: A commander observes a soldier smoking a hand-rolled cigarette. Unaware that he is being observed, the soldier placidly puffs

away for a few minutes, drops the butt on a public sidewalk, and strolls off. The commander retrieves the smoldering joint, which looks, feels, and smells like marijuana. He takes it to his local Provost Marshall, who orders a field test by which the contents of the joint are confirmed to be marijuana. Early the next morning, the soldier voluntarily seeks enrollment in ADAPCP and, during the course of the following processing, freely admits his use of marijuana on the previous day to both his commander and the ADAPCP personnel.

In the situation just described, the commander's observation, the joint seized and the results of any tests subsequently conducted on the joint would not be covered by the Limited Use Policy. Therefore, they would be admissible in a disciplinary proceeding under the UCMJ or on the issue of characterization of discharge. On the other hand, the admissions made by the soldier during the course of processing for admission to ADAPCP would be covered by the Limited Use Policy and could not be used in a disciplinary action under the UCMJ. If these admissions were utilized in a discharge proceeding, the soldier would be guaranteed an Honorable Discharge. All of the evidence described, subject to limited use or not, could be used in support of any other type of administrative sanction.

In a related matter, the Army demonstrated considerable sound judgment and foresight. Paragraph 6-3a(1), quoted above, applied the Limited Use Policy to the results of urinalysis tests taken to determine a member's fitness for duty, to determine the need for counseling, rehabilitation, or in conjunction with

enrollment in ADAPCP. These were the types of tests authorized by paragraph 2.a.(3) of Enclosure 2 to the 28 December 1981 memorandum from the Office of the Secretary of Defense (quoted and discussed earlier in this chapter). However, paragraph 3-16b(1)(a), AR 600-85 added a requirement not contained in the OSD memorandum: it required that a commander have "reasonable suspicion" that the person to be tested was using a controlled substance. In addition, paragraph 3-16b(2)(a), dealing with physician-directed tests of this sort, required that the physician "suspect" the person to be tested of having used a controlled substance. Vague as these standards may appear, they were better than no standards at all and, as it developed several years later, they anticipated the thinking of the Supreme Court in the area of search and seizure.

For all of the major improvements contained in the Limited Use Policy, Interim Change I02 brought along its own baggage of semantic difficulties. The third sentence of paragraph 6d stated that, regardless of overall performance of duty, a soldier would receive an Honorable Discharge Certificate "if discharge is based upon a proceeding where the government initially introduces evidence prohibited above" (emphasis added). Paragraph 6e used the term "prohibited evidence" twice.

Although incorrect, the term "prohibited evidence" (as opposed to "limited use evidence") appeared relatively harmless in this context. Unfortunately, the term was adopted and expanded upon in US Department of the Army, Army Regulation 635-200, Personnel Separations-Enlisted Personnel. Consequently, serious problems arose in the processing of separation actions

and related board proceedings. An excerpt from an analysis prepared in 1984, which discussed this problem in detail, is attached as Appendix Z. Both regulations have recently been amended to eliminate this problem.

THE NEVER ENDING STORY

On 16 March 1983, the Department of Defense issued Department of Defense Instruction 1010.1, Subject: Drug Abuse Testing Program (Appendix AA). This incorporated the provisions of the 1981 memorandum and consolidated guidance on the subject of the drug testing program. In paragraph E.1.a.(3)(a), the instruction added a requirement for "a reasonable suspicion of drug abuse" as a prerequisite for examinations to determine fitness for duty or the need for counseling , rehabilitation, or other medical treatment. If imitation is the sincerest form of flattery, the Army program had just received a compliment.

In April 1983, Interim Change I03 to AR 600-85 (Appendix AB) added punitive provisions concerning alcohol impairment while on duty and provided some minor explanatory notes to Table 6-1. In June 1983, Interim Change I04 (Appendix AC) continued the "hard-line" trend becoming apparent in both Department of Defense and Department of the Army. The new version revealed less feeling of responsibility on Department of the Army's part for what amounted to a consciously self-inflicted injury on the soldier's part. While not lacking in compassion, it showed far less patience with those unwilling or unable to participate responsibly in the resolution of their own problems.[8] Interim Change I05 (Appendix

AD) made some minor technical changes in the punitive provision on alcohol impairment. Interim Changes I06 through I12 (Appendices AE through AK) made a variety of alterations, some major and some minor, to the scope and administration of the ADAPCP; however, none were of consequence to the Limited Use Policy.

ENDNOTES

1. United States v. Armstrong, 9 M.J. 374 (1980).

2. Ruiz involved an order to provide a urine specimen. Armstrong dealt with the taking of a blood sample.

3. AR 600-85, Para 1-5.

4. Ibid., Para 6-1 through 6-5.

5. Ibid., Table 6-1.

6. However, the reorganization of Table 3-1 (1976 version) into Table 6-1 (1981 version - Appendix S) introduced yet another element of confusion. The first remark in Column B - "the member acquires exemption as to drug use/possession for personal use or alcohol abuse occurring prior to -[1]." The footnote refers back to the provisions of paragraph 6-4, which lists exceptions (soldier already apprehended for the offense, under investigation, charged with offense, offered punishment under Article 15 for the offense, etc.) to the protections granted by the Exemption Policy. This footnote, by its placement, is made to apply only to column B. It appears nowhere else in Table 6-1. Therefore, the table seems to say, a soldier enrolled in the program who, after enrollment, was found in possession of drugs and charged with the offense, could proceed to reveal such possession to a counselor at the next scheduled interview and be protected from both disciplinary action and having the incident serve as a basis for other than an Honorable Discharge. This result, ridiculous on its face and contrary to the rule concerning incidents occurring prior to enrollment, is, nevertheless, required by a literal reading of the regulation. Any defense counsel worth his salt should have made such an argument as courts are generally quite willing to require the drafter of a regulation to be bound by its language.

Interestingly enough, the issue was apparently never raised, at least at DA level. Table 6-1 survived unchanged until the Exemption Policy was overhauled in 1983 and renamed the "Limited Use Policy."

7. The decision to limit the use of evidence described in paragraph 2.a.(3) of Enclosure 2 to the memorandum was based upon the belief that Department of Defense was on dangerous ground in authorizing these searches at all. It was believed that, if such searches were to be upheld by the courts in the face of a legal challenge, it would be due to the needs of the government to conduct such searches and the fact that servicemembers were protected from punitive consequences based upon the evidence derived therefrom.

This rationale was revealed in an "Action Memorandum" (Appendix U) forwarding the document (28th December 1981 memorandum) for approval and signature and further elaborated upon in a delightfully concise, articulate and readable opinion signed by the General Counsel (Appendix W), responding to rumblings of discontent from the Navy (Appendix V).

8. Compare the tone of paragraph 1-8a, IC 104, with the previous version:

AR 600-85, 1 December 1981

> A sustained effort to prevent alcohol abuse, alcoholism, and misuse or abuse of other drugs is required of all elements of DA. An attempt must be made to restore the (sic) effective and reliable duty individuals who fail to function properly in a military environment because of abuse of alcohol or other drugs. Those who cannot be effectively restored to duty within a reasonable period of time will be referred to the commander for discharge or termination.

Interim Change 104

> Alcohol and drug abuse are incompatible with military service. Service members identified as alcohol and illegal drug abusers who, in the opinion of their commanders warrant retention, will be afforded the opportunity for rehabilitation. Those service members identified as alcohol or other drug abusers who do not warrant retention will be processed for separation from the military.

In addition, paragraph 1-10 was amended to require mandatory processing for separation of all soldiers in the grade E6 or above and all officers identified as illegal drug abusers (Appendix AC). Other soldiers were required to be processed for separation upon the second incidence of identification as drug abusers. [IC 106, 1 Feb 84, added E5's to the list of those who must be processed for separation on the first instance of identification as drug abusers (Appendix AE)].

CHAPTER VII

NOW THAT WE'RE HERE -- WHERE ARE WE?

AR 600-85 was republished on 3 November 1986 with an effective date of 1 December 1986. This version, as updated, is in effect as of this writing (Appendix AL). It consolidates the numerous changes to its predecessors and improves upon wording in several places. The trend toward diminished tolerance continues, as reflected in the excerpt below.

> 1-9. General Policy.
>
> a. Alcohol and drug abuse are incompatible with military service. Soldiers identified as alcohol and drug abusers who, in the opinion of their commanders warrant retention, will be afforded the opportunity for rehabilitation. Those soldiers identified as alcohol abusers who do not warrant retention will be considered for separation from the military by their unit commander. Consideration and processing for separation of soldiers identified as drug abusers will be in accordance with paragraph 1-10 (sic) and applicable administrative regulations.
>
> . . . . . .
>
> 1-11. Other drugs
>
> a. Any soldier involved with the illicit trafficking, distributing, or selling of drugs will be considered for disciplinary action under the UCMJ and/or for separation for misconduct.
>
> b. Soldiers identified as illegal drug abusers may be considered for disciplinary actions under the UCMJ in addition to separation actions.
>
> c. Officers, warrant officers, and noncommissioned officers (E5-E9) who are identified as drug abusers will be processed

in accord with AR 635-100 and AR 635-200. These individuals have violated the special trust and confidence the Army has placed in them.

d. Any soldier who has been identified in two separate instances occurring since 1 July 1983 as users (sic) of illegal drugs will be processed for separation from the service.

e. Soldiers diagnosed as physically dependent (other than alcohol), will not generally possess the potential for future service and will be processed for separation. These soldiers will be detoxified, given medical treatment, and afforded the opportunity for rehabilitative treatment through the Veterans Administration, or a civilian program.

f. Soldiers identified as nondependent drug abusers, who in the opinion of their commander warrant retention, should be enrolled in the ADAPCP, when enrollment is recommended as a result of the ADAPCP screening.

With respect to the Limited Use Policy, it is now (as it has been since Interim Change I02) a limitation on the use of evidence -- nothing more, nothing less. The limitation is that, with respect to evidence to which it applies, the policy prohibits the use of evidence in a disciplinary proceeding under the Uniform Code of Military Justice or in a separation proceeding resulting in less than an Honorable Discharge. The types of evidence to which it applies are clearly set out in paragraph 6-4 and Table 6-1, as are the exceptions to the policy.

Last, in spite of all of the convolutions which have wracked the program and the policy since their inceptions -- and all of the traumatic changes generated by changing times and court decisions -- the legacy of Deputy Secretary of Defense Packard is still with us. Paragraph 6-3 states:

> The objective of the Limited Use Policy is to facilitate the identification of alcohol and drug abusers through self-referral, and the treatment and rehabilitation of those abusers who demonstrate the potential for rehabilitation and retention.

The following paragraph lists a variety of instances, in which the policy applies, which have absolutely nothing to do with self-referral.

However, with the exception of this one incongruency, the meaning of the policy is now settled and it is explained in terms which the average reader can comprehend and apply to the variety of cases which arise under the ADAPCP.

The remaining question is whether the policy is what it ought to be and, if not, how it should be changed.

CHAPTER VIII

SETTING THE STAGE FOR CHANGE

THE BACKDROP

As noted earlier, the Army developed and implemented its drug and alcohol program to identify and, if possible, rehabilitate soldiers. In order to encourage volunteers, it made a number of concessions concerning the use of evidence obtained from such volunteers. In addition, the Army limited the use of evidence -- particularly urinalysis tests -- in order to comply with the law as it existed at the time. Last, out of concern that Veterans Administration services be available to veterans with drug problems, the Army limited the types of discharges which could be awarded solely on the basis of drug abuse.

The Army has now passed into a new era -- it is a different institution than the Army of the late 1960's and early 1970's. An unpopular war is long over and many senior NCO's and field grade officers now on active duty have entered service since its conclusion. The public resentment toward the war has dissipated, as has the tendency to transfer that resentment to those who fought in it. The draft has been abolished and we now have an all-volunteer Army.

The ADAPCP has changed as well. The uncertainty and sense of crisis which attended the early years of the program have disappeared as both the Army and civilian society gained confidence in their abilities to deal with the drug problem. The

Secretary of Defense no longer directs that discharges under honorable conditions be awarded to those separated solely for drug abuse. Years of effort have culminated in an orderly, efficient program for identifying drug abusers, evaluating their potential for further service and either attempting to rehabilitate them or eliminating them based upon that evaluation.

The law, too, has changed as will be discussed shortly. However, the Army has failed to take advantage of beneficial rulings. The consequences of this failure have been to put the ADAPCP in conflict with other Army policies and goals, particularly with respect to characterization of discharges.[1]

By its failure to move as the law allowed, the Army has done something which was never intended: it has established drug abusers as a "most favored" class of miscreants.

CHANGES IN THE LAW OF SEARCH AND SEIZURE

A Broader Test for What is "Reasonable"

On 15 January 1985, the Supreme Court decided the case of New Jersey v. T.L.O.[2] ("T.L.O." identifies the juvenile involved as a defendant in the case). This was not a military case, but many of the factors influencing the Court's decision are found in the military environment and, in fact, are present to a significantly greater degree than in the surroundings considered by the Court.

The facts of T.L.O. were that, on 7 March 1980, a teacher in a New Jersey school discovered two girls smoking in a lavatory. Because this was a violation of school rules, she took them to

Assistant Vice Principal Choplick. One of the girls, T.L.O., denied that she had been smoking and stated that she did not smoke at all. Thereupon, Mr. Choplick took T.L.O.'s purse and opened it, discovering a package of cigarettes. As he extracted the cigarettes, he noticed a package of cigarette rolling papers. This, in turn, caused him to look further and he found and seized a small amount of marijuana, paraphernalia, and notes indicating that T.L.O. had been dealing in marijuana. Over T.L.O.'s protests, this evidence was later used against her in a delinquency proceeding. The issue before the Supreme Court was whether this search violated T.L.O.'s Fourth Amendment right to be free from unreasonable search and seizure.

The case raised a number of interesting factual and legal issues which were discussed and disagreed upon at great length by members of the Court. However, for the purposes of this analysis, the following holdings and discussions of the Justices are most important.

At the outset, the Court held that the protections of the Fourth Amendment apply to school children. Furthermore, the Court concluded, school officials are officials of the state and cannot claim that they are merely "surrogates of the parents," thereby avoiding the strictures of the Fourth Amendment.[3]

The Court noted in passing that the Fourth Amendment protects only subjective expectations of privacy which are reasonable and concluded that students have a reasonable expectation of privacy with respect to personal property carried onto the school grounds.[4] Against this interest in privacy, the Court weighed "the substantial interest of teachers and

administrators in maintaining discipline in the classroom and on school grounds."[5] The opinion of the Court (presenting the views of Chief Justice Burger and Justices White and Rehnquist) repeatedly emphasized the need for school officials to maintain discipline[6] and order.[7]

Weighing all of the factors involved, the Court concluded that the search of a student by a school official is reasonable (and, therefore, not in violation of the Fourth Amendment) when:

> there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school (footnote omitted). Such a search will be permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction (footnote omitted).[8]

The two footnotes omitted above contained two important caveats by the Court. The court pointed out that its ruling did not necessarily cover situations in which school officials were acting in conjunction with, or at the request of, law enforcement officials. The Court declined to rule on that issue. Moreover, the Court emphasized that it was not deciding whether individualized suspicion (directed toward a particular individual as opposed to a group) was necessary. Such individualized suspicion was present in this case and the Court reserved for a later date a decision on the reasonableness of a search where individualized suspicion was not present.

Justices Powell and O'Connor concurred with the Court's holding, but wrote an additional opinion to point out that they would have placed greater emphasis on the special characteristics

of an elementary or secondary school which "make it unnecessary to afford students the same constitutional protection granted adults and juveniles in a nonschool setting."[9]

a. Students have a lower expectation of privacy because of long hours of close association, both in class and during recreation, with other students. In addition, the degree of familiarity with, and authority over, students by their teachers is unusually high.

b. The unique relationship between teachers and students distinguishes it from the adversarial relationship between criminal suspects and law enforcement officers.

c. The primary duty of school officials is to educate students and they cannot fulfill their responsibility "without first establishing discipline and maintaining order."[10]

Justice Blackmun also concurred in the holding of the case, but wrote a separate opinion. He pointed out that,

> because drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.[11]

He went on to observe that the "government has a heightened obligation to safeguard students whom it compels to attend school."[12]

Justice Stevens dissented on the ground that the Court's holding was too broad. He argued that it would permit searches based upon reasonable suspicion of the most trivial infraction of school regulations and expressed his view that a better test would be:

> reason to believe that the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process.[13]

He elaborated further by stating that he would view the case differently if Mr. Choplick "had reason to believe that T.L.O.'s purse contained evidence of criminal activity, or of an activity that would seriously disrupt school discipline."[14] It is clear from Justice Steven's further analysis that he considered possession of marijuana to fall within this category.[15]

In summary, the members of the Court focused on various characteristics of the special school setting, including factors which led them to discern a reduced reasonable expectation of privacy on the part of the students and a strong need to maintain order and discipline on the part of the school officials. Six Justices concurred in the Court's holding and, had the "reasonable suspicion" involved drugs, they would have been joined by a seventh Justice.

Application to the Army

Focusing on an Army setting, it is apparent that all of the factors deemed important by the Court in its analysis are present. There is no doubt that soldiers have some reasonable expectation of privacy and that they are entitled to the protections of the Constitution.[16] Weighed against this, it is also clear that the Army has a substantial interest in maintaining discipline and order.[17] In addition, the Army must be ready to perform its mission at both a national and international level.[18] The courts have recognized that drug

abuse by soldiers is a serious threat to these substantial interests.[19]

Furthermore, soldiers have a lower reasonable expectation of privacy than do most civilians. This is an obvious fact of military life and it has been recognized by the courts.[20] Using the factors noted by Justices Powell and O'Connor, soldiers spend long hours in close association with their peers, subordinates and superiors, both on and off duty. Many live in close contact in the barracks. While the degree of familiarity with, and authority over, students by their teachers may be exceptionally high, it does not approach the familiarity and authority involved in military relationships. In addition, it lacks the degree of responsibility held by military leaders of all ranks for the welfare, morale and readiness of their soldiers.

Justices Powell and O'Connor also observed that the relationship between teachers and students distinguished it from the adversarial relationship existing between law enforcement officials and criminal suspects. Although unmentioned by the Justices, it must be noted that teachers do have some law enforcement responsibilities simply by virtue of their responsibility for maintaining order and discipline. Commanders and other military leaders also have law enforcement responsibilities which stem from their other duties and responsibilities. Their law enforcement responsibilities are arguably greater than those of teachers and other school officials, but not significantly so when viewed against the backdrop of the substantially greater familiarity with,

obligation to, and responsibility for, soldiers by their leaders as alluded to above. These responsibilities and duties are of a higher order than those found compelling by the Justices.

Last, Justices Powell and O'Connor particularly emphasized the need for discipline and order to enable school officials to accomplish their primary mission of educating students. Even had the special needs of the military not been repeatedly recognized by the courts,[21] it would require little imagination to conclude that the same observation is even more true with respect to accomplishing military missions in an age of ever-increasing technological sophistication and lethality of weaponry.

Justice Blackmun expressed agreement with the Court's holding, but noted his particular concern for the need to be able to deal with problems of weapons and drugs. There is nothing in any portion of his opinion to indicate that he would find the needs of the military to combat these problems any less compelling than those of school officials.

In addition, Justice Blackmun noted that the government has a special obligation to provide for the safety of children "whom it compels to attend school."[22] Although the government (with very limited exceptions) no longer compels its citizens to provide active military service, it exhorts them to do so voluntarily. Once they have joined, their lives are controlled by their superiors. They are told when and where to live, work, play, eat and sleep. Surely Justice Blackmun would have no difficulty concluding that for these reasons, as well as other sacrifices inherent in military service, the government has at least as great an obligation to provide, within the boundaries of

mission accomplishment, for the safety and welfare of its soldiers.

Last, Justice Stevens dissented on the ground that the Court's holding would permit searches based upon reasonable suspicion that the most minor rule or regulation had been violated. However, he agreed with the ruling insofar as it applied to serious offenses such as drug abuse. In the context of urinalysis tests for drug abuse, there is every reason to believe that he would find the "reasonable suspicion" test acceptable.

In summary, no optimism is necessary to conclude that seven of nine of the Justices participating in the case of New Jersey v. T.L.O. would find the holding applicable to the military environment. Although Chief Justice Burger has retired, his successor, Justice Scalia has hardly been on the cutting edge of liberal legal thought. His basically conservative approach would lead one to believe that he, likewise, would support application of the T.L.O. holding to military situations involving drug abuse. Even if he were to vote the other way, a six-justice majority would still carry the day.

ADMINISTRATIVE PROCEEDINGS AND THE EXCLUSIONARY RULE

Immigration and Naturalization Service v. Lopez-Mendoza

In a related matter, the Supreme Court has continued a trend of balancing costs and benefits to determine whether the exclusionary rule should be applied to administrative proceedings. The latest case in which the Supreme Court

addressed this issue involved a deportation proceeding. In Immigration and Naturalization Service v. Lopez-Mendoza,[23] the Court ruled that the exclusionary rule would not be applied in such a proceeding to preclude admission of evidence concededly taken in violation of the respondent's Fourth Amendment rights. For the purposes of the discussion below, it should be noted that this opinion dealt with two separate individuals, Lopez-Mendoza and Sandoval-Sanchez, despite the name by which the case is identified. The portion of the opinion relevant to this paper actually deals with Sandoval-Sanchez.

Lopez-Mendoza produced an opinion of the Court in which five Justices joined in the first four parts and only four Justices joined in the last part. It produced separate dissenting opinions from the remaining Justices which revealed strong differences of opinion with respect to both the law and the interpretation of the facts. The case has been the subject of considerable comment.[24] For our purposes, it is sufficient to note that a majority of the Court agreed upon several critical issues.

The facts were that Sanchez-Sandoval was detained in a manner which, it was agreed, violated his rights under the Fourth Amendment. Subsequently, he admitted that he had entered the country illegally. At his deportation hearing, he unsuccessfully moved to suppress his admission on the ground that it was a product of his unlawful arrest. He was ordered deported. The Board of Immigration Appeals (BIA) dismissed his appeal. However, the Ninth Circuit Court of Appeals concluded that his arrest was unlawful and that his statements were products of his

arrest. It went on to rule that the exclusionary rule barred the use of these statements against him in a deportation proceeding.[25] The deportation order was reversed. In this posture, the case arrived before the Supreme Court for consideration.

The Supreme Court's opinion included the observations that deportation proceedings were "purely civil"[26] in nature and were held to "determine eligibility to remain in this country, not to punish for unlawful entry, though entering or remaining unlawfully in this country is itself a crime."[27] The Court then noted several other differences between deportation proceedings and criminal proceedings such as the fact that guilt is not adjudicated and punishment for a crime is not imposed.[28] It observed that a lower standard of proof is utilized and otherwise voluntary statements are not excluded because of a lack of Miranda warnings.[29] The Court summarized by stating, "In short, a deportation proceeding is intended to be a streamlined determination of eligibility to remain in this country, nothing more."[30]

The Court then went on to note its rationale in a previous case:

> Imprecise as the exercise may be, the Court recognized in Janis that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefits side of the balance "the 'prime purpose' of the (exclusionary) rule, if not the sole one, 'is to deter unlawful police conduct.'" (Citations omitted.) On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.[31]

While acknowledging that the deterrence "benefit" of excluding illegally seized evidence in a deportation proceeding was hard to assess, the Court noted that the evidence would still be excluded in a criminal proceeding and that fact might have some deterrent effect. The Court identified a number of factors which indicated that application of the exclusionary rule in deportation proceedings was likely to have little impact on the future conduct of Immigration and Naturalization Service (INS) officials. These included the facts that deportation would still be possible without the excluded evidence; INS agents know that only a small percentage of aliens apprehended bother to contest their deportation; the INS has its own schemes for deterring Fourth Amendment violations by its personnel and; finally, other remedies such as declaratory judgments are available. In summary, the Court concluded that the "benefits" in terms of deterring future unlawful conduct would be very slight if the exclusionary rule were applied to prohibit admission of unlawfully seized evidence in deportation proceedings.[32]

However, the Court observed, the costs to society of excluding such evidence would be high. They would include returning to the streets persons whose mere presence was a continuing criminal offense. Significant difficulties would be generated for a simple, streamlined, high-volume INS operation. Last, such a rule might exclude a large amount of evidence which had been <u>lawfully</u> obtained simply because, with the number of apprehensions made by each INS agent, the agents would be unable to remember sufficient details to testify precisely to all

factors necessary to show that evidence had been seized in accordance with constitutional requirements.[33]

Weighing the benefits to be derived from application of the exclusionary rule against the costs of such application, the Court found the balance in favor of not applying the rule.[34]

Some commentators have suggested that the Court has demonstrated a clear reluctance to expand the application of the exclusionary rule beyond criminal or "quasi-criminal" proceedings.[35] Some favor this approach arguing that, in fact, the exclusionary rule ought to be abolished altogether.[36] Others lament the trend, asserting that the Court is failing in its obligation to protect Fourth Amendment rights.[37] Whatever the merits of these contentions, it appears that, ab ent outrageous conduct or widespread abuse by government officials,[38] the Court is inclined to find the cost to society of expanding applicability of the exclusionary rule disproportionately high.

Garrett v. Lehman

Interestingly enough, the only reported military case to cite Lopez-Mendoza was decided by the Ninth Circuit Court of Appeals, the same court that was reversed by the Supreme Court's Lopez-Mendoza decision. The plaintiff's brief in the case of Garrett v. Lehman[39] was filed one week before the Supreme Court announced Lopez-Mendoza and the government, in its responding brief, relied upon Lopez Mendoza in support of its position.

Garrett involved the case of a marine who had been convicted by court-martial for possession, and introduction onto a military base, of marijuana. On appeal, the Navy-Marine Court of Military

Review reversed the conviction on the ground that the evidence used (marijuana and a pipe) to convict Garrett should have been suppressed during trial because it was seized in violation of the Fourth Amendment.[40]

Thereafter, Garrett was considered for separation by an administrative discharge board. The evidence previously considered at trial was then considered by the board over Garrett's objection. Subsequently, he was discharged with an Other than Honorable Discharge.

Garrett then attacked the discharge proceeding in federal district court claiming, among other things, that the exclusionary rule should have precluded receipt of the evidence in the discharge proceeding. The district court denied relief, ruling in favor of the government.[41] Garrett appealed to the Ninth Circuit, again raising the issue of the applicability of the exclusionary rule.

The Ninth Circuit had no difficulty concluding that the holding of Lopez-Mendoza controlled the outcome on the exclusionary rule issue. The court held that administrative discharge proceedings were civil, not criminal or "quasi-criminal" in nature. Tracking the factors utilized by the Supreme Court in Lopez-Mendoza, it noted that these proceedings were prospective in nature -- they were not intended to punish for past wrongs, but to determine eligibility for continued service. The fact that Garrett received an Other than Honorable Discharge required no different result because it was given "because of his unfitness for future duty as shown by his

commission of a crime - not as punishment for his past behavior."[42]

The Ninth Circuit then proceeded with a balancing of benefits and costs. It addressed at some length the need for discipline in the Armed Forces and the disruptive effect that application of the exclusionary rule would have upon the military and concluded that this was a price too high to pay.[43] In particular, the court noted that one effect would be to require the Marine Corps to return to active duty a person who had used marijuana and possessed it for sale on a military base.

The Ninth Circuit closed its remarks on the exclusionary rule issue with the following observation:

> We do not have the special training or knowledge to fathom the extent of the damage to military discipline which would result from imposition of the exclusionary rule in administrative discharge proceedings. We are certain, however, that the cost far exceeds the dubious "additional marginal deterrence" that might result from such an intrusion on military authority and discipline.[44]

I'm OK, You're OK

The Army has, for a number of years, operated under the assumption that, with respect to searches and seizures, only evidence seized in "bad faith unlawful searches" was subject to exclusion from administrative elimination proceedings.[45] In view of the Supreme Court's actions, and that of the Ninth Circuit, the Army's view [illegible].

CONCLUSIONS

The Supreme Court has adopted the position that, in the context of searches conducted at elementary and secondary schools, a search will pass constitutional muster if it is based upon reasonable suspicion that it will produce evidence of a violation of the law or school regulations. The factors relied upon by the Court are even more apparent in the military. This less rigorous requirement is applicable to urinalysis testing as well as other areas.

In addition, it appears that, insofar as military administrative separation proceedings are concerned, the exclusionary rule does not loom large as a threat in those instances in which the benefit of superior knowledge or detached hindsight may reveal that a commander, in good faith, seized evidence under circumstances which are later determined to have violated the Fourth Amendment.

Recognizing this posture of the law, the next task is to review the current provisions of the Limited Use Policy to determine if it contains restrictions which are no longer necessary.

CHAPTER VIII

ENDNOTES

1. US Department of the Army, Army Regulation 635-100, paragraphs 1-4 and 1-5 and US Department of the Army, Army Regulation 635-200, Chapter 3 (hereafter referred to as AR 635-100 and AR 635-200) describe the manner in which the character of service should be determined and the type of discharge which should be given based upon the character of service. To the extent that the Limited Use Policy gives broader protection than is necessary, it prevents consideration of relevant evidence in deliberations on character of service and may result in the granting of discharges which are inappropriate in view of the true character of the servicemembers overall performance. In many cases, it may result in receipt of benefits (based upon type of discharge) which are unearned.

2. New Jersey v. T.L.O., 495 U.S. 325, 105 S.Ct. 733 83 L.Ed.2d 720, (1985).

3. 105 S.Ct. at 741.

4. Ibid., p. 742.

5. Ibid.

6. Ibid., p. 742-743.

7. Ibid., p. 742-744.

8. Ibid., p. 744.

9. Ibid., p. 747.

10. Ibid., p. 748.

11. Ibid., p. 749-750.

12. Ibid., p. 750.

13. Ibid., p. 753.

14. Ibid., p. 766.

15. Ibid., p. 747.

[illegible] Wallace, 475 U.S. 296, 103 S.Ct. 2362, 76 [illegible] Harper v. [illegible], 417 U.S. 733, 94 S.Ct. 2547,

41 L.Ed.2d 439 (1974); Schlesinger v. Councilman, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975).

17. Schlesinger v. Councilman, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975); Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); Goldman v. Weinberger, 475 U.S. ____, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986).

18. The Committee for GI Rights v. Callaway, 518 F.2d 466, 476.

19. Ibid; Murray v. Halderman, 16 M.J. 74 (1983).

20. 518 F.2d at 477.

21. See endnote 17.

22. 105 S.Ct. at 750.

23. 468 U.S. 1032, 104 S. Ct. 3479 82 L. Ed. 778, (1984).

24. See, for example, John Teeples, "The Uncertainty of Applying the Exclusionary Rule to Civil Proceedings: Immigration and Naturalization Service v. Lopez-Mendoza," Detroit College of Law Review, Summer 1985, pp. 215-251; and, Bernard A. Nigro, Jr., "The Exclusionary Rule in Administrative Proceedings," The George Washington Law Review, May 1986, pp. 564-590.

25. 468 U.S. at 1038.

26. Ibid.

27. Ibid.

28. Ibid.

29. Ibid., p. 1039.

30. Ibid.

31. Ibid., p. 1041.

32. Ibid., pp. 1042-1046.

33. Ibid., pp. 1049-1050.

34. Ibid., p. 1050.

35. Kathleen K. Bach, "The Exclusionary Rule in the Public School Disciplinary Proceeding: Answering the Question after New Jersey v. T.L.O.," Hastings Law Journal, July 1986, pp. 1133-1170; Bernard A. Nigro, Jr., "The Exclusionary Rule in Administrative Proceedings," The George Washington Law Review, May 1986, pp. 564-590.

36. James Duke Cameron and Richard Lustiger, "The Exclusionary Rule: A Cost-Benefit Analysis," Federal Rules Decisions, 1984, Vol. 101, pp. 109-159.

37. John Teeples, "The Uncertainty of Applying the Exclusionary Rule to Civil Proceedings: Immigration and Naturalization Service v. Lopez-Mendoza," Detroit College of Law Review, Summer 1985, pp. 215-251.

38. 468 U.S. at 1050, 1051.

39. 751 F.2d 997 (1985).

40. Ibid., p. 1000.

41. Ibid., p. 1001.

42. Ibid., p. 1003.

43. Ibid., p. 1004.

44. Ibid., p. 1005.

45. US Department of the Army, Army Regulation 15-6 (hereafter referred to as AR 15-6), paragraph 3-2c states:

> c. Limitations. Administrative proceedings governed by this regulation generally are not subject to exclusionary rules precluding the use of relevant evidence. However, the following limitations do apply with regard to evidence which may be accepted and considered in an investigation or board proceeding governed by this regulation.
> . . . . . .
>
> (7) Bad Faith Unlawful Searches. If a member of the Armed Forces, acting in an official capacity (e.g. military policeman, commander), conducted or directed a search which he knew was unlawful under the Fourth Amendment, United States Constitution, as applied to the military community, evidence obtained as a result of that search may not be accepted or considered against any respondent whose rights were violated by the search. In all other cases, evidence obtained as a result of any search or inspection may be accepted.

AR 15-6 is made applicable to enlisted separation proceedings by paragraph 2-10e, AR 635-200. Paragraph 2-11 of AR 635-200, which addresses evidentiary matters, contains nothing which conflicts with the above-quoted portion of AR 15-6.

Although the regulation on officer separations, AR 635-100, does not specifically incorporate the provisions of AR 15-6, its frequent references to AR 15-6 certainly indicate the intent to do so.

CHAPTER IX

ANALYSIS OF THE LIMITED USE POLICY AND PROPOSALS FOR CHANGE

EVIDENCE RESULTING FROM EMERGENCY MEDICAL TREATMENT

One of the most compelling provisions of the Limited Use Policy involves evidence taken in conjunction with emergency medical treatment. The application of the Limited Use Policy to evidence obtained as a result of emergency medical care for actual or possible drug or alcohol overdose (unless such treatment results from apprehension by law enforcement officials) is not required by statute, court decision or Department of Defense Directive. However, it represents a sound decision at Department of the Army level, based upon experience, to offer such protection in order to eliminate a substantial barrier (fear of prosecution or separation with an Other than Honorable Discharge) to soldiers' submission of themselves or their friends for emergency medical care [para 6-4a (5), AR 600-85].

The logic supporting that decision is still sound and this provision of the Limited Use Policy should be retained in its present form. Likewise, because the underlying objective of this provision is not furthered by providing protection in cases involving emergency medical care resulting from apprehension by law enforcement officials, this exception to the policy's application should also be continued.

ADMISSIONS AND URINALYSIS INCIDENT TO PARTICIPATION IN ADAPCP

A major assumption underlying the ADAPCP is that it is worthwhile to encourage voluntary submission for treatment and rehabilitation. If that assumption is correct (and, for many reasons, it seems to be), then the Department of Defense should be willing to take reasonable steps to remove impediments to volunteering. One such step is application of the Limited Use Policy to statements and the results of urinalysis or breath tests conducted incident to application for, and voluntary enrollment in, ADAPCP. US Department of Defense, Department of Defense Directive 1010.1[1] (DOD Directive 1010.1) and AR 600-85[2] now grant this protection and it should be continued. However, the same logic does not support extending the protection to the results of urinalysis tests which are performed after enrollment in the program.

The Limited Use Policy does not apply to admissions concerning use of drugs or possession of drugs incident to personal use occurring after the date of initial referral to ADAPCP for treatment.[3] Therefore, rights warnings problems aside, any admissions of use or possession occurring after the date of initial referral may be used for any purpose -- including court-martial or separation from service with an Other than Honorable Discharge.

In spite of the fact that such admissions are not protected, limited use continues to apply to the results of urine and breath tests taken during the course of the ADAPCP program.[4] Such coverage is illogical because it hinders the government and

provides no offsetting benefits. It does little, if anything, to encourage voluntary enrollment in ADAPCP.[5] Even if this protection does have some effect in terms of encouraging volunteers, the government is paying a large price for a very small return. Statistics maintained by the US Army Drug and Alcohol Operations Agency reflect that, during FY84, FY85 and FY86, the percentages of personnel enrolled in ADAPCP who were volunteers were only 16.26%, 16.25% and 17.10%, respectively (Appendix AN).

In addition to being of dubious value in encouraging voluntary enrollments in ADAPCP, application of the Limited Use Policy to the results of urinalysis tests conducted during the program certainly makes no contribution to the overall effectiveness of the treatment program. Removal of this coverage would not impact upon a soldier's ability to speak honestly with his or her counselor (thereby increasing the value of counseling) because, as noted above, admissions made to counselors concerning drug use or possession of drugs incident to personal use occurring after the date of initial referral are not protected anyway. The effect of the current provision is to remove an incentive for ADAPCP clients to discontinue drug use by promising to shield continuing users from the more serious consequences of their misconduct. If providing such coverage to volunteers (at whom the program is aimed) is inappropriate, it is even less appropriate to extend the protection to non-volunteers who comprise the majority of participants.[6]

DOD Directive 1010.1, authorizes the conduct of mandatory urinalysis testing "in conjunction with a service member's

participation in a DoD drug treatment and rehabilitation program." It states that such tests are permissible as inspections or intrusions for valid medical purposes. If that conclusion is correct -- and it certainly appears to be -- then there is no legal reason why the results of such tests should not be admissible in evidence.

There is no legal impediment to eliminating application of the Limited Use Policy to the results of urinalysis or breath tests taken in conjunction with participation in ADAPCP. As noted above, application of the Limited Use Policy in such circumstances limits the government's use of reliable, relevant evidence, serves no useful function by encouraging volunteers, and may be counterproductive in terms of providing a disincentive to rehabilitation for soldiers enrolled in the program. Therefore, the provisions of DOD Directive 1010.1 and AR 600-85 should be modified to delete this coverage.

FITNESS FOR DUTY

A commander may direct a urine or breath test in order to determine a soldier's fitness for duty and the need for counseling, rehabilitation, or other medical treatment provided there is a "reasonable suspicion" that the soldiers has used a controlled substance.[8] The Limited Use Policy applies to the results of such tests.[9] Here, too, a change would be beneficial.

As with the provisions concerning urinalysis and breath tests taken in conjunction with participation in ADAPCP, this portion of the Limited Use Policy is perpetuated at considerable

cost to the government, it does nothing to encourage volunteers, and it is not required by law.

At the time that this provision was originally adopted,[10] it was based upon a sound analysis of the law as it existed at that time. However, the choice of criteria utilized by the Army to permit the test, "reasonable suspicion", proved prophetic. In view of the Supreme Court's decision in T.L.O., there is now a more solid legal basis (instead of the previous guarded optimism) for concluding that evidence obtained in fitness for duty tests is admissible for any purpose and that its offer in criminal or administrative proceedings would survive challenges on a constitutional basis.[11] The provisions of DOD Directive 1010.1 and AR 600-85 should be amended to delete the limitations on the use of evidence obtained through tests to determine fitness for duty and the need for counselling, rehabilitation, other medical treatment, or the need for enrollment in ADAPCP.[13]

CONCLUSION

As discussed in Chapter VIII and the preceeding portions of this chapter, both the Army and the law have changed since the implementation of the Army's drug and alcohol program in 1971. The population of the Army is different, the drug problem is different, and the needs of the Army have changed. Changes in the law have made it possible for the Army to relax many of the restrictions under which it has labored. Several provisions of the Limited Use Policy still serve useful purposes and are in consonance with the Army's overall policies and objectives. Other provisions, identified earlier in this chapter, are harmful

to the Army's interests and serve no worthwhile purpose. They are vestiges of the days when the law of search and seizure was more restrictive and they should be abandoned.

If the recommendations contained in this chapter are implemented, the Limited Use Policy will apply only to a soldier's self-referral to ADAPCP, certain admissions concerning alcohol abuse and use or possession of drugs incident to personal use occurring prior to date of initial referral to, or entry in, ADAPCP, and information concerning alcohol and drug abuse or possession of drugs incident to personal use obtained as a result of emergency medical treatment.[14] This would limit the application of the policy to situations in which it served some legitimate purpose and increase the amount of relevant evidence available for appropriate consideration in both courts-martial and separation actions.

All of the restrictions which should be eliminated are embodied in DOD Directive 1010.1. Therefore, the Army should take the initiative to induce the Department of Defense to remove these restrictions. The practical arguments and legal rationale in support of such proposed changes are relatively simple and, in the author's opinion, free of controversial content. Finally, there is no need to develop a program or to draft and justify new provisions -- all that must be done is to delete several provisions which are now obsolete.

The process of amending Army regulations will be considerably more tedious due to the need to carefully review and redraft related provisions within AR 600-85, AR 635-200, and,

possibly, AR 635-100 to insure that all are properly synchronized.[15] Nevertheless, the need for change is apparent, the means are available and the climate is right. The effort should be undertaken immediately. The result will be a simpler, more effective and efficient program which is more clearly aligned with the needs of today's Army.

CHAPTER IX

ENDNOTES

1. Paragraph 2, US Department of Defense, Department of Defense Directive 1010.1, 28 December 28, 1984, (DOD Directive 1010.1) (Appendix AM).

2. Paragraph 6-4a (1) and Table 6-1, AR 600-85.

3. Paragraph 6-4a (3) and (4) and Table 6-1, AR 600-85.

4. Paragraph E. 1. a. (3) (b), DOD Directive 1010.1; Paragraph 6-4a (1) and Table 6-1, AR 600-85.

5. Personnel who volunteer for the program are required to receive a detailed explanation of the Limited Use Policy (Paragraphs 3-7a and 3-10, AR 600-85). Consequently, they should be aware that any admissions or results of urinalysis tests administered during the program may be utilized to support their separation from the service. In addition, they are subject to prosecution (or elimination with an Other Than Honorable Discharge) based upon admissions of continued drug use during the program. They continue to be subject to the entire spectrum of non-Limited Use means (inspection, probable cause search, routine medical examination, etc.) of gathering evidence. The Limited Use Policy does not purport to protect them from the use of such evidence in federal or state criminal prosecutions or in civil cases (i.e., divorce or child custody disputes). Under these circumstances, it seems very unlikely that any significant number of legitimate volunteers (those without any ulterior motive) would be deterred from enrollment by knowledge that the results of periodic urine tests would not be covered by the Limited Use Policy.

6. It should be noted that the limitation on the use of admissions (as opposed to urinalysis evidence) concerning drug use or possession of drugs incident to personal use occurring prior to the date of initial referral to ADAPCP applies to volunteers and non-volunteers alike. While the logic supporting such protection to volunteers does not apply to non-volunteers, the protection should continue to be provided to both. Development of separate rules, based upon reason for enrollment in the ADAPCP, would exacerbate the difficulties already being experienced in understanding and applying the Limited Use Policy. Moreover, this protection may facilitate communications between counselors and clients and, thereby, enhance prospects for rehabilitation -- a worthy goal even for non-volunteers.

7. Paragraph E.1.a. (3)(b), DOD Directive 1010.1.

8. Paragraph E.1.a.(3)(b), DOD Directive 1010.1; Paragraphs 6-4a (1), 10-2a, and 10-3a (1); Table 6-1, AR 600-85. Paragraph 10-2 states that physicians may also order a test to determine "fitness for duty." However, paragraph 10-3b, which specifically addresses the reasons for which physicians may direct tests, does not mention "fitness for duty," nor does the portion of Table 6-1 dealing with physician-directed tests.

9. Paragraph E. 2. a., DOD Directive 1010.1; Paragraph 6-4a (1) and Table 6-1, AR 600-85.

10. Secretary of Defense Memorandum, Subject: Alcohol and Drug Abuse, 28 December 1981 - Appendix T.

11. See the discussion of T.L.O. in Chapter VIII, pages 57-64.

12. Paragraphs 6-4a (1), 10-2a and 10-3 a-b; Table 6-1: AR 600-85.

13. Regardless of any changes made in the Limited Use Policy, paragraph 10-3 b (1) should be amended to change the word "suspects" to "has a reasonable suspicion", thereby bringing the standard in line with the language of the Supreme Court in T.L.O..

14. Paragraph 6-4a, AR 600-85. An additional protection concerning tests taken incident to "mishap or safety" investigations (not mentioned in AR 600-85) is described in paragraph E.1.a.(3)(c), DOD Directive 1010.1.

15. US Department of the Army, Army Regulation 190-22, which deals with search and seizure, is already overdue for revision. It should be updated to include provisions for searches based upon "reasonable suspicion". At a minimum, paragraph 2-7d(2)(d) should be revised to make it clear that, at least in the case of urinalysis, "reasonable suspicion" is sufficient.

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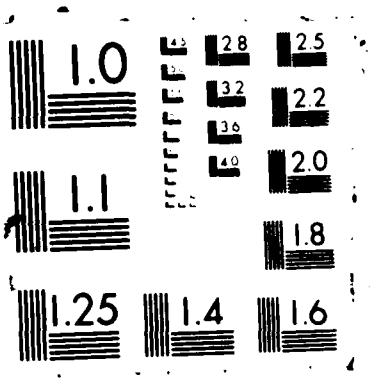
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