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Value Engineering in Military Procurement: The Old Suggestion Box?

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Introduction.

The concept of value engineering (VE) was articulated first in the early 1960's as a method of providing incentive to contractors to submit cost saving ideas. The basic clauses and regulation first appeared in the Armed Services Procurement Regulation [hereinafter ASPR] in December 1962, with subsequent revision in the November 15, 1963, and April 16, 1973 editions of ASPR. Defense Procurement Circular 121 issued 10 May 1974 became the current Armed Services Procurement Regulation pertaining to value engineering on 1 September 1974.[1] The language of the current clauses and regulation accomplishes a marked departure from the previous regulatory language. This article is intended to acquaint the reader with the meaning and application of the present value engineering clauses and regulation, contrast the same to the predecessor, probe the most common areas of legal dispute and suggest the present viability of previous Armed Services Board of Contract Appeal decisions.

Purpose.

> "The value engineering clause is, in effect, the functional equivalent of the old employee suggestion box, but with a prescribed system of rewards for valuable suggestions which are adopted. And it is well-established that the value engineering clause is to be liberally construed to carry out its purpose of encouraging contractors to develop and submit cost savings proposals." [2]

Value engineering provisions serve the purpose of providing incentives to government contractors to explore avenues of cost saving to the government by providing that a portion of any cost savings will be shared between the contractor and the government. Through the correct use of value engineering, the armed forces may obtain needed supplies and services at the lowest cost and the contractor realize significant monetary rewards.

The basic purpose underlying value engineering is described as:

> "* * * the elimination or modification of anything that contributes to the cost of a contract item or task that is not necessary for needed performance, quality, maintainability, reliability, or interchangeability. Specifically, VE as contemplated by this Part, constitutes a systematic and creative effort, not required by any other provision of the contract, directed towards utilizing each contract item or task to insure that its essential function is provided at the lowest overall cost. Overall cost may include but need not be limited to, the costs of acquiring, operating, and logistically supporting an item or system." [3]

Value Engineering Described.

Not every proposal which if implemented by the government would result in cost savings is value engineering. Reductions in overall cost attributable solely to deliverable end item quantities, or a change in research and development end items or test quantities due solely to results of previous testing under the contract, or solely on a change of the contract type are not compensable as value engineering.[4]

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Thus, reduction of a contract quantity from 10 items to five items is not value engineering. However, use of the word "solely" suggests that overall cost savings attributable to changes in quantity may be value engineering, if based in part on valid and defined value engineering criteria.

ASPR contains three mechanisms for implementing the value engineering concept. (1) Use of the VE program requirement contract clause (VEPR).[5] (2) Use of the VE incentive clause (VEI).[6] (3) Review of unsolicited value engineering change proposals.[7]

All three clauses further the same purpose; to-wit: reduction of overall contract costs without impairment of essential function.[8] The VEPR differs from the VEI clause in that it mandates a systematic value engineering effort as part of the contract, whereas the VEI clause operates strictly as an inducement.[9]

A contractor operating under a VEPR clause apparently is paid twice, once as an item of work in the contract for undertaking a continuous value engineering program and again when a Value Engineering Change Proposal (VEPR) resulting from the value engineering program, is accepted. The policy of the Department of Defense to insure critical reappraisals of contract requirements with a view toward cost savings justifies providing contractors with substantial financial incentives to undertake value engineering. Early Department of Defense policy in this regard was stated as follows:

> "It is Department of Defense policy to continuously review systems against 'design to' requirements for cost acquisition and ownership. To exercise such cost restraint, management mechanisms and tools are necessary to challenge unnecessary requirements. Value engineering is one of the management tools available for this purpose." [10]

Consistent with this directive, the current regulation states the objective for inclusion of a VEPR in a contract as being:

> "* * * to reduce *development, production, or use costs* by requiring the contractor to establish a VE program in accordance

with MIL-V-38352 or as otherwise specified in the contract. *The clause should be used when a sustained VE effort at a predetermined level is desired.* The VE program requirement shall be shown as a separately priced line item in the contract and may apply to all or to selected phases of contract performance. This clause is designed primarily for contracts covering conceptual, validation and full scale development phases of a program." (Emphasis supplied.) [11]

Thus, the government is willing to pay the contractor for undertaking the value engineering program to insure it will receive the early and full benefit of the cost savings which the contractor may be able to effect.

"It is DOD policy: (a) to provide contractors with a substantive financial incentive to undertake VE on the premise that both DOD and the contractor will benefit. Accordingly, the contractor should be assured (1) a fair proportion of the savings, (2) that his proportion will apply to a substantial base, and (3) objective and expeditious processing of proposals submitted, and

"(b) To encourage subcontractor participation through extension by prime contractors of VE incentives to appropriate subcontractors.

"VE incentive payments do not constitute profit or fee subject to the limitation imposed by 10 USC 2306(d)." [12]

By contrast the VEI clause does not require any specified value engineering effort on the contractor's part as an item of work, but merely holds forth the prospect for reward if the contractor develops and submits meritorious cost saving proposals.[13]

The contracting officer decides, within certain prescribed confines, whether a contract is suitable for value engineering.[14] A VEI clause is mandatory for supply and service contracts in excess of $100,000.00 and all fixed price construction contracts.[15] However, the head of the procurement agency may determine a minimal potential exists for cost reduction and excuse use of the VEI clause. The use of the VEI clause in supply and service contracts amounts under $100,000.00 is optional.[16] If a VEI clause is present in the prime contract, its use is mandatory in subcontracts of over $100,000.00 and optional in subcontracts of under that amount.[17]

The VEI clause may be excluded if in conflict with other contract requirements and objectives in contracts for advanced development or engineering development or cost plus incentive fee or cost plus award fee type contracts.[18]

The incentive clause must be excluded from: contracts for research or exploratory development; contracts for engineering services from nonprofit organizations; cost reimbursement type contracts other than cost plus incentive fee or cost plus award fee type contracts; contracts for architect engineer services; contracts containing a VEPR clause except as provided in ASPR 1-1702.3(b); contracts providing for product or component improvement unless restricted to areas not covered by provisions for product or component improvement, contracts for commercial items being procured without invoking special military requirements and specifications; and contracts for personal services.[19]

ASPR now provides a specific procedure for consideration of unsolicited VE proposals. The prior ASPR provision merely authorized acceptance of such proposals, but did not define specific requirements for acceptance or payment.

An unsolicited value engineering proposal may be submitted on any contract. There is no requirement that the person submitting the VECP have any connection with the contract. The proposal must reduce costs without affecting essential functions and must contain certain minimal information.[20] If the procurement activity accepts an unsolicited VECP, a separate purchase agreement will be negotiated.[21] However, the contract price for an unsolicited VECP is limited to the larger of 20 percent of the net savings on current contracts, or 20 percent of the estimated average savings to the department as determined by the purchasing office.[22]

Methods of Cost Sharing.

A contractor submitting a VECP which is accepted shares in the net reduction of cost. There

are two basic kinds of savings which can result from a valid VECP. The first of these savings types is acquisition savings.[23] The second type is described as collateral savings.[24]

Acquisition savings are savings which accrue on supply or service contracts and include instant contract savings, concurrent contract savings, and future contract savings.[25] The instant contract is, of course, the contract under which the VECP was submitted. Concurrent contracts are other contracts of the purchasing office for essentially the same item, while future contracts are subsequent contracts for essentially the same item.[26]

Collateral savings are measurable net reduction in the agency's overall documentable projected costs of operation, maintenance, logistic support, or government-furnished property resulting from the VECP regardless of acquisition costs.[27]

Whether a contractor will share in a particular type of savings depends on the language of the value engineering clause in the contract. Absent a specific provision allowing a particular savings such as future contract savings, a contractor has no enforceable right to such savings.[28]

The clauses and regulation contain a formula for determining the contractor's share of the instant, concurrent, and future contract savings and collateral savings.[29] The sharing *rates* for both acquisition, savings, and collateral savings are set forth as a percentage in the regulation and clauses.[30]

The sharing *base* is limited to contracts of the "purchasing office" or its successor unless expanded by specific contractual language.[31] The prior regulation contained a broader sharing base, which was described in terms of contracts by the "department".[32]

The sharing *period* begins on the date of first delivery of the item incorporating the VECP. The contractor shares in the savings on all effective end items scheduled for delivery within three years or until the originally scheduled delivery date of the last affected end item under the instant contract, whichever is later.[33] The predecessor regulation specified the date of approval of the VECP as the beginning of the sharing period.[34]

The elements included in the formula for computation of the contract savings and consequent share to the contractor vary with the type of saving. The regulation and clauses must be closely adhered to in such computations.

Prior to the 1974 change, only the contractor's cost of implementing and developing the VECP was subtracted from the contract price to get the sum against which the savings ratio is applied. The present regulation, however, adds the government's cost of implementing and developing the VECP with the contractor's costs. This, of course, results in a lesser total from which the contractors' share is computed.[35]

Elements of a Valid VECP.

Previous to September 1, 1974, a valid VECP contained the following elements:

(1) The proposal must be identified as a value engineering change proposal when submitted to the contracting officer.[36]

(2) The proposal must be initiated and developed by the contractor.[37]

(3) The proposal must involve some change to the drawings, design, specifications or other requirements of the contract.[38]

(4) The proposal must require, in order to be applied to the contract, a change to the contract.[39]

(5) The proposal must result in savings to the government by providing a decrease in the cost of performance of the contract without impairment of the services provided by the contractor.[40]

The present value engineering clauses and regulations dispense with the specific language of (1), (2), and (3), but retain (4) and (5) in language similar to that of the predecessor statute.[41]

Significantly, the predecessor VEI clause was accorded a pragmatic construction favorable to the contractor. The result was pinned to the broadly stated purpose of value engineering in the prior clause and regulation.[42] The language of the prior value engineering provisions is in-

structive for two reasons: (1) the prior administrative decisions conferred specific meaning to certain phrases as a part of a factual setting thus offering some degree of predictability, and (2) in order to understand what, if any, change the 1974 regulation has accomplished it must be contrasted to that which preceded.

The 1974 changes eliminated much of the grand declaratory policy and purpose language previously quoted and relied upon by the Armed Services Board of Contract Appeals [hereinafter "Board" or ASBCA].[43] The Board's decisions construing the retired language of the predecessor clause and regulation are obviously of diminished value in interpreting the present provision. Still, nothing in the "new" regulation changes the stated purpose or policy. The same purpose and policy are stated more tersely.[44] The functional characterization of value engineering as the equivalent of the old employees' suggestion box fits comfortably with the present regulation.

Although the basic purpose remains identifiable and unchanged speculation exists regarding whether the specific language changes will permit the ASBCA to continue to be:

> "Guided by the cases previously dealing with this clause and emphasis placed upon the purpose of the clause."[45]

Administrative Board Construction.

Preparatory to construing the language of the predecessor clauses and regulation, the reviewing Board was often faced with a threshold inquiry regarding the purported unreviewability of the contracting officer's decision on a proffered VECP.[46]

The predecessor ASPR clause stated:

> "The decision of the contracting officer as to the acceptance of any such proposal under this contract (including the decision as to which clause is applicable to the proposal if this contract contains both a 'value engineering incentive' and a 'value engineering program requirement' clause) shall be final and shall not be subject to the 'disputes' clause of this contract."[47]

The present clauses are virtually identical in terminology and hence, earlier decisions are determinative.[48]

The Armed Services Board of Contract Appeals in *Covington Industries, Inc.* rejected the notion of finality expressed in the pre-1974 standard VE clause by stating:

> "We are of the view that Paragraph 1-C recognizes the proper procurement discretion of the contracting officer to accept or reject any change proposal without recourse by the contractor to the disputes procedure, but that it does not purport to establish such immunity for any contractual disputes arising *after* the *acceptance* of the VEI change proposal." (Emphasis added.)[49]

The contracting officer's refusal to render a decision on a proferred VECP in *McDonell Douglas Corp.* did not bar Board review. The Board merely cited the rule which specifies that a contracting officer must render a decision on any question arising under the contract and remediable under the contract regardless of the type of issue involved.[50]

The contracting officer's alternatives when confronted with a VECP in proper form are:

(1) Acceptance in whole or in part; or

(2) Rejection.

Constructive acceptance of a VE proposal will prevent application of the non-reviewability provision. In *North American Rockwell Corp.* the Board extended Covington to a situation where the government changed a contract after award to include a requirement for a test virtually identical to that previously submitted by the contractor as a VECP. Under the circumstances, a constructive acceptance was found, and hence the language of the clause was not offended.[51]

It is now clear that:

> "Whether a VECP within the meaning of the clause was submitted by the contractor and whether it was in fact accepted are proper questions for decision to the Board."[52]

It seems probable that a constructive acceptance will be found where a VECP is rejected in

form but accepted in fact and used by the government.[53] However, until acceptance, the contractor is required to perform as the original contract provides.[54]

Consistent with its refusal to confine the broadly stated purpose of the VE clauses, the Board has frequently spurned hypertechnical arguments. Thus a VEI claim not expressly labeled as such as required by the pre-1974 clause, but so treated by the government was found adequate.[55] In *Covington Industries, Inc.*, the contractor proposed a procedure which, if adopted, would result in a cost savings to the government. The proposal was not expressly identified as a VE proposal at the date of submission. On that basis, the contracting officer rejected the contractor's claim, but initiated the proposed change. The ASBCA found in the form of a routine reply to the contractor's correspondence, an acknowledgement by the contracting officer of the contractor's proposal as a VEI proposal. This constituted a "sufficient identification of the proposal" at the time of its submission and the Board invoked the doctrine of equitable estoppel by acquiescence against the government. It is interesting to note that "identification" of the VEI proposal was based solely upon the government's characterization of the proposal. The Board has not attached significance in the form used to advance the cost saving suggestion so long as it constituted an affirmative submission of a money saving suggestion.[56]

The meaning of the phrase "initiated and developed" received scrutiny in the greatest number of ASBCA opinions in the first 12 years of value engineering.[57]

The present clauses and regulation do not contain the much defined term "initiated"; instead value engineering now applies to change proposals, "developed and documented by the contractor." [58]

The meaning of this change is unclear. If, elimination of the term "initiated" accomplishes a step away from the notion of conceiving of an idea or originating an idea, then the change merely reflects developed ASPCA precedents.

> "The word 'initiated' does not require that the contractor produce an original concept and the word 'developed' in the same context requires the submission of the concept in an effective manner for practical application to the contract in issue." [59]

The purpose of the value engineering clauses is to encourage development and submission of cost reduction proposals requiring a change to the contract requirement. This purpose is advanced by giving recognition to contractor initiated proposals where the government has not taken affirmative steps to utilize its concept or idea for cost saving. The ASBCA has flatly stated that:

> ". . .a VECP may be based on a government idea previously conceived but not affirmatively implemented prior to receipt of a VECP based thereon. As between a contractor and the government, originality of thought is not, but primacy of positive action is, a *sine qua non* of a valid VECP." [60]

In *Xerox Corp.*, the contractor was engaged to manufacture a night vision sight which included a right angle eyepiece. The contractor determined that the right angle eyepiece was being discarded by the using troops in Vietnam as useless. Hence, a VECP was submitted proposing elimination of the eyepiece. Prior to receipt of the VECP, the Army determined that it had enough night sights, which included the right angle eyepiece in stock to justify elimination of this item from the sight, but no change order was issued deleting the item. It seems that previous to submission of the VECP, the contracting officer received an internal recommendation from the Army to delete the right angle eyepiece. The ASBCA was of the opinion that the government fell asleep on the idea of deleting the eyepiece and was "tardily jarred into positive action by the alarm of the appellant's VECP." [61] Priority of conception is meaningless unless accompanied by the "flesh of positive action." [62]

The government may, of course, insulate its concepts from diversion by the contractor by taking positive steps resulting in a contract change order, or formal indication that a change order is forthcoming.[63]

The contractor under the present clauses and regulation may restrict the government's use of

any part of the VECP until accepted by restrictive endorsement to each page of the VECP.[64]

In the case of genuine independent parallel effort by the contractor and the government to come up with a cost saving proposal, the proof must be conclusive that the government won the race to promulgate the change before the contractor submitted his VECP, or the contractor will not be denied a share of the savings.[65] The contractor may, as occurred in *North American Rockwell Corp.*, submit a VECP based on an earlier procedure and share in consequent cost savings. The government's property right in the prior contract procedure becomes irrelevant once it awards a contract without requirement for the previous procedure.

The present and predecessor clauses state that a valid change proposal must, if implemented, necessitate a change to the contract. Decisions of the ASBCA interpreting the prior ASPR provision evidenced a sympathetic willingness to look at the purpose rather than the technical formal requirements of the clause itself.[66] Thus, the Board has held that a contractor is entitled to an award under the VEI clause, even though the proposal related to a contract which was not in existence at the time the VECP was submitted and for which there could be no contract change order at that time.[67]

In *McDonnell Douglas Corp.* the contractor was to maintain the air conditioning room of an Air Force launch support building. By letter to the contractor, the Air Force requested the contractor to advise of additional costs of a plan addition of an underground room to the launch support building. The design for the new building involved extending the air conditioning from the existing room to the new room, but the contractor suggested it would be more economical to provide air conditioning to the new room by separate room air conditioners. The contractor's design change proposal was adopted for the new room, but the contracting officer denied his claim for entitlement to the resulting savings. The government contended that the services eliminated were never required and, thus, the value engineering incentive clause did not apply. The Board declined to follow the contracting officer's conclusion and instead rested its decision in favor of the contractor on the pragmatic observation that a substantial cost savings was in fact achieved. The Board's chain of analysis contained the following links:

> "This brings us to the heart of the issue which is whether the proposal is one that 'would require, in order to be applied to this contract, a change order to this contract,' within the meaning of the 'value engineering incentive' clause. To conclude in the affirmative requires the subsidiary conclusion that the contract impose upon appellant, at the time of the proposal, the performance of the services its proposal eliminated." [68]

In affirmatively answering its rhetorical inquiry, the Board observed:

> "The appellant could reasonably conclude, under these circumstances, at the time it made its cost reduction proposal that it had the contractual obligation to provide the services its proposal was addressed to and that the incentive offered by the 'value engineering incentive' clause was operative." [69]

Whether a change to the contract is required is usually easily ascertainable by reference to the contract requirements and specifications. The Board has not labored in construing within the context of value engineering what constitutes a change to the contract.

To be compensable, a proposal must reduce overall costs. Overall cost reductions extends to future and collateral savings.[70]

A recent decision by the ASBCA is instructive because it teaches that a reduction in overall costs may be affected even though the original contract price is not reduced.[71] The contract under review in *Electromotive Division of Magna Industries* required the contractor to deliver a quantity of storage battery terminal lugs equipped with two nuts and two bolts conforming to a government-furnished military standard specification. The government imposed specification was dimensionally defective in that use of the required nut resulted in scoring or scraping the shoulder of the terminal lug. Electromotive submitted a VECP recommending utilization of a simple $^{1}/_{16}$-inch washer with the standard nut. This proposal, if

adopted, would have increased the overall contract costs by approximately $11,000. The government, after contemplating a dimensional change to the terminal lug or use of a washer-faced nut as a means around the defective specification, modified the contract and directed Electromotive to change the dimension of the terminal lug. This change would have resulted in additional contract costs of approximately $35,000. Subsequently, the government rescinded the modification and applied appellant's proposal, for use of a 1/16-inch washer and then denied the contractor's value engineering proposal because use of the washer increased rather than decreased the cost of the contract.

The ASBCA, in ruling for the contractor, noted:

> "While it is clear that the addition of a plated washer to the assembly necessarily increased rather than decreased the cost of the assembly, nevertheless the adoption of this appellant proposal qualifies as a basis for award to the appellant under the particular facts attendant to this contract." [72]

The difference between the cost of the initial government change of $35,000 and the cost of appellant's proposal of $11,000, represented a savings to the government on which appellant was entitled to share under the VEI clause. *Electromotive* suggests that the test of overall cost at least where the government provides defective specifications is not the original or basic contract cost.

Summary.

The value engineering regulation and clauses are complex and offer rewards only to the most alert and tenacious. The 1974 changes accomplished a shakedown of the procedure for implementation of value engineering as a concept based on almost 13 years active experience on the part of DOD. Value engineering is still an active means for soliciting and rewarding contractor initiated cost savings proposals, even though the present sharing formula contains elements somewhat less favorable to contractors than heretofore.

What remains from the earlier regulation, other than administrative instructions on submission, processing and so forth, is the basic purpose and policy. The stated policy remains available to the administrative boards and courts in appropriate cases. Policy is, after all, resorted to for answering close questions such as where specific clause language is not decisive. That portion of the "old" regulation, which has not been carried over, has not detracted from the stated purpose or diminished the viability of earlier ASBCA decisions. The 1974 regulation change avoids some of the previous definitional tricks, especially the consuming difficulty with the phrase initiated and developed. The reigning language points away from the notion of conception in favor of putting an idea to use by "developing and documenting" a proposed change. Read thus the present language coexists with earlier ASBCA decisional law.[73]

Footnotes

1. Armed Services Procurement Reg. § 1701 *et seq.* (1 Jul 1974) [hereinafter cited as ASPR—additional citations are to the current ASPR unless otherwise noted]. (Prior to value engineering, if the contractor suggested a method of saving the government money, the contract price would be reduced and the profit with no net benefit to the contractor.)

2. American Standard, Inc., DOTCAB 71-1, 14 April 1972, 72-1 BCA ¶9433.

3. ASPR § 1.1701.

4. ASPR § 7.104.44 (a), (b).

5. ASPR § 1.1702.3; ASPR § 7.104.44 (b).

6. ASPR § 1.1702.1; ASPR § 7.602.50; ASPR § 7.104.44 (a).

7. ASPR § 1.1708.

8. ASPR § 7.104.44 (a), (b).

9. ASPR § 1.1702.3.

10. DOD Dir. 5010.8.

11. ASPR § 1.1702.3 (a).

12. ASPR § 1.1701 (a), (b); MIL V 38352 ¶ 3.2, 3.3, specifies in detail the minimum program requirements and elements by specifying areas of effort, needed cost information and required review actions.

13. ASPR § 1.1702.1; ASPR § 1.1702.2; ASPR § 7104.44 (a).

14. ASPR § 1.1707 (a), (b), is a contracting officer's decision checklist. The first decision by the contracting officer is whether a value engineering clause should be used.

15. ASPR § 7.602.50.

16. ASPR § 1.1702 (1) (a).

17. ASPR § 7.104.44 (a).

18. ASPR § 1.1702.1 (c).

19. ASPR § 1.1702.1 (b).

20. ASPR § 1.1708 (a).

21. ASPR § 1.1708 (b).

22. ASPR § 1.1708 (c).

23. ASPR § 1.1703.1.

24. ASPR § 1.1703.2.

25. ASPR § 1.1703.1; ASPR § 1.104.44 (a).

26. ASPR § 1.104.44 (a).

27. ASPR § 1.1703.2.

28. Centre Mfg. Co., Inc., ASBCA 12633, 25 November 1968, 68-2 BCA ¶ 7407; See the contracting officer's check list in ASPR 1.1707 (b) for the kinds of decisions the contracting officer must make with respect to a variety of sharing and payment provisions.

29. ASPR § 1.1704.1-4; ASPR § 1.104.44 (a).

30. ASPR § 1.1704.1-4; ASPR § 1.104.44 (a).

TYPE OF CONTRACT	INCENTIVE CLAUSE (Government/ Contr.)	PROGRAM CLAUSE (Government/ Contr.)
Fixed-Price (other than Incentive	50/50	75/25
Fixed-Price-Incentive (FPI) or Cost-Plus-Incentive-Fee (CPIF)	65/35	80/20
Cost-Plus-Award-Fee (CPAF)	75/25	85/15
Cost Reimbursement (Other than CPIF and CPAF)	Not Applicable	85/15

31. ASPR § 1.1704.2.

32. ASPR § 1.1703.3 (16 April 1973).

33. ASPR § 1.1704.3.

34. ASPR § 1.1703.3 (b) (16 April 1973); Centre Mfg. Co., Inc., ASBCA 12633, 25 November 1968.

35. ASPR § 1.104.44 (a), Subpart (e).

36. ASPR § 1.1707.1 (a), (b); *See* Airmotive Engineering Corporation, ASBCA 17139, 1 March 1974, 74-1 BCA 10,517 for the circumstance in which an unidentified proposal may be considered an amendment to an earlier VECP.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. ASPR § 1.1708 (a); ASPR § 1.104.44 (a); ASPR § 1.104.44 (b).

42. B.F. Goodrich Co. v. United States, 398 F. 2d 843 (Ct. Cl. 1968); Airmotive Engineering Corporation, ASBCA 17139, 1 March 1974; Xerox Corp., ASBCA 16374, 21 November 1972, 73-1 BCA 9784, *reconsidered and affirmed* 23 January 1973, 73-1 BCA 9881; Syro Steel Co., ASBCA 12530, 10 January 1969, 69-2 BCA ¶ 8046.

43. ASPR § 1.1702 (16 April 1973). *See ASPR* § 1.1701 (a) through (c) (16 April 1973).

44. ASPR § 1.1701; ASPR § 1.1702.1; ASPR § 1.1702.3; ASPR § 1.1708.

45. McDonnell Douglas Corp., ASBCA 14314 (30 April 1971), 71-1 BCA 8859 at 41,177.

46. Thompson Aircraft Tire Corp., ASBCA 14432, 9 July 1971, 71-2 BCA 8981; McDonnell Douglas Corp., ASBCA 14314 (30 April 1971); North American Rockwell Corp., ASBCA 14485, 16 March 1971, 71-1 BCA 8773; Covington Industries Inc., ASBCA 12426, 27 September 1968, 68-2 BCA 7286; *See* American Standard, Inc., DOTCAB 71-1, 14 April 1972, 72-1 BCA ¶ 9433.

47. ASPR § 1.1707.1.

48. ASPR § 7.104.44 (a), Subpart (d); ASPR § 7.104.44 (b).

49. Covington Industries, Inc., ASBCA 12426, 27 September 1968, 68-2 BCA 7286 at 33, 884.

50. McDonnell Douglas Corp., ASBCA 14314 (30 April 1971).

51. North American Rockwell Corp., ASBCA 14485, 16 March 1971, 71-1 BCA 8773; Rejection of a contractor's value engineering proposal does not present a justiciable controversy subject to the jurisdiction of the ASBCA. Jay De Construction Co., Inc., ASBCA 14378 (30 November 1970), 70-2 BCA 8604.

52. Thompson Aircraft Tire Corp., ASBCA 14482, 9 July 1971, 71-2 BCA 8981.

53. *See* cases in footnote 46.

54. *See* footnote 48.

55. Covington Industries, Inc., ASBCA 12426, 27 September 1968, 68-2 BCA 7286.

56. *See* Xerox Corp., ASBCA 16374, 21 November 1972, 73-1 BCA 9784, *reconsidered and affirmed* 23 January 1973, 73-1 BCA 9881 at 9784. The contractual requirement to identify the proposal as one submitted under the value engineering clause is essentially a notice requirement. To say that this notice requirement must be satisfied by only one method would be unduly restrictive. Syro Steel Co., ASBCA 12530, 10 January 1969, 69-2 BCA ¶ 8046 at 37369.

57. B.F. Goodrich Co. v. United States, 398 F.2d 843 (Ct. Cl. 1968); Airmotive Engineering Corporation, ASBCA 17139, 1 March 1974, 74-1 BCA 10,517; Xerox Corp., ASBCA 16374, 21 November 1972, 73-1 BCA 9784, *reconsidered and affirmed* 23 January 1973, 73-1 BCA 9881; North American Rockwell Corp., ASBCA 14485, 16 March 1971, 71-1 BCA 8773; Syro Steel Co., ASBCA 12530, 10 January 1969, 69-2 BCA ¶ 8046; Covington Industries, Inc., ASBCA 12426, 27 September 1968, 68-2 BCA 7286.

58. ASPR § 7.104.44 (a), (b).

59. Syro Steel Co., ASBCA 12530, 10 January 1969, 69-2 BCA ¶ 8046.

60. Xerox Corp., ASBCA 16374, 21 November 1972, 73-1 BCA 9784, *reconsidered and affirmed* 23 January 1973, 73-1 BCA 9881 at 45,703.

61. Xerox Corp., ASBCA 16374, 21 November 1972, 73-1 BCA 9784, *reconsidered and affirmed* 23 January 1973, 73-1 BCA 9881 at 45,703; Airmotive Engineering Corporation, ASBCA 17139, 1 March 1974.

62. *Id.*

63. Thompson Aircraft Tire Corp., ASBCA 14432, 9 July 1971, 71-2 BCA 8981.

64. ASPR § 7.104.44 (a), Subpart (i).

65. American Standard, Inc., DOTCAB 71-1, 14 April 1972; North American Rockwell Corp., ASBCA 14485, 16 March 1971, 71-1 BCA 8773.

66. McDonnell Douglas Corp., ASBCA 14485, 16 March 1971, 71-1 BCA 8773, at 41,177: "To the extent that the issue is not completely free from doubt we resolve it in favor of the policy behind the clause we are asked to interpret."

67. McDonnell Douglas Corp., ASBCA 14485, 16 March 1971, 71-1 BCA 8773.

68. *Id.* at 41,176.

69. *Id.* at 41,177.

70. ASPR § 1.1701; ASPR § 7.104.44 (a).

71. Electromotive Division of Magna Industries, ASBCA 18461, 7 August 1974; 74-1 BCA 10793.

72. Electromotive Division of Magna Industries, ASBCA 18461, 7 August 1974; 74-1 BCA 10793, at 51,333.

73. *See* cases collected in footnotes 46 through 52.

Exemption From Mandatory Disclosure Under the Freedom of Information Act

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This is the third in a series of articles concerning the Freedom of Information Act (FOIA). The purpose of this article is to discuss briefly the nine categories of information or records which are exempt from mandatory release under the Act. Exemptions (8) and (9), pertaining to the regulation of financial institutions and geological/geographical information, respectively, are not discussed, as, to date, the Army has had limited experience in dealing with requests for information falling within these exemptions.

Exemption 1. Information specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy (5 USC 552 (b) (1)).

In *EPA v. Mink*, 410 U.S. 73 (1973), the Supreme Court held that, under the FOIA, documents bearing a security classification are exempt from disclosure. It was further held that the Act neither authorizes nor permits *in camera* inspection of such documents. Thus, the Executive branch remained the exclusive arbiter as to declassification and release of information as well as original classification.

Dissatisfied with the holding in *EPA v. Mink, supra,* Congress amended the FOIA to, among other things, specifically authorize *in camera* inspection of classified documents to determine whether they are properly and currently classified (Sec 1 (b) (2), P.L. 93-502; 5 USC 552 (a) (4) (b)).

For Army lawyers in the field called upon to advise commanders or other officials regarding the FOIA, this change will have little practical significance, as requests for classified information *must* be forwarded to the Initial Denial Authority (para 2-1a (2), AR 340-17).

Exemption 2. Information related solely to the internal personnel rules and practices of an agency (5 USC 552 (b) (2)).

The second exemption may be applied to documents pertaining solely to internal personnel rules and practices which have no applicability and legal effect vis-a-vis the public *(Hicks v. Freeman,* 397 F.2d 193 (4th Cir. 1968), *cert. denied,* 393 U.S. 1064 (1969)).

Examples of documents held to fall within the second exemption include agency reduction in

force regulations (*Hicks v. Freeman, supra)*; a National Labor Relations Board manual on the conduct of representation elections *(Polymers, Inc. v. NLRB*, 414 F.2d 999 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970)); a Bureau of Customs training manual (*City of Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971); and a Social Security Administration claims manual (*Tietze v. Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972)). Perceiving a significant effect on the public, courts have denied second exemption protection to the results of hearing aid tests conducted by the Veterans' Administration (*Consumers Union of the US v. Virginia*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971)), an Internal Revenue Service operating guide for agents (Long v. IRS, 349 F. Supp. 871 (W.D. Wash. 1972); *see also Hawkes v. IRS*, 467 F.2d 787 (6th Cir. 1972)); an Occupational Safety and Health Administration training manual (*Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972), *affirmed*, 476 F.2d 699 (5th Cir. 1973)); and case summaries of honor and ethics code adjudications at the Air Force Academy (*Rose v. Department of the Air Force*, 495 F.2d 261 (D.C. Cir. 1974)).

In deciding whether to recommend that a request for information be denied based upon the second exemption, Army lawyers must bear in mind that Army policy requires more than a finding that a particular document contains only internal guidance and does not affect the public. It must also be found that release of the requested document would frustrate the purpose of the document by rendering it ineffectual in future use. Where no frustration of purpose is foreseen, the document may be released without referral to the Initial Denial Authority (para 2-1*a* (2), AR 340-17).

Exemption 3. Information specifically exempted from disclosure by statute (5 USC 552 (b) (3)).

Since the FOIA became effective in 1967, two divergent bodies of case law have developed under the third exemption.

One line of authority places a very narrow construction upon exemption (3). Emphasizing the appearance of the word "specifically" in the exemption, these cases express the view that in enacting the Freedom of Information Act, Congress intended to eliminate vague phrases, such as "in the public interest," as a basis for withholding information from public disclosure. Thus, it is reasoned, the Freedom of Information Act, by implication, modifies existing statutes which restrict public access to government records, so that in order to fall within exemption (3), the statute relied upon must specifically identify a class or category of items that Congress considers appropriate for exemption, or set forth legislatively prescribed standards or guidelines that must be followed in determining what matter shall be exempted. (*Robertson v. Butterfield*, 498 F.2d 1031 (D.C. Cir. 1974); *Serchuk v. Weinberger*, 493 F.2d 663 (5th Cir. 1974); *Stretch v. Weinberger*, 495 F.2d 639 (3d Cir. 1974); *Schecter v. Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974))

Other courts have taken a much broader view of the third exemption, holding that any words of exemption, however general, are sufficient. The word "specifically" is construed as requiring that the exemption be found in the words of the statute, rather than drawn from it by implication. (*Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *Sears v. Gottschalk*, 502 F.2d 122 (5th Cir. 1972); *People of the State of California v. Richardson*, 351 F. Supp. 733 (N.D. Cal. 1972), affirmed 505 F.2d 767 (9th Cir. 1974)).

This divergence of authority remained until recently when the Supreme Court considered the scope of the third exemption. Based upon a detailed review of the legislative history, the court held that in enacting the Freedom of Information Act, Congress did not intend to affect existing statutes which limit public disclosure of government records. The term "specifically", it was held, cannot be read to mean that the exemption applies only to documents specified, *i.e.*, by naming them precisely or by describing the category in which they fall. (*Administrator, FAA v. Robertson*, ___ U.S. ___ (Civil No. 74-450, decided June 24, 1975)). Thus, the narrow view of exemption (3) was rejected in favor of a broad construction (see discussion, *supra*).

Given the Supreme Court's broad construction of exemption (3), it is likely that this exemption more frequently will be a factor in the Army's administration of the Freedom of Information Act. When faced with a request for information that may fall within the third exemption, Army lawyers must remember that as in the case of exemption (1) (classified documents), requests for information falling within exemption (3) must be referred to the Initial Denial Authority. Release below IDA level is prohibited (para 2-1*a* (2), AR 340-17).

Exemption 4. Trade secrets and commercial or financial information obtained from any person and privileged or confidential.

Initially the scope of the fourth exemption was subject to speculation and some doubt. The Department of Justice suggested that the fourth exemption applied to three types of information: (1) trade secrets, (2) commercial or financial information, and (3) privileged or confidential information (Attorney General's Memorandum on the Public Information Section of the Administrative Procurement Act, June 1967, pp. 32-34). This interpretation was a result of a desire to interpret the exemption as broadly as possible and of the Act's rather poor legislative language. The best reading grammatically, and the interpretation adopted by the courts, is that there are two types of information exempted by the fourth exemption, first, trade secrets and second, commercial or financial information which is obtained from any person and which is privileged or confidential. (*See e.g., Getman v. N.L.R.B.*, 450 F.2d 670 (D.C. Cir. 1971)). "Trade secret" is used in it normal meaning, which, according to *Black's Law Dictionary* 1666 (Rev. 4th Ed. 1968), is "a secret formula or process not patented, but known only to certain individuals using it in compounding some articles of trade having a commercial value." In *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court established the following test for determining what commercial and financial information may be exempted from release by the fourth exemption:

> [C]ommercial or financial matter is "confidential" for the purpose of the [4th] exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future, or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. 498 F.2d at 770 (footnotes omitted)

Where a person is required to provide the government with information, there is presumably no damage to the government by public disclosure; and where the person is a monopolist, there may not be any harm to his competitive position because, arguably, he has no competitors (*National Parks and Conservation Ass'n v. Morton, supra*). The fact that information was provided to the Government on an express promise of confidentiality cannot in and of itself defeat public disclosure (*Petkas v. Staats*, 501 F.2d 887 (D.C. Cir. 1974)). There have been several cases where the person who provided commercial or financial information to the government sought an injunction to prevent the agency from making discretionary releases of exempt information. *See e.g., Neal-Cooper Grain Company v. Kissinger*, 385 F.Supp. 769 (D.D.C. 1974). The plaintiffs in these "reverse-FOIA" cases argued that either section 1905, title 18, United States Code, a criminal statute that penalizes government employees who release information submitted to the government concerning "income, profits, losses, or expenditures", or the FOIA, provided for such injunctive relief. In *Charles River Park "A", Inc. v. H.U.D.*, Civ. No. 73-1930 (D.C. Cir., decided 10 March 1975, amended sua sponte 17 June 1975), the court refused to imply injunctive relief and held that discretionary releases of exempt information are subject to judicial review for abuse of discretion under sections 701-706, title 5, United States Code. To determine whether release of exempted information would be an abuse of discretion, first determine if the information falls within that type of information protected by section 1905, title 18, United States Code. (Keep in mind that 18 USC 1905 is a criminal statute and should be narrowly construed.) If the information is protected, a discretionary release would be an abuse of discretion. If the information is not

covered by section 1905, balance the interest of the requester and the public in releasing the information against the interest of the person who provided the information in keeping the information confidential. If the interest of disclosure outweighs that of withholding, then it will not be an abuse of discretion to release exempted information (*Charles River Park "A", Inc., supra*).

Whenever a request is received under the FOIA for financial or commercial information provided to the Army by any person, the first action should always be to contact that person and ask whether he objects to release and what, if any, competitive harm will result from release. If the information is exempt but qualifies for release without referral to the Initial Denial Authority (*see* para 2–1*a*(2), AR 340–17), it should be determined whether it would be an abuse of discretion to release the exempted information. Release on a condition, *e.g.*, promise by the requester to insure the released information is kept confidential, should be considered in an attempt to accommodate both parties' interest. If it is determined that release of the exempted information would be an abuse of discretion, then forward the request, the requested record, and the facts and reasoning used in determining that the record is exempted and that release would be an abuse of discretion, to the Initial Denial Authority in accordance with paragraph 2–6*d*, AR 340–17.

Exemption 5. Information from inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency (5 USC 552(b) (5)).

The long-recognized purpose of the fifth exemption is to encourage free exchange of ideas during the process of deliberation and policy making. Thus, it has been held that recommendations, advice, opinions, and other material reflecting the deliberative process are exempt, while purely factual material, including factual material reasonably severable from deliberative material, is nonexempt. (*NLRB v. Sears, Roebuck & Co.*, ___ U.S. ___, 43 L.W. 4491 (1975); *EPA v. Mink*, 410 U.S. 73 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970)). It has also been held that the "deliberative process" includes purely factual material which is, *e.g.*, weighed, compared, evaluated, or analyzed to assist decision-making authorities. (*Montrose Chemical Corp. of California v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *see also Brockway v. Department of the Air Force*, ___ F.2d ___ (Civil No. 74–1268 (8th Cir.) filed June 6, 1975)

The factual/deliberative test, while generally applicable, is qualified in the following situation: (1) where factual material is not otherwise available to the requester, even material considered part of the deliberative process may be subject to release (*Vaughan v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Cuneo v. Laird*, 484 F.2d 1086 (D.C. Cir. 1973)); (2) where material otherwise exempt from release under the fifth exemption is publicly cited as the basis for an agency adjudication, it may lose its exempt status. (*NLRB v. Sears, Roebuck & Co., supra; American Mail Lines Ltd v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969).

When considering a request for information vis-a-vis the fifth exemption, an attempt should normally be made to separate reasonably segregable, nonexempt portions of a document from those portions which are exempt.

With respect to material exempt under the fifth exemption, as in the case of material exempt from release under other exemptions (except exemptions (1) and (3)), it must be determined whether there exists a legitimate governmental purpose for withholding requested information. If it appears that no governmental interest would be served by withholding, the information should be released without referral to the Initial Denial Authority.

Exemption 6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This exemption was designed to strike a balance between the protection of an individual's affairs from public scrutiny and the preservation of the public's right to governmental information. S. Rep. 813, 89th Cong, 1st Sess.

(1965). "Personnel and medical files" needs little clarification; however, the meaning of "and similar files" is less certain. In *Wine Hobby USA, Inc. v. United States Internal Revenue Service*, 502 F.2d 133, 135 (3d Cir. 1974), the court stated, "The common denominator in 'personnel and medical and similar files' is the personal quality of information in the file, the disclosure of which may constitute a clearly unwarranted invasion of personal privacy." In other words, "similar files" must have the same characteristics of confidentiality as medical or personnel files and may be exempted to the extent that they contain intimate details of a personal nature (*Robles v. Environmental Protection Agency*, 484 F.2d 843, 845 (4th Cir. 1973)). In order to determine whether a release of information from "personnel and medical files and similar files" will constitute a "clearly unwarranted invasion of personal privacy," the responsible official must balance the right of privacy of the affected individual against the right of the public to be informed, and the "clearly unwarranted" language instructs that the balance be tilted in favor of disclosure (*Getman v. N.L.R.B.*, 450 F.2d 670 (D.C. Cir. 1971)). "[The official] should first determine if disclosure would constitute an invasion of privacy, and how severe an invasion. Second, [he] should weigh the public interest purpose of those seeking disclosure, and whether other sources of information would suffice" (*Rural Housing Alliance v. U.S. Department of Justice*, 498 F.2d 73, 77 (D.C. Cir. 1973)). Where the disclosure interest outweighs the privacy interest, the information is not exempt and must be released. In determining the disclosure interest, both a general public interest as well as the specific interest of the requester should be considered. *See e.g., Ditlow v. Shultz*, 379 F.Supp. 326 (D.D.C. 1974); *Rabbitt v. Department of the Air Force*, 383 F.Supp. 1065 (S.D.N.Y. 1974). Where the privacy interest outweighs the disclosure interest, the record is exempt, and if the record is subject to the Privacy Act (5 USC 552a which is effective 27 September 1975) it is the opinion of The Judge Advocate General that it may not be released without the prior consent of the individual to whom the record pertains. It is believed that the agencies no longer have discretion to release personal information exempted under the Freedom of Information Act if the information is maintained in a system of records subject to the Privacy Act. Section 552a(b)(2), title 5, United States Code, prohibits any agency from releasing personal information contained in a system of records to third person, without prior consent of the person involved, unless such release is *required* by the FOIA. Release is required by the FOIA only where the information is not exempt. If it is exempt, release is not required, and hence, prohibited.

As with commercial and financial information, the first action by the Army upon receipt of a request for personal information is to contact the individual to whom the information pertains to determine if he objects to its release. If he does, or contacting him is impossible or impractical, the requestor should be contacted and an inquiry made as to the reason why he wants the information and the public interest, if any, to be served by the release. Also, it should be determined whether the information is available from another source, and what adverse impact denial of the request will have on the requester. If it is determined that the information is exempt, the request, the requested information, and all the information considered in balancing the privacy interests and the disclosure interests should be forwarded to the Initial Denial Authority in accordance with paragraph 2–6*d*, AR 340–17.

Exemption 7: Investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Prior to the 1974 amendments this exemption read, "investigatory files compiled for law en-

forcement purpose except to the extent available by law to a party other than an agency." There were, essentially, two changes made by the 1974 Amendments. First, and the most obvious, was the conditioning of the exemption on six adverse consequences which would result from release. Second was the change from "files" to "records." The first change reflected a Congressional desire that the agency consider the need to withhold investigatory material and not summarily deny access to all investigatory material. (*See* 120 Cong. Rec. S. 9329–30 (daily ed. 30 May 1974).) The second change, and the provision concerning reasonably segregable portions of records (5 USC 552b), require that each record compiled during an investigation for law enforcement purposes must be considered separately to determine whether its release would result in one or more of the six adverse consequences so as to justify its being withheld. It should be noted that a record created prior to an investigation may be "compiled" into the investigation file during a later investigation for law enforcement purposes.

The case law which had developed under the seventh exemption prior to the 1974 Amendments has a continued validity with respect to the meaning of "investigative" and "compiled for law enforcement purposes". In discussing the meaning of "investigative", the court in *Center for Nat. Pol. Rev. on Race & Urb. Is. v. Weinberger*, 502 F.2d 370, 373 (D.C. Cir. 1974), observed, "There is no clear distinction between investigative reports and material that, despite occasionally alerting the administrator to violations of the law, is acquired essentially as a matter of routine. What is clear, however, is that where the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way." What one must do is to distinguish between records of "government surveillance or oversight of the performance of duties of its employees" and records of "investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions" (*Rural Housing Alliance v. U.S. Department of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974)). In *Center for National Policy Review, supra,* the court held that civil as well as criminal law enforcement was included within "law enforcement purposes", as that phrase is used in the seventh exemption, and that it was not necessary that an adjudication have been imminent or even likely at the time the information was compiled or at the time disclosure was sought (502 F.2d at 373). The court did add in a "supplemental opinion" that a record is not compiled for law enforcement purposes "by the mere fact that one of the purposes of opening a file is investigative, or that sanctions hover as a possibility somewhere down the road, or that some material in some file may at some point be used for some law enforcement purpose" (502 F.2d at 375).

Once it is determined that information requested under the FOIA is an "investigatory record compiled for law enforcement purposes", one must determine whether release would result in one of the six adverse consequences. Each of these consequences will be discussed briefly. A more complete discussion and the basis of this brief discussion can be found on pages 7–12 of the "Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act", February 1975.

(A) *Interference With Enforcement*

The scope of "enforcement proceedings" corresponds generally to that of "law enforcement purposes" and includes preliminary investigations. Generally, the law enforcement efforts must still be active, and the meaning of interfere will depend upon the particular facts.

(B) *Deprivation of Right to Fair Trial or Adjudication*

Here the exemption is aimed at protecting the rights of private persons. "Adjudication" refers to "structured, relatively formal, quasi-judicial administrative determinations in both State and Federal agencies, in which the decision is rendered upon a consideration of statutorily or administratively defined standards" (pp. 8–9, Attorney General's Memorandum).

(C) *Invasion of Privacy*

The "balancing test" used under the sixth exemption should be used to determine if an in-

vasion of privacy will be unwarranted. The absence of "clearly" in the seventh exemption lessens the government's burden of upholding a denial of access. The individual protected is both the subject of the investigation and any third persons mentioned in the investigation. As for information exempt under the sixth exemption, information exempt under this section, and subject to the Privacy Act, may not be disclosed. (*See* discussion under sixth exemption, supra.)

(D) *Disclosure of Confidential Sources or Information Provided by Such Sources*

"Confidential source" refers not only to paid informants but also to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." S. Rep. No. 93-1200, 93d Cong., 2d Sess., p. 13 (1974). "Criminal law enforcement authority" is limited to those components (USACIDC, etc.) whose primary function is the prevention or investigation of criminal statutes (including UCMJ). "National security" refers to "military security, national defense, or foreign policy", and "intelligence" applies to "positive intelligence-gathering activities, counter-intelligence activities, background security investigation by [authorized] governmental units. . . ." (S. Rep. No. 93-1200, 93d Cong., 2d Sess., p. 13 (1974).)

(E) *Disclosure of Techniques and Procedures*

This exemption does not apply to routine techniques or procedures which are generally known outside the government.

(F) *Endangering Law Enforcement Personnel*

While "personnel" may not technically have to be employees, it does not include families of law enforcement personnel. It seems unlikely that Congress intended to have investigatory material released where there was a threat to the life or safety of any person. Clause (A) may be broadly interpreted to cover such a case.

Conclusion. In conclusion, the purpose of this article and the two which have preceded it is to aid Army lawyers in making the initial determination whether a request under the Freedom of Information Act involves material exempt from mandatory release, and, if so, whether the request should be forwarded to the Initial Denial Authority. When making these decisions, especially the latter, it should be remembered that Army policy requires the narrowest possible construction of the exemptions and, where material is determined to be exempt, nondisclosure is to be the exception rather than the rule. In furtherance of this policy, requests for exempt documents (other than documents falling within either the first or third exemption) should not be forwarded to the Initial Denial Authority, unless the decision has been made that the request should be denied and specific reasons supporting denial are set forth in the forwarding correspondence.

Grade Authorization of MOS 71E (Court Reporter) to E8/E9

The following information was contained in a 6 August 1975 letter from MILPERCEN's Director of Personnel Management Developments:

Change 5 to AR 611-201 will reflect a revision to MOS 71E (Court Reporter) authorizing the establishment of grades E8 and E9 positions. This will permit career progression as a Court Reporter from entry into the military to possible retirement in the highest enlisted grade (E9). So as to maintain an appropriate balance of enlisted positions in the legal environment, the establishment of these Chief Court Reporter positions will be through a HQDA approved tradeoff with Legal Clerk (MOS 71D) positions. Positions to be initially reclassified will be identified in separate letter to affected Commands.

Personnel reclassification guidance is not provided as it is not applicable. It is anticipated that reclassification into MOS 71E50 will be through the media of promotion to E8/E9.

This information is provided for planning purposes only. Recipients of this letter are respon-

sible for notifying subordinate activities requiring advance notification of changes to the enlisted MOS classification structure.

* * *

CMF 71

COURT REPORTER

MOS 71E

Summary

Takes notes of activities and statements in legal proceedings and prepares for inclusion in official legal documents.

Duties

MOSC 71E20: Must be able to perform the duties of Clerk Typist (71B30). *Records complete details of statements and activities during legal proceedings.* Identifies participant. Places identification marks on all supplemental material. Takes dictation by means of stenomask (or other dictation methods) at speed of 175 or more words per minute. Takes verbatim notes of statements of participants. Transcribes notes of proceedings to required forms. Prepares and assembles records and forms relating to reporting of general and special court-martial cases.

MOSC 71E50: Must be able to perform the duties of Court Reporter (71E20). *Serves as Chief Court Reporter.* Performs duties shown in preceeding level of skill and provides technical guidance to subordinate Court Reporters in accomplishment of these duties. Supervises legal office activities. Assures processing of legal records within prescribed time limits. Reviews completed records for correctness and proper application of legal policies and procedures.

Qualifications

Must possess the following cumulative qualifications:

	MOSC 71E20	MOSC 71E50
a. *Physical Profile:* 323122	X	X
b. *Aptitude area:*		
(1) AApre-1973: CL	X	
(2) ACB-1973: CL	X	
c. *Other:* Certified by staff judge advocate as being fully qualified to perform the duties of Court Reporter	X	

Related Civilian Occupations

DOT classification	*Code*
Court Reporter	202.388
Federal Civil Service classification	*Code*
Closed Microphone Reporter	GS 319

Standards of Grade Authorization

Line	Duty position	Code	Grade	Number of positions authorized*										Explanatory notes
				1	2	3	4	5	6	7	8	9	10	
1	Assistant Court Reporter	71E20	E5	-	1	1	1	2						Grades of additional positions will be authorized in same pattern.
2	Court Reporter	71E20	E6	1	1	1	2	2						
3	Senior Court Reporter	71E20	E7	-	-	1	1	1						

Line	Duty position	Code	Grade	Number of positions authorized*										Explanatory notes
				1	2	3	4	5	6	7	8	9	10	
4	Chief Court Reporter	71E50	E8											**In JA section at division level in lieu of E8 71D50 Chief Legal Clerk.
5	Chief Court Reporter	71E50	E9											**In JA section at corps level in lieu of E9 71D50 Chief Legal Clerk.

* Blank spaces in this column indicate not applicable.
** Note: Establishment of E8 and/or E9 positions of Chief Court Reporter must have approval of HQDA (DAPE-PBA).

CMF 71
LEGAL CLERK
MOS 71D

Summary

Supervises or assists in the preparation and processing of summary, special, and general court-martial records, line of duty investigation, reclassification board proceedings and claims investigation.

Duties

MOSC 71D20: Assists legal officer in the execution of professional and administrative responsibilities. Assures that charges are properly prepared and that specifications are complete and accurate. Makes initial determination as to jurisdiction of court, accused, and subject matter of offenses. Prepares orders appointing court-martial and courts of inquiry. Prepares indorsements referring charges for trial. Examines completed records of line-of-duty investigations, reclassification board proceedings, claims investigations, and other records requiring legal review for administrative correctness. Prepares court-martial orders promulgating sentence. Assures that records of court-martial are correct and complete before disposition of case. Transmits court-martial cases to The Judge Advocate General's Office. Keeps correspondence files and legal library. Serves as receptionist for Legal Officer. Types wills, contracts, powers-of-attorney and similar legal documents. Applies basic concepts of military and civil law to assist claims officer.

MOSC 71D50: Must be able to perform the duties of Legal Clerk (71D20). *Supervises administrative responsibilities of a Legal Office.* Supervises Legal Office activities to facilitate disposition of work. Examines and distributes incoming correspondence and other communications. Processes actions under provisions of Manual for Court-Martial, Uniform Code of Military Justice, and Army administration and organization. Reviews material to detect errors in grammar, punctuation, spelling, and application of regulations, policies and procedures. Supervises cataloging and filing of Army publications, books, periodicals, journals, and similar materials. Requisitions office supplies and equipment. Supervises processing of records within prescribed time limits. Organizes and directs keeping of statistical records of discipline within command. Supervises the gathering of legal procedure data.

Qualifications

Must possess the following cumulative qualifications:

	MOSC 71D20	MOSC 71D50
a. Physical profile: 323222	X	
b. Aptitude area:		
(1) AApre-1973: CL	X	
(2) ACB-1973: CL	X	

Related Civilian Occupations

DOT classification	*Code*
Court Clerk	249,368
Law Clerk	119,288

Federal Civil Service classification	*Code*
Legal Clerical and Administrative Clerk	GS 986

Standards of Grade Authorization

Line	Duty Position	Code	Grade	Number of positions authorized*										Explanatory notes
				1	2	3	4	5	6	7	8	9	10	
1	Asssistant Legal Clerk	71D20	E5	-	1	2	2	2	2	3	4	4	4	Grades of additional positions will be authorized in same pattern.
2	Legal Clerk	71D20	E6	1	1	1	1	2	3	3	3	3	4	
3	Senior Legal Clerk	71D20	E7				1	1	1	1	1	2	2	
4	Chief Legal Clerk	71D50	E7											In JA section below division level, or in garrison serving less than 10,000 military personnel and exercising general courts-martial jurisdiction.
5	Chief Legal Clerk	71D50	E8											In JA section at division or in garrison serving 10,000 to 20,000 military personnel and exercising general courts-martial jurisdiction. (See note)
6	Chief Legal Clerk	71D50	E9											In JA section of corps or higher headquarters or in garrison serving 20,000 or more military personnel and exercising general courts-martial jurisdiction (See note)

*Blank spaces in this column indicate not applicable.

Note: Positions classified in MOS 71D, grades E8 or E9 are not authorized in activity that has Chief Court Reporter, MOS 71E, grade E8 or E9 authorized.

MOS Change Reclassification Guidance

1 CAREER MANAGEMENT FIELD, MOS, TITLE AND SUMMARY OF CHANGE	2 PERSONNEL CURRENTLY CLASS IN MOSC	3 RECLASSIFICATION GUIDANCE	4 WILL BE RECLASSIFIED INTO	5 PERS/TAADS GUIDANCE		6 AUTH GRADES LOW TO HIGH	7 TITLE OF MOST WHEN DIFFERENT THAN TITLE SHOWN WITH MOS UNDER COLUMN 1
				PERS	TAADS		
71D, Legal Clerk (revised). SGA revised to show footnote on E8/E9 positions when 71E Senior NCO is authorized	-----	N/A	----	---	---	---	
71E, Court Reporter (revised) MOS specification and SGA revised to add "5" skill level for E8/E9 Chief Court Reporter positions and constraints on establishment of positions included in SGA.	----	Personnel: None Positions to be converted from 71D50 to 71E50 will be identified by HQDA.	----	---	---	---	

Medical Treatment Facility Liability For Patient Suicide And Other Self-Injury*

By: Captain Thomas R. Cooper, Jr., JAGC, U.S. Army Claims Service

'nce Jennie Harris hurtled through the
'h floor window of the Women's Hospital in
'ork City at 4 a.m. on January 19, 1891,[1]
S. hospitals have been sued for failure
patients from themselves.[2]

'ation has not produced much con-
for lawyers advising clients or
al seeking to determine the stand-
which it will be measured in suicide
'hroughout the cases appears a tension
e goals of security in suicide preven-
few as opposed to expanding patient
that promotes recovery for the major-

The issues of liability for patient injuries through escape and through suicide sometimes have been discussed separately in the past,[5] but are joined here because of apparent overlap in the facts of cases as well as in their treatment by the courts.[6]

Jurisdictions chosen for this review are New York State (because of its relatively large number of cases over the last 80 years) [7] and the federal courts (to illustrate several situations that did not come up in New York cases).[8] Limiting the jurisdictional coverage hopefully will allow an in-depth view and make clearer the inherent contradictions by pointing out the variations within a supposedly integrated jurisdiction.

New York State Cases

Generally the cases from New York give an understanding of problems involved in determining "the law" in this area of hospital liability. Starting from a lack of foreseeability of suicide in 1891,[9] the New York courts developed a rigid standard of care by the hospital through the 1920's and 1930's.[10] In the 1940's [11] the courts seemed to swing away from close supervision in response to medical pleas for more freedom for mental patients. Cases in the late 1950's and through the 1960's do not reflect a predominant theme.[12] Going into the 1970's, the field of hospital liability for patient suicide and self-injury seems wide open for the imaginative advocate.[13]

In the early case of *Harris v. Women's Hospital*, the victim was Jennie Harris, who was admitted to the defendant hospital for the repair of a lacerated cervix. "The operation was apparently successful, but about 4 o'clock in the morning of January 19, while laboring under a temporary fit of insanity, she arose, unobserved, from her bed in the ward where she lay and, finding her way to the toilet room of that floor, leaped from the window and was killed by her fall of four stories to the ground below." [14] In denying recovery on the merits, the court stated, "That which never happened before, and which in its character is not such as not to naturally occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good grounds for a charge of negligence in not foreseeing its possible happening and guarding against that remote contingency." [15]

In 1917, the New York courts established a precedent of a strict standard of care by the hospital in *Robertson v. Charles B. Towns Hospital*.[16] Walter A. Robertson was admitted to the defendant hospital as a private patient on March 11, 1915, for alcoholism. He showed no evidence of unsound mind until three days later when he accused his roommate of attempting to kill him and physically drove the man out of the room. Then Mr. Robertson moved to the window and began shaking the window grating. After calming Mr. Robertson, an attendant accompanied him to the lavatory down the hall and waited outside. Inside, Mr. Robertson broke the window glass and jumped through the window. He died of injuries sustained in the fall. Although reversing against the plaintiff on a technical ground, the court did find that Robertson's death was proximately caused by the negligence of the hospital in failing "to use reasonable care and diligence, not only in treating, but in safeguarding a patient, measured by the capacity of the patient to provide for his own safety."

*Reprinted with permission from the January 1975 issue of *The Journal of Legal Medicine*.

Because of the lack of New York precedent on point, the court cited two cases from other jurisdictions to support its dicta of negligent causation.[17]

The next New York case was *Van Patter v. Charles B. Towns Hospital.*[18] In this 1927 case the jury found the hospital negligent for allowing a patient who was being treated for morphine addiction to go to a drugstore and buy some "veronal." The consumption of this drug had caused her death.

The most often cited case involving patient suicide is *Martindale v. State of New York.*[19] The memorandum decision allowed recovery for the death of the plaintiff's wife from injuries she sustained in a fall from a third floor window of the Syracuse Psychiatric Hospital on October 13, 1933. The patient was not supervised while she went to the toilet. While there, she removed a lug that secured the window, climbed out, and fell to the ground below. The court held that the hospital had been put on notice because the patient had previously escaped through another window after removing a lug. The hospital was therefore negligent in failing to exercise better supervision over this patient, who had a known desire to escape.

The 1937 case of *Spataro v. State* [20] allowed damages for the suicide death of a patient who threw himself into an uncovered, unsupervised boiling vat of soap in the washroom of the hospital laundry. The court found the State negligent for failing to have enough supervision for a group of inmates who were waiting to be shaved and for leaving three boiling vats uncovered and unwatched.

In another much-cited case, *Shattuck v. State,*[21] the Court of Claims of New York relied on *Martindale* [22] in finding the hospital liable for injuries to an inmate who escaped in light clothing during severe winter weather after putting the hospital on notice by a previous similar escape. George C. Shattuck, a "delinquent mental defective," escaped through an unblocked window. The court found inadequate the hospital's securing of the window because of the patient's previous escape. In holding the State responsible for the plaintiff's double leg amputation, necessitated by his exposure to the cold, the court also cited *Palsgraph* [23] in finding that the defendant's negligence started in motion a chain of events that could reasonably have been foreseen.

In 1939 the Court of Claims of New York in *Dimitritt v. State* [24] said: "There should have been direct supervision of the dormitory and the deceased," in holding the State liable for the suicide of a patient with syphilis meningoencephalitis who was considered "disturbed and restless." This had been manifested by his attack on an attendant and other behavior. The hospital was held negligent for leaving the patient unsupervised for an hour—long enough for him to hang himself with a bed sheet.

The New York Court of Claims in 1941 backed off somewhat from prior findings that an inmate who previously escaped put the institution on notice to supervise him more closely.[25] Pasquale Calabria, a 15-year-old retarded epileptic assigned to the Craig Colony for Epileptics, had escaped and been killed when struck by an automobile six miles from the institution. The court in *Calabria v. State* stated that the colony had no duty to exercise close supervision over the boy because he was not a "recalcitrant." The court reasoned that the colony had no notice of a desire to escape because a prior departure was not an escape, but an "absence without leave." In addition, the court found that the failure to restrain the boy was not the proximate cause of his death. This finding was affirmed on appeal.

In *O'Brian v. State,*[26] inadequate supervision in the presence of a dangerous heating appliance formed the basis of liability. There were only two attendants on a "disturbed ward," where the plaintiff was a patient with 65 other women. She was injured because she was able to reach through a protective grating to bare steam pipes. She became wedged in the appliance and could not remove her head from the pipes.

A tendency appears in these cases to infer negligence in the absence of direct supervision of the patient or where the lack of supervision was found to be the requisite negligence for liability by the hospital. Furthermore, the courts seemed ready to use any evidence of disturbed behavior or prior escape to place a special duty of care on the hospital. In the cases that fol-

lowed in the 1940's, there seems to be a general change in the outlook of the courts.

Irwin N. Perr cites the 1942 Tennessee case *James v. Turner* as one that "shows greater insight into modern thought and current therapeutic practices." [27] In that case,[28] the patient was walking with an attendant when he suddenly ran to a water reservoir, jumped in, and drowned. In finding that the hospital acted reasonably, the court balanced the value of restraining devices for safety against their retarding effect on patients' recovery. Since this patient had previously been allowed freedom to go to town and had not put the hospital on notice as to any suicidal tendencies, this case does not present any change in the "foreseeability" rule. By coincidence, however, in 1942 New York courts did begin to show much more deference to hospitals,[29] citing more often than not the need to allow the hospital more freedom to attain its therapeutic goal.[30]

The first such case was *Brigante v. State.*[31] Margaret Brigante, an incompetent patient in her early 20's with no history of suicide attempts, set fire to herself while polishing the hospital ward floor using a "nonflammable material" and later died from her burns. The court refused recovery on the basis of *res ipsa loquitur* and found the hospital acted reasonably in coming to the "carefully drawn conclusion" that one attendant could supervise 79 patients.

The move in protection of the hospital was interrupted by a finding for the patient in *Callahan v. State of New York.*[32] The patient who suffered from a manic-depressive psychosis, had previously escaped from an open ward and had continued to express a desire to escape. The hospital was held negligent for again assigning her to an open ward from which she escaped. After her escape, she attempted suicide by wading into a cold pond, which turned out to be too shallow for drowning. As a result of this act and the patient's subsequent exposure to the elements for six days, both legs had to be amputated.

The 1943 case, *Root v. State,*[33] appears to show a definite change in the court's approach to suicide by a mental patient. Sam Root attempted suicide on September 26, 1940, by slashing his wrists. He was admitted to Bellevue and subsequently committed by a court to Rockland State Hospital, where he was diagnosed as having dementia praecox, paranoid type, and assigned as a suicidal risk to a specialized ward for suicidal patients. On November 3, 1940, while still assigned to the ward, he with two other patients was given the task of bedmaking as "occupational therapy." At a time when the attendant was out of sight, Root hung himself by the neck, using his trouser belt. Although quickly taken down, he died as a result of the incident. The Court of Claims of New York found no liability. After citing the earlier cases of *Shattuck* and *Martindale* as establishing the standard of care required for mental defectives, the court went on to say that the State was not an "insurer" of the safety of its inmates and had no duty "to maintain constant supervision over deceased herein."

In addition, the court stated that "there is no such duty on the State to maintain individual supervision for each potential suicide case." In support of this proposition, the court noted that such individual supervision would "unduly burden the State and be contrary to accepted treatment." The court also found that the hospital could not foresee that Root would hang himself from the dormitory window since hospital records showed that his condition had not required that he be kept in isolation. In fact, the records gave evidence of improvement through the patient's cooperation and his own statements that he no longer intended to do away with himself. The court further found this case's facts distinguished it from *Robertson, Shattuck, Spataro, Martindale,* and *Dimitritt.*

Daley v. State,[34] like the 1937 *Spataro* case, involved a mental patient's jump into an open vat of boiling soap in a hospital laundry room. Here the Court of Claims of New York found no liability to the State but was reversed by the Supreme Court, Appellate Division. The Court of Claims found that the patient had no history of suicidal behavior and had been one of 18 patients sorting laundry under the supervision of three attendants when he went unattended to the lavatory and then to the "soap room," 82 feet down the hall. There he threw himself into the unsupervised soap vat. The court found that a prior incident of jumping overboard from a berthing ship was not a suicide attempt but accepted the patient's explanation that he wanted to get to shore faster.

The opinion of the Appellate Division adds some interesting facts to this case. The court placed more emphasis on the incident of jumping overboard because of ship records showing Daley as "moody, depressed, and withdrawn" as well as records from Norfolk Naval Hospital, where he was taken after the incident, describing him as "negativistic, confused, and emotionally blunted." Additionally, when the patient was transferred to the Bethesda Naval Hospital, he was found to be "partially oriented, hallucinated, deluded, suspicious, and confused." Thereafter, he was sent to St. Elizabeth's Hospital where he attempted an escape. At trial, an expert testified to the need for close supervision of disturbed patients. As a result of this evidence, the Appellate Division found notice to the hospital of previous suicidal behavior, negligent lack of supervision of Daley, and negligence in maintaining the unguarded soap vat.

In 1948, the Court of Claims of New York denied damages for the wrongful death of Alberta S. Fowler.[35] Admitted to a state hospital with a history of manic depression and of attempting suicide, she was later transferred as "improved" to a minimum supervision ward. Subsequently her "body was found hanging from a door hinge, suspended by a light cord." The court found this situation similar to that in *Root*.[36] After citing *Shattuck* and *Martindale* on the duty to furnish all mental patients with every reasonable precaution to protect them from injury, the court said: ". . .the State, nevertheless, is not an insurer of the safety of the inmates of its institutions. There is no duty upon the State to maintain individual and constant supervision over the deceased herein." Citing hospital records, the court found signs of improvement by the patient. The court noted the alternative of keeping "a patient cooped up in one room and to limit his activities and prevent his taking part in work, in doing something useful about the ward, is harmful."

The Court of Claims' decisions in *Root* and in *Fowler* represent the high-water mark for therapeutic concerns over patient safety in New York.

Beginning with *Gries v. Long Island Home, Ltd.*,[37] the courts have proceeded on a case-by-case basis, emphasizing a number of different factors as the basis of decisions. In *Gries*, the Appellate Division in a memorandum opinion found the hospital had prior knowledge of the suicidal tendencies of the plaintiff's husband but left him unattended for an unspecified time, during which he committed suicide.

Two cases in the early 1950's involved suicides by young women during and after labor. The findings at trial differed, but on appeal both cases were decided in favor of the plaintiff.

In *Santo v. University Hospital*,[38] decided in 1950, the claimant's wife had jumped from a hospital window as a result of intrapartum depression while she was unattended in the labor room. At trial, the defense objected to an instruction that the jury was to decide whether the hospital's failure to have the windows barred to prevent suicide constituted negligence. The court found no error and affirmed the finding for the plaintiff notwithstanding a dissent that there was no custom in labor rooms of having bars on the windows. The dissent also pointed out that the nurse's absence was a short one to answer the telephone. The other case, *Murray v. St. Mary's Hospital*, was decided in 1952.[39] Rose M. Murray suffered a postpartum psychosis and jumped from the window of her hospital room. The court directed a verdict for the defense. The Appellate Division reversed, finding a question for jury decision where there was evidence that the hospital knew of patient's "condition and irrational behavior," but did not inform the patient's doctor. In such an instance, the jury could have found that the negligence of the hospital prevented the physician from taking appropriate measures in view of the patient's condition.

In re Apicella's Estate [40] appears similar in some respects to the earlier *Root* case. The Court of Claims of New York found the hospital's negligence to be the cause of Vincent Apicella's suicide. He had said he wanted to kill himself and was assigned to the ward for suicide-risk patients. On August 13, 1953, attendants returned him from an x-ray appointment but left him unattended momentarily in his ward's hall. During this time, Apicella hanged himself. The facts of this case diverge from *Root* in the inclusion at trial of expert testimony that leaving a patient like Apicella unattended was not in accord with established institutional psychiatric practice.

How much freedom to give a patient must be carefully decided by the physician. In 1955, the New York Appellate Division held that a doctor made an "honest error of judgment" when he allowed a patient then under "close observation" to leave the ward to eat in the dining hall with his friends.[41] Without warning, the patient after the meal ran past the guards and escaped onto the grounds. Shortly thereafter, attendants found the patient dead, "presumably having jumped or fallen from a considerable height." The court found no proof that a greater number of attendants in the dining room would have prevented the unexpected act.

Reyes v. State of New York,[42] decided in 1958, is probably an accident rather than a suicide case, but it does provide an interesting view in the progression of the hospital's duty of supervision and care of mentally defective patients. Felix A. Reyes, aged nine, was admitted to a state institution where tests and evaluation showed an IQ of 52 to 78, a mental age of seven to eight, mental instability, and a danger that the patient might harm himself. On April 4, 1955, the patient sat up on a window sill to put his shoes on. In leaning back he pushed the window screen out and fell to the ground below lacerating his scalp and fracturing the right parietal bone. The court found that neither of the two attendants assigned to the ward were watching the boy when he fell. They had previously told the patient to stay off the window sill. The screen was ordinary window screen. The court inferred that the screen was not hooked properly. Furthermore, the court noted that the window was normally opened from the top and from this inferred knowledge that such accidents could occur. The Court of Claims found "manifestly unwarranted" the State's claim that the only alternative to liability was to lock each child in a cubicle to the detriment of rehabilitation.

The absence of expert medical testimony can be determinative as in the 1958 *Kowalski* case.[43] Here, the court denied liability for the suicide death of a patient who had a history of previous attempts of slashing his wrists. The memorandum opinion by the Appellate Division noted that "no proof was offered medically as to the type of his medical condition, the reactions and tendencies resulting therefrom or what constituted the proper method of supervision in a mental institution or any acts which might constitute negligence." It added: "Negligence may not be presumed from the mere happening of an accident."

Two months later the Court of Claims did presume negligence from the occurrence of an accident in *Hirsch v. State of New York*.[44] The court awarded damages for death by Seconal overdose, although the source of the drug was never discovered. Since the patient had a history of escape and suicide attempts, the court held that the attendants on duty when he went to bed had a duty "to examine the clothing of the patients and to inspect their beds to discover any evidence that might indicate a suicide attempt." Although there was conflicting evidence as to what checks were made, the court found the inference of negligence here "irresistible."

In the 1960's, New York courts decided a number of new issues in suicide cases in addition to foreseeability.

In the 1961 case, *Wilson v. State of New York*,[45] the claimant's wife died of injuries sustained when she jumped from the fourth floor of a hospital through an unlocked laundry chute. In finding negligence, the court pointed to hospital records showing the patient to be potentially suicidal. The records also indicated lack of adequate supervision. In addition, the court found the hospital negligent in failing to obey its own rule to keep the laundry chute locked.

The claimant in *Mahoney v. State of New York*[46] had taken his brother, who had grounds freedom, away from the institution without permission. During this episode, the patient leaped out of a moving car and off the Tappan Zee Bridge. The brother sued the hospital, alleging notice to the institution, in that his brother had previously cut his wrists and expressed a desire to kill himself, and also alleging negligence in allowing his brother freedom of the grounds. The court found evidence of improvement in hospital records that justified allowing the patient such freedom.

In *Gioia v. State of New York*,[47] the defense used an argument of intervening cause in alleging unsuccessfully that it could not be held liable for the patient's suicide because it was a new and independent agency. Since the patient had

previously demonstrated "murderous behavior," as well as attempting suicide, and then hanged himself in defendant's hospital, the State argued that no liability should attach to it even if it was negligent because there had been no judicial finding of legal insanity or incompetency. In rejecting this argument, the court stated: "The responsibilities of custody arise upon admission, and the duties to the patient are not suspended pending a finding of either sanity or insanity in accordance with some legal definition."

The State occasionally uses the "discretionary function" argument or "honest mistake" where a patient transferred to an unrestricted ward uses his new freedom to allow him to commit suicide. The 1962 case, *Herold v. State of New York*,[48] demonstrated the importance of hospital records in support of such a transfer. The patient was transferred to a less supervised status and subsequently hanged himself. The hospital records were the most damaging evidence against the State. They showed the patient was "suicidal, had delusions, was excited, nervous, and violent." The reason for the transfer stated in the record was the opening of more bed space on the ward.

The failure to follow established hospital rules formed part of the basis for liability in *Zophy v. State of New York*.[49] Rita E. Zophy was admitted to Marcy State Hospital for treatment of chronic alcoholism. The day after her admission, Mrs. Zophy had a convulsive seizure and fell to the floor, sustaining a one-inch laceration under her right eye. For four minutes she frothed at the mouth and was rigid. While the attendant did report the incident to the treating physician, there was no compliance with the hospital's "Mental Health General Order Number 23." This set out a more elaborate procedure (upon which the court did not elaborate) for preventing a recurrence of injury from such seizures. The next night, Mrs. Zophy had a 10-minute grand mal seizure during which she fell again, striking her head and sustaining a 2-inch laceration as well as becoming unconscious, rigid and bleeding from her mouth and nose. The court found omission of the specified procedure together with lack of adequate x-rays and the failure to get help by the doctor—unlicensed in the United States—to be the negligent cause of the patient's death by bilateral subdural hemorrhage.

In some cases, expert medical testimony is not necessary to support a finding of hospital negligence in a patient's self injury. The Appellate Division in *Wright v. State of New York* [50] found that expert testimony was not necessary to get the case to the jury. "In light of the claimant's suicidal tendencies, his conceded mental illness, his impulsive and bizarre behavior since entering the hospital and the immediate danger of an opened unscreened window 15 feet above the ground coupled with his threat to jump out of the window, a decision to leave him alone with the door closed would appear to be inherently reckless and taken without any reasonable regard for the patient's safety," the court said. In response to arguments for the therapeutic value of lack of restraints, the court further stated: "Any benefit which might ultimately accrue from treating claimant in a permissive manner at this juncture were far outweighed by the highly dangerous and imminent exposure of claimant's person to physical injury."

The type of action by a patient of the hospital showing suicidal tendencies necessary to put the hospital on notice continues to be unclear. While some cases finding liability seem to contain no notice to the hospital of suicidal tendencies, the 1971 case of *Dalton v. State of New York* [51] sets a high threshold. Although hospital records contained descriptions of the patient's depression and talk of doing away with herself, the court found there was no notice to the hospital of suicidal tendencies since the patient had not actually attempted suicide. Therefore, the hospital was not liable for the transfer of the patient to an unlocked, unguarded ward from which she escaped, to commit suicide by throwing herself off a ferry boat.

Cases in the Federal Courts

Several cases in the federal courts from 1961 to the present are of interest in a discussion of hospital liability for suicide because of new issues raised and the differences in handling the issues from the New York cases.

In *Sklarsh v. United States*,[52] a patient with known suicidal desires was transferred from his closed psychiatric ward to a room in the surgical

ward for adrenal gland surgery. The patient's room on the 10th floor had two windows, which were not locked but which the doctors felt were too heavy for the patient to raise. There was testimony that someone checked the windows every two hours and someone looked in on the patient every 10 minutes. Despite these precautions, the window was somehow opened and the patient leaped to his death. The court found despite the incident, that the hospital's precautions were adequate.

The type of psychiatric symptoms that will trigger a notice to the hospital of suicidel risk was narrowly circumscribed in *Moore v. United States.*[53] In this 1963 case, evidence was presented that the hospital knew the patient was "delusional, paranoid, disoriented, and in fear of his life." The court held that this evidence was not sufficient to put the hospital on notice that the patient might pry the detention screen from a third-floor bathroom window and jump out. The court found that since the evidence did not show depression or suicidal expressions, no special care was required.

The 1964 case, *Baker v. United States,*[54] brought a strong finding in favor of the hospital's freedom to take risks with patients' safety in pursuit of therapeutic goals. When Kenneth Baker, 61, was admitted to the VA Hospital, Iowa City, Iowa, his physician's statement pointed out suicidal thought content. After the admission workup, however, the patient was assigned to an open ward because he was not considered a suicide risk. Four days later, the patient, who had freedom to roam the grounds, attempted suicide by jumping into a well. This resulted in complete paralysis of his right side. The court found no notice of suicidal tendencies and also adequate protection of the well by a heavy wire fence three feet high.

In its finding, the court stated: "Treatment requires the restoration of confidence in the patient. This, in turn, required that restrictions be kept at a minimum. Risks must be taken or the case left hopeless." It added: "The standard of care which stresses close observation, restriction and restraint has fallen in disrepute in modern hospitals and this policy is being reversed with excellent results."

White v. United States [55] shows the different views that courts can take of the same case. Although the patient had a history of suicide attempts, the hospital assigned him to an open ward despite his protests and pleas that he be tied to his bed. Subsequently, he was killed when he stood in front of a train on tracks adjoining the hospital property.

At trial, the federal court for the Eastern District of Virginia held the VA Hospital was immune to suit as a charitable institution and that the transfer of the patient came within the discretionary act exception to the Federal Tort Claims Act. On appeal, the Court of Appeals of the Fourth Circuit reversed on both grounds and sent the case back for a new trial.

The trial court again found for defendant, emphasizing and enlarging in its opinion on the need for hospital freedom to pursue the therapeutic goal. It said: "In former days mental hospitals were mere asylums or 'jails' for the hopeless. They have gradually become curative institutions, but to accomplish the commendable approach to such a serious problem, it has become necessary to give the patient sufficient freedom to assure self-controlled responsibility." The court added: "Such a therapy program entails risks to the patient and to society as a whole, but it involves a balancing of interests which is most important in the psychiatric field."

In affirming this decision, the Fourth Circuit Court of Appeals stated: "While the issue would be highly debatable if before us *de novo,* we find no reversible error in the record."

In *Lucy Webb Hayes National Training School for Deaconesses and Missionaries v. Perotti,*[56] the District of Columbia Court of Appeals discussed issues of need for expert testimony, therapeutic purpose, and hospital violation of law. William L. Perotti had slipped out of a closed psychiatric ward but been discovered by an attendant. He broke away and jumped through a safety glass window to his death several floors below.

While the court determined that expert testimony was necessary to establish the inadequacy of the safety glass, it held that issue of negligence in allowing a patient to slip out of a closed ward was clear enough to go to the jury

without expert testimony. Furthermore, the court refused to allow the hospital to explain the patient's presence outside the ward as part of the therapeutic purpose since there was testimony that the event was an accident. The court reversed the finding of liability against defendant, however, because of a faulty instruction by the trial judge that labeled as negligence per se violation of an old District of Columbia ordinance on the "keeping of maniacs."

In *Pietrucha v. Grant Hospital* [57] the Seventh Circuit Court of Appeals in 1971 reversed a finding of no liability for suicide on several grounds. Albert Pietrucha had committed suicide while a mental patient in the defendant hospital by hanging himself by his belt in the washroom of the psychiatric ward. Among the errors found by the court was an argument by the defense attorney in which he raised the issue of the voluntary aspects of the suicide as something for the jury's consideration. The court also found the trial court erred in refusing to apply *res ipsa loquitur* in view of the complete control the defendant exercised over the decedent.

The 1971 case of *Bornmann v. Great General Hospital* [58] is novel in its appellate approval of a lower court instruction that included the doctrine of "new and independent cause."

The patient was a nurse on the hospital staff with a history of problems with the phenobarbital and diphenylhydantoin she took to control seizures. On June 11, 1968, she was admitted with a "possible phenobarbital or [D]ilantin reaction." Three days later she was found dead. Postmortem examination revealed 300 phenobarbital pills in the stomach. No explanation was ever given as to how she obtained the pills. The judge's instructions allowed the jury to find that the hospital was negligent but that the negligence was not the proximate cause of the patient's death. The rationale for the instruction was that the taking of the pills, however they were obtained, was a "new and independent cause" of death. Furthermore, this act constituted contributory negligence by the patient, expecially since as a nurse, "she did actually appreciate the danger of taking the drug and that she voluntarily exposed herself to such appreciated danger."

Conclusion

"Foreseeability" appears to be the central issue in modern cases to the same extent it was in the *Harris* case of 1891. This review of cases has shown how differently courts have held hospitals responsible to foresee the future behavior of their patients based on their past actions. Indeed, the examination of the cases does not reveal hard rules that can be applied confidently for a ready prediction on the outcome of particular cases. From these cases, however, do arise a number of factors that should be considered in the analysis of future cases.

- There is no particular level of patient behavior to require a particular level of watchfulness. Whether threat of suicide as opposed to actual suicide attempts will cause a special duty is not clear. One court differentiated between suicide attempts and mere "gestures." Where there have been suicide attempts, passage of time dilutes the impact of these attempts in requiring watchfulness by hospital personnel.

- Related to time lapse since suicide attempts is inclusion in hospital records of entries that show improvement of the patient's condition. Where the records indicate that the degree of watchfulness was relaxed for hospital expediency rather than because of the patient's condition, the action creates vulnerability if the patient harms himself.

- The hospital will be held to a duty to maintain its facilities and equipment so as not to create hazards.

- Staffing occasionally determines the question of negligence. While some courts based their findings of negligence on inadequate attendant/patient ratios, one court found that one attendant could supervise more than 70 patients. The opinion indicated this ratio was the result of a carefully considered decision.

- Mental hospitals are not the only institutions charged with taking special measures to prevent suicide. Maternity hospital wards, for example, have been held to special standards of care to prevent suicide.

- There is generally little or no comment on the lack of opportunity of the plaintiff to know how a death occurred. Normally these actions are brought by an administrator for a deceased

patient where the hospital had complete control over the movements of the patient.

- Courts do not agree on the amount of supervision required where the patient has been found to be a suicide risk. Whether direct supervision of patients is required is not settled.

- Where the claimant can show a violation by the hospital of its own rule, the cases indicate the courts will find negligence.

- Whether the suicide was an independent intervening cause has been held to rest on its voluntariness.

- If the courts find a hospital mistake is an "honest error of judgment" within the discretion of the physician, the court will not find liability.

- The tension between the hospital's therapeutic purpose and the risk of suicide to the patient has presented a dilemma to courts that has been resolved according to individual personalities of the courts.

All these factors should be considered by the advocate in the presentation of a case and by the hospital in formulating policies for the care of suicidal patients.

Footnotes

1. Harris v. Women's Hospital, 14 N.Y.S. 880 (1891).

2. "Civil liability for death by suicide in the presence of a specific duty of care by hospitals and asylums," 11 A.L.R.2d 751, 775. *See also* "Liability of noncharitable hospitals or sanitariums for improper care or treatment of patients," 70 A.L.R.2d 341; "Liability of hospitals or sanitariums, for injury or death of patient as result of his escape or attempted escape," 70 A.L.R.2d 347; "Malpractice liability with respect to diagnosis and treatment of mental disease," 99 A.L.R.2d 599; "Necessity for expert evidence to support action against hospital for injury or death of patient for suicide," 40 A.L.R.3d 515, 548.

3. Perr IN: *Liability of Hospital and Psychiatrist in Suicide*, 122 AM. J. PSYCHIATRY 631 (1965).

4. *Liability of Mental Hospitals for Acts of Their Patients under the Open Door Policy*, 57 VA. L. REG. (n.s.) 156 (1971).

5. 70 A.L.R.2d 347; 11 A.L.R.2d 751, 775.

6. In *Robertson v. Charles B. Towns Hospital*, 165 N.Y.S. 17 (1917) there was testimony that patient's delusional state of mind put him in such fright of harm that he leaped through a glass window to escape unknown terror.

7. My own count shows 35 cases. Furthermore, the ad hoc nature of decisions in this area can best be shown by demonstrating the wide variances in the cases of one active jurisdiction.

8. This paper will not present all federal cases on point, but will use appropriate federal cases that show situations and rationales not covered in the New York cases.

9. Harris v. Women's Hospital, 14 N.Y.S. 880 (1891).

10. Robertson v. Charles B. Towns Hospital, 165 N.Y.S. 17 (1917); Van Patter v. Charles B. Towns Hospital, 209 N.Y.S. 935 (1927); Martindale v. State, 199 N.E. 667 (1935).

11. Root v. State, 40 N.Y.S.2d 576 (1943); Fowler v. State, 78 N.Y.S.2d 860 (1948).

12. *In re Apicella's Estate*, 140 N.Y.S.2d 634 (1955) dealt with hospital negligence in failure of supervision in leaving patient unattended in ward corridor; *Public Administrator v. State*, 146 N.Y.S.2d 81 (1955), honest error in judgment of granting more freedom to patient who subsequently escaped; *Kowalski v. State*, 179 N.Y.S.2d 925 (1958), refusal to presume negligence for suicide in hospital; *Hirsch v. State*, 183 N.Y.S.2d 175 (1959), presumption of negligence where patient obtained and took overdose of Seconal; *Wilson v. State*, 221 N.Y.S.2d 357 (1961), hospital negligence for failure to follow its own rule of locking laundry chutes; *Herold v. State*, 224 N.Y.S.2d 369 (1962), hospital failure to record the patient's improvement that formed the basis for his move to another less supervised ward.

13. In *LaVigne v. Allen*, 321 N.Y.S.2d 179, a sheriff was held liable for failure to properly supervise prisoner with a disturbed mental condition who hanged himself.

14. *Supra*, reference 1, at 881.

15. *Id.*, at 882.

16. *Supra*, reference 6.

17. Hogan v. Clarksburg Hospital Co., 59 S.E. 943 (1907); Wetzel v. Omaha Maternity and General Hospital, 148 N.W. 582 (1914).

18. Van Patter v. Charles B. Towns Hospital, 209 N.Y.S. 935 (1927).

19. Martindale v. State, 199 N.E. 667 (1935).

20. Spataro v. State, 3 N.Y.S.2d 737 (1937).

21. Shattuck v. State, 2 N.Y.S.2d 353 (1938).

22. *Supra*, reference 19.

23. Palsgraph v. Long Island RR, 162 N.E. 99 (1928).

24. Dimitritt v. State, 13 N.Y.S.2d 458 (1939).

25. Calabria v. State, 29 N.Y.S.2d 477 (1941), 34 N.Y.S.2d 820 (1942), 43 N.Y.S.2d 836 (1942).

26. O'Brian v. State, 33 N.Y.S.2d 214 (1942).

27. *Supra*, reference 3, at 633.

28. James v. Turner, 201 S.W.2d 691 (1942).

29. Brigante v. State, 33 N.Y.S.2d 354 (1942).

30. Root v. State, 40 N.Y.S.2d 576 (1943); Daley v. State, 64 N.Y.S.2d 32 (1946) *rev'd* 78 N.Y.S.2d 584 (1948); Fowler v. State, 78 N.Y.S.2d 860 (1948).

31. *Supra*, reference 29.

32. Callahan v. State, 40 N.Y.S.2d 109 (1943).

33. Root v. State, 40 N.Y.S.2d 576 (1943).

34. Daley v. State, 64 N.Y.S.2d 32, *rev'd* 78 N.Y.S.2d 584 (1948).

35. Fowler v. State, 78 N.Y.S.2d 860 (1948).

36. *Supra*, reference 30.

37. Gries v. Long Island Home, Ltd., 83 N.Y.S.2d 728 (1948).

38. Santos v. Unity Hospital, 93 N.E.2d 574 (1950).

39. Murray v. St. Mary's Hospital 113 N.Y.S.2d 104 (1952).

40. *In re* Apicella's Estate, 140 N.Y.S.2d 634 (1955).

41. Public Administrator of New York v. State, 146 N.Y.S.2d 81 (1955).

42. Reyes v. State, 170 N.Y.S.2d 633 (1953).

43. Kowalski v. State 179 N.Y.S.2d 925 (1953).

44. Hirsch v. State, 183 N.Y.S.2d 175 (1959).

45. Wilson v. State, 221 N.Y.S.2d 354 (1961).

46. Mahoney v. State, 230 N.Y.S.2d 564 (1962).

47. Gioia v. State, 254 N.Y.S.2d 384 (1964).

48. Herold v. State, 224 N.Y.S.2d 369 (1962).

49. Zophy v. State, 279 N.Y.S.2d 918 (1967).

50. Wright v. State, 300 N.Y.S.2d 153 (1969).

51. Dalton v. State, 308 N.Y.S.2d 441 (1970).

52. Sklarsh v. United States, 194 F. Supp. 474 (N.Y. 1961).

53. Moore v. United States, 22 F. Supp. 87 (Mo. 1963).

54. Baker v. United States, 226 F. Supp. 129 (Iowa 1954).

55. White v. United States, 205 F. Supp. 662 (Va. 1962); *rev'd* 317 F.2d 13 (5th Cir. 1963); *retired* 244 F. Supp. 127 (Va. 1965); *aff'd* 359 F.2d 989 (5th Cir. 1966).

56. Lucy Webb Hayes National Training School for Deaconesses and Missionaries v. Perotti, 419 F.2d 704 (D.C. Cir. 1969).

57. Pietrucha v. Grant Hospital, 447 F.2d 1029 (7th Cir. 1971).

58. Bornmann v. Great General Hospital, 453 F.2d 616 (5th Cir. 1971).

Bicentennial Series

The Judge Advocate General's School (1944)

By: Colonel Edward H. Young JAGC

Colonel "Ham" Young, TJAGSA Commandant from February 1942 to December 1944 and from August 1950 to August 1951, authored this item which appeared in the January 1944 issue of the *Detroit Bar Quarterly*. It marks the third installment in our bicentennial series of historical Corps writings.

* * *

Prior to the beginning of the present war the Judge Advocate General's Department was very small, consisting of only about 100 officers; now there are about 1,500 officers on duty with the Department. This expansion was made necessary to keep pace with the mushroom growth of the Army as a whole.

As the additional officers were required in a hurry, the former practice of assigning to duty in the Department, a civilian lawyer or Army officer with a legal education and letting him gradually learn the groundwork was no longer possible. The need for new officers was imperative and immediate.

The first solution of the problem was the organization of an officers' replacement pool in which reserve officers and civilian lawyers were assigned. It was my task to organize them for instruction and training, and thus, the Judge Advocate General's School was activated in February, 1942, at the National University Law School, Washington, D.C. Four classes were trained there.

Having outgrown our first home, we were fortunate in obtaining the use of the beautiful Law Quadrangle and fine facilities of the University of Michigan Law School at Ann Arbor. Immediately our classes were increased in number so that we were instructing two groups of 75 members each and, at the same time, giving time to research and the writing of textbooks for the use of future classes scheduled to attend the

school and others in the field unable to take the course.

Until June, 1943, our students were all officers who were directly commissioned from civilian life, or from the ranks of enlisted men in the Army, or who had been on active duty on foreign shores or in this country. In June came the institution of the first Officer Candidates' School in the history of our Department, at which carefully selected enlisted men and warrant officers compete for commissions in the Department. The officers' classes are also in full swing, so that at the present time we have two officer classes and two candidate classes in attendance.

We now have about 1,500 officers in the Judge Advocate General's Department, two-thirds of whom have been trained at the schools in Washington or Ann Arbor. At its present size the Judge Advocate General's Department is the largest law firm in the country. It is my firm conviction that most of these officers so trained have been fitted not only to act as capable staff officers, but also as officers of the line. We train men to be soldiers. They are not just lawyers in uniform.

You may be surprised to learn that military justice, claims, contracts, military affairs, international law, law of belligerent occupation, to mention a few of the legal subjects studied, do not constitute the entire course by any means. Military training and military subjects are allotted only less than half our work and study time. In addition to close order drill, instructions in voice and command, we teach map reading in the classroom and practical application in the field, staff functions, organization of the Army, chemical warfare, gas mask drill, minor infantry tactics, company administration, first aid and sanitation, signal communication, the use of weapons such as the .30 cal. carbine, the M-1 rifle, .30 cal. Browning BAR, pistol, machine gun, and other kindred subjects designed to give our officers the background necessary to function as a line officer if need be.

A word about the efficiency of the court martial system. It is speedier in most cases than our civilian criminal courts. Usually the trial is over and the sentence pronounced within a month's time of the offense. Unlike civilian courts, the court acts as judge and jury and applies the law and evaluates the evidence. Court martial law is devoid of the many technicalities found in the civilian legal system. As an example of the reputation for justice of the court martial system, I can not help but recall the saying of old Army soldiers, "If I'm innocent, let me be tried by a court martial; if I'm guilty, I'll have a better chance in a civilian court."

Criminal Law Items

From: Criminal Law Division, OTJAG

Priority of USACIL Evidentiary Examinations. The U.S. Army Criminal Investigation Command recently provided guidance by message concerning the priority of evidentiary examinations at the U.S. Army Criminal Investigation Laboratories (USACIL). The substance of the message is as follows.

Evidence examinations will be expedited when any of the following conditions exist:

a. The suspect is in pretrial confinement;

b. The trial date is set;

c. The results of the evidence examination are needed for an Article 32, UCMJ, investigation;

d. The results of the evidence examination are needed for an Article 39a, UCMJ, session;

e. The suspect is due for reenlistment, permanent change of station (PCS), or expiration term of service (ETS);

f. The special agent working the case is scheduled for PCS or ETS; or,

g. The evidence was obtained through a confidential purchase by CID investigators and the SJA concludes that evidentiary examination must be expedited.

If the existence of any of the above conditions is known at the time of submission of the evi-

dence, block 4 of DA Form 3655, Crime Lab Examination Request, should be marked "expedite" with the desired date and reasons for the request. If the request for expeditious handling arises after the USACIDC element has dispatched the evidence to a USACIL, the SJA should notify the appropriate USACIDC field office of the request, reasons, and required date the evidentiary examination is needed. The CIDC field office will so inform the laboratory by priority electrical transmission by COB that same day. USACIL will provide immediate written notification and explanation to the requester whenever the expeditious handling request cannot be accomplished or the date required cannot be met.

The above policy will be incorporated into future changes to AR 195–5 and CIDR 195–20. The DA message number is P 251722Z JUL 75 (ALCID Message 050/75).

Reserve Affairs Items

From: Reserve Affairs, TJAGSA

1. JAG Reserves Research Project: State Laws on Garnishment. Here is an opportunity for JAG reservists to perform a valuable research service and earn retirement points or credit for the Advanced Course writing requirement.

Under a new law enacted earlier this year, the United States has waived sovereign immunity and consented to garnishment or attachment proceedings ". . .in like manner and to the same extent as if the United States were a private person. . ." for the enforcement of child support and alimony obligations of federal employees, including active duty, reserve and retired members of the military. Sec. 459, P.L. 93–647, Jan 6, 1975, 42 USC 659. Under this statute, state law will be controlling on most questions. Since garnishment is a statutory remedy which differs widely from state to state, the military services have identified a need for a compendium of various state laws on garnishment and attachment covering such aspects as initiation of proceedings, service of process, wages subject to garnishments, responsibility of garnishee to respond, garnishee's duties to comply and sanctions for noncompliance, and discharge of garnishee.

It is believed the JAG Reservists are particularly well-suited to perform this research and to provide the practical insight which comes from active practice and which can be so valuable in helping the military services to cope with their new responsibilities.

The Army has responsibility for compiling the garnishment laws of:

Alaska	Kentucky	Oklahoma
Delaware	Massachusetts	South Dakota
Georgia	New Jersey	Vermont
Indiana	New Hampshire	West Virginia
Iowa	New Mexico	Wisconsin
Kansas	North Dakota	

JAG Reserves who are interested in this research project should call or write: LTC James N. McCune, the Assistant Commandant for Reserve Affairs, TJAGSA, Charlottesville, Virginia 22901 or call Area Code 804 293-6121.

2. Change in Reserve Component Technical Training (On-Site). As a result of recent changes instituted by the Office of Assistant Commandant for Reserve Affairs and the Academic Department of The Judge Advocate General's School, Charlottesville, Virginia 22901, the format of the Reserve Component Technical Training (On-Site) Program for 1975–76 has been modified. These modifications are designed to place a greater emphasis on New Developments in Military Criminal Law, Administrative and Civil Law, Procurement and International Law. They also include provisions for relaying relevant information about current happenings in the JAGC and TJAGSA. This method of instruction should prove to be more interesting, informative and helpful to Reserve Component Judge Advocates.

Under the new program, TJAGSA will send a four-man team to a specified area. The team will provide eight hours of instruction on one day in

New Developments in Military Law. The format for the program is as follows:

3 hours—Criminal Law
3 hours—Administrative and Civil Law
1 hour—Procurement Law
1 hour—International Law

Both Procurement and International Law instructors will be prepared to give additional instruction if functional JAGSO teams are present at the session and desire such instruction. The schedule which follows sets forth the date, time, and city of the on-site technical training program to be presented throughout the United States for the first half of the academic year 1975–76. Also provided is a list of the local action officers and the training site location for each unit. The schedule for the second half of the academic year 1975–76 will be printed at a later date.

Reserve Component officers who do not receive notification of the on-site program through their unit of assignment are encouraged to contact the action officer to confirm the date, time and location of the scheduled training, as unavoidable changes may occur. As with previous training, coordination should be initiated with units other than JAGSO to provide maximum opportunity for interested JAG officers to take advantage of this training. In addition, all active duty JAGC officers assigned to posts, camps and stations located near the scheduled training site, are encouraged to attend the sessions.

Detachment commanders who have not already done so are requested to amend their unit training schedule to conform to the published schedule. For those units performing OJT at various posts it may be necessary to advise the SJA involved that your unit may not be available for OJT during the day of the "on-site" training.

Reserve Component JAG Corps officers assigned to troop program units other than Judge Advocate General Service Organizations should advise their commander of the "on-site" training and request equivalent training for unit assemblies during the month of the technical training.

Questions concerning the on-site instruction by local Reserve Component officers should be directed to the appropriate action officer. Problems encountered by action officers or unit commanders should be directed to: Captain Robert W. Freer in the Office of the Assistant Commandant for Reserve Affairs, The Judge Advocate General's School, Charlottesville, Virginia 22901 or telephone (804) 293-6121.

RESERVE COMPONENT TECHNICAL TRAINING (ON-SITE) SCHEDULE
FY 1975–76

Trip Number	*City*	*Date & Times*	*Subject*	*Action Officer Phone*	*Training Site Location*
1-	Boston	20 Sep 75 0800–1700	Criminal Law Administrative Law Procurement *International Law	MAJ Peter F. MacDonald 617-583-2019	Boston USAR Center
2-	New York	27 Sep 75 0800–1700	Criminal Law Administrative Law Procurement *International Law	COL Morton Levinson 212-947-0941	Patterson USAR Center
3-	Kansas City/ Topeka	4 Oct 75 0800–1700	Criminal Law Administrative Law Procurement International Law	MAJ Thomas Graves 816-221-2800	Long USAR Center
3-	St. Louis	5 Oct 75 0800–1700	Criminal Law Administrative Law Procurement International Law	CPT Robert L. Norris 324-268-6971	Training Center #1

4-	Washington, D.C./ Baltimore	18 Oct 75 0800–1700	Criminal Law Administrative Law *Procurement *International Law	CPT George Borsari 202-296-8900	Fort Meade, Bldg Tp816
5-	Chicago	1 Nov 75 0800–1700	Criminal Law Administrative Law *Procurement *International Law	CPT Gary L. Vanderhoof 312-242-2981	Moskala USAR Center
5-	Milwaukee	2 Nov 75 0800–1700	Criminal Law Administrative Law *Procurement International Law	LTC James W. Moll 414-762-7000	536 West Silver Spring Drive
6-	Cleveland	8 Nov 75 0800–1700	Criminal Law Administrative Law Procurement International Law	MAJ Robert E. Glaser 216-696-1144	Mote USAR Center
7-	San Francisco	15 Nov 75 0800–1700	Criminal Law Administrative Law Procurement *International Law	LTC Robert J. Smith 415-941-6161	Bldg. #1750, Golden Gate Reserve Center Presidio
7-	Los Angeles	16 Nov 75 0800–1700	Criminal Law Administrative Law Procurement *International Law	CPT Herman J. Wittorff 213-485-3640	#850, Fort MacArthur
8-	Atlanta	22 Nov 75 0800–1700	Criminal Law Administrative Law Procurement International Law	CPT Bob Bartlett 404-521-1168	Chamblee Armory
8-	Columbia, S.C.	23 Nov 75 0800–1700	Criminal Law Administrative Law Procurement *International Law	LTC H. Hugh Rogers 803-359-2599	Forest Drive Armory
9-	New Orleans/ Baton Rouge	13 Dec 75 0800–1700	Criminal Law Administrative Law Procurement International Law	CPT Donald R. Mintz 504-586-1200	US Army Reserve Center 5010 Leroy Johnson Dr.

* Additional instruction will be provided for the specialized teams.

Judiciary Notes

From: U.S. Army Judiciary

1. Recurring Errors and Irregularities.

A. July 1975 Corrections by ACMR of Initial Promulgating Orders.

(1) Failing to show correct SSN—two cases.

(2) Failing to properly set forth the dollar amounts in the specifications of a charge—two cases.

(3) Failing to add the words "By Military Judge" after the word "Sentence"—two cases.

B. The following errors in final promulgating orders (as set forth in messages to field commands from the Office of The Clerk of Court requesting corrective action be taken).

(1) Order incorrectly stated that *TJAG* had denied accused's petition to USCMA.

(2) Incorrectly ordering sentence into execution before accused was served with ACMR decision.

(3) Failing to set forth proper appellate action taken pursuant to Article 66.

C. One other matter of importance should be noted.

A request for final action by an accused does not constitute a withdrawal of his petition to USCMA.

JAG School Notes

1. Bicentennial Programs. We are receiving some copies of various bicentennial presentations done "in the field," but would like to request that *all* bicentennial action officers provide the School with "Law Day-type" reports of those programs which took place. These articles and photographs will be a welcome addition to TJAGSA's historical files—and we would like to let the entire Corps know of what went on during our bicentennial observances throughout the world. Send your materials to: The Judge Advocate General's School, U.S. Army, ATTN: Doctrine and Literature Division, Charlottesville, VA 22901. A comprehensive after-action report will follow in a future issue of *The Army Lawyer.*

TJAGSA Instructor Appointed to UVA Faculty. Captain Fred Lederer, Instructor in Criminal Law, has been appointed a Lecturer on the UVA faculty and his Advanced Course seminar "Analysis of the Military Criminal Legal System" listed in the UVA Law School catalog. The elective, a two-credit semester course, will constitute an in-depth critical study of the military criminal legal system assuming that military justice, although similar in many respects to civilian law, is a distinct legal system of its own. Comparisons with civilian procedure and foreign law, both civilian and military, will be made in an effort to properly weigh the utility of basic aspects of the military system. Particular attention will also be paid to Congressional efforts to revise military law. Scrutiny will include jurisdiction, application of the first amendment to the military, the right against self-incrimination, search and seizure, trial by jury, pretrial confinement, preliminary hearings, command control of the court-martial system and disposition of offenders. The course will use a multivolume text of cases and materials developed especially for the seminar. This is the first time that TJAGSA courses have been formally opened to UVA law students and listed in the Law School catalog. "Mr." Lederer's services as a lecturer will be without additional compensation in view of the provisions of section 209 of title 18, United States Code.

3. Military Administrative Law Developments Course. In an effort to keep abreast of current legislation, regulatory law and judicial opinions, a military lawyer must devote a substantial part of his already busy schedule to reading and research. In the field of military administrative law, keeping up with new developments in such diverse and technical fields as Judicial Review of Military Administrative Actions, Federal Labor Relations, Legal Basis of Command (installations, nonappropriated funds, environmental law), Military Personnel Law, and Release of Information requires the full-time attention of any lawyer.

To assist the military lawyer in this effort new developments and trends in these areas are the subject of the 2d Military Administrative Law Developments Course (5F-F25) to be offered at TJAGSA, 8–11 December 1975. Specifically this course will provide military lawyers with an update in military administrative law, and serve as a refresher course to those military lawyers who are about to enter into administrative law practice in the field.

An enrollment of 30 students will be instructed by the faculty of the Administrative and Civil Law Division, TJAGSA.

4. Legal Assistance Course. The 3d Legal Assistance Course (5F-F23) will be held from 6 October through 9 October 1975. The course is designed for the practicing military Legal Assistance Officer and emphasizes the management and administration of legal assistance offices and the practical problems of rendering legal aid to members of the military community. Addi-

tionally, there will be an in-depth analysis of new legal developments in the following selected substantive areas: family law and counseling (enforcement of support, separation and divorce, inter-jurisdictional problems); personal finance and consumer affairs; estate planning and survivors' benefits; the state taxation of the income and property of members of the military community; the Soldiers' and Sailors' Civil Relief Act; civil rights; and real property.

The course will facilitate the exchange of information between practicing Legal Assistance Officers through the extensive use of seminars in addition to presentations by members of the TJAGSA faculty and guest speakers. The course will have an enrollment of 30 students.

CLE News

1. TJAGSA Courses (Active Duty Personnel).

September 22–26: 5th Law Office Management Course (7A-713A).

September 29–October 3: 12th Federal Labor Relations Course (5F-F22).

October 6–9: 3d Legal Assistance Course (5F-F23).

October 28–31: 22d Senior Officer Legal Orientation Course (5F-F1).

November 10–21: 64th Procurement Attorneys' Course (5F-F10).

December 8–11: 2d Military Administrative Law Developments Course (5F-F25).

January 5–16: 6th Procurement Attorneys' Advanced Course (5F-F11).

January 12–15: 3d Environmental Law Course (5F-F27).

January 19–23: 4th Military Lawyer's Assistant Course (Criminal Law) (512-71D20/50).

January 19–23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512-71D20/50).

January 26–29: 23d Senior Officer Legal Orientation Course (5F-F1).

March 8–19: 65th Procurement Attorneys' Course (5F-F10).

April 5–8: 24th Senior Officer Legal Orientation Course (5F-F1).

April 26–May 7: 66th Procurement Attorneys' Course (5F-F10).

May 10–14: 6th Staff Judge Advocate Orientation Course (5F-F52).

May 17–20: 1st Civil Rights Course (5F-F24).

May 24–28: 13th Federal Labor Relations Course (5F-F22).

June 28–July 2: 2d Criminal Trial Advocacy Course (5F-F32).

July 19–August 6: 15th Military Judge Course (5F-F33).

July 26–29: 25th Senior Officer Legal Orientation Course (5F-F1).

August 9–13: 3d Management for Military Lawyers Course (5F-F51).

2. TJAGSA Courses (Reserve Component Personnel).

September 22–26: 5th Law Office Management Course (7A-713A).

October 20–23: 3d Reserve Senior Officer Legal Orientation Course (5F-F2).

November 10–21: 64th Procurement Attorneys' Course (5F-F10).

January 5–16: 6th Procurement Attorneys' Advanced Course (5F-F11).

January 19–23: 4th Military Lawyer's Assistant Course (Criminal Law) (512-71D20/50).

January 19–23: 5th Military Lawyer's Assistant Course (Legal Assistance) (512-71D20/50).

March 8–19: 65th Procurement Attorneys' Course (5F-F10).

April 26–May 7: 66th Procurement Attorneys' Course (5F-F10).

June 21–July 2: 1st Military Justice II Course (5F-F31).

June 21–July 2: 1st Military Administrative Law Course (5F-F20).

July 11–24: USA Reserve School BOAC (Procurement Law and International Law, Phase VI Resident/Nonresident Instruction).

3. Selected Civilian-Sponsored CLE Programs (This Quarter).

SEPTEMBER

Rhode Island Bar Association, annual meeting.
Bar Association of Puerto Rico, annual meeting.
The Missouri Bar, annual meeting.
Wyoming State Bar, annual meeting.
Washington State Bar Association, annual meeting.

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

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

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

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

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

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

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

17–19: Federal Publications Inc., Government Contract Program, Risk Management in Construction Contracting, Holiday Inn/Golden Gateway, San Francisco, CA.

17–19: Federal Publications Inc., Government Contract Program, Small Purchasing, Sheraton-Houston, Houston, TX.

18–19: Practicing Law Institute, Annual Forum on Defending Criminal Cases, Hyatt Regency Hotel, Atlanta, GA.

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

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

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

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

21–25: National College of District Attorneys Course, Trial Techniques Seminar, Registry Hotel, Bloomington, MN.

22–24: Federal Publications Inc., Government Contract Program, Small Purchasing, Holiday Inn/Golden Gateway, San Francisco, CA.

22–25: Federal Publications Inc., Government Contract Program, Fundamentals of Government Contracting, Quality Inn/Pentagon City, Washington, D.C.

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

23–26: GORMAC, National Homicide Institute, Sheraton-Los Angeles Airport Hotel, Los Angeles, CA.

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

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

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

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

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

28–Oct 3: National College of the State Judiciary, Specialty Session in Sentencing Mis-

demeanants, Judicial College Building, University of Nevada, Reno, NV.

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

29–Oct 3: Federal Publications Inc., Government Contract Program, The Skills of Contract Administration, Holiday Inn-Golden Gateway, San Francisco, CA.

OCTOBER

American Association of Attorney-Certified Public Accountants, Inc., annual meeting, Amsterdam and Luxembourg.

Nebraska State Bar Association, annual meeting.
North Carolina State Bar, annual meeting.
State Bar of New Mexico, annual meeting.
West Virginia State Bar, annual meeting.
Kansas Bar Association annual meeting.

1–3: US Civil Service Commission CLE Program, Institute for Legal Counsels, Charlottesville, VA.

2–3: Federal Publications Inc. Government Contract Program, Contracting for Services, Sheraton-National, Arlington, VA.

5–10: National College of the State Judiciary, Graduate Session in Evidence II, Judicial College Building, University of Nevada, Reno, NV.

6–8: Federal Publications Inc. Government Contracting Program, Construction Project Scheduling, Sheraton-National, Arlington, VA.

6–8: Federal Publications Inc. Government Contract Program, The Learning Theater of Government Contracting, Williamsburg, VA.

7–10: National College of District Attorneys Course, Regional Police-Prosecutor School, Dallas, TX.

8–10: Federal Publications Inc. Government Contract Program, Profit and the Contracts Man, Tropicana Hotel, Las Vegas, NV.

8–11: Indiana State Bar Association, annual meeting, Evansville, IN.

9–11: Colorado Bar Association, annual meeting, Colorado Springs, CO.

9–11: ALI-ABA program "Atomic Energy Licensing and Regulation—VI," Mayflower Hotel, Washington, DC.

12–17: National College of the State Judiciary, Specialty Session in Alcohol and Drugs, Judicial College Building, University of Nevada, Reno, NV.

12–17: National College of the State Judiciary, Session in Administrative Law II, Judicial College Building, University of Nevada, Reno, NV.

12–17: World Law Conference, biennial meeting, Sheraton Park Hotel, Washington, DC.

13–15: Federal Publications Inc. Government Contract Program, Competing for Contracts, Sheraton-Harbor Island Hotel, San Diego, CA.

15–17: Federal Publications Inc. Government Contract Program, Small Purchasing, Sheraton-National, Arlington, VA.

16–17: Federal Publications Inc. Government Contract Program, Defective Pricing, Ramada Inn, Alexandria, VA.

17–18: ALI-ABA Program, Tort Trends 1975, ABCNY, New York, NY.

19–23: National College of District Attorneys Course, Organized Crime Seminar, Boston, MA.

20–22: ALI-ABA Program, Real Estate: Debtors' and Creditors' Rights, Sheraton-Harbor Island Hotel, San Diego, CA.

20–22: Federal Publications Inc Government Contract Program, Practical Negotiation of Government Contracts, Americana Hotel, Los Angeles, CA.

22–24: Federal Publications Inc. Government Contract Program, Risk Management in Construction Contracting, Quality Inn/Pentagon City, Washington, DC.

24–25: Connecticut Bar Association, Annual Meeting, Hartford, CT.

24–25: ALI-ABA Program, Practice Under the Federal Rules of Evidence, Washington, DC.

27–29: Federal Publications Inc. Government Contract Program, Competing for Contracts,

International Inn/Thomas Circle, Washington, DC.

27–29: Federal Publications Inc. Government Contracting Program, Construction Project Scheduling, Holiday Inn/Golden Gateway, San Francisco, CA.

30–31: Federal Publications Inc. Government Contract Program, Defective Pricing, Americana Hotel, Los Angeles, CA.

31–Nov 1: ABA Section of Young Lawyers, National Institute on "Consumer Law Practice," St. Louis Marriott, St. Louis, MO.

NOVEMBER

2–5: National College of District Attorneys Course, Pretrial Problems Seminar, Orlando, FL.

2–7: National College of the State Judiciary, Specialty Session in Evidence—Special Courts, Judicial College Building, University of Nevada, Reno, NV.

2–7: National College of District Attorneys Course, Prosecutors Office Administrator Course II, Houston, TX.

2–21: National College of the State Judiciary, Regular Four Week Session (Session III), Judicial College Building, University of Nevada, Reno, NV.

3–4: Federal Publications Inc. Government Contract Program, Contracting for Service, Washington, DC.

6–8: Illinois State Bar Association, midyear meeting, Pick-Congress Hotel, Chicago, IL.

7: ALI-ABA Committee on Continuing Professional Education, meeting, Philadelphia, PA.

7: Maritime Law Association of the United States, fall meeting, Americana Hotel, New York, NY.

9–14: National College of the State Judiciary, Graduate Session, The Judge and the Court Trial, Judicial College Building, University of Nevada, Reno, NV.

10–12: National Conference on Continuing Legal Education, meeting, sponsored by the ABA, Kellogg Center for Continuing Education, Chicago, IL.

12–15: National Legal Aid and Defender Association, 53d Annual Conference, Olympic Hotel, Seattle, WA.

14–15: ABA Section of Young Lawyers, national institute on "Consumer Law Practice," Omni International Hotel, Atlanta, GA.

16–19: National College of District Attorneys, Prosecutor Education Institute, Houston, TX.

17–19: Federal Publications Inc. Government Contract Program, Practical Negotiation of Government Contracts, Twin Bridges Marriott, Washington, DC.

19–21: Federal Publications Inc. Government Contract Program, Negotiated Procurement, Washington, DC.

20–21: ALI-ABA Program, Trade, Aid and International Regulation, ABCNY, New York, NY.

21–22: 17th Annual State Tax Institute, Idaho State University, Pocatello, ID.

30: ALI-ABA Federal Rules Complex, meeting, St. Thomas, V.I.

Legal Assistance Items

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

Items of Interest.

Legal Assistance Programs and Administration—Limitations on Legal Assistance Services. The Chief, Legal Assistance Office, OTJAG, recently reported that information is frequently received that Legal Assistance Officers are directly involving themselves in matters which are the responsibilities of other Judge Advocate sections or other staff agencies. Examples include claims, military justice activities, efficiency report appeals, and other military administrative matters. Paragraph 8, Army Reg. 608–50 sets out the limitations on Legal Assistance activities. This information is

expanded upon in Chapter 1 of the *Legal Assistance Handbook* and should be reviewed by all Legal Assistance Officers. [Ref: Ch. 1, DA Pam 27-12].

Family Law—Child Support—Addresses for Processing Offices for Garnishment Orders. Listed below are the addresses of those offices which are responsible for the receipt and processing of writs of garnishment and attachment relating to the enforcement of alimony and child support obligations in accordance with 42 U.S.C.A. § 659 (1975).

U.S. Army.
Commander, U.S. Army Finance and Accounting Center, ATTN: FINCR, Indianapolis, Indiana 46249

U.S. Air Force.
U.S. Air Force Accounting and Finance Center, (AFAFC/AJQ), 3800 York St., Denver, Colorado 80205.

U.S. Navy.
Director, Navy Family Allowance Activity, Anthony J. Celebrezze Federal Building, Cleveland, Ohio 44199.

U.S. Marine Corps.
Commandant of Marine Corps (Code FDD), Headquarters, U.S. Marine Corps, Washington, D.C. 20380.

U.S. Coast Guard.
Chief of General Law/G-LGL, 400 7th Street, S.W., Washington, D.C. 20590.

See also, 1 *Family L.R.* 2691 (August 19, 1975) (Brief summary of ABA Family Law Section Meeting at ABA Convention regarding Federal Child Support Enforcement).

Decisions of the Comptroller General—Legal Assistance. As stated in para. 8.6 (a), DA Pam 27-21, *Military Administrative Law Handbook,* (October 1973), "[t]he principal importance of [the decisions of the Comptroller General] to the military lawyer lies in the fact that, where money matters are concerned, 'the balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government.' " 31 U.S.C. § 44 (1970). Listed below are brief digests of selected decisions which may be of particular relevance to the military Legal Assistance Officer. Volume 53 of the Decisions of the Comptroller General (1 July 1973-30 June 1974) is digested below. Volume 54 will be similarly digested in the near future. The decisions below are organized and listed by subject area.

Retired Serviceman's Family Protection Plan, 10 U.S.C. § 1431, *et seq.*

53 Comp. Gen. 94 (1973) (RSFPP—Computation of reduction in retired pay for purchase of annuities).

53 Comp. Gen. 228 (1973) (RSFPP—Recoupment of erroneous payments made to a previously eligible beneficiary—Waivable by government—Meaning of "undue hardship").

53 Comp. Gen. 918 (1974) (RSFPP—Definition of "incapable of self-support"—Blindness antedating age 18).

Survivor Benefit Plan, 10 U.S.C. 1447, *et seq.*

53 Comp. Gen. 192 (1973) (SBP—Member denies existence of spouse or other dependents at time of election—Liability of government upon subsequent "discovery" of eligible beneficiaries).

53 Comp. Gen. 393 (1973) (SBP—Revocability of elections—Prior to entitlement to retired pay—Meaning of "administrative error").

53 Comp. Gen. 420 (1973) (SBP—Definition of "Dependent child"—No requirement of showing of "actual dependency" except regarding children with mental or physical incapacities and foster children).

53 Comp. Gen. 461 (1974) (SBP-Definition of "dependent child"-Dependent grandchild in care and custody of member may qualify as "foster child").

53 Comp. Gen. 470 (1974) (SBP—Surviving spouse eligible for annuity regardless of two-year length of marriage requirement if member dies on AD or even if after release from AD if marriage occur while member was on AD). [Cross-reference: *See,* "Legal Assistance Items, *The Army Lawyer,* February 1975].

53 Comp. Gen. 519 (1974) (SBP—Death of member prior to actual receipt of election by service—Definition of "receipt" by administering office).

53 Comp. Gen. 733 (1974) (SBP—Social Secu-

rity offset—Method of Calculation—Only wages attributable to military service).

53 Comp. Gen. 758 (1974) (SBP—Social Security offset—Inapplicable to widower with dependent child since widower receives no social security "mother's benefit") [*Ed Note:* Questionable status of this decision in light of subsequent constitutional interpretations regarding social security classifications based upon sex].

53 Comp. Gen. 818 (1974) (SBP—Applicability of two-year length of marriage requirement—Marriage after retirement but before effective date of Act (Sept. 21, 1972)).

53 Comp. Gen. 832 (1974) (SBP—Definition of "entitled to retired or retainer pay"—Nonregular service personnel).

53 Comp. Gen. 847 (1974) (SBP—Effect of recall to AD-Inter-relation of SBP and Dependency and Indemnity Compensation—Eligibility of children for annuity in § 1448(d) Case).

53 Comp. Gen. 857 (1974) (SBP—Relationship between SBP and Civil Service Retirement Survivorship Plan).

53 Comp. Gen. 887 (1974) (SBP—Period of time in MIA status treated as Active and "qualifying" service for purpose of establishing both minimum eligibility for retirement for years of service and retired pay computation within meaning of SBP).

53 Comp. Gen. 971 (1974) (SBP—Continuing relevance of prior election if member placed on Temporary Disability Retired List—Return to AD—Retired for Length of Service).

Miscellaneous.

53 Comp. Gen. 116 (1973) (Sex discrimination—Application of *Frontiero v. Richardson*—Joint Travel Regulations—Definition of "dependents").

53 Comp. Gen. 148 (1973) (Sex discrimination—Application of *Frontiero v. Richardson*—Family Separation Allowance—Retroactivity of *Frontiero*-based allowance claims).

53 Comp. Gen. 539 (1974) (Eligibility of BAQ—Both spouses on active duty—Effect of *Frontiero*).

53 Comp. Gen. 787 (1974) (Dislocation allowance—Classification of members as with or without dependents when separated from wife under a separate maintenance decree or interlocutory divorce decree).

53 Comp. Gen. 960 (1974) (Reimbursement for return travel to United States—Spouse and/or minor children who traveled to overseas post as dependents but because of divorce or annulment said spouse or children are no longer classified as "dependents") (*See also,* 52 Comp. Gen. 246 (1972); 53 Comp. Gen. 1051 (1974)).

Articles and Publications of Interest.

Administrative Law—Veterans. Addlestone, Newman, "Upgrading General and Undesirable Military Discharges," 21 *Prac. Law.* 43 (July 15, 1975) [Ref: Ch. 44, DA Pam 27-12].

Estate Planning—Retired Personnel—Veterans' Benefits—Disability Separation. DOD PA-1B/DA Pam 360-506, *Disability Separation,* June 1975. This 52-page pamphlet describes the disability separation guidelines and procedures, the different kinds of such separations, and the computation of disability retirement pay. Additionally, it briefly analyzes the Survivor Benefit Plan, SGLI, and certain VA and Social Security entitlements. [Ref: Chs. 13, 15, 38, 39, 44, DA Pam 27-12].

Family Law—Intercountry Adoptions. Comment, "Immigration Laws, Procedures, and Impediments Pertaining to Intercountry Adoption," 4 *Denver J. Int. L. & Pol.* 257 (Fall 1974). Because of the relative frequency of intercountry adoptions within the military community and because of the general paucity of information on the complexities of such adoptions, this article is highly recommended for inclusion in the Legal Assistance Articles file (Cross-reference: "The Management and Administration of Military Legal Assistance Offices," Sec II(C) (D), *The Army Lawyer,* April 1975, p. 5). This article very briefly outlines the procedures and considerations applicable to intercountry adoptions and lists agencies and organizations which may be of further assistance. [Ref: Ch. 21, DA Pam 27-12].

Legal Research Papers—Legal Assistance Subjects—Loan Copies. In the July issue of *The*

Army Lawyer ("Legal Assistance Items") it was announced that a limited number of legal research papers written by JAG Reserve Officers as a part of the Advanced Correspondence Course would be available to JAG Officers upon request. Those papers then on file or then being written were listed in that note. As a supplement or updating to that list the following papers should be added:

Presently on File:

Hood, "Common-Law Marriage in Oklahoma: A Survey," August 1975.

Pajak, "The Effect of War and Military Service Exclusions on the Payment of Benefits Under Life Insurance Policies," June 1975.

Presently Being Completed: (Exact titles subject to change):

Chevis, "Federal Estate Tax—A Legal Assistance Officer Prepares a Typical Form 706 for a Louisiana Decedent."

Fong, "The Legal Status of the Serviceman In Hawaii."

Graves, "A Critical Analysis of the Common Law Doctrine That the Release of One Joint Tortfeasor Bars Any Action Against Those Jointly Liable."

Hopkins, "The Real Effects of Less Than Honorable Discharge In Louisiana."

Jeglikowski, "Establishment of the Expanded Legal Assistance Program—A Case Study: Fort Ord, California."

McKee, "New Development in Attorney Recertification and Specialty."

Sanders, "Garnishment of Federal Pay for Alimony and Child Support."

Schreck, "The Right of a Soldier to State Services in California."

Staiti, "The DOD Expanded Legal Assistance Program in Massachusetts."

Written requests for copies of these papers should be mailed to the Deputy Director for Nonresident Instruction, The Judge Advocate General's School, Charlottesville, Virginia 22901.

Soldiers' and Sailors' Civil Relief Act—Civilian Indebtedness. Goldman, "Collection Of Debts Incurred by Military Personnel: The Creditor's View," 10 *Tulsa L.J.* 537 (1975).

New Developments Course 1975–76

The New Developments Course for military lawyers and civilian attorneys with the U.S. government continues to provide timely information and training on new developments and trends in all areas of military law.

The Quarterly Examination.

The New Developments Course is issued in three-month increments with lessons being distributed in each phase, each quarter. At the end of a quarter a standard correspondence course examination will be administered to cover only those lessons which have been issued during that particular quarter. Successful completion of each of these examinations will be required to obtain credit for that portion of the New Developments Course.

Variable Enrollment.

The New Developments Course will be administered much like a commercial magazine subscription. A person may enroll at any time during the fiscal year and his lessons will begin as of the date of enrollment. *No back issues will be sent.* His enrollment will be automatically terminated at the end of the fourth quarterly period after his original enrollment. A person taking the New Developments Course for credit who enrolls in the middle of a quarter will receive the lessons for the remainder of that quarter, however, the quarterly examination will be administered for the next full quarter after the date in which he enrolls. For example, an individual desiring to enroll in November of 1975 will receive all the lessons which are issued dur-

ing the months of November and December, but the first quarter for which he will be tested will be that quarter beginning in January 1976. This allows flexibility and accommodates the individual retirement year for the reservist and permits credit to be earned on a quarterly basis.

Academic Requirements:

a. The New Developments Course may be taken for purely informational value in a non-credit mode and the non-credit student may take as few or as many phases as he desires. The non-credit student does not have to do the practical exercises or take the quarterly examinations. Normally, active military and government civilian lawyers will be in this category.

b. The New Developments Course may also be taken for credit. A student enrolling in this mode will be required to take all four phases within any given year and will be required to pass quarterly examinations. This mode is primarily designed for the reservist who wishes to earn retirement points; however, a reservist who so enrolls must complete all assignments and pass all quarterly examinations before credit will be awarded toward retirement points.

The following New Developments Courses were offered last year:

1st Quarter	*Credit Hours*
PHASE I — CRIMINAL LAW	
Lesson 1: Search Incident to Arrest	2
Lesson 2: Plain View	2
PHASE III — INTERNATIONAL LAW	
Lesson 1: Law of the Sea	1
PHASE IV — PROCUREMENT LAW	
Lesson 1: The Thirty-Day Rule	3
Lesson 2: Truth in Negotiations: Defective Pricing	3
Lesson 3: Estoppel of the Government	2
2nd Quarter	
PHASE II—ADMINISTRATIVE AND CIVIL LAW	
Lesson 1: The Posse Comitatus Act	1
Lesson 2: Legal Assistance	2
Lesson 3: Due Process and Consumer Protection	2
Lesson 4: Exercise of Constitutional Rights on Military Installations	2
Lesson 5: Expanded Government Liability Under the Federal Tort Claims Act	3
Lesson 6: Labor-Management Relations: Timeliness Requirements for Representation Elections	1
Lesson 7: Labor-Management Relations: Unfair Labor Practices	1
PHASE III — INTERNATIONAL LAW	
Lesson 2: Draft Definition of Aggression	1
3rd Quarter	
PHASE I — CRIMINAL LAW	
Lesson 3: Due Process: Eyewitness Identification	4
Lesson 4: Compelling a Lineup	4
Lesson 5: Standing	4
PHASE III — INTERNATIONAL LAW	
Lesson 3: Geneva Convention Application in the Mid-East	2
PHASE IV — PROCUREMENT LAW	
Lesson 4: Office of Federal Procurement Policy	4
Lesson 5: Off-Shore Procurement and Litigation	3
4th Quarter	
PHASE I — CRIMINAL LAW	
Lesson 6: Command Influence	2
PHASE II — ADMINISTRATIVE AND CIVIL LAW	
Lesson 8: Labor-Management Relations: Executive Order No.	4
PHASES II and IV — ADMINISTRATIVE & CIVIL LAW AND PROCUREMENT LAW	
Freedom of Information	6
PHASE III — INTERNATIONAL LAW	
Lesson 4: Evolving States' View of International Law	4
Lesson 5: The Soviet View of International Law	4
Lesson 6: Human Rights in the Israeli Occupied Territories	6

Applications for the New Developments Course (credit or non-credit) are available by writing to: Commandant, The Judge Advocate General's School, U.S. Army, ATTN: Correspondence Course Office, Charlottesville, Virginia 22901.

JAGC Personnel Section

From: PP & TO, OTJAG

1. Retirements. On behalf of the Corps, we offer our best wishes for the future to the following individuals who retired 31 July 1975:

Colonel Henry J. Olk
Colonel Thomas J. Nichols
Colonel Vernon H. H. Newman
Colonel Robert L. Wood

2. Orders requested as indicated.

Name	*From*	*To*
	LIEUTENANT COLONELS	
JONES, Robert W.	HQ EAMTMC, Bayonne, NJ	HQ First US Army, Ft. G. Meade, Md
RADOSH, Burnett	OTJAG, Washington, DC	USA Elm ASBCA, Washington, DC
STEWART, Ronald	USALSA w/sta Ft Sill, Okla	USALSA w/sta Ft Riley, Kansas
WICKER, Raymond	HQ First US Army, Ft G. Meade, Md	HQ USASA, Arlington Hall Sta, Va.
	MAJORS	
CARROLL, Bartlett	USA Student, Ft Benj. Harrison, In	OTJAG, Washington DC
DAVIES, David C.	OTJAG, Washington, DC	TRADOC, Ft. Monroe, Va
KELLEY, Oliver	USALSA w/sta Ft Hood, TX	USALSA w/sta Ft. Sill, Okla
McBRIDE, VICTOR	USA Admin Center, Ft Benj. Harrison, Indiana	S-F, TJAGSA, Charlottesville, Va
	CAPTAINS	
ALLAN, Edward G.	82d Abn Div, Ft Bragg, NC	Korea
BIRCH, John O.	USAREUR	OTJAG, Washington, DC
BROOKS, Waldo W.	USA Gar. Aberdeen Pvg Gr. Md.	Europe
BURTON, Joseph	Korea	HQ USA Gar. Ft. Sam Houston, Texas
CICHOWSKI, Stanley	USALSA, Falls Church, Va	Iran
COLLINS, Gary	Defense Lang. Inst. Presidio of Monterey, Ca.	Panama
FLORSHEIM, Charles	Fifth US Army, Ft. Sam H. Tx	Korea
GAMMON, William	AMC, Alexandria, Va	USALSA, Falls Church, Va
GAYLORD, Stanley	4th Inf Div, Ft Carson, Co	Korea
HEMMER, Paul C.	USALSA, Falls Church, Va	HQ, MDW, Washington, DC
HOUGH, Richard	82d Abn Div, Ft. Bragg, NC	USA Stu Det, Ft Benj. Harrison, In w/sta Geo Wash. Univ
LANE, Thomas C.	USALSA, Falls Church, Va	OTJAG, Washington, DC
LEWIS, Hollis	Korea	USA Air Def Center, Ft Bliss, TX
MASENGA, Robert	USATC, Ft Leonard Wood, Mo	Korea
McCANN, James P.	USA Stu Det, Ft Benj Harrison, Indiana	USA Garrison, Presidio of S.F. Ca.
MORLOCK, Frank	Iran	USATCI, Ft Dix, N.J.
NORRIS, DAVID E.	US Army Gar. Ft Meade, Md	USALSA, Falls Church, Va
RETSON, Nicholas	Korea	USALSA, Falls Church, Va
RUTH, Patrick A.	Europe	82d Abn Div, Ft Bragg, N.C.
SCHNEIDER, William	USA Gar, Aberdeen PG, Md	Korea

SCHWARZ, Paul W.	HQ WAMTMC, Oakland, CA	Thailand
SNELL, Landon P.	USAIS, Ft Benning, GA	USA Inf Cen, Ft Benning, Ga
SOMERS, Bruch W.	Fort Bliss, Texas	Korea
VREELAND, John	USA Gar, Ft Sam Houston, Tx	HQ Fifth USA, Ft Sam Houston, Tx

3. JAGC Anniversary Celebration in D.C. On the 29th of July Army Lawyers throughout the world celebrated the 200th Anniversary of the Judge Advocate General's Corps. In Washington, DC, Major General Wilton B. Persons, Jr., The Judge Advocate General, US Army, hosted a reception in his office in honor of the bicentennial. Guests included: The Honorable Charles Ablard, General Counsel of the Army; Lieutenant General Harold G. Moore, Deputy Chief of Staff, USA; Lieutenant General Ralph L. Foster, Director of the Army Staff; and all members of the Office of The Judge Advocate General. TJAG Persons and Captain Donald Manney ceremoniously cut a birthday cake, which was decorated to depict the American flag with the caption, "Happy 200th Birthday JAGC." The event was highlighted by Major H. Jere Armstrong's reading of a humorously annotated history of the Corps. That evening, a Dining-In was also held in honor of the occasion at the Fort McNair Officers' Club. Honored guests included: Mr. Ablard; the Honorable Monroe Leigh, Legal Advisor, United States Department of State; Rear Admiral H. B. Robertson, Jr., The Judge Advocate General, United States Navy; and Rear Admiral Ricardo A. Ratti, Chief Counsel, United States Coast Guard. Music for the dining-in was provided by the United States Army Band. As part of the JAGC bicentennial observances throughout the Army, birthday messages from the Secretary of the Army and the Army Chief of Staff were also received.

4. Administrative Law Handbook Update. Reference: *Military Administrative Law Handbook*, DA Pam 27-21 (C1 7 Mar 1975). Pending revision of Chapter 2 of the *Handbook*, it is suggested that holders of DA Pam 27-21 obtain a copy of *Commanders Digest*, Volume 18, Number 5 (31 July 1975) entitled "The Organization of Department of Defense." The *Digest* may be filed with Chapter 2, "Military Organization," assuring accuracy of the information contained therein. The *Digest* may be obtained through normal distribution channels or by request to: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. TJAGSA does *not* maintain a supply of publications for distribution to the field.

5. DoD General Counsel Becomes Army Secretary. On 5 August 1975 Martin R. Hoffmann, former DoD General Counsel, was sworn in as Secretary of the Army, succeeding Howard H. Callaway. As noted in the September 1974 issue of *The Army Lawyer*, Hoffmann has held various government positions since his graduation from the University of Virginia Law School in 1961. He served as a law clerk with the US Court of Appeals for the Fourth Circuit; as an Assistant US Attorney for the District of Columbia; as minority counsel for the House Judiciary Committee; as legal counsel for Senator Charles W. Percy; and as general counsel of the Atomic Energy Commission. Prior to his appointment as DoD General Counsel, Hoffmann served 11 months as special assistant to the Secretary of Defense and Deputy Secretary of Defense. The 43-year old Massachusetts native holds a bachelors degree from Princeton University. He is married to the former Margaret Ann McCabe and has three children.

6. Senior Trial Lawyers. Three more JAGC captains have been designated Senior Trial Lawyers. They are:

Captain Steven F. Lancaster
Captain Michael G. Rice
Captain Ray A. Farrington

7. Fort Sam SGM Retires. Retirement ceremonies were held on the 31st of August for Sergeant Major Daniel A. Cretaro of the SJA office at Headquarters, Fifth United States Army, Fort Sam Houston, Texas after some 26 years of military service which began in January 1949. He was presented the Legion of Merit by Lieutenant General Allen M. Burdett, Jr., Commanding General, Fifth United States Army.

Current Materials of Interest

Articles

Addlestone and Newman, "Upgrading General and Undesirable Military Discharges" 21 PRAC LAW 43 (July 1975). In a 16-page piece, David F. Addlestone, Executive Director of the Military Rights Project and the Lawyers Military Defense Committee of the ACLU, and Susan H. Newman, attorney with the Project, outline the discharge review system, provide detailed instructions for practicing before the Discharge Review Boards and the Boards of Correction of Military Records, and present guidelines for preparing a discharge recharacterization case.

Goldman, "Collection of Debts Incurred by Military Personnel: The Creditor's View" 10 TULSA L.J. 537 (1975).

Enthoven, "U.S. Forces in Europe: How Many? Doing What?" *Foreign Affairs*, Volume 53, Number 3 (April 1975) at 513.

Darby, "A Study in Equity: Army Discharge Review Board," *Army*, Volume 25, Number 4 (August 1975) at 35.

Note, "Declarations Against Penal Interest: What Must Be Corroborated Under the Newly Enacted Federal Rate of Evidence, Rule 804 (b) (3)" 9 VAL. U.L. REV. 421 (Winter 1975).

Carter, "The Cumulative Evidence Rule and Harmless Error," 40 MO. L. REV. 79 (Winter 1975).

Kahn and Carlson, "Transactions Subject to Gift Tax" 21 PRAC LAW 81 (July 1975).

Knox, "Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures," 40 MO. L. REV. 1 (Winter 1975).

Harmelink and Shurtz, "Child Care Expenses: Current Status and Alternatives," *Taxes*, Volume 53, Number 8 (August 1975) at 479.

Adams, "Admissions of Agents" 40 MO. L. REV. 55 (Winter 1975).

Note, "A Survey of the Qualifications of Magistrates Authorized to Issue Warrants," 9 VAL. U.L. REV. 443 (Winter 1975).

By Order of the Secretary of the Army:

Official:

PAUL T. SMITH
Major General, United States Army
The Adjutant General

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