

10 FEB 1981

MEMORANDUM FOR HONORABLE EDWARD C. SCHMULTS  
Deputy Attorney GeneralRe: Execution of Warrants and Subpoenas  
by United States Marshals

This responds to former Deputy Attorney General Renfrew's request of November 25, 1980 for our opinion whether the United States Marshals ("Marshals") are authorized to execute military warrants and subpoenas. We conclude that the "Memorandum of Record" prepared by the Department of the Army ("the Army") and dated May 8, 1980 reflects a detailed and accurate analysis of the law and agree with its conclusion that the Marshals are authorized to execute process issued in a court-martial under 10 U.S.C. § 846. Rather than repeat that analysis, we will add only the following comments regarding the contrary arguments raised by the Marshals.

1. We have discovered nothing to negate the Army's conclusion that a process issued by a court-martial is "process . . . issued under the authority of the United States . . .," 28 U.S.C. § 569(b), which process the Marshals must execute. See also 12 Op. Att'y Gen. 501 (1868).

2. The Army's courts-martial may issue process to compel the attendance of witnesses "similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . . ." Although the use of warrants of attachment has fallen into desuetude, the inherent power of the federal courts to issue them has not lapsed. See United States v. Anfeld, 539 F.2d 674, 677 (9th Cir. 1976); United States v. Shibley, 112 F. Supp. 734, 751-52 (S.D. Ca. 1953).

3. The President has stated in the Executive Order which constitutes the United States Manual for Courts-Martial that "[w]hen it becomes necessary to issue a warrant of attachment,

the trial counsel will . . . , when practicable, effect execution through a civil officer of the United States." Manual for Courts-Martial, United States ¶ 115(d)(3) (rev. ed. 1969). If the execution of the military warrants were to become too burdensome to the Marshals, the Attorney General could order the Marshals to desist and bring the problem to the attention of the President and urge him to amend the Executive order. \*/

4. The Director's letter of July 8, 1980 to the Army states that the Army "ignores the role of U.S. Marshals as officers of the United States District Courts and United States Courts of Appeals, under the supervision of the Attorney General, 28 U.S.C. § 569(a)." If this statement is meant to say that the Marshals may only serve the process of courts expressly listed in 28 U.S.C. § 569(a), it is inaccurate. The Marshals serve the subpoenas of both the Court of Claims, see 28 App., Ct. of Claims R. 123(e)(1), and the United States Tax Court, see 26 App., U.S. Tax Ct. R. 21(b)(3), neither of which is listed in 28 U.S.C. § 569(a). Nor is it accurate if it is meant to say that the Marshals may only serve the process of courts set up under Articles I or III of the Constitution. The Marshals may also serve "civil investigative demands" issued by the Attorney General or the Assistant Attorney General in charge of the Antitrust Division in an antitrust investigation. 15 U.S.C. § 1312(d)(1).

We conclude, therefore, that the Marshals are authorized to execute process issued in a court-martial held pursuant to 10 U.S.C. § 846.

Larry L. Simms  
Acting Assistant Attorney General  
Office of Legal Counsel

\*/ The Marshals claim, without citing any figures, that they are too burdened to serve the attachment warrants. This assertion may raise a policy issue which, as appropriate, could be the subject of discussion with the Department of Defense and, as noted above, with the President. It does not, however, give rise to any legal question regarding the Marshals authority.