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The Gonzales Bill

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On 8 October 1976 President Ford signed Public Law 94–464, commonly known as the Gonzales Bill. The bill is of great importance for all of those persons, military or civilian, whose jobs involve providing medical care for the Armed Forces.[1]

The first section of the bill makes the Federal Tort Claims Act[2] the exclusive remedy for those seeking damages for allegedly improper medical treatment by Armed Forces medical personnel. This legislation immunizes "any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces from personal liability for damages caused by a negligent or wrongful act or omission," while acting within the scope of his employment.[3] The act specifically waives section 2680(h) of the Federal Tort Claims Act, so that the Gonzales Bill covers actions which allege false imprisonment, assault and battery, etc., as well as negligence (as in the case of an allegation of assault and battery by the physician's failure to obtain an informed consent prior to surgery).[4] In cases where a person protected by the bill is sued individually, the Attorney General is authorized to defend the suit, and if the suit is brought in a state court, the suit is subject to removal to the appropriate Federal District Court. Once in federal court, the suit is to be "deemed a tort action against the United States". For situations in which the remedy of the Federal Tort Claims Act is likely to be precluded (such as in the case of negligence in a military hospital outside CONUS), the bill authorizes the government to purchase liability insurance for its personnel or to hold them harmless.[5]

The second section of the bill[6] authorizes payment of malpractice claims and judgments against National Guard medical personnel by the Federal Government, and sets out procedures for the implementation of this authority. The aim of this section is to encourage the participation of medical personnel in the various National Guard organizations; since National Guardsmen and National Guard employees are generally not considered federal employees for Federal Tort Claims Act purposes, torts committed by them when not in federal service are not cognizable under the Federal Tort Claims Act. Further, they are often subject to personal liability for tortious conduct and the Gonzales Bill serves to indemnify them should they be sued individually for acts taken within the scope of their medical duties.

The Department of Defense and the various services are currently drafting regulations which will implement the Gonzales bill. For the present, Staff Judge Advocates should take steps to insure that all medical personnel within their commands are advised to notify *immediately* their Staff Judge Advocate should they be named in any lawsuit involving the performance of their medical duties. Staff Judge Advocates should, in turn, immediately notify the Litigation Division, (HQDA, DAJA–LTT, WASH DC 20310, AUTOVON 225–1734) if they are aware of any suits involving medical personnel within their commands. More specific instructions will be an-

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nounced via interim changes to appropriate regulations.

Notes

1. The Bill also relates to NASA, CIA, and National Guard medical personnel.

2. 28 U.S.C. § 2674, et seq.

3. 10 U.S.C. § 1089.

4. 10 U.S.C. § 1089(e).

5. 10 U.S.C. § 1089(f).

6. 32 U.S.C. § 334.

Public Law 94-464—Oct. 8, 1976

Public Law 94-464

94th Congress

An Act

To provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 55 of title 10, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 1089. Defense of certain suits arising out of medical practice

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

"(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

"(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

"(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

"(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

"(f) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

"(g) In this section, 'head of the agency conecrned' means—

"(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

"(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy; and

"(3) the Secretary of Defense, in all other cases.".

(b) The table of sections at the beginning of such chapter 55 is amended by adding at the end thereof the following:

"1089. Defense of certain suits arising out of medical malpractice".

SEC. 2. (a) The Congress finds—

(1) that the Army National Guard and the Air National Guard are critical components of the defense posture of the United States;

(2) that a medical capability is essential to the performance of the mission of the National Guard when in Federal service;

(3) that the current medical malpractice crisis poses a serious threat to the availability of sufficient medical personnel for the National Guard; and

(4) that in order to insure that such medical personnel will continue to be available to the National Guard, it is necessary for the payment of malpractice claims made against such personnel arising out of actions or omissions on the part of such personnel while they are performing certain training exercises.

(b) Chapter 3 of title 32, United States Code is amended by adding at the end thereof a new section as follows:

"§ 334. Payment of malpractice liability of National Guard Medical personnel

"(a) Upon the final disposition of any claim for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any medical personnel of the National Guard in furnishing medical care or treatment while acting within the scope of his duties for the National Guard during a training exercise, the liability of such medical personnel for any costs, settlement, or judgment shall become, subject to the provisions of this section, the lia-

bility of the United States and shall be payable under the provisions of section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a), or out of funds appropriated for the payment of such liability.

"(b) The liability for any claim for damages under this section against any medical personnel shall become the liability of the United States only to the extent that the liability of such medical personnel is not covered by insurance, and such liability shall not constitute coinsurance for any purpose.

"(c) Liability of the United States for damages against any medical personnel referred to in subsection (a) shall be subject to the condition that the medical personnel against whom any claim for such damages is made shall—

"(1) promptly notify the Attorney General of the claim, and in case of any civil action or proceeding brought in any court against any such personnel, deliver all process served upon such personnel (or an attested true copy thereof) to the immediate superior of such personnel or to such other person designated by the appropriate Adjutant General to receive such papers, who shall promptly transmit such papers to the Attorney General.

"(2) furnish to the Attorney General such other information and documents as the Attorney General may request, and

"(3) comply with the instructions of the Attorney General relative to the final disposition of a claim for damages.

"(d) The liability of the United States under this section shall also be subject to the condition that the settlement of any claim described in subsection (a) of this section be approved by the Attorney General prior to its finalization.

"(e) The provisions of this section shall not apply in the case of any claim for damages against any medical personnel settled under the provisions of section 715 of title 32.

"(f) As used in this section, the term—

"(1) 'Medical personnel' means any physician, dentist, nurse, pharmacist, paramedical, or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Army National Guard or the Air National Guard.

"(2) 'Training exercise' means training or duty performed by medical personnel under section 316, 502, 503, 504, or 505 of this title or under any other provision of law for which such personnel are entitled to or has waived pay under section 206 of title 37.

"(3) 'Final disposition' means—

"(A) a final judgment of any court from which the Attorney General decides there will be no appeal,

"(B) the settlement of any claim, or

"(C) a determination at any stage of a claim for damages in favor of a medical personnel and from which determination no appeal can be made.

"(4) 'Settlement' means any compromise of a claim for damages which is agreed to by the claimant and approved by the Attorney General prior to its finalization.

"(5) 'Costs' includes any costs which are taxed by any court against any medical personnel, normal litigation expenses, attorney's fees incurred by any medical personnel, and such interest as any medical personnel may be obligated to pay by any court order or by statute.

"(6) 'Claim for damages' means any claim or any legal or administrative action in connection with any claim described in subsection (a) of this section.

"(7) 'Attorney General' means the Attorney General of the United States".

(c) The table of sections at the beginning of such chapter 3 is amended by adding at the end thereof the following:

"334. Payment of malpractice liability of National Guard medical personnel.".

SEC. 3. Title III of the National Aeronautics and Space Act of 1958, as amended, is amended by redesignating section 307 as 308 and by inserting after section 306 a new section 307 as follows:

"DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE SUITS

"SEC. 307. (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28, United States Code, for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Administration in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other

supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

"(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought to the Attorney General and to the Administrator.

"(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28, United States Code, and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

"(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, United States Code, and with the same effect.

"(e) For purposes of this section, the provisions of section 2680(h) of title 28, United States Code, shall not apply to any cause of action arising out of a negligent or wrongful act of omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

"(f) The Administrator or his designee may, to the extent that the Administrator or his designee deem appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of title 28, United States Code, for such damage or injury.".

SEC. 4. This Act shall become effective on the date of its enactment and shall apply only to those claims accruing on or after such date of enactment."

Approved October 8, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94-333 (Comm. on Armed Services).

SENATE REPORT No. 94-1264 (Comm. on Armed Services).

CONGRESSIONAL RECORD:
Vol. 121 (1975): July 21, considered and passed House.
Vol. 122 (1976): Sept. 24, considered and passed Senate, amended.
Sept. 27, House concurred in Senate amendment.

Handling Malpractice Claims

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In view of the wide publicity being given to medical malpractice insurance and the crisis it has brought about in some states, it appears appropriate to discuss an effective procedure which is being used at the Office of the Staff Judge Advocate, United States Army Support Command, Hawaii, in handling medical malpractice claims under the Federal Tort Claims Act. The claims attorney assigned to that office is responsible for potential and actual malpractice claims based on medical treatment at Tripler Army Medical Center in Hawaii. This

medical facility is the only major military hospital in the state of Hawaii and treats medical problems of dependents of all members of the armed forces, as well as other patients, such as Veterans Administration beneficiaries.[1]

Potential claims are discovered as a result of good liason with medical personnel, the hospital judge advocate, legal assistance officers and inspectors general. These personnel are usually the first to hear about or receive a complaint about a potential malpractice claim. Good liaison with these personnel brings about early investigation which is the key to the entire malpractice problem.

When the claims attorney receives information on a potential claim or receives an actual claim, he attempts to gather from the claimants or their attorneys if an attorney is in the picture, all information concerning the circumstances of the case.[2] This information is then forwarded to medical personnel at Tripler Army Medical Center for an opinion.

Over the years, it has been discovered that a request for a general, overall opinion whether reasonable medical standards were followed, often brings an answer which is incomplete and of little value. Accordingly, the claims attorney has found that it is most effective to send a questionnaire, which is actually interrogatories, to medical personnel at the hospital and ask that specific questions be answered. Very often, the questionnaire can be returned quite expeditiously with hand written answers. The average person who is asked to render an opinion will complete a fill-in questionnaire much more quickly and thoroughly than he will answer general questions which require either dictation or writing the answers and then having them typed by a secretary.

The questionnaire can also ask for an overall opinion whether reasonable medical standards were followed in a specific case. The questionnaire is extremely effective in asking the treating physician against whom the allegation of malpractice is made, to detail his treatment. Another questionnaire is then completed by the chief of the medical section who then reviews the treatment of the treating physician and renders an opinion regarding the reasonableness of the treatment. In order to prepare such questionnaires, it is necessary that the claims attorney review relevant medical literature and utilize prior experience in the malpractice field.

After the questionnaire or questionnaires are returned, the claims attorney must then decide whether it is necessary to interview the specific treating personnel. Often it is only by discussing the case with treating personnel, that the claims attorney is able to understand all of the medical and factual issues. Further, if the claims attorney understands all aspects of the medical and factual issues, it places him in a much better position to negotiate a settlement of the claim or to convince the claimant or his attorney, that there is no basis for a claim. After the investigation and medical opinions are received in Hawaii, the investigation and the medical opinions along with medical records are forwarded through the Chief, U.S. Army Claims Service, to the Division of Legal Medicine, Department of Forensic Sciences, Armed Forces Institute of Pathology (AFIP), Washington, D.C. This Division reviews the medical opinions, interrogatories, and medical records from Tripler Army Medical Center personnel and then renders its own opinion which is referred through the Chief, U.S. Army Claims Service, to the claims attorney. It is noted that most of the members of the Legal Medicine Division have degrees in both law and medicine, making them invaluable in assessing whether medical negligence exists under particular circumstances. If the opinion from the Legal Medicine Division finds medical negligence, the claims attorney then assesses the damages and begins to discuss damages with the claimant or his attorney.

The claims attorney then consults with representatives of the U.S. Army Claims Service and gives his views as to the value of the case. If his assessment of the value of the case is concurred in by representatives of the U.S. Army Claims Service, the claims attorney then

begins to negotiate with the claimant and his attorney. There cannot be enough stress laid on the necessity for good and continual liaison with representatives of the U.S. Army Claims Service, in order to be certain that any settlement will be fair to the claimant and the United States. When the claims attorney arrives at a settlement amount which is within the range previously agreed upon by representatives of the U.S. Army Claims Service, he refers this amount to the U.S. Army Claims Service for approval. The amount must be one which appears fair to the government in the opinion of the claims attorney. Upon concurrence from the Chief, U.S. Army Claims Service, the claims attorney then secures a settlement agreement and prepares a memorandum substantiating payment of the amount agreed upon. It is noted that the authority of Department of the Army is only twenty-five thousand dollars and in many of the malpractice cases, particularly those involving death and serious personal injuries, the amount agreed upon is in excess of such authority. Therefore, in settlement agreements above twenty-five thousand dollars the memorandum must justify payment which has to be approved by Department of Justice and in some cases by Congress.

If the opinion from the Legal Medical Section, Armed Forces Institute of Pathology, does not find medical negligence, the claims attorney then has the responsibility to confer with the claimant or his attorney in an attempt to convince him that the claim is without merit and should be withdrawn. The claims attorney must be familiar with the medical aspects of the case and thus must read carefully and understand not only the medical opinion of the consultants, but the relevant medical literature. Without familiarity with the medical aspects of the case, he is in a poor position to convince the claimant or his attorney that the case should either be withdrawn or should be settled for a certain amount.

The above procedure is an effective method of settling malpractice claims on an administrative level thus preventing suit when there is an insufficient basis for a malpractice finding. It is important in dealing with malpractice claims to maintain excellent rapport with the claimant and their attorneys, and create an atmosphere that the claims attorney and the medical consultants and U.S. Army Claims Service personnel are attempting to evaluate fairly and openly the merits of the claim. If this rapport is maintained, in most cases the denial of malpractice or settlement amount is accepted by the claimant and his attorney. Another aspect of preventing suit on claims which have no merit is to refer the claimant back to the treating doctor, or back to the treating doctor's chief, who is able to explain in detail the medical aspects of the case. The claims attorney may be present and should always be present if the claimant has an attorney who wishes to be present. It has been noted that some claimants come to the claims attorney because they have been unable to obtain a clear understanding of the medical aspects of the case involved in their treatment or the treatment of their dependents.

The above procedure usually results in a fair and expeditious handling of malpractice claims. This is the intent of the Federal Tort Claims Act.

In summary, the following is recommended for claims personnel dealing with medical negligence:

a. Early discovery of potential malpractice cases by liaison with appropriate personnel who receive notice of such potential claims.

b. Thorough investigation and the use of proper questionnaires. Relying on involved medical personnel to spontaneously outline the deficiencies in the government's case is not always trustworthy.

c. Familiarity and knowledge of the medical aspects as much as is required in order to discuss and negotiate intelligently settlement of the case.

d. Close liaison with U.S. Army Claims Service along all steps of the procedure.

The claims attorney must portray in manner, action and speech that he is a fair and open-minded attorney, who is seeking the truth.

Notes

1. There is no Veterans Administration hospital in the State of Hawaii.

2. Of course, if an attorney is representing a claimant, all contact must be made through the attorney and never directly with the claimant.

Administrative and Civil Law Section

Topic Headings

76–5 *Judge Advocate Legal Service* 27 (1976), 76–7, *Judge Advocate Legal Service* 31 (1976), and 76–9 *Judge Advocate Legal Service* 30 (1976) contain a list of topic headings suggested for use in filing administrative law opinions under 402–01 Legal Opinion Precedent files. This topic heading should be added to that list.

MARRIAGE

The Judge Advocate General's Opinions

1. (Military Installations, Post Services) **Availability of Objectionable Magazines in Post Exchanges.** DAJA–AL 1975/5157, 4 Nov. 1975. In response to an inquiry about the extent of an installation commander's authority to control what he considers to be objectionable magazines, TJAG expressed the opinion that the ability of the installation commander to control material in post exchanges is limited. Even though AR 210–10, para. 5–5, gives commanders discretion in the control of distribution of literature, a magazine may be banned from distribution on post only where the magazine presents "clear danger to military loyalty, discipline or morale" of the troops. While the term "morale" may include the standard "public morals of the post population," TJAG considered a decision by a commander to ban an adult magazine to be guided by the constitutional standards of obscenity rather than by a danger to post moral standards. Therefore, Supreme Court guidelines in *Miller v. California,* 413 U.S. 15 (1972) and *Paris Adult Theater v. Slaton,* 413 U.S. 49 (1972) control. As these standards have continued to shift, it is impossible to provide specific guidelines to commanders. While 18 U.S.C. § 1462 does regulate obscene materials in federal areas, it is difficult to enforce because of the uncertainty whether any definition of obscenity to be used by the Army or a post commander will meet a Supreme Court test.

Any attempt to prohibit the resale of so-called objectionable magazines would not be in accord with Department of Defense or Department of the Army policy permitting free access by the soldier to news and publications other citizens enjoy. Printed matter need not be treated differently than other services offered through the Army and Air Force Exchange Service in determining the responsiveness of the exchange system to customer needs. The "commander's area exchange council" described at paragraph 1–4*d*, Army Regulation 60–10, 21 March 1973, could evaluate customer "complaints" in determining customer needs and desires, thereby providing the most responsive services to the exchange customer. Printed matter, however, should not be censored or otherwise broadly excluded merely because it is offensive to the sensibilities of some customers.

2. (Military Installations, Regulations, Law Enforcement) **Curfew And Off-Base Limitations In Overseas Commands.** DAJA–AL 1975/5301, 17 Dec. 1975. An overseas command requested an opinion of The Judge Advocate General concerning three policies which were intended to reduce the incidence of crime directed at US personnel. The policies prohibited guests of the opposite sex from visiting

bachelor officer quarters or enlisted billets on base; required troops without dependents on short tours to occupy on-post housing; and established "curfew" areas and hours during which time military personnel must not only stay off the street, but must return to base or leave the curfew area.

The Judge Advocate General concluded that all of the policy statements concerned the authority of the commander to preserve property under his control, assure law and order on the installation, and protect health, welfare, and safety of military personnel. Reasonable precautions, based on the specific facts in each situation, may be taken by the commander to insure that a high state of combat readiness is maintained and the security of the installation is enhanced. While The Judge Advocate General perceived no legal objection to the policies, it was noted that the imposition of a curfew in designated areas for specified time periods would be difficult to enforce in view of the fact that hotel rooms and living quarters were located in the curfew area.

3. (Military Installations, General, Off-Duty Employment) **Off-Duty Soldiers May Not Be Employed Under Food Service Attendant (KP) Contracts.** DAJA-AL 1975/5409, 5 Jan. 1976. KP was abolished throughout the Army during 1973–1974 in an attempt to make all-volunteer service attractive. At that time the Department of the Army prohibited contractors from hiring off-duty military personnel as KP's. An exception was requested to permit employment of off-duty personnel at commands where civilian manpower is in short supply. TJAG stated that allowing a civilian contractor to hire military personnel to perform off-duty KP work may violate the principles that are the basis of the Dual Compensation Act, 5 U.S.C. § 5536. Such a contract might be voided by the Comptroller General as an attempt to circumvent the intent of the statute.

4. (Military Installations, Law Enforcement, Citizen Band (CB) Radios) **Overseas Commander Responsible For Insuring Compliance Of CB Radio Owners With Host Country Regulations.** DAJA-AL 1976/4022, 8 Apr. 1976. In response to an inquiry concerning controls on the sale of citizen band radio equipment for use overseas, The Judge Advocate General stated that there is no legal objection to para. 3, Army Regulation 105-4. The regulation prohibits transportation or shipment of citizen band radios to overseas areas without the prior permission of the appropriate overseas commander. At the time the regulation was promulgated, Germany prohibited use of CB radios by private citizens. Now such use is merely restricted. Neither the Joint Travel Regulations nor Federal Communications Regulations prohibit overseas shipment or possession of citizen band radios. The overseas commander must insure that members of his command comply with national and international regulations. The maintenance of good international relations requires the overseas commander to regulate in some instances, various aspects of the private lives of members of his command more than a stateside commander could, especially where a violation of the law is involved or misuse of the citizen's band radio would discredit the Army.

5. (Information and Records, Release and Access) **Draft Studies Of Installation Closures And Realignments Are Exempt From Release To The Public.** DAJA-AL 1976/4630, 7 June 1976. In response to a request from a member of the public for certain studies concerning the closing or realignment of various installations, The Judge Advocate General advised that the studies were in draft form or were at the "working papers" stage, and as such represented information received or generated preliminary to a decision. It was noted that these studies were exempt from release under 5 U.S.C. § 552(b)(5) (internal memoranda) because premature disclosure would interfere with or impede the orderly decision-making process of the Department of the Army.

6. (Information and Records, Collection of Information) **Impact Of Privacy Act On Collection Of Personal Data For Unit Alert Rosters.** DAJA-AL 1976/4487, 11 June 1976. An

opinion was requested as to whether members of reserve component units could be prosecuted for refusal to furnish personal information for inclusion in a unit alert roster. The Judge Advocate General expressed the opinion that the Privacy Act imposes no additional constraints on the unit commander in obtaining necessary information (such as telephone numbers and temporary address for official alert notification purposes) from individual unit members except for the requirement to provide each reserve unit member with the Privacy Act Statement. The opinion noted that the Privacy Act Statement should advise that furnishing the requested information is mandatory.

7. (Military Aid to Law Enforcement, General) **Civilian Ambulance Services By Army Personnel Under The Domestic Action Program.** DAJA–AL 1976/4469, 11 June 1976. An opinion was requested whether an agreement providing 12 Army medics to assist in the operation of a city's ambulance service was in accordance with AR 28–19 (The Army Domestic Action Program). The service had been available at no charge to the civilian or military community since 1971, and one-half of the persons provided assistance were military or dependents. There was no other ambulance service available and the community had no program to replace the Army medics. Termination of Army assistance would have left the community virtually without ambulance service. The Judge Advocate General noted that paragraph 2*b*, AR 28–19, provides that the "thrust" of the Army's Domestic Action Program is toward projects considered of benefit to the disadvantaged members of the civilian community. Specific objectives of the program are to transfer technological advances and skills to the civilian community and to increase employment, training, education and recreational opportunities for these disadvantaged citizens. Projects that will have adverse effects on the civilian community, if terminated on short notice, are not authorized. TJAG opined that short-term domestic support to local, state and federal agencies is proper only when those agencies develop and provide long-term support from their own resources. A combined effort to recruit and train civilian replacements for the Army medics within a reasonable time was recommended.

8. (Military Installations, Solicitation, Withdrawal of Privileges) **Sufficiency Of Evidence For Withdrawal Of Solicitation Privileges On All Department Of The Army Installations—Life Insurance.** DAJA 1976/4501, 21 June 1976. A life insurance agent was advised that a hearing was to be conducted to determine whether he violated Army Regulation 210–8 by having allotment forms in his possession and by soliciting for life insurance without an appointment. At the hearing, the witnesses were unable to identify the agent as one of the life insurance salesmen who had approached them, and it was determined that he was not in fact one of the salesmen involved in the allegations. Apparently, he had been suspected because his signature appeared on certain DA Forms 2056 (Commercial Insurance Solicitation Record) given to the witnesses by the salesmen.

The agent had testified at the hearing that he was the general agent for the life insurance company, and therefore only he possessed a post solicitation permit, although 15 other salesmen who work for him solicited at the post. He, therefore, signed all the DA Forms 2056 which were used by his salesmen. Based on this evidence, the agent's solicitation permit was revoked and the post recommended an Army-wide suspension. The Judge Advocate General had earlier indicated that an Army-wide suspension should be based upon "comparatively flagrant misconduct which is obviously in controvention of the regulations." See JAGA 1969/4297, 11 Sept 1969. Because the evidence of record indicated that the agent apparently believed in good faith that only he, as the single authorized general agent for the life insurance company, was required to obtain a permit, The Judge Advocate General concluded that, while the evidence revealed a violation of regulations, a flagrant violation had not been established.

Another issue was raised as to whether the show cause hearing was legally sufficient to justify the general agent's suspension when the entire hearing was conducted in regard to other allegations. The Judge Advocate General concluded that the violation discovered was sufficiently related to the initial charges so as to place the general agent on notice and that his voluntary statement was sufficient to justify a suspension of solicitation privileges on post. The opinion concludes by noting that only a two-year suspension is allowable in circumstances such as these. See DAJA-AL 1973/4484, 27 Aug. 1973; DAJA-AL 1973/4136, 4 June 1973.

9. (Information and Records, Release and Access) **Opinions Of SJA And Other Staff Elements Are Exempt From Release.** DAJA-AL 1976/4790, 23 June 1976. In response to a request from a member of the public, The Judge Advocate General advised that opinions of a staff judge advocate and certain other elements of the Army staff are exempt from release under the Freedom of Information Act. It was noted that these items constitute predecisional advice, suggestion, or opinion and are therefore exempt from mandatory disclosure under 5 U.S.C. § 552(b)(5), and para. 2-12*e*, AR 340-17 (internal memoranda). The opinion pointed out that the legitimate governmental purpose served by withholding the documents in question was the prevention of injury to the quality of the decisions of the Department of the Army (which would result from disclosures of predecisional memoranda containing the candid opinions, recommendations, and legal advice of the various elements of the Army staff and its field agencies).

10. (Information and Records, General) **Privacy Act Applies To BankAmericard Contract With Officer's Club.** DAJA-PL 1976/6711, 13 July 1976. An opinion was requested as to whether the Privacy Act of 1974 applied to a BankAmericard contract that an Officer's Club had with a local bank. Under the contract, the bank maintained a system of records in order to furnish the club with a monthly printout of membership dues and golf and tennis fees. The Judge Advocate General expressed the opinion that the Privacy Act applied to the BankAmericard contract, because the contract was one the contractor could perform "only by the design, development, or operation of a system of 'records' " (ASPR 1-327.3*a*) and the system of records was not one which was exempt as "a system used by a contractor as a result of his management discretion" (ASPR 1-327.3*a*). It was further noted that the system of records in question came under the provisions of 5 U.S.C. § 552*a*(m) which applies the provisions of the Privacy Act to such systems "when an agency provides by contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function . . . ." Only by modifying the contract so the bank did not maintain any of the club records or systems of records would the Privacy Act not apply.

Legal Assistance Items

Captain F. John Wagner, Jr. and Captain Steven F. Lancaster,
Administrative and Civil Law Division, TJAGSA

1. ITEMS OF INTEREST.

Civilian Indebtedness — Bankruptcy — Debts Not Discharged; Family Law — Alimony, Child Support, Custody and Property Settlements. Mr. *C* received a divorce from Mrs. *C*, now Mrs. *Y*, in early 1973. As to alimony, the decree required Mr. *C* to pay Mrs. *Y* a sum certain in one-hundred sixty-eight (168) semi-monthly installments. Mrs. *Y* remarried and Mr. *C* went to the court to terminate alimony payments. The court refused, stating that the alimony was really a division of property, since it was a sum certain, and since nothing in the decree allowed termination of alimony upon death or remarriage. Subsequently, Mr.

C filed for bankruptcy, listing Mrs. *Y* as a creditor. Mrs. *Y* then entered the proceeding asking the court to determine that the alimony judgment be excepted from discharge as provided in 11 U.S.C. § 35(a)(7). The bankruptcy court heard the question, and construed the divorce decree the same as did the state district court, holding that the alimony provision should be treated as a division of property and therefore dischargable in bankruptcy. Not unimportant in the bankruptcy court's determination was the fact that the state court which granted the divorce and issued the decree, being privy to all the facts and circumstances of the case, determined that the term "alimony" as used in the decree really stood for a division of property; further, the court felt compelled to accept the judgment of the district court in the construction and application of local law. *Cox. v. Cox*, —— F. Supp. —— (W.D. Okla. 1976); 3 FAM. L. REP. (BNA) 2073. [Ref: Chs 9 & 20, DA PAM 27-12]

Family Law—Domestic Relations—Alimony, Child Support, Custody and Property Settlements; Support of Dependents. Mr. *P* and Mrs. *P* were divorced in 1972. Mrs. *P* received custody of the children of the marriage. Mr. *P* moved from the jurisdiction of the court, Catawba County, Florida, to North Carolina. Mr. *P* stopped sending the decreed support to Mrs. *P*, so she began an action under the Florida Uniform Reciprocal Enforcement of Support Act to (URESA) to force Mr. *P* to honor his duty of support. Mr. *P* admitted that he stopped supporting the children, as required by the court, but that he did so only because Mrs. *P* would not let him exercise his decreed reasonable visitation rights. In fact, Mr. *P* received a North Carolina court order predicating his future payment of support upon Mr. *P*'s ability to exercise his visitation rights. The North Carolina Court of Appeals ruled that the lower court erred in not setting aside the order issued below which permitted Mr. *P* to cease support payments until his visitation privileges were forthcoming. In essence, the court held that the only matter of jurisdiction before the court referred to the sole underlying purpose of the URESA, namely "to improve and extend by reciprocal legislation the enforcement duties of support and to make uniform the law with respect thereto." The duty of support is the only subject matter covered by the URESA, and therefore is the only subject matter which the court should have considered. Nothing in the Act allows adjudication of custody or visitation privileges or other matters commonly determined in domestic relations courts. Therefore, the lower court had no jurisdiction to condition the support payments upon the visitation privileges and consequently had no authority to permit discontinuance of the support payments upon a finding of an alleged violation of the condition of visitation privilages. *Pifer v. Pifer*, —— N.C. App. ——, —— S.E.2d —— (1976); 3 FAM. L. REP. (BNA) 2075. [Ref: Chs 20 & 26, DA PAM 27-12]

Legal Assistance—Status and Acts of the Legal Assistance Officer—Liaison with the Civilian Bar. Judge Advocates, whether or not they are members of the State Bar of California, are invited to join the Legal Services Section and to participate in the activities of the Standing Committee on Military Legal Assistance. Membership in the Section is not a prerequisite for attendance at seminars sponsored by the Section. Dues are $10 per year. Checks should be sent to The Legal Services Section of the State Bar of California, Suite 502, 633 Battery Street, San Francisco, CA 94111. Telephone (415) 922-1440. [Ref: Ch 1, DA PAM 27-12]

Taxation—State and Local Income Tax—Tax Reform Act of 1976. The Tax Reform Act of 1976, § 1207 (26 U.S.C. § 6213), amended Title 5, United Code, Section 5517, permitting federal withholding of state income taxes from the pay of military personnel. For a state's income tax to be withheld, it must enter into an agreement with the Treasury Department. The agreement "shall provide that the head of each agency of the United States shall comply with the requirements of the state withholding statute in the case of employees of the

agency who are subject to the tax and who are residents of the state with which the agreement is made." (5 U.S.C. § 5517). Such an agreement may be obtained when the state's income statute:

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the state; and

(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the state; (4 U.S.C. § 5517).

As of this date eight states have requested an agreement to permit their state income tax to be withheld from the pay of military personnel. It appears that it will be June or July 1977 before any state taxes are actually withheld from military pay. However, the United States Army Finance Center has started preparing for the implementation of state withholding. Starting in September of this year, Leave and Earning Statements of Army personnel contained an entry stating the servicemember's state of domicile for state tax purposes. The Finance Center intends to rely on the information provided by the servicemember in withholding state income taxes. Servicemembers should be advised to request a change, if the Leave and Earning Statements reflect the incorrect state of domicile.

Once a state reaches an agreement with the Treasury Department, withholding for servicemembers domiciled in that state will be mandatory. Servicemembers should take great care in declaring their state of domicile because most states have no statute of limitations for collecting back taxes if no tax return has been filed. A servicemember could be subjecting himself to payment of back taxes if he has not been paying state income taxes or filing state income tax returns in the state he declares as his domicile. [Ref: Ch 43, DA PAM 27-12 and THE ARMY LAWYER, Nov. 1976, at 15.]

2. ARTICLES AND PUBLICATIONS OF INTEREST.

Domestic Relations—Alimony.

Sherman, *Husband's Right to Seek Permanent Alimony Under Louisiana Law*, 22 LOY L. REV. 397 (1975-76). [Ref: Ch 20, DA PAM 27-12]

Domestic Relations—Divorce.

Bates, *Behind the Law of Divorce: A Modern Perspective*, 7 MAN. L.J. 39 (1976). [Ref: Ch 20, DA PAM 27-12]

Domestic Relations—Support of Dependents.

Hurowitz, *Some Basic Techniques for the Support Case*, PRAC. LAW., Sept. 1, 1976, at 13. [Ref: Ch 26, DA PAM 27-12]

Commercial Practices and Controls—Truth in Lending.

Comment, *The Truth in Lending Class Action*, 40 ALB. L. REV. 753 (1976).

National Consumer Law Center, *Truth-in-Lending: Retroactivity of the New Three-Year Statute of Limitations on the Right of Recission*, 10 CLEARINGHOUSE REV. 263 (1976).

Hewson, *Acceleration Clauses in Georgia: Consumer Installment Contracts and The Federal Truth-in-Lending Act*, 27 MERCER L. REV 969 (1976).

Knepper, *The Superiority Requirement of Rule 23(b)(3) in Class Actions Under the Truth in Lending Act*, 37 OHIO ST. L.J. 291 (1976). [Ref: Ch 10, DA PAM 27-12]

Commercial Practices and Controls—Truth in Warranties Act.

Strasser, *Magnuson-Moss Warranty Act: An Overview And Comparison with UCC Coverage, Disclaimer, and Remedies in Consumer Warranties*, 27 MERCER L. REV. 1111 (1976). [Ref: Ch 10, DA PAM 27-12]

Commercial Practices and Controls—The Equal Credit Opportunity Act.

Schober, *A Second Look at the Equal Credit*

Opportunity Act, 9 U.C.C. L.J. 5 (1976). [Ref: Ch 10, DA PAM 27-10]

Commercial Practices and Controls—Preservation of Consumer Claims and Defenses.

Merritt, *New FTC Rule: Preservation of Claims and Defenses in Consumer Credit Transactions—Uniform Protection Comes to the Scene*, U.C.C. L.J. 65 (1976). [Ref. Ch 10, DA PAM 27-12]

Note: Ch 10, DA PAM 27-10 is presently being revised. The draft version contains subchapters on The Truth in Warranties Act, The Equal Credit Opportunity Act, and The Preservation of Consumers' Claims and Defenses.

Domestic Relations—Marriage.

Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976). [Ref: Ch 9, DA PAM 27-12]

3. RECENTLY ENACTED LEGISLATION

Decedent's Estates and Survivor's Benefits—The Survivor Benefit Plan.

Public Law 94-496, approved on 14 October 1976, substantially amends the Military Survivor Benefit Plan, 10 U.S.C. § 1447 et seq. The amendments provide for elimination of payments into the Plan when a spouse beneficiary predeceases the retiree. They reduce from two years to one year the eligibility period for a new spouse to be eligible under the Plan and permits a retiree to leave benefits to children when there is surviving spouse. They also increase from $1,400 to $2,100 the minimum income payment to widows of retired numbers of the Plan. [Ref: Ch 15, DA PAM 27-12]

Law Day 1977

INTRODUCTION

On the occasion of the first observance of Law Day in 1958, President Dwight D. Eisenhower stated:

> It is fitting that the American people should remember with pride and vigilantly guard the great heritage of liberty, justice and equality under law. . . . It is our moral and civic obligation as free men and as Americans to preserve and strengthen that great heritage.

In 1961 the 87th Congress by joint resolution set aside the first day of May of each year as a special day of celebration by the American people in appreciation of their liberties and the reaffirmation of their loyalty to the United States of America; of their rededication to the ideals of equality and justice under law in their relations with each other as well as with other nations; and for the cultivation of that respect for law that is so vital to the democratic way of life.

Law Day is not a day for lawyers, but was established to encourage every citizen to reexamine the central role of law in our society. It behooves the legal profession to take advantage of its opportunity to explain the operation of our legal system and to encourage examination of how it can be improved. Law Day activities provide an excellent educational vehicle to remind all citizens of their rights and the role of the law in the preservation of those rights. Law Day chairpersons should make every effort to seek the citizens' support of the law for without that support the legal system can no longer effectively function.

1976 LAW DAY OBSERVANCE

For its ever increasing role in Law Day observances throughout the world, the Judge Advocate General's Corps has been awarded, during the past five years, Certificates of Merit by the American Bar Association. The 1976 award was in recognition of Law Day activities conducted at 42 installations in 18 states,

Puerto Rico, the District of Columbia and three foreign countries. News of these celebrations appeared in 40 newspapers, including one German language daily. At the request of Army Law Day chairpersons, 15 radio stations broadcast ABA spot announcements while 4 television stations covered activities relating to the 1976 Law Day Observance. Twenty-eight installations made use of displays and billboards to alert the public to the Law Day message. In addition, ABA and locally developed posters, stickers, and pamphlets carrying the 1976 theme were distributed at schools, commissaries, post exchanges, service clubs, theaters and other frequently visited locations.

LAW DAY 1977 OBSERVANCE

The objective of Law Day '77 will be to foster greater public understanding of the role citizens and institutions can play in supporting, strengthening and improving our legal and judicial system. Thus, the 20th annual observance of Law Day U.S.A. in 1977 will be keyed to the theme:

PARTNERS IN JUSTICE

In support of that theme, Law Day committees, working closely with state and federal trial and appellate courts, should strive to present meaningful programs which explain *why* all Americans are allies in the work of the courts to administer justice fairly and equitably. Law Day chairpersons also should demonstrate *how* and *what* citizens can do to help reduce crime, assist the courts in the administration of justice, update and modernize court facilities and procedures and encourage legislative support of measures designed to improve the system.

Law Day '77, falling on Sunday this year, provides chairpersons with a good opportunity to encourage church leaders of all faiths to make May 1st a special occasion for recognizing the role of law in establishing religious freedom. In regards to other forms of observances, chairpersons may wish to select Friday, 29 April, or Monday, 2 May, to conduct their Law Day Programs.

Law Day chairpersons will receive the 1977 Planning Guide and Program Manual from the American Bar Association in January. The manual contains ideas which will assist Law Day committees in their planning and preparation for their Law Day '77 program. The Judge Advocate General's School has no material for distribution; however, additional information on how to obtain supplementary materials from state or local bar associations is also contained in the ABA Guide.

1977 AFTER-ACTION REPORTS

In furtherance of JAGC participation in Law Day celebrations, all installations are again required to submit after-action reports on local celebrations to TJAGSA, ATTN: JAGS–RA, Charlottesville, Virginia 22901, before 10 May 1977. After-action reports should be subdivided into categories of: (1) command letters and proclamations; (2) displays; (3) newspaper articles; (4) radio and television coverage; (5) religious activities; (6) school programs; (7) naturalization ceremonies; (8) Law Day gatherings; (9) seminars and panel discussions; and (10) miscellaneous. Photographs, press releases and other exhibits in conjunction with observances are encouraged but should not delay the narrative reports.

Professional Responsibility

From: Criminal Law Division, OTJAG

TJAG Professional Ethics Committee considered a case involving a defense counsel's (CPT *A*) statement to the court that data on the charge sheet was cor-

rect when in fact counsel had prior knowledge that the accused's age was not correctly reflected on the charge sheet.

The Ethics Committee considered whether trial defense counsel's conduct in this case was in consonance with the Code of Professional Responsibility of the American Bar Association, Disciplinary Rules (DR) 1–102(A) (4), 4–101(B)(1) and (2), and 7–102(A)(3) and (5), which provide:

DR 1–102(A)(4)—A lawyer shall not: Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

DR 4–101(B)(1)—Except when permitted under DR 4–101(C), a lawyer shall not knowingly: Reveal a confidence or secret of his client.

(2)—Use a confidence or secret of his client to the disadvantage of the client.

DR 7–102(A)(5)—In his representation of a client, a lawyer shall not: Knowingly make a false statement of law or fact.

Based upon careful consideration of relevant portions of the record of trial and a written statement by the trial defense counsel, the Committee unanimously concluded that the counsel's conduct, summarized below, was in violation of DR 1–102(A)(4) and DR 7–102(A)(5).

Summary of Conduct

CPT *A* represented an accused before a special court-martial. In accordance with his pleas, the accused was found guilty of three specifications in violation of Article 128 U.C.M.J. In an out-of-court hearing prior to sentencing, the military judge directed the trial counsel to show CPT *A* the first page of the charge sheet, which reflected the accused's date of birth, and asked defense counsel if the data thereon were correct. CPT *A* responded, "Yes, sir, Your Honor, the data are correct." Subsequently, the data from the charge sheet were read to the court members by the trial counsel, and the military judge again asked CPT *A* if they were correct. He stated, "Yes, Your Honor, they were read correctly."

The issue of absence of jurisdiction to try the accused because of minority enlistment was raised on appeal. The Court of Military Review ordered a limited rehearing to resolve certain factual questions bearing on jurisdiction. During the rehearing, it was established that the accused was born three years later than the date reflected on the charge sheet. In a statement submitted in connection with the appeal, CPT *A* said that at the trial he was aware the accused was under age when he enlisted, but that he decided not to open any inquiry into that fact because he did not want to implicate the accused in other violations. In addition, he said that he asked no question of the accused during the trial that would cause him to state his chronological age.

Analysis and Conclusions

The Committee concluded on the basis of CPT *A*'s statement that he was aware, when asked by the military judge about the correctness of the data on the charge sheet, that the accused's age was not correctly reflected. It also concluded that both responses given by CPT *A* to the military judge's questions on the subject, taken together, appeared to be a knowing misrepresentation of fact.

The Committee considered whether the obligation CPT *A* had regarding confidences and secrets under DR 4–101(B)(1) and (2) justified his apparent misrepresentation and concluded it did not. The obligation to preserve confidences and secrets does not permit affirmative misrepresentation to a court under any circumstance. Counsel may simply decline to verify the accuracy of such information, by reciting the absence of any obligation.

Recommendations

The Committee recommended that Judge Advocate General consider admor CPT *A* concerning his conduct after him of the intent to take adverse

with a reasonable opportunity to respond, such admonishment not to be reflected in his official records.

CPT *A* was provided the opportunity for rebuttal and submitted a response to The Judge Advocate General. After consideration of the entire case, including matters submitted by CPT *A*, The Judge Advocate General directed that CPT *A* be reprimanded for misleading the court.

Judiciary Notes

From: U.S. Army Judiciary

RECURRING ERRORS AND IRREGULARITIES

Record of Trial

a. Staff Judge Advocates in the field should assure that all copies of the record of trial forwarded to the Army Judiciary for appellate review are complete, legible, and properly assembled.

b. Carbon copies of the record, as well as the original, should include Chronology Sheets, copies of the staff judge advocate review, copies of court-martial orders, etc.

MONTHLY AVERAGE COURT-MARTIAL RATES PER 1000 AVERAGE STRENGTH JULY–SEPTEMBER 1976

	General CM	*Special CM*		*Summary CM*
		BCD	*NON-BCD*	
ARMY-WIDE	.13	.09	.47	.18
CONUS Army commands	.10	.10	.51	.20
OVERSEAS				
Army commands	.18	.07	.41	.14
USAREUR and Seventh Army commands	.21	.06	.35	.14
Eighth US Army	.07	.14	.63	.13
US Army Japan	.08	—	.15	.30
Units in Hawaii	.05	.09	.36	.14
Units in Thailand	—	—	—	—
Units in Alaska	.36	.11	.72	—
Units in Panama/ Canal Zone	.10	—	1.22	.39

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

NON-JUDICIAL PUNISHMENT MONTHLY AVERAGE AND QUARTERLY RATES PER 1000 AVERAGE STRENGTH JULY–SEPTEMBER 1976

	Monthly Average Rates	*Quarterly Rates*
ARMY-WIDE	18.98	56.95
CONUS Army commands	20.76	62.29
OVERSEAS		
Army commands	15.57	46.72
USAREUR and Seventh Army commands	15.09	45.28
Eighth US Army	18.45	55.34
US Army Japan	5.16	15.47
Units in Hawaii	20.84	62.53
Units in Thailand	—	—
Units in Alaska	11.98	35.94
Units in Panama/ Canal Zone	20.31	60.93

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

The Court of Military Appeals and Its Supervisory Authority

Captain Gary F. Thorne,
Government Appellate Division, USALSA

Persons involved in the military criminal justice system who have harbored lingering doubts regarding the activism of the newly composed Court of Military Appeals, should

have those doubts dispelled by the decision in *McPhail v. United States*.[1] The court ruled that, via *coram nobis* relief, the C.M.A. could reverse the special court-martial conviction of an Air Force defendant whose sentence negated automatic review.

The *McPhail* case involved a situation where the accused had originally had his case dismissed for lack of jurisdiction by a military judge, but who was later tried because the convening authority disagreed with the military judge's decision and returned the case to the judge for trial, using as authority Article 62. At the time of the trial the action by the convening authority was consistent with previous court decisions as to the construction of Article 62, but subsequent to trial the Court of Military Appeals had granted the petition in the case of *United States v. Ware*.[2] The ultimate decision in *Ware* prevents a convening authority from *ordering* a judge to hear a case he has dismissed. *Ware* was decided after The Judge Advocate General of the Air Force had approved the conviction of *McPhail*, but the petition in *Ware* had been granted prior to that approval. Final review in *McPhail* was completed in compliance with Article 65(c) of the Code.

The court's decision intimated that the proper course of action for The Judge Advocate General of the Air Force would have been to withhold action in *McPhail* until the *Ware* decision was rendered. However, since The Judge Advocate General of the Air Force approved the conviction, the issue before the Court of Military Appeals in the form of a writ, was whether it could act to hear the petitioner's allegation that the court-martial which convicted him lacked jurisdiction, when the case was not a case which would progress through the appellate courts and, thus, possibly wind its way to the Court of Military Appeals. For this reason "the Government argues that the Court possesses only appellate jurisdiction, and its ancillary writ authority is strictly limited to a case already docketed in the Court or which can potentially reach the Court by appeal authorized by Article 67."[3] The Air Force went on to reason that, because the petitioner could never have reached the court by way of appeal, there was no way in which the court could consider the writ as the court would never have jurisdiction over the case, and the court can act in a writ matter only when it is "in aid of its jurisdiction" under 28 U.S.C. § 1651(a).

The court, however, rejected the Government's argument. The *McPhail* case portends how deeply the Court of Military Appeals considers its obligation to oversee criminal matters from its position as the "supreme civilian court of the military justice system."[4] The court reviewed congressional history and previous decisions rendered by it in indicating that the court's "role in the military justice system was perceived by the proponents of the Uniform Code and Congress in much larger terms than the relatively small number of cases subject to ordinary appellate review under Article 67."[5] The court, in citing congressional history, indicated that the entire criminal justice system in the military is dependent upon a strong and active Court of Military Appeals which is available to remedy a denial of any fundamental right in the court-martial setting, for the court has no intention of forcing persons in such a situation to go outside the military justice system to seek relief. This role, as perceived by the court, is labeled a "supervisory function."[6] It is a term which undoubtedly will be seen again in decisions issued by the Court of Military Appeals.

The court's three judges have evidenced in the *McPhail* opinion a concurrence in the perception of their role in the criminal justice system and an intent to fill that role vigorously. The court's concluding comments harbinger a judicial philosophy likely to appear again.

> Assuredly, there are limits to our authority, even as the highest court in the military justice system. Whatever those limits are, as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to

require compliance with applicable law from all courts and persons purporting to act under its authority. (citations omitted).[7]

It is important that all members of the criminal justice system realize the significance of *McPhail*. It is not a new direction for the three judges now sitting on the court, but it is one of the most concise and commanding decisions to date indicating the continuity of thought by the three judges as to their obligations in the military criminal justice system. The court intends to exercise supervisory authority over both courts and persons who act under authority of the Uniform Code of Military Justice. That control is a surface yet barely scratched.

One of the most revealing documents as to the potential gravity of the court's supervisory authority is the proposed revision of the court's Rules of Practice and Procedure which have been submitted to the court by its staff for consideration.[8] Proposed Rule 11 provides that "no attorney shall practice before a court-martial, Court of Military Review, or this Court, unless he has been admitted to the bar of this Court or is appearing *pro hac vice* by leave of the court in which he enters an appearance." This rule may contemplate a unified bar in the military as the court considers it necessary to exercise control over those persons involved at all levels of the system. In the Army, in nearly all cases, persons practicing at the court-martial level have been admitted to the Court of Military Appeals, as this is the practice when one enters the Army JAG Corps. If the court should adopt its staff proposal, this would no longer be an optional situation, but would be a requirement for practicing before any court-martial or court under the Code.

If the court propounds such a rule, one need not extend the rationale for its necessity very far to envision a further unification resulting in one corps of lawyers serving all the armed forces. If the court intends to exercise supervision and control of its bar, which will include all who practice under the Code, can such supervision be enhanced by a one corps arrangement? Are there peculiarities of each service necessitating the present structure?

Rule 12 of the staff's proposed revisions exists in conjunction with Rule 11, for it provides that the court "expects members of its bar to maintain the highest professional standards" and the court intends to oversee disciplinary actions against members of its bar, which would include all attorneys in the military, through the existence of an ethics committee to take evidence and report where any allegation of unethical conduct is brought to the court's attention. The court itself would render final decisions in such ethical cases. Through such an arrangement the Court of Military Appeals would have unprecedented control and authority over all persons in the criminal justice system of the military, to include the highest levels.

The staff's proposed rules would tighten control over counsel appearing at the appellate level. The staff's proposed Rule 13 would require that both "civilian and military appellate counsel" enter an appearance in writing before participating in any case and that a withdrawal would have to be filed in writing and approved by the court. In addition, Rule 14 of the staff's proposals would require that the same counsel who represented the party before the Court of Military Review continue to represent him before the Court of Military Appeals, unless good cause was shown in writing and the court granted leave to withdraw.

The staff's proposed rules and the decision in *McPhail*, when read together, indicate the growing commitment by the court to gain control of the military criminal justice system, particularly as to the appearance of counsel at all levels. There seems little doubt that one of the prime concerns of the court is that a defense counsel representing an accused not be withdrawn from that case for anything except what is labeled "good cause" in the proposed rules, and that good cause *may* not be a simple transfer of position in the military or a physical move from one location to another.

As to the defense counsel, it is clear that the Court of Military Appeals considers the attor-

ney-client relationship to be one of absolute priority. Defense counsel must insure that whenever that relationship is severed, the reason for that severance is placed on the record, and whatever action is necessary be taken to insure the accused receives proper representation in future proceedings. For both the individual counsel and the staff judge advocate, consideration must be given to those situations where a counsel is to be reassigned to a new job or is to move to a new location when such action will affect his ability to represent an accused. In the past it has been assumed that the military could readily take such action and that another counsel could be substituted. However, there is every indication that because of the priority given to the attorney-client relationship, the court will be most susceptible to hearing allegations from accused that they have been denied counsel when such substitutions exist and the accused and/or a court have not approved the withdrawal. The services would be well advised to place in the record proof that the accused is in accord with any such withdrawal and that withdrawal should itself be in writing in the record with the reasons therefore and the signature of a military judge who approved the action *at the time of the withdrawal.*

Defense counsel should particularly beware of forgetting a case once the trial has ended. It seems likely that the court, which desires continuity of representation, will not look favorably upon a defense counsel who does not assist those at the appellate level who represent the accused, for the trial defense counsel's attorney-client relationship does not end with the conclusion of the trial or the forwarding of the record for appellate review. In fact, there is the possibility that should a defense counsel who represented the accused at trial request to continue representation at the appellate level, and is denied that opportunity, such a case brought before the Court of Military Appeals may well find a favorable forum for consideration of that issue in the context of a denial of counsel.

There is an underlying current of conflict that exists between military personnel, particularly those at the highest levels of command, and the Court of Military Appeals in this area. In the past, the staff judge advocates of the different services have ruled almost without interference from the court as to the procedural aspects of the appointment, detail and withdrawal of counsel from individual cases and from particular positions in the service. There can be little doubt that the present court has misgivings as to whether some of those actions have resulted because defense counsel were doing too good a job in representing particular accused or in pursuing particular issues. There has been a rumor that counsel in the Army were often assigned defense counsel positions initially and then, when their ability is ascertained or developed, they are moved into trial counsel positions. This practice, if it ever existed, has probably ended; it nevertheless is the kind of action which the Court of Military Appeals may seize upon, under its theory of supervisory power, to insure that withdrawals and assignments are not based on actions which ultimately deny the best representation available to an accused.

In addition, the court's decision in *McPhail* continues to broaden what has been for the past year the increasing situations in which writs will be considered by the court. The requirement of the All Writs Act, 28 U.S.C. § 1651(a), that such writs be issued only when in aid of a court's jurisdiction can now be met whenever relief is warranted, for the court, as a matter of supervisory authority, will not be told it cannot act to grant appropriate relief. If this definition of "in aid of jurisdiction" seems without borders, that conclusion is basically correct. In large measure, the direction of the court in this area will be evidenced by what is finally adopted as the court's new Rules of Practice and Procedure. The adoption of such rules will not take place for at least two or three months; numerous parties were given until the end of September to submit recommendations and comments on the staff's proposals before they will be considered by the court members. Nevertheless, the staff's proposals, when considered in conjunction

with the decision in the *McPhail* case, are food for thought for each military attorney, for there seems little doubt that the court in the future will exercise far more control over the individual attorney and hold him to the highest standards of ethical obligations.

In those situations where the opportunity to represent fully is interfered with or denied, the court undoubtedly will stand ready to hear such allegations either under direct appeal or through the writ process. Those persons who are tempted to interfere with an attorney's ability to totally represent his client should be aware of the potential disciplinary action which the court may take leading to suspensions, reprimands, or ultimately disbarment.[9] If counsel in the service represent their clients vigorously without fear of overt or covert actions being taken against them by commanders who find their actions too radical, the Court of Military Appeals will stand by them so long as their actions are ethically undertaken.

Thus, the decisions in *McPhail* should be read not only for its wide ranging implications as to those writs which the court will consider, but perhaps more importantly, for the rationale and concept of supervisory authority which the new court unanimously agrees must be exercised in order to insure the proper operation of the military criminal justice system.

Notes

1. 24 C.M.A. 304, 52 C.M.R. 15 (1976).

2. 24 C.M.A. 102, 51 C.M.R. 275 (1976).

3. 24 C.M.A. 304, 307, 52 C.M.R. 15, 18 (1976).

4. 24 C.M.A. 304, 308, 52 C.M.R. 15, 19 (1976).

5. *Id.*

6. 24 C.M.A. 304, 310, 52 C.M.R. 15, 21 (1976).

7. *Id.*

8. It should be noted that the proposals are in fact just those of the Court's staff and they have neither been reviewed nor approved by the Court itself. Therefore, the rules cannot be read to be the feelings of the judges, at least at this point.

9. Such action is in fact provided for in the staff's proposed Rule 12.

Criminal Law Section

From: Criminal Law Division, OTJAG

USE OF CITIZENS BAND RADIO FOR CRIMINAL INVESTIGATIVE PURPOSES

The Staff Judge Advocate, US Army Criminal Investigation Command, recently requested the Office of the General Counsel, Department of the Army, to re-examine the issue of the propriety of monitoring citizens band radio channels for criminal investigative purposes.

The Office of the General Counsel adhered to its earlier opinion that no such monitoring should be conducted absent prior judicial authorization issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., sections 2510–20. The Office of the General Counsel states that should an occasion arise requiring the initiation of this type of activity, and sufficient information is available to justify issuance of a warrant, a request for authorization should be submitted to the Office of the General Counsel for review and approval by the Secretary or Under Secretary of the Army. The Office of the General Counsel would in turn forward the request through the Office of the Secretary of Defense to the Justice Department.

JAC School Notes

1. ADMINCEN Conference will be at TJAGSA. TJAGSA will host the ADMINCEN Associated Schools Commandants Conference on 6–8 April 1977.

2. 83d Basic Class. The 83d Basic Class reports 9 January to Fort Lee and 31 January to Charlottesville. The class of approximately 70 is scheduled to graduate 1 April 1977.

3. 3d Fiscal Law Course. The Honorable Hadlai A. Hull, Assistant Secretary of the Army for Financial Management, gave the closing remarks to the 3d Fiscal Law Course on 3 December 1976.

The 3d Fiscal Law Course speakers also included: Mr. John W. Cooley, Deputy Director of Finance and Accounting, Office of the Comptroller of the Army; Colonel Richard P. Dettmar, Chief, Appropriation Accounting Division, Office of the Comptroller of the Army; Mr. John F. Wallace, Deputy for Management Information and Financial Systems, Office of the Assistant Secretary of the Army for Financial Management; and Mr. Robert T. Feerst, Office of the Corps of Engineers.

4. Advanced Class Speakers. Major Marschall Smith (USMCR) and Lieutenant Steven S. Honigman (USNR) of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York addressed the 25th Advanced Class on 21 October 1976 on proposed changes to the U.C.M.J. to be presented to the next Congress.

Dr. Browning B. Hoffman, Associate Professor, University of Virginia Schools of Law and Medicine, addressed the 25th Advanced Class on law and psychology on 11 November 1976.

Professor Inis L. Claude, Jr., Department of Government and Foreign Affairs, University of Virginia, addressed the 25th Advanced Class on 9 December 1976.

5. 3d Military Administrative Law Developments Course. Colonel Darrell L. Peck, Chief, Administrative Law Division, OTJAG, addressed the 3d Military Administrative Law Developments Course on 9 December 1976.

6. TJAGSA Course Quota System. Continuing legal education courses presented at TJAGSA have a limited enrollment. Students arriving at TJAGSA without quotas will not be allowed to attend the courses. This is mandated by the need to maintain excellence in instruction, the physical facilities available, the educational materials available, the number of instructors available and the instructional methods employed. Limited enrollment is accompanied by use of a quota system. At the beginning of each academic year, the School curriculum is established and the maximum number of students to be allowed in each course determined. Courses in great demand are repeated during the academic year. The total number of spaces available in each course is divided into quotas for major Army commands. Commands with small numbers of attorneys are not usually assigned quotas for courses. Accordingly, a small number of spaces is retained under the control of the School for these commands. They are available upon application.

SJA offices desiring to send students to courses offered at TJAGSA should apply for quotas through their AG schools office. Quotas will generally not be furnished directly to SJA offices by TJAGSA. Information on quotas may be obtained from Mrs. Kathryn Head, Academic Department, TJAGSA, (804) 293-6286.

CLE News

1. CLE at Fort Carson. Continuing legal education must be a never-ending process for all judge advocates. An example of an outstanding CLE program is the one in the Office of the Staff Judge Advocate, Fort Carson, Colorado. During the past 15 months, 21 attorneys, out of 28 assigned, engaged in some form of continuing legal education totaling 1140 hours.

2. TJAGSA Correspondence Course Catalog Addendum. The legal research and writing requirement of Phase VII of the Advanced

Correspondence Course has been revised through the addition of a new subcourse, entitled Fundamentals of Military Legal Writing. The subcourse consists of a series of relatively short drafting problems. The course description reads as follows:

Subcourse JA 151.

Fundamentals of Military Legal Writing.

Scope: This subcourse deals with using military legal citations and with drafting typical items of correspondence encountered in the military legal office. The requirements include completion of a practical exercise in legal citations, preparation of draft changes to a regulation, writing a post trial review, and drafting of several short items of correspondence such as forwarding indorsements, decision papers, memoranda, and military letters. The source materials will be provided. The student should not need to do independent research. Completion of the course will require an interchange of correspondence between the student and the correspondence course office.

The thesis requirement of JA 150 remains substantially the same as it has been but is now an elective. Students will have the option of completing either the legal research project of JA 150 or taking the new course in legal writing JA 151.

3. 69th Procurement Attorneys' Course. The two-week 69th Procurement Attorneys' Course will be held at The Judge Advocate General's School from 7–18 February 1977. Instruction will cover the planning, solicitation, award, performance and disputes resolution phases of federal procurement. The course is primarily for the benefit of those government attorneys with at least six months procurement experience.

4. Law of War Instructor Course. This new course will offer team teaching instruction in the Hague and Geneva Conventions to judge advocate officers and officers with command experience. The officers taking the course will afterwards give instruction in teams in fulfillment of the requirements under AR 350–216. During the course the students will study both the law of war and methods of instruction. Practical application will include the filming of instruction given by the students and playback for critique and improvement. Course dates are: 2d Course—28 February 1977–2 March 1977; 3d Course—4–8 April 1977; 4th Course—6–10 June 1977.

5. 1st International Law II Course. This course dealing with the law of war, will be held at TJAGSA from 16–27 May 1977.

6. 3d Allowability of Contract Costs Course. This course dealing in particular with the problems existing between the ASPR Cost Principals and the congressional standards established under the Cost Accounting Standards Board, will be held at TJAGSA from 21–23 March 1977. Attendance is limited to attorneys who have successfully completed the Procurement Attorneys' Course (5F–F10), or have equivalent training or experience. Course content is prepared for students who have less than one year's experience in the allowability of contract costs area.

7. Other Courses. The 4th Fiscal Law Course will be held from 7–10 March 1977. The 15th Federal Relations Course will be held during 4–8 April 1977.

8. TJAGSA Courses.

January 31–April 1: 83d Judge Advocate Officer Basic Course (5–27–C20).

February 7–18: 69th Procurement Attorneys' Course (5F–F10).

February 28–March 4: 2d Law of War Instructor Course (5F–F42).

March 7–10: 4th Fiscal Law Course (5F–F12).

March 14–18: 2d Civil Rights Course (5F–F24).

March 21–23: 3d Allowability of Contract Costs Course (5F–F13).

April 4–8: 15th Federal Labor Relations Course (5F–F22).

April 4–8: 3d Law of War Instructor Course (5F–F42).

April 6–8: JAG National Guard Training Workshop.*

April 6–8: ADMINCEN Associated Schools Commandants Conference.

April 11-15: 32d Senior Officer Legal Orientation Course (5F-F1).

April 11-22: 70th Procurement Attorneys' Course (5F-F10).

April 18-20: 1st Government Information Practices (5F-F28).

April 18-21: 2d Defense Trial Advocacy Course (5F-F34).

May 2-4: 1st Negotiations (tentative title) (5F-F14).

May 2-6: 7th Staff Judge Advocate Orientation Course (by invitation only) (5F-F52).

May 9-13: 4th Management for Military Lawyers Course (5F-F51).

May 9-20: 2d Military Justice I Course (5F-F30).

May 16-20: Criminal Trial Advocacy Course (5F-F32).

May 16-27: 1st International Law II Course (SECRET clearance required) (5F-F40).

May 30-June 17: Military Judges Course.*

May 31-June 3: 6th Environmental Law Course (5F-F27).

June 6-10: Military Law Instructors Seminar.*

June 6-10: 4th Law of War Instructors Course (5F-F42).

June 13-17: 33d Senior Officer Legal Orientation Course (5F-F1).

June 20-July 1: USA Reserve School BOAC and CGSC (Criminal Law, Phase II Resident/Nonresident Instruction) (5-27-C23).

July 11-22: 12th Civil Law Course (5F-F21).

July 11-29: 16th Military Judge Course (5F-F33).

July 25-August 5: 71st Procurement Attorneys' Course (5F-F10).

August 1-5: 34th Senior Officer Legal Orientation Course (5F-F1).

August 1-12: NCO Advanced Phase II (71 D50).

August 8-12: 7th Law Office Management Course (7A-713A).

August 8-October 7: 84th Judge Advocate Officer Basic Course (5-27-C20).

August 22-May 1978: 26th Judge Advocate Officer Advanced Course (5-27-C22).

August 29-September 2: 16th Federal Labor Relations Course (5F-F22).

* Tentative

9. Civilian Sponsored CLE Courses.

February

4-5: PLI, 9th Annual Criminal Advocacy Institute: The Psychology of Defense and Cross-Examination in a Criminal Trial, Sir Francis Drake Hotel, San Francisco, CA. Contact: Nancy B. Hinman, Practicing Law Institute, 810 7th Ave., New York, NY 10019. Phone: 212-765-5700. Cost: $160.

9-15: ABA, American Bar Association Midyear Meeting, Seattle, WA.

10-12: American Law Institute-ABA-Environmental Law Institute-The Smithsonian Institution, Environmental Law, Washington, DC. Contact: Director, Courses of Study, ALI-ABA Committee on CLE, 4025 Chestnut St., Philadelphia, PA 19104.

13-17: NCDA, Trial Techniques Seminar, Salt Lake City, UT. Contact: National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone: 713-749-1571.

20-24: NCDA, Newly Elected Prosecutors Institute, Houston, TX. Contact: National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone: 713-749-1571.

21-23: American Academy of Judicial Education, Evidence I: Hearsay & Cross-Examination, Arizona State U., Tempe, AZ. Contact: American Academy of Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005.

22-23: LEI, Seminar for Attorneys on FOI/Privacy Acts, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, US Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483, Cost: $150.

24-26: American Academy of Judicial Education, Criminal Law I: Search and Seizure, Arizona State U., Tempe, AZ. Contact: American Academy of Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005.

25: Virginia State Bar, 7th Annual Criminal Law Seminar, Fredericksburg, VA. Contact: Director, CLE Committee, Univ. of Va. School of Law, Charlottesville, VA 22901.

March

14-16: FBA-BNA, Briefing Conference on Federal Contracts, The Warwick, Philadelphia, PA. Contact: Federal Bar Association, 1815 H St. NW, Washington, DC 20006. Phone: 202-638-0252.

15-17: LEI, Trial Practice Seminar, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, US Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483. Cost: $300.

17-20: National Conference of Representatives of the ABA and AMA, National Medicolegal Symposium, Fairmont Hotel, San Francisco, CA.

21-25: Pittsburgh Institute of Legal Medicine, Medical-Legal Seminar, Vail, CO. Contact: Cyril H. Wecht, M.D., J.D., Pittsburgh Institute of Legal Medicine, 1519 Frick Bldg., Pittsburgh, PA 15219.

22-24: LEI, Legal Research for Paralegals Seminar, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, US Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483. Cost: $200.

28-1 APR: Pittsburgh Institute of Legal Medicine, Medical-Legal Seminar, Vail, CO. Contact: Cyril H. Wecht, M.D., J.D., Pittsburgh, Institute of Legal Medicine, 1519 Frick Bldg., Pittsburgh, PA 15219.

JAGC Personnel Section

From: PP&TO, OTJAG

1. Appointment of Warrant Officer Court Reporters. DA message AGUZ-RPP-PR 201710Z Sep 76, Voluntary Active Duty for Warrant Officers, FY 77, announced that MOS 713A, Legal Administrative Technician, is open for procurement. DA message DAJA-PT D42D24Z Nov 76, Appointment of Warrant Officer Court Reporters, announced approval of a test program in which Court Reporters would be appointed as Warrant Officers. A Board of Officers will be convened by The Judge Advocate General on or about 31 January 1977 to select and appoint Warrant Officer Court Reporters. Applications received after 31 January 1977 will be held until a subsequent board is convened. Enlisted Court Reporters (MOS 71E) should apply for appointment in accordance with AR 135-100. The DA Form 61 (application for appointment) should request appointment in MOS 713A (Legal Administrative Technician). In Block 32 (comments), the applicant should state that he desires assignment in the Court Reporter sub-specialty. The application packet should include a statement personally signed by the Staff Judge Advocate of the applicant's command, evaluating the applicant's fitness for appointment as a Warrant Officer and proficiency as a Court Reporter.

2. Thailand MAC Flights Terminated. Due to the reduction of U.S. forces in Thailand, all MAC flights in and out of country have been terminated. As a result, all official and personal mail is traveling via commercial carrier, with a substantial delay in handling time incurred. Request that all official mail be marked "MOM" (military official mail) in a conspicuous manner. All personal packages should be sent either SAM or PAL in order to assure expeditious processing. Personal letters should be sent either first class or air mail.

3. Graduate Schooling at Government Expense for Judge Advocate General's Corps Officers. Selections will be made in February 1977 of JAGC officers for graduate schooling at government expense for classes commencing in FY 77 (September 1977). The period of schooling will be for one year.

Four quotas are tentatively available for graduate schooling during FY 77. These four quotas are in the following disciplines: Procurement Law—1; Administrative Law—2; and International Law—1.

Following completion of schooling, an immediate utilization tour of three years is required. Utilization tours are generally in the following locations: Procurement Law—Office of The Judge Advocate General, The Judge Advocate General's School, USALSA (Contract Appeals Division), Korea or Europe; Administrative Law—Office of The Judge Advocate General or The Judge Advocate General's School; International Law—Office of The Judge Advocate General, The Judge Advocate General's School, Korea or Europe.

JAGC officers with between 4–10 years of active duty who have not attended a resident advanced class may volunteer for graduate schooling at government expense. Written requests must be received in HQDA (DAJA-PT), Washington, D.C., by 1 February 1977 to be eligible for consideration. The request must specify the discipline the officer wishes to study.

4. Assignments

CAPTAINS

NAME	*FROM*	*TO*	*APPROX DATE*
ANDERSON, James H.	1st Armored Div, Germany	USA Leg Svc Agcy, Wash, DC	Apr 77
BABOIAN, Richard	USA Eng Ctr & Ft Belvoir, VA	Korea	Feb 77
BUTT, William J., II	Korea	USAG VHF, VA	Apr 77

NAME	*FROM*	*TO*	*APPROX DATE*
CARR, John C.	USA Leg Svc Agcy, Wash, DC	MDW, Wash, DC	Jan 77
CHRISTIANSEN, Scott R.	VII Corps, Germany	31st Air Def Artillery Bde, Homestead AFB Miami, FL	Apr 77
DUFFY, Thomas J., III	USAG Ft Meade, MD	OTJAG, Wash, DC	Feb 77
FRICK, Ralph J.	USAG Ft McPherson, GA	Korea	Jan 77
GALLIVAN, Richard A.	USA Leg Svc Agcy, Wash, DC	Korea	Feb 77
HEALY, Maurice D.	2d Armd Div, Ft Hood, TX	USA Leg Svc Agcy, Wash, DC	May 76
KOONTZ, William P.	25th Inf Div, APO SF	9th Inf Div, Ft Lewis, WA	Jan 77
LAZAREK, James M.	USA Leg Svc Agcy w/dy Ft Campbell, KY	Korea	Feb 77
NEWBERRY, Robert	1st Armd Div, Germany	USA Leg Svc Agcy, Wash, DC	Jan 77
PELUSO, Andrew J.	NY Area Cmd & Ft Hamilton, NY	Korea	Jan 77
POWELL, Gayle M.	XVIII ABN Corps, Ft Bragg, NC	Korea	Feb 77
PRICE, Samuel S.	USA QM Ctr, Ft Lee, VA	USA QM Sch, Ft Lee, VA	Dec 76
RAMSEY, William B.	1st Inf Div, Ft Riley, KS	USA Leg Svc Agcy, Wash, DC	Mar 77
RESEN, William P.	USA ADC, Ft Bliss, TX	Korea	Feb 77
RODRIGUEZ, Jorge A., Jr.	USACC & Ft Hauchuca, AZ	USATC Ft Dix, NJ	Apr 77
SEGAAR, Ruurd C.	32d Air Def Cmd, APO NY	USA Leg Svc Agcy, Wash, DC	Mar 77
SHEKITKA, Jan N.	USA Medical Research & Development Cmd	US Army Japan	Feb 77
SLATTERY, Mary E.	MDW, Wash DC	USA Medical Research & Development Cmd	Feb 77
SMITH, Paul C.	USAAC Ft Knox, KY	Korea	Jan 77
TAYLOR, George E.	US Combined Arms Ctr & Ft Leavenworth, KS	Armed Svcs Bd of Contract Appeals	Feb 77
VANCE, William W.	2d Armd Div, Ft Hood, TX	USA Leg Svc Agcy	Apr 77
WILBERT, Randall	3d Armd Div, APO NY	USAG Ft Devens, MA	May 77
YEKSAVICH, Michael E.	USAREUR	USADC Ft Bliss, TX	Jan 77

5. Promotions

AUS MAJOR

REYNOLDS, Arthur L.	1 Dec 76
SOVIE, Donald E.	1 Dec 76

AUS CAPTAIN

D'ANTONIO, Gregory D.	12 Nov 76
GOLD, Steven D.	12 Nov 76
MELTON, Frank L.	12 Nov 76

CW3

WEST, Charles L.	1 Dec 76

6. Selectees for CGSC and AFSC for AY 1977-78. DA TWX, dated 1 Dec 76 (DAPC-OPZ-A), announced the below named JAG officers for attendance at CGSC and AFSC for AY 1977-78:

a. CGSC—MAJ Corrigan
MAJ Cundick
MAJ (P) Eckhardt
MAJ (P) Gideon
MAJ (P) Gilligan
MAJ Haessig
MAJ (P) Handcox
MAJ (P) Charles A. Murray
MAJ Steinberg

b. Class 62 AFSC—MAJ Armstrong

7. Selectees for the Army War College and the Industrial College of the Armed Forces. The below named JAG officers have been selected to attend the Army War College and the Industrial College of the Armed Forces for AY 78-79 (announced by TWX dated 1 Dec 76, DAPC-OPZ-A):

LTC Terry W. Brown—AWC
LTC Michael M. Downes—AWC
LTC (P) Ronald M. Holdaway—ICAF

Current Materials of Interest

Articles

Opinions & Comments, *Speaking Out Against Ethics Committee Inquiry 19*, DISTRICT LAWYER, Winter 1976, at 35. The District of Columbia Bar Committee on Legal Ethics Tentative Draft Opinion Inquiry 19 concludes that "when an attorney is disqualified from a matter because of substantial responsibility in that matter while a government employee, the partners and associates of that lawyer should also be disqualified." This comment is by Richard E. Wiley, President of the Federal Bar Association.

FBA Opposes D.C. Bar Ethics Proposal as Harmful to Government Service, 23 FEDERAL BAR NEWS 278 (1976).

Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L.L. REV. 596 (1976).

Comment, *Claiming Illegal Electronic Surveillance: An Examination of 18 U.S.C. § 3504 (a)(1)*, 11 HARV. C.R.-C.L.L. REV. 632 (1976).

Commentary, *Freedom of Information: Judicial Review of Executive Security Classifications*, 28 U. FLA. L. REV. 551 (1976).

Note, *Judicial Review Under the Federal Water Pollution Control Act Amendments of 1972: Which Federal Court?*, 33 WASH. & LEE L. REV. 745 (1976).

Comment, *The Unclear Boundaries of the Constitutional Rights of Public Employees*, 44 UMKC L. REV. 389 (1976).

Comment, *Brainwashing: Fact, Fiction and Criminal Defense*, 44 UMKC L. REV. 438 (1976).

The AMERICAN JOURNAL OF COMPARATIVE LAW Contains a Symposium on The New German Penal Code. The symposium contains a foreword, an introduction, seven articles, and seven discussions and comments on the new German Penal Code. 24 AM. J. COMP. L. 589-778 (1976).

Book Reviews

Dorsen, *Book Review*, 11 HARV. C.R.-C.L.L. REV. 764 (1976) (Review of MONROE H. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM).

Deane, *Book Review*, 76 COLUM. L. REV. 897 (1976) (Review of LOUIS LUSKY, BY WHAT RIGHT?).

MG George M. Wallace, *Book Review*, MIL. REV., Nov. 1976, at 99 (Review of GENERAL MAXWELL D. TAYLOR, PRECARIOUS SECURITY).

RADM Ben Eiseman, *Book Review*, MIL. REV., Nov. 1976, at 100 (Review of ADMIRAL ELMO R. ZUMWALT, JR., On WATCH: A MEMOIR).

MAJ W. Hays Parks, JAGC, USMC, *Book Review*, ARMED FORCES J., Nov. 1976, at 26 (Review of LTC JOHN DRAMESI, CODE OF HONOR).

AR

Interim change to Chapter 16, AR 27-10. This interim change was transmitted by electronic message DAJA-CL 161600Z Dec 75 (U). 1. Effective 15 November 1976, the following sentence is added to paragraph 16-4D, AR 27-10, 26 November 1968.

"In this respect, a commissioned officer lawyer of the Navy, Marine Corps, Air Force, or Coast Guard, who has been authorized or designated to act as a military magistrate by his or her service, may review the pretrial confinement of Army personnel confined in other service facilities, provided such review is authorized by the Chief, US Army Judiciary, or his or her designee."

AR Policy

NCO retraining / reclassification — Commanders counseling statement.

MILPERCEN has received requests for deletion from assignment on NCOs selected for the NCO retraining/reclassification program based upon the NCO signing a commanders counseling statement (CH3 AR 601–280) indicating he will not reenlist. The policy of MILPERCEN is that in the future no soldier who will have less than six (6) months (179 days) until ETS at the scheduled reporting date for training will be involuntarily selected for participation. Declining to reenlist and signing a counseling statement to that effect is not an option. Rebuttals and request for deletion based solely upon time remaining until ETS for soldiers with six (6) months or more remaining at their scheduled report date for training should not be submitted.

By Order of the Secretary of the Army:

BERNARD W. ROGERS
General, United States Army
Chief of Staff

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

*U.S. GOVERNMENT PRINTING OFFICE: 1977 720-191/4 1-3