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Judge Advocate Reserve Officers of All Services are in the Same Boat

Army and Navy force planners have been somewhat skeptical, in the recent past, as to the need for judge advocate officers in the ready reserve. This skepticism may have been based upon a report of a few years ago, which stated that physicians and lawyers could be recruited into the force after mobilization. The thrust of this report was not directed at any one of the services, but, rather at them all.

The Army has been able to convince the force planners of the need for judge advocate officer and unit augmentation, from the reserve components, upon mobilization. The main argument was that the legal workload is directly related to the size of the total force; that increasing the strength of the Army also increases the number of legal transactions, and, consequently the number of legal problems. In addition, a deployment of forces to a foreign country will, by necessity, require interpreting and formulating status of forces agreements, forces-to-forces agreements, and international law, formalizing labor agreements, entering into contracts for subsistence items such as perishable foodstuffs, payment of claims, and processing the increased military justice workload. The Army's force planning for reserve component judge advocate officers also included reorganizing its JAGSO detachments to provide for the type of organization, with the personnel strength, necessary to augment the force at the time of mobilization.

The U.S. Naval Reserve Law Program has undergone a similar force planning process. Rear Admiral Penrose L. Albright, JAGC, USNR-R, the recently appointed Director, Naval Reserve Law Programs, in a speech delivered to the 1976 Annual Navy Judge Advocate General's Conference in Washington, DC, outlined the development of the Naval Reserve law program. Portions of the speech, dealing with the need for clear-headed planning for the intelligent use of reserves in peace and wartime, are reprinted below.

Common Sense Preparedness

Speech of Rear Admiral Penrose L. Albright to the 1976 Annual Judge Advocate General's Conference, Washington, DC, on 18 October 1976

Fellow Lawyers

From experience over the years I have noted that a successful effort of any individual or enterprise seems always to have at least two of three ingredients: (1) hard work; (2) the proper talent or abilities; and (3) luck—and it cannot, for any continued period, succeed with a large negative dose of any one of these ingredients.

For the last three years, the Naval Reserve has been in turmoil. Yet during this same period the JAG Corps Naval Reserve community has thrived and blossomed as in no other period since its inception following World War II. A major portion of the credit for this goes to my predecessor, Admiral Howell, his hard work, his abilities—and I must add, God bless him, just plain good luck.

Today we have a JAGC ready reserve of 1,082 members.

The Army Lawyer

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Gertrude Stein is supposed to have once written: "A rose is a rose is a rose." Some would modify this to: "A lawyer is a lawyer is a lawyer." There is thus a conventional wisdom in some quarters that lawyer reservists are superflous on the theory that civilian lawyers can be taken off the street in the event of emergency or war to meet any expansion needs of the armed forces. "Why then," they charge, "do we need a JAG Corps reserve at all"?

Like much conventional wisdom, this breaks down in the face of the reality. It makes about as much sense as maintaining the world is flat—although I understand that there are still some holdouts who continue to maintain it to be so. In the same vein, I do not believe that we will ever convince *some* of the need for a JAG Corps reserve.

But, the reality is that in some respects there is a greater need for a JAG Corps reserve than for a line reserve although there is, of course, a very real need for the line reserve.

The reason for this anamoly is based on two facts: fact one: military law, in its broader sense, has become highly specialized in practically all of its aspects. For example, military justice—although similar in many respects to civilian criminal law is also different in many respects. This includes different procedures leading up to a court-martial, different nature of many of the offenses, a difference in the conduct of the trial itself and finally important differences in review and appeals. International law has no real civilian counterpart. Administrative law in the Navy requires an intimate and in-depth knowledge of the statutes and regulations involved as well as knowledge of the fundamentals of administrative law. Even legal assistance deals with unique situations and involves clients with various types of special status which must be thoroughly understood. Thus a lawyer without an appropriate military JAG Corps background cannot be expected to perform competently in military law fields without training. And even further because military law continues to evolve and change, there must be

a continuing education program for those having JAG Corps experience.

We roughly calculate there will be required at least 100 days of processing and training before the average practicing lawyer can become sufficiently competent for the practice of military law, and this estimate is probably optimistic. Moreover, the training facilities for the numbers needed in the requisite time frame for such training would, if provided, drain productive time from the active JAG Corps forces. In 100 days the war could be lost.

Fact two: the active-duty JAG Corps and the naval legal activities are largely an essential *on-going* service organization to the line Navy (as well as the rest of the Navy organization). The line is essentially a *prepared-for-war* service organization. The line Navy is thus manpower redundant if one does not consider its combat wartime function. Accordingly, much of the line Navy has a considerable amount of its wartime manpower needs built-in so to speak. This is simply not so with the Navy JAG Corps organization.

Peacetime Navy legal activities, of course, *do have* a certain amount of inherent expansion capabilities. Working hours can be lengthened and the working days of the week extended. Leaves can be cancelled. Officers can be recalled from post graduate studies. But I have no doubt that very real human limits exist as to the inherent expansion capabilities of naval legal activities unless supplemented by trained legal and paralegal support forces. I personally doubt that a 30 percent increase in workload could be handled expeditiously for long without organizational bottlenecks developing, and without substantially reducing efficiency and professional standards.

Yet the JAG Corps is an *essential* element for an effective military organization. Discipline has traditionally been an indispensable ingredient and an important measure of military organizations. And the JAG Corps provides the ultimate "or else" for military discipline. Morale of armed forces personnel depends significantly on JAG Corps officers promptly processing claims and providing needed legal assistance. For many, probably most, incidents, investigations cannot be deferred.

And I could go on and on. But the long and short of it is that under total or full mobilization, the generation of business for naval legal activities can be expected to increase several fold due to the synergetic effects of: (1) an increase in population coming under military jurisdiction (about one hundred seventy thousand) for the Navy in the first few days including reservists, the Coast Guard and civilians placed by statute under military jurisdiction, and three hundred thousand in the first ninety days; (2) the increase in movement of men, equipment and materials; (3) the abrupt change from a civilian to a military status of those reservists coming aboard; (4) the changed circumstance of those already on active duty; (5) the needs to place peacetime procedures on a wartime footing in an orderly fashion, and then to become familiar with those procedures; and (6) the requirement to advise *command* correctly and prompty in a wartime tempo.

In my judgment, if we are to continue to observe traditional American law and order with due process and fairness in total or full mobilization under accelerating war conditions, the question is not whether an immediately ready naval reserve JAG Corps is needed, but rather the question is whether the presently allotted numbers in the selected reserve and the ready reserve are sufficient.

I have no complaint with the past and present excellent relationship of cooperation existing between the active JAG Corps forces and the JAG Corps reserve. Nevertheless, I believe that a substantial expansion of this cooperation will be requisite in the future. Thus, we will be asking you to help us help you. For one thing, we must cooperate to find rational mechanisms to advance from guesstimates to sound estimates of the anticipated legal requirements of the Navy in

mobilization. I am not at all satisfied that our presently stated mobilization requirements takes into account all aspects of legal workloads which will be generated on mobilization. I know there are activities requiring legal support which are not now covered. I am *positive* that the presently stated needs do not correlate with the actual inventory of JAG Corps reserve officers.

"On hands" training at active duty sites is to be encouraged. Everyone benefits by well organized "on hands" training. Properly planned and managed, it is a resource which lightens the active duty workload. Experience has demonstrated that it is by far the best—and most enjoyed—training for reservists.

Ladies and Gentlemen, it is now eighteen minutes nearer World War III that when I started to talk to you—or, more hopefully, nearer that moment that the strength of the free world will disuade potential enemies from taking that terrible step which will lead to World War III. As certainly as I stand here, common sense preparedness and cooperation between the active forces and reserves will more likely lead to the winning of World War III if it comes and, with God's help, prevent it from coming at all.

Government Contract Costs—An Introduction

Captain Glenn E. Monroe, Procurement Law Division, TJAGSA

Introduction. Government attorneys whose responsibilities include any procurement work, including reviews and advice, should develop at least a familiarity with the cost aspects of government contracting. Procurement lawyers must begin to grapple with the issues that historically have been reserved to the auditors. An examination of the terminology peculiar to government procurement law affords an excellent introductory method. A consideration of the application of these terms to concepts such as the major elements in the cost of a manufactured product, overhead burden, ASPR Cost Principles, Cost Accounting Standards and the Truth in Negotiations Act quickly leads to the heart of current cost issues.

This article develops from the contractor's viewpoint because the milieu of government contract costs originates in an operating business. The statutory and regulatory requirements imposed upon a business performing a government contract relate to and build upon an established system of generating, identifying and accumulating costs. The Armed Services Procurement Regulation (ASPR) Cost Principles, the Cost Accounting Standards (CAS) and Cost or Pricing Data, virtually are meaningless if the reader does not understand such fundamental accounting terms as cost, indirect cost, direct cost, cost burden, fixed and variable costs, overhead and general and administrative expenses. These cost accounting terms undergo no definitional change as a result of their application in government contracting.

It is difficult to grasp the scope and application of contract cost principles without exposure to the situations in which those issues arise. This exposure can be accomplished through the following discussion of basic terminology.

In government contracting, "cost" can mean the amount of money the government spends to purchase an item. It also can mean the price the government pays to acquire the item plus all expenses of operating and maintaining the item, in other words, the government's cost of ownership. From the contractor's perspective, cost refers to all expenses incurred in fulfilling a contractual obligation without regard to profit.

There is a further dichotomy regarding costs in the pricing of government contracts. Basic procurement law says that acquisitions

will be made by means of formal advertising, if feasible and practicable. For the most part, award is based on price, which is arrived at competitively; and, both the contractor's cost of performance and the profit earned are his business. Where competition is present, the government subordinates cost and profit to price. The lowest price from a responsive, seller usually is held to be "fair and reasonable."

This concept of competitive price is consistent with the notion that in the commercial marketplace, price comes first and products are priced to permit profitable manufacture and sale. Price is independent of cost, and the manufacturer who cannot sell profitably at a competitive price will be forced out of the market. Quoted price is thought of as a maximum that can be lowered at the discretion of the seller, but cannot be raised. In this circumstances, profit is considered a function of demand and efficiency. But, the nature of government procurement often does not permit the use of this method.

Despite the statutory preference for formal advertising, millions of dollars are spent on negotiated procurements under exceptions to the basic law. In these procurements, particularly those in excess of $100,000, price is established after evaluating and bargaining over the estimated costs of performance and profit to reach agreement on the amount to be paid for the work. In a very real sense, a price does not exist until it is established by negotiation between the parties. Typically (especially with respect to items the government buys to its specifications), price develops in an orderly fashion. First, there is a requirement (the statement telling what is needed) with specifications. Then the estimate cost to produce to the specifications is developed. Finally, the profit, or fee, is calculated.

During negotiations, the contractor is asked to support its proposal with a detailed breakdown of price into estimated elements of cost and profit. The government then evaluates the proposal on the basis that cost plus profit equals price. Therefore, cost becomes a portion of the final price paid by the government for a property or service. Our attention is thus drawn to an examination of the elements that go into establishing costs.

Although ASPR does not define costs, ASPR § 15-201.1 (1 July 1976) does inform that the "total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits." Five concepts or terms, which will be accorded particular attention, are presented: allowable costs, direct costs, indirect cost, allocable costs and incurred or to be incurred costs.

The term "allowable costs" deserves immediate attention. A specific definition is not offered; however, ASPR § 15-201.2 (1 July 1976) does list factors to be considered when determining allowability. They are: "reasonableness, allocability, standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise, generally accepted accounting principles and practices. . . ."

This "definition" of allowable costs sets out only general guidelines, *e.g.*, "reasonableness" and "allocability," thereby requiring reference to other ASPR provisions. However, a cursory consideration of the factors listed in ASPR § 15-201.2 (1 July 1976) does advance appreciably one's understanding of the allowable cost concept.

ASPR § 15-201.3 (1 July 1976) declares a cost reasonable if it "does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business." This definition has permitted the courts and boards to apply a liberal approach to issues regarding the reasonableness of contractor expenditures. These general rules have emerged: consider the actions of the contractor in light of the circumstances peculiar to him; costs incurred by the contractor are presumed reasonable; and, contractors are to be allowed broad discretion in the conduct of their business affairs. In short, the government has had little success with its arguments

that costs should be disallowed because of their unreasonableness.

ASPR § 15-201.4 (1 July 1976) does provide a definition of allocability. 'A cost is allocable if it is assignable or chargeable to one or more cost objectives . . . in accordance with the relative benefits received or other equitable relationship." In addition, the cost must: be "incurred specifically for the contract," benefit "both Government work and other work" and be distributable "in reasonable proportion to the benefits received," or be "necessary to the overall operation of the business."

The Cost Accounting Standards Board, created as an agent of Congress by amendment to the Defense Production Act of 1950, 50 App. U.S.C. § 2167 (1970), is a five member Board chaired by the Comptroller General. Under 50 App. U.S.C. § 2168 (1970) the CASB was accorded the authority to "promulgate cost accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts."

ASPR § 3-1204 (1 July 1976) states that a clause requiring compliance with the Cost Accounting Standards (CAS) must be included in every negotiated contract over $100,000 unless "the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public or is set by law or regulation." The Board has granted some exceptions to this requirement, the most important of which is the establishment of a $500,000 monetary threshold in many instances, 4 C.F.R. § 331.30, ASPR § 3-1204 (1 July 1976). Where applicable, defense contractors are to use the CAS in estimating, accumulating and reporting costs.

The ASPR "Cost Principles" are those provisions contained in Section XV of the Regulation. They include the treatment accorded the ASPR § 15-205 (1 July 1976) "Selected Costs." These particular cost principles receive additional consideration below.

Cost Objective. Although this term has been accorded a variety of rather complex definitions, it perhaps can best be explained as a particular work project or entity to which costs are assigned.

Direct Cost. ASPR § 15-109(f) (1 July 1976) describes this term as "(a)ny cost which is identified specifically with a particular final cost objective." Such costs are to be assigned to only one cost objective. That is, if a cost is susceptible of being identified specifically with just one contract or project, it must be assigned thereto (unless it is a direct cost of minor dollar amount, discussed *infra.*).

Indirect Cost. In contrast to direct costs, these costs are those which are "not directly identified with a single final cost objective, but identified with two or more final cost objectives." ASPR § 15-109(i) (1 July 1976). Included in this category are costs such as general operating expenses which benefit overall plant operations or, at least more than one contract or project. ASPR § 15-203(a) (1 July 1976) permits direct costs of minor dollar amount to be treated as indirect costs, if the results are equitable.

In summary, direct costs are those related exclusively to a particular project, and they include the contractor's costs for materials used and labor employed on that project. Indirect costs are those which pertain to more than one project. These costs include general and administrative expenses, material overhead and manufacturing overhead. In general, a *pro rata* share of a contractor's indirect costs are to be assigned to each cost objective in which the contractor is involved. Direct and indirect costs may overlap in the costing of some projects. For example, if a contractor is devoting the entire resources of one of his plants to the performance of a government project, all the costs of that plant may be considered direct costs, including costs which would normally be indirect.

Variable and Fixed Costs. Within the total costs incurred in the production of any item are changes that relate to fluctuations in the activity of a chosen cost objective. As the rate of production of goods changes, a cost that changes corresponding to that rate is referred to as a variable cost. An example of such costs is the cost of material used to produce the item. There is generally a direct correlation between the cost of materials and the ups and downs of a production line. Conversely, certain costs are fixed and remain unchanged despite wide fluctuations in the activity of a certain cost objective. Examples of such fixed costs are depreciation, interest and rent.

To further illustrate that there are few certainties in the world of contract costs, another related term should be mentioned—semi-variable costs. Depending on the activity and the type of production line, such costs as electricity or water may or may not increase as the production line increases in volume.

With the discussion of costs and basic terminology in mind, it now will be profitable to turn to an examination of principal procedures used by industry to account for contract expenditures. Contractors generally classify expenses as belonging to one of the following major elements in the cost of a manufactured product: direct materials, direct labor and factory overhead.

Direct Materials. Although the term is simple in concept, its application is more difficult. In this group are included such components as sheet steel and subassemblies. Other direct materials may not so readily come to mind. These include such items as adhesives, bolts and screws. (Recall the discussion concerning the possibility of treating as indirect costs direct costs of minor dollar amounts.)

Direct Labor. The second major element in the cost of a manufactured product is the cost of direct labor. Again there is a traceability problem; but, that labor which is related to and specifically traceable to the product (e.g., the labor of machine operators or assemblers) would be considered direct labor and accounted for accordingly. Conversely, dock workers who handle various types of materials, including the material for a government contract, janitors and plant guards would be considered indirect labor because of either the difficulty or impracticability of tracing these cost items to a specific contract or project.

Factory Overhead. This is the "all other" category of the cost of a manufactured product. Lumped into this denomination are all factory costs other than direct materials and direct labor. Perhaps a more accurate description of this cost element would be indirect manufacturing costs. Synonymous terms include manufacturing overhead, manufacturing expenses or factory burden.

The principles that pervade any discussion of overhead are those of accumulation and allocation. ASPR § 15-203(b) (1 July 1976) states that such "costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring the costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives." For government contract purposes four different groupings of indirect costs generally are used: (1) material overhead (2) engineering overhead (3) manufacturing overhead and (4) general and administrative expenses.

Having accumulated the indirect costs into various groups, the next consideration is that of allocating these costs to specific cost objectives, that is, spreading indirect costs around the plant in a logical fashion so that each cost objective bears its proportionate share of these costs. This allocation must be done in accordance with generally accepted accounting principles or the CAS.

This allocation process requires the selection of a distribution base common to all cost objectives to which the cost grouping (*e.g.*, material overhead)is to be allocated. The goal is to have the cost objective, (*e.g.*, a govern-

ment contract) carry only its fair share of the overhead. With these broad generalizations noted, it is easier to conceptualize this accumulation and allocation process by understanding how overhead often is computed.

First, the contractor selects a cost base for allocation of his overhead. Alternatives include direct cost of material and cost of sales. There is a presumption that the contractor's method of allocation and his selection of the base are reasonable. Disputes relating to the base used require the government to overcome this presumption of reasonableness and prove that the contractor's method is unreasonable. Second, the overhead rate is normally presented as a percentage which can be expressed as follows:

$$\frac{\text{Total Material Overhead Expense}}{\text{Total Direct Materials Cost}} = \text{Overhead Rate}$$

Material Overhead. This refers to the total overhead expense grouped within this indirect cost category that the company incurs during an accounting period. Material overhead normally includes the costs related to the acquisition, transportation (incoming), receiving, inspection, handling and storage of material.

Direct Material. This refers to the direct cost of material in terms of total dollars for an accounting period.

Using illustrative figures—

$$\frac{\text{Material Overhead } \$1,437,397.00}{\text{Direct Material } \$28,446,900.00} = 5.0\%$$

The overhead rate of 5% would then be applied to the direct costs claimed to be incurred by the contractor, the result being the cost to the government. If the contract had direct material costs of $18,000,000., the 5% material overhead rate would be applied to these direct costs. The total cost for material to the government is represented by the following:

Direct Material Cost	$18,000,000.
Material Overhead	+ 900,000.
	$18,900,000.

This is known as "burdening the cost." The treatment would be the same for figuring the overhead rates for manufacturing overhead and engineering overhead. However, General and Administrative Expenses (G&A) are computed somewhat differently and will be treated independently.

General and Administrative Expenses are most easily defined as all indirect costs necessary for the conduct of business. Such costs generally include salaries and expenses of officers and executives, salaries and expenses of clerical help, the cost of staff services such as legal, accounting and public relations and other miscellaneous expenses related to the overall business. The continuing problem is the determination of the G&A overhead rate, *i.e.*, how these costs are to be allocated to a cost objective. The primary distinction between G&A and other overhead accounts is the base used for allocation. For engineering overhead one might use direct engineering labor; for manufacturing overhead one might use direct manufacturing labor; and, for material overhead, as discussed, one might use direct material costs. However, since G&A costs are spread throughout the entire plant, the base for computing the G&A rate is the total manufacturing costs of the plant. This includes direct as well as overhead expenses.

$$\frac{\text{Total G\&A}}{\text{Total Manufacturing Costs}} = \text{GAA Rate}$$

$$\frac{\$\ 6,148,431.}{\$70,993,247.} = 8.66\%$$

Having identified this rate, it is applied, or allocated, to each contract in proportion to the total manufacturing costs charged to each contract. If the total manufacturing costs for the product production is $25,000,000, the G&A expense allocated to the contract would be 8.66% of $25,000,000 or $2,165,000. The contractor's total cost is $25,000,000 plus $2,165,200.

Having reviewed some of the functional cost accounting terms and their application from the perspective of a government contractor, we now focus on how these elements of

cost are identified, accumulated and reported to the government. The perspective now changes to that of the procurement attorney and the emphasis will be on how a contractor's costs are identified on government forms.

The Truth in Negotiations Act, 10 U.S.C. § 2306 (1970) and the implementing ASPR provisions establish the requirement for the contractor to furnish cost or pricing data to the contracting officer with his proposal.

Price Analysis v. Cost Analysis. Before looking into the specific requirements and exemptions to the Act, it is important to understand the distinction between price analysis and cost analysis. The objective of a contracing officer is to negotiate fair and reasonable prices. (Recall that the price is the final amount paid by the government and it includes elements of cost and profit.) The concept that pervades this area is that cost analysis will not be used if a fair and reasonable price will result from adequate price competition, or catalog or market prices.

ASPR § 3–807.2 (1 July 1976) distinguishes and describes, in some detail, price analysis and cost analysis. Price analysis involves consideration only of a "prospective price without evaluation of the separate cost elements and proposed profit of the . . . supplier whose price is being evaluated." All that is examined is the total price figure. The examination consists, primarily, of comparing the proposed price to other price data (*e.g.*, other price proposals, published catalog or market prices, and estimates of cost independently developed by personnel within the purchasing activity).

On the other hand, cost analysis involves a much more detailed review of submitted cost data and the contractor's projections of total price based on such data. In addition to the requirement to examine the necessity and reasonableness of costs and overhead rates, cost analysis must "also include appropriate verification that the contractor's cost submissions are in accordance with the Section XV Contract Cost Principles and Procedures."

The Statutory Requirement—10 U.S.C. § 2306 (f) (1970).

In very general terms, the Truth in Negotiations Act requires contractors and subcontractors to submit cost or pricing data before the award of any negotiated prime contract (or subcontract if the Act applies at each tier above the subcontractor) where the price of such contract (or subcontract) is expected to exceed $100,000. Cost or pricing data also is required before the pricing of any contract modification (or subcontract modification if the Act applies at each tier above the subcontractor) where the sum of the adjustments is expected to exceed $100,000.

The above requirements do not apply "where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or in exceptional cases where the head of an agency determines that the requirements : . . may be waived. . . ." 10 U.S.C. § 2306(f) (1970).

The ASPR Cost Principles.

The ASPR Section XV Cost Principles are the cardinal means of defining the costs which will be considered by the government in the negotiation and administration of contracts. When cost analysis is required by ASPR § 3-807.2 (1 July 1976), Section XV of the Regulation contains the general cost principles and procedures for the pricing of contracts and contract modifications. These principles also are used for the determination, negotiation or allowance of costs when such action is required by a contract clause. The limitation imposed by Section XV is that the contract costs be "allowable." This issue must be resolved in several instances, including the following.

Initial Contract Negotiations. Where cost analysis is required, ASPR § 3-807.2(c)(2) (1 July 1976) states that "[c]ost analysis shall also include appropriate verification that the

contractor's cost submissions are in accordance with the Section XV Contract Cost Principles and Procedures."

Cost Reimbursement Contracts. All cost reimbursement contracts involve a consideration and determination of allowable costs. The required clause, ASPR § 7-203.4(a) (1 July 1976) "Allowable Cost, Fixed Fee, and Payment (1974 Apr)" provides that the government will pay the contractor the allowable costs for performance in accordance with Section XV.

Price Redetermination and Incentive Price Revision. These types of contracts also contain clauses that require the submission of cost data and a determination of allowability in accordance with Section XV.

Price Adjustments. Various other contract clauses deal with the pricing of adjustments to the contract during performance. These clauses include the "Changes" clause and the "Differing Sites Condition" clause. When the price is to be adjusted under any of these clauses, the increase or decrease is a function of the cost of performance. ASPR § 7-103.26 (1 July 1976) contains the "Pricing of Adjustments (1970 Jul)" clause applicable to all fixed price contracts whether formally advertised or negotiated. This clause provides that any cost determination shall be in accordance with Section XV.

Termination for Convenience. When a contract has been terminated for the convenience of the government and such termination is to be settled on the basis of costs, the clause at ASPR § 7-103.21(b) (1 July 1976) states that the costs claimed shall be in accordance with Section XV.

Conclusion. For attorneys to participate meaningfully in the negotiation of contract proposals, modifications and terminations, a basic knowledge of cost principles, and related cost terminology is imperative. In short, the concept of cost can no longer be disregarded by government procurement attorneys.

Tudor Family Tree Rustles With Memories of Revolutionary Days

Ed Reavis, Staff Writer, The Stars and Stripes. This article is reprinted from the Friday, June 25, 1976, edition of The Stars and Stripes.

Some of us may have ancestors who were horse thieves or practitioners of other tawdry skills we'd rather not talk about.

Capt. Thomas Tudor, a judge advocate general lawyer, Hq 3d Armd Div, Butzbach, has several ancestors of impeccable quality to parade at the snap of his finger, if you can coax him to talk about them.

In light of Tudor's present position, one of his ancestors is particularly interesting to talk about. William Tudor, his great-great-great-great-grandfather, was the first judge advocate general in the Revolutionary Army.

William Tudor, an eminent Boston lawyer, was appointed to the position the same day it was created by the Continental Congress, in legislation pursuant to the "Articles of War," on July 29, 1775. On Aug. 10, 1776, he was designated judge advocate general and given the rank of lieutenant colonel in the Army—a $20-a-month job, by the way.

It is a heady pedigree but nothing that intoxicates the present Tudor.

"I certainly find it all interesting but it doesn't preoccupy me in any way," Tudor said.

"If you really want to know all the romantic details of the Tudors, you should write to my uncle, Dr. Frederic Tudor, in Milton, Mass."

Fortunately, a member of the 3d Armd Div information office already had written and received a reply.

According to Dr. Tudor, William Tudor studied law in John Adams's office, and Washington rode out to Saugus, Mass., to ask him to take the judge advocate post.

The history book says that he resigned the office in April 1777 and served in the field as a lieutenant colonel for the duration of the war. He left the Army in 1778 as a colonel.

During the Revolutionary War Tudor received wide publicity for his brilliant defense of Col. David Henley in January 1778.

Henley was accused of cruelty to British troops captured at the Battle of Saratoga.

John Burgoyne, a British general captured at the battle of Saratoga, was allowed to take part in the prosecution. Burgoyne tried to establish that a "general massacre of the troops under his command was threatened."

Tudor rebutted the charge successfully, citing the attitude of the British that the Americans considered insolent and Burgoyne's own conduct of spurring Indian mercenaries on to murder Americans.

Henley was acquitted.

Tudor became a magistrate in 1781 and held that office for the latter part of his life. In turn he became a representative for Boston in the state legislature, a senator for Suffolk, commissioner of bankruptcy, secretary of state of Massachusetts and clerk of the Massachusetts supreme court from 1811 to his death on July 8, 1819.

According to Dr. Tudor, William Tudor, after the success of the Revolution, founded the Society of the Cincinnati with George Washington and Lafayette.

The society was an offshoot of the Sons of the Revolution, the leading veteran's organization of its day.

In 1796 Tudor's father died, leaving him a large inheritance. He gave up his law practice and traveled extensively in Europe.

The colonel, Dr. Tudor wrote, was an Army luminary, a bright lawyer, and a warm patriot.

The present-day Tudor, the doctor concludes, has every qualification to equal his ancestor.

Observance Of Law Day USA 1977

The following letter is from The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF
THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

12 January 1977

DAJA-ZA

SUBJECT: Observance of Law Day USA 1977

TO: ALL STAFF JUDGE ADVOCATES

1. Law Day is set aside on 1 May each year by joint resolution of Congress and Presidential proclamation as "a special day of celebration by the American people in appreciation of their liberties" and as an occasion for "rededication to the ideals of equality and justice under law." The American Bar Association has designated "Partners in Justice" as the theme for Law Day 1977. Because Law Day, May 1, falls on a Sunday in 1977, it is suggested that either Friday, April 29, or Monday, May 2, be selected if local circumstances make this more desirable.

2. As in the past the Corps should assume the responsibility of conveying the spirit of Law Day to both the military and civilian communities. I personally urge each Staff Judge Advocate to designate a Law Day Chairperson and to take all necessary steps toward supporting the 1977 theme and to expand this year's observance through maximum cooperation with local educational and civic groups, news media, and bar associations. To assist you, the American Bar Association has been requested to distribute Law Day materials to all Army Judge Advocate offices. A description of the Corps' participation in the 1976 observance can be found in the January issue of *The Army Lawyer*.

3. The Law Day 77 theme provides an excellent opportunity not only to remind all Americans of their rights and the role of the law in the preservation of these rights but also to display the American legal system to other members of the world community. This opportunity should be accorded the most serious attention. Effective Law Day activities serve as an exceptional vehicle to engender a greater public confidence in the legal profession. Your past efforts have been especially praiseworthy in view of the five consecutive ABA Awards of Merit citing the Army for outstanding observance of Law Day.

4. In order to be considered for this year's awards, all after-action reports must be forwarded to The Judge Advocate General's School, ATTN: JAGS-RA, Charlottesville, Virginia 22901, not later than 10 May 1977.

1 Incl
Suggestions for Law Day
USA Programs

WILTON B. PERSONS, JR.
Major General, USA
The Judge Advocate General

The materials mentioned as inclosures in The Judge Advocate General's letter are printed below

Suggestions for Law Day USA Programs

1. Appoint an officer to plan and coordinate all Law Day activities and ceremonies.
2. Prepare a letter or proclamation for the commander for distribution on the purpose and meaning of Law Day.
3. Coordinate publicity for Law Day with the local or command Information Officer. Strive for maximum publicity on all news media.
4. Coordinate Army activities with local bar committees.
5. Prepare appropriate displays in locations where they will be most effective.
6. Coordinate displays and bibliographies concerning law and Law Day with Post Librarians.
7. Explore the use of films on the law usually stocked by schools, bar associations, and libraries.
8. Prepare film slides or procure ABA film for post theaters announcing "Law Day USA."
9. Offer assistance to schools, clubs, and civic organizations on their Law Day activities.
10. Furnish speakers to schools, clubs, troop commanders, boy scouts, and other civic organizations.
11. Sponsor appropriate ceremonies, luncheons, banquets, or buffets, and provide guest speakers.
12. Utilize SJA office, courtroom, or other appropriate place for open house cere-

monies with exhibits depicting Law Day themes.

13. Arrange for color guards at civilian Law Day ceremonies.

14. Make a special effort in overseas areas, with local command approval, to entertain and include local officials and members of bar groups in Law Day ceremonies and celebrations.

Professional Responsibility

From: Criminal Law Division, OTJAG

The OTJAG Professional Ethics Committee recently considered a case involving a trial defense counsel's failure to communicate with his client regarding an application for relief under Article 69, UCMJ.

Before an appeal could be submitted the accused departed the command for a new assignment. Thereafter, on two occasions a friend of the accused inquired of defense counsel about the accused's appeal. In the first instance the defense counsel discussed the appeal with the friend. In the second, he wrote a letter to the accused but received no response. Ultimately another judge advocate filed an application under Article 69 on behalf of the accused.

The Ethics Committee found no ethical violation in the defense counsel's failure to file the application under Article 69 under the circumstances. However, it was critical of defense counsel's dealing with a third party. It was the opinion of the Ethics Committee that, even if the client initially chose the indirect method of communicating, defense counsel's immediate response should have been directly to his client.

Copyright Law Items

CPT Frank Agovino,
Patents Division, OTJAG

After more than twenty years of legislative effort, Public Law 94–533 has been enacted. It is the first comprehensive revision of the copyright laws since the Copyright Act of 1909; the major portions of the law will be effective on January 1, 1978. Below is a summary of some of the important changes. A more detailed analysis will follow later this year. For further information, call Autovon 225–3322, 6736, 6851.

1. *Single National System.* Instead of the present dual system of protecting works under the common law before they are published and under the federal statute after publication, the new act establishes a single system of statutory protection for virtually all copyrightable works whether published or unpublished.

2. *Duration of Terms.* For all new works, the new law provides for a term of the author's life plus 50 years after his death, in order to bring it into line with the copyright term in most other developed countries. For corporate and anonymous works, the term will be 75 years from publication, with a maximum of 100 years from the creation of the work. The total duration of protection for existing works will be 75 years.

3. *Limitation on Author's Assignments.* The new law permits the author or his heirs to terminate the original transfer of his rights

after 35 years by serving written notice on the transferee. This right cannot be divested.

4. *Government Publications.* The new law continues the prohibition in the present law against copyright in "publications of the United States Government" but expands its scope to include all works prepared by an officer or employee of the United States Government as part of his official duties.

5. *Fair Use.* The law adds a provision to the statute specifically recognizing the principle of "fair use" as a limitation on the exclusive rights of copyright owners, and indicates the following factors to be considered in determining whether a particular use falls within this category:

(a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(b) the nature of the copyrighted work;

(c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) the effect of the use upon the potential market for, or value of the copyrighted work.

See *Williams & Wilkins Co. v. United States,* 419 U.S. 962 (1975), *aff'g by an equally divided court,* 487 F.2d 1345 (Ct.Cl. 1973).

6. *Reproduction by Libraries and Archives.* The law specifies that certain reproductions of works by libraries and archives are not copyright infringements.

7. *Sound Recording.* The law retains the provisions of the present copyright law which accord protection limited to the prohibition against unauthorized duplication of sound recordings.

8. *Exempt Performances.* The law removes the present exemption of public performance of nondramatic literary and musical works where the performance is not "for profit." Instead, it provides specific exemptions for certain types of uses, including "face-to-face" teaching activities, educational activities, display of audiovisual works in classrooms of nonprofit educational institutions, and instructional broadcasting in specific situations.

9. *Jukebox Exemption.* The law removes the present exemption for performances by jukeboxes. It substitutes a system of compulsory licenses based upon the payment of jukebox operators of an annual royalty fee to the Register of Copyrights, who is to distribute the amounts received to the copyright owners.

10. *Cable Antenna Television.* The new Act provides for the payment, under a system of compulsory licensing, of certain royalties for the secondary transmission of copyrighted works on cable antenna television. The amounts are to be paid to the Register of Copyrights, who will make distribution to the copyright owners.

11. *Copyright Royalty Tribunal.* The law creates an independent Copyright Royalty Tribunal whose purpose will be to determine whether certain copyright royalty rates, in those categories where such rates are established, are reasonable and, if not, to adjust them.

12. *Notice of Copyright.* The new law calls for a notice on published copies, but omission or errors would not result in forfeiture of the copyright. Innocent infringers misled by the omission or error would be shielded from liability.

13. *Computer Software.* The new law also provides that it does not change the rights presently available for computer programs and other technical processing data.

Administrative & Civil Law Section

The Judge Advocate General's Opinions

1. (Information and Records, Release and Access) **Home Address Not Releasable To Post Exchange Concessionaire.** DAJA-AL 1976/4062, 5 Apr. 1976. A Post Exchange concessionaire sought the home address of an indi-

vidual who had left the installation without returning a rented television set and was no longer on active duty. The Judge Advocate General noted that paragraph 3-5*a*, AR 340-21, prohibits release of home addresses to creditors and others without the consent of the individual involved. It was pointed out that while a Post Exchange concessionaire has a contract to do business on a military installation, the business relationship is no different from that of any other private business or creditor in applying the terms of AR 340-21. The fact that the requestor of the address was a concessionaire was found not to constitute a compelling and overriding interest sufficient to outweigh privacy protection considerations. Nevertheless, the result would be different if the address were being sought by a court or police official in connection with a civil suit or criminal complaint against the former service member.

2. (Separation from the Service: Grounds, Discharge Characterization) **Where The Government Included Evidence Exempted By The ADAPCP In Documentation For Administrative Separation, The Exemption Policy Required Honorable Discharge Based On Those Proceedings Notwithstanding The Government's Attempt To "Purify" The Record Prior To Consideration By A Board Of Officers; However, New Proceedings Could Be Initiated.** DAJA-AL 1976/4405, 16 June 1976. A Chapter 13 proceeding was initiated to administratively eliminate a servicemember for frequent incidents of a discreditable nature. The action was forwarded through command channels with all intermediate commanders recommending approval. However, legal review of the file upon which the commanders acted revealed that the documentation included evidence of several drug abuse counseling sessions protected by the exemption policy of the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). See DA MSG 262200Z Sep 1975, superseded by AR 600-85. Upon realizing that the inclusion of this information would require an honorable discharge, the company commander deleted the exempt information by masking over it.

The enlisted member filed a complaint against the company commander under Article 138, UCMJ, requesting reinstatement of the deleted information in order to guarantee an honorable discharge. The Chapter 13 action was suspended pending the outcome of the Article 138 complaint. The company and brigade commanders admitted that exempt evidence was initially included in the Chapter 13 documentation, but contended that such inclusion was inadvertent because the proceedings were not intended to be based on complainant's involvement in the ADAPCP. The member's general court-martial convening authority found that the company commander's action in deleting the evidence was appropriate because his decision to initiate discharge action was not based on the member's exempt use or incidental possession of drugs or due to his involvement in the ADAPCP, and, accordingly, relief was denied.

On review, TJAG noted that the exemption policy requires that an honorable discharge be given to a member processed for elimination on other (non-exempt) grounds where exempt evidence is introduced by the Government into the proceedings (*inter alia*, in the commander's recommendation for discharge or in documents forwarded with the recommendation) or where the decision to initiate discharge action is motivated by the member's exempt drug involvement or his having been a client in the ADAPCP (DA MSG 262200Z Sep 1975, superseded by AR 600-85). Accordingly, TJAG found that the Government's inclusion of exempt evidence in the documentation forwarded with the recommendation for discharge, even if inadvertent, required application of the exemption policy. Inquiry into the commander's motivation for initiating elimination action is necessary only if the proceedings are devoid of exempt evidence from the beginning.

The purpose of the exemption policy is to maintain a credible and viable rehabilitation

program and to encourage voluntary program entry in insuring that the member's identity as a client, or other exempt evidence, will not play any role, directly or indirectly, in the decisional process from initiation of elimination proceedings based on other grounds through final disposition. DoD Dir 1332.14, 30 Sep 1975, as changed, and DA MSG 302228Z Mar 1976, provide that it "is essential to assure compliance with both the letter and spirit" of the exemption policy. Because discretion is exercised by the initiating commander and each intermediate level of command, TJAG found that there was no basis for allowing "purification" of the record at any point before the case reached a board of officers; the evil sought to be avoided by the policy may have already occurred. A contrary position could validate proceedings which involve at least the appearance (if not the fact) of use of exempt evidence at one or more of the levels of the decisional process, contrary to the letter and the spirit of the policy, because each commander in the member's chain of command made his recommendation for elimination based on a file containing exempt evidence.

Accordingly, TJAG found that the commander's attempt to purify the tainted record was ineffective, and the member was entitled to an honorable discharge based on those proceedings.

After initiation of the Chapter 13 proceeding, the member was determined to be a rehabilitation failure. Processing for separation is mandatory upon rehabilitation failure (DA Cir 600–85, superseded by AR 600–85). Chapter 16, AR 635–200 (DA MSG 302228Z Mar 1976) now provides the authority for separation based on exempt drug involvement and rehabilitation failure. Chapter 16, however, does not take precedence over proceedings under other applicable authority. Processing under Chapter 16 is required only where other proceedings have not been initiated or have resulted in retention. Accordingly, TJAG noted that there would be no legal objection to initiating new Chapter 13 proceedings which did not contain exempt evidence, if the original proceedings were terminated without a final determination that the member should be retained in the service (para 1–13*a*(2), AR 635–200). However, if exempt drug involvement and complainant's classification as a rehabilitation failure motivated the separation action, then any new proceedings must be initiated under Chapter 16, which requires an honorable discharge.

3. (Dependents, Medical Care) **Uniform Special Power Format Regarding Medical And Dental Care For Children When The Parent Is Temporarily Absent.** DAJA–AL 1976/5109, 16 July 1976. In response to a request from the Director, Health Care Operations, Office of the Surgeon General, United States Army, OTJAG recommended that the following special power of attorney be used in situations where a parent or legal guardian desires to appoint an individual to stand temporarily in *loco parentis* for the purpose of authorizing medical and dental care for minor children. Using the recommended format avoids the need for granting custody over minor children and any reluctance of designated attorneys to accept the full ramifications of custody under state law.

SPECIAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That I, _____, a legal resident of _____, am *(the spouse of _____, who is) now *(in the active) (retired from the) military service as a _____, SSAN: _____, stationed at _____, and am the lawful parent of the *(child)(children) named below.

That I do make, constitute and appoint _____, whose present address is _____, my true and lawful attorney to perform all the following acts with the same validity as I could effect if personally present, to wit:

AUTHORIZE ANY AND ALL MEDICAL, DENTAL AND HOSPITAL CARE AND TREATMENT, EITHER PREVENTIVE OR CORRECTIVE, INCLUDING MAJOR SURGERY, DEEMED NECESSARY BY A DULY LICENSED PHYSICIAN OR DENTIST FOR THE HEALTH AND WELL BEING OF MY *(CHILD)(CHILDREN), _____ AGE _____ *(and _____, AGE _____).

Any act lawfully done hereunder by my said attorney shall be binding on myself and my heirs, representatives and assigns.

However, all business transacted hereunder on my account shall be transacted in my name, and all indorsements and instruments executed by my said attorney for the purpose of carrying out the above powers shall contain my name, followed by that of my said attorney and the designation 'attorney-in-fact."

Unless sooner revoked or terminated by me, this Special Power of Attorney shall become NULL and VOID after _____, 19____.

IN WITNESS WHEREOF, I have hereunder set my hand and seal this _____ day of _____, 19____.

_____(SEAL)

WITNESSES:

_____	_____
Signature	Name, Address
_____	_____
_____	_____

• Substitute appropriate words.

*ACKNOWLEDGMENT
(by Civilian Notary Public or
Qualified Military Personnel)

* An acknowledgment should be attached whenever required by state law. In the absence of a state statute or other legal ruling a power of attorney need not be acknowledged. The nearest Office of the Staff Judge Advocate should be consulted for a determination in this regard.

4. (Information and Records, Release and Access) **Home Telephone Numbers Of Department Of The Army Personnel Are Exempt From Release To The Public.** DAJA-AL 1976/5045, 23 July 1976. In an opinion involving a request for copies of an installation phone directory and current organizational charts, The Judge Advocate General advised that a staff directory of the installation was releasable. It was pointed out, however, that a "personnel roster" of key installation personnel would be released only after deletion of home telephone numbers. The Judge Advocate General determined that home telephone numbers are exempt from release under 5 U.S.C. § 552(b)(6) and para 2-12*f*, AR 340-17 (clearly unwarranted invasion of privacy). The opinion stated that the legitimate governmental purpose served in denying this information was the protection of the personal privacy of the individuals involved. This case was distinguished from cases in which post telephone directories were already in the public domain.

5. (Marriage) **Establishment Of Common Law Marriage Possible Under Colorado Law.** DAJA-AL 1976/5453, 23 Sept. 1976. An enlisted man and an enlisted woman stationed at Fort Carson, CO, considered themselves to be married under the common law. The enlisted woman requested, upon reassignment of her putative husband, "to be located with my husband." Section 14-2-101 *et seq.*, Colorado Revised Statutes (1973) substantially enacted the Uniform Marriage Act. The Uniform Marriage Act proposes for state adoption two alternative sections concerning the validity of common-law marriages; one section expressly recognizing the validity of common-law marriages and the other section expressly invalidating common-law marriages. The Colorado enactment did not adopt either alternative. The Colorado statutes neither proscribe common-law marriages nor state that the procedures and requirements contained within the statutes are the only means of establishing a legally recognized marriage in the State of Colorado. In the absence of an express provision to the contrary, statutes regulating marriage are construed as directory, and do not invalidate common-law marriages. So long as the traditional elements of common-law marriages are proven (mutual agreement, open cohabitation, consummation and open representation to others that the parties are married) the trial courts are recognizing common law marriages. The Army recognizes marriages considered valid by the state in which they occur. Whether this particular relationship is a marriage is a factual question for determination by Commander, U.S. Army Fi-

nance Support Agency, under subparagraphs 30216*g* and 30216*j*, AR 37-104-3.

6. (Dependents, Medical Care) **Child Adopted By Widow Of Retired Serviceman Is Not A Dependent.** DAJA-AL 1976/5438, 30 Sept. 1976. A retired serviceman and his wife filed a petition for adoption in the D.C. Court of General Sessions. Subsequent to that filing, the retired serviceman died. After his death, a final decree of adoption was issued establishing the relationship of parent and child between the serviceman's widow and the child. The basis for granting medical care to "dependents" under 10 U.S.C. § 1072 is that they are "dependents with respect to a member or former member of a uniform service." As no provision of the D.C. Code created a parental relationship in deceased spouses of an adopting parent, the adopted child of a former serviceman's widow is not a dependent of the former member of the uniformed service within the meaning of § 1072 and paragraph 1-2*c*(1), AR 40-3. See D.C. Code § 16-301 to 16-315.

FOIA Impact on News Releases

On 13 January 1977 the Assistant Secretary of Defense (Public Affairs) sent message 131348Z JAN 77 to the field clarifying the relationship between public affairs policy and the Freedom of Information Act. The message emphasized the need for public affairs officers to consult with counsel when making determinations concerning the release of information to news media representatives. The full text of the message is as follows:

SUBJ: Public Affairs Policy

REF: DoD Directive 5400.7, Feb. 14, 1975

1. Department of Defense policy is to provide the public with maximum, accurate and timely information of defense activities and to conduct its activities in an open manner, consistent always with the need for security and personnel safety. The Freedom of Information Act (P.L. 93-502), which was implemented by DoD Directive 5400.7, reinforces this DoD policy by requiring the release of nonexempt information when that law is invoked.

2. When news media representatives ask DoD or service public affairs officers for information which would have to be released if requested under the Freedom of Information Act, the requested information should be released on initial request. Reporters should be able to get the information without repeat without having to invoke the Freedom of Information Act.

3. A collateral responsibility is the determination by public affairs information officers that information requested by news media representatives qualifies or does not qualify for withholding under an exemption to the Freedom of Information Act. Even if the requested information qualifies under an exemption of the Act, it should not be withheld unless significant government purpose is served by withholding. The need for close consultation with legal counsel is obvious.

4. Public affairs/information officers should not suggest that news media representatives resort to the Freedom of Information Act, since providing the public with maximum, accurate, and timely information of defense activities through normal public affairs channels allows the inherent advantages of suitably amplifying the information and providing the perspective that is often missing when documents are provided under a Freedom of Information request.

Criminal Law Section

From: Criminal Law Division, OTJAG

On 4 November 1976 the Criminal Law Division dispatched a message to the field describing the facts and holding in *United States v. Walck*, 54 C.M.R. Adv. Sh. 308, 76-10 JALS 6 (1976). Because of the numerous inquiries which have been received from the field regarding *Walck*, the message is repeated below in its entirety:

"SUBJ: ACMR Decision, US v. Walck

1. In US v. Walck, CM 43511 (ACMR, 18 OCT 76), the court reversed a conviction because the Army failed to follow the regulatory provisions contained in paragraph 2–4*a*, AR 635–200, for the retention of jurisdiction over an individual beyond the expiration of his term of service.

2. In the *Walck* case, the offenses were committed on 17 Aug 75 and flagging action was initiated on 27 Aug 75. Charges were preferred on 15 Sep 75, two days prior to appellant's ETS date. On his ETS date charges were forwarded recommending that appellant be tried by a BCD special court-martial and that he be retained beyond expiration of his term of service by the general court-martial convening authority. During the litigation of the jurisdictional motion at trial. the parties stipulated that neither the convening authority nor any designee had taken action to retain the accused past his ETS, as was required by paragraph 2–4*a*, AR 635–200.

3. ACMR noted that the requirements contained in paragraph 2–4*a*, AR 635–200, for the retention of jurisdiction over such an individual were more rigorous than those contained in paragraph 11*d*, MCM, 1969 (Rev.), and that the Army need not have imposed the more rigorous requirements. However, the court held that once the Army had imposed them, it must follow them to create a valid involuntary extension of service. The failure to comply with the promulgated regulatory requirement defeated jurisdiction.

4. The Criminal Law Division, OTJAG, is in the process of requesting a change to paragraph 2–4*a*, AR 635–200, which will harmonize the provision with paragraph 11*d*, MCM, 1969 (Rev.). Until such time as the change can be effected, SJA's are cautioned to insure compliance with the requirements of paragraph 2–4*a*, AR 635–200."

Caution dictates that the actions required by paragraph 2–4*a*, AR 635–200, be done in writing.

Effective 21 December 1976, paragraph 2–4*a*, AR 635–200, was superceded as follows:

a. A member may be retained beyond the expiration of his term of service when an investigation of his conduct has been initiated with a view to trial by court-martial; charges have been preferred; or the member has been apprehended, arrested, confined or otherwise restricted by the appropriate military authority. However, if charges have not been preferred, the member shall not be retained more than 30 days beyond the expiration of his term of service without the personal approval of the general court-martial convening authority concerned.

Judiciary Notes

From: U.S. Army Judiciary

RECURRING ERRORS AND IRREGULARITIES

1. The following errors in the initial promulgating orders were corrected by the Army Court of Military Review:

a. Failure to indicate that trial was by mili-

tary judge alone by inserting the words "by military judge" after the word "sentence"—3 cases (See paragraph 12–4b(3)(i), AR 27–10, Change 6, 3 Apr 70).

b. Failure to set forth the proper wording in the specification of a Charge—3 cases.

2. Staff judge advocate offices are reminded that when charges are referred to a court-martial for trial, and proceedings take place but are permanently terminated either before arraignment or findings for any reason, a record of proceedings held should be transcribed and authenticated, and contain sufficient information to establish jurisdiction over the accused and the offense. Copies of the transcript should be furnished the accused, and, if a general court-martial, the transcript of proceedings with allied papers specified in Appendix 9*e* of the Manual should be transmitted to the Office of the Clerk of Court, US Army Judiciary—see Paragraphs 82*b* and 83*b*, MCM.

NUMBER OF UNITED STATES PERSONNEL IN POST-TRIAL CONFINEMENT IN FOREIGN PENAL INSTITUTIONS AS OF 30 NOVEMBER 1976

Country	*Total by Service*			*Total by Country*
	Army	*Navy*	*Air Force*	
Australia	1	1	0	2
Canada	0	1	0	1
Denmark	1	0	0	1
Germany, Federal Republic of	71	0	3	74
Greece	2	3	1	6
Italy	3	2	0	5
Japan	7	65	12	84
Korea, Republic of	6	0	0	6
Mexico	1	4	0	5
Panama	1	0	0	1
Spain	0	7	0	7
Taiwan	0	2	5	7
Thailand	3	0	0	3
Turkey	3	0	2	5
United Kingdom	0	1	6	7
Total by Branch of Service	99	86	29	214

Total Confined: 214

New BG Selected

Colonel (P) Alton H. Harvey Selected As New Brigadier General. Colonel (P) Alton H. Harvey, Assistant Judge Advocate General for Civil Law, has been selected as the new Brigadier General. Colonel (P) Harvey is a native of McComb, Mississippi and has been on active duty for over 19 years. He holds a BA degree in History and a LLB degree in General Law from the University of Mississippi. Military schools he has attended include The Judge Advocate General's School, Basic and Advanced Courses; United States Army Command and General Staff College; Industrial College of the Armed Forces; and the Defense

Language Institute. Some of Colonel (P) Harvey's major duty assignments were as Chief, Defense Appellate Division, U.S. Army Legal Service Agency (July 75–December 76); Chief, Military Justice and later Criminal Law Divisions, Office of The Judge Advocate General (April 72–August 74); Staff Judge Advocate, 101st Airborne Division and later United States Army Support Command, Vietnam (August 71–April 72); Staff Judge Advocate, U.S. Military Assistance Command/Joint United States Military Advisory Group, Thailand (July 68–August 71); Staff Judge Advocate, 6th Infantry Division, Fort Campbell, Kentucky (January 68–July 68); and Staff Judge Advocate, United States Army John F. Kennedy Center for Special Warfare and later XVIII Airborne Corps, Fort Bragg, NC Octobe 66–January 68).

LTC Mills Elected to New Judicial Position

On December 8, 1976, Judge Richard Mills was inducted as Justice of the Appellate Court of Illinois. The ceremony took place in the courtroom of the Supreme Court of Illinois at Springfield, with Supreme Court Justice Robert C. Underwood administering the oath of office to Justice Mills. Remarks were made to the court by representatives of the Illinois Bar, and Mrs. Rachel Mills assisted her husband into his Appellate Court robes.

Justice Mills was elected to his new judicial position in the November 1976 election. For the past ten years he served as Circuit Judge of the 18th Judicial Circuit of Illinois and on the Appellate Court by assignment. Before his election to the trial bench in 1966, he served as State's Attorney of Cass County, Illinois, and prior to that as Legal Advisor to the Illinois Youth Commission.

He received a B.A. degree from Illinois College in 1951 and earned his J.D. degree in 1957 from Mercer University where he served on the Law Review. He was admitted to practice in Illinois in 1957 and has served as a member of the Illinois Supreme Court Rules Committee since its creation in 1963.

Justice Mills served in Korea with the 3rd Infantry Division and is a Lieutenant Colonel in the Judge Advocate General's Corps, United States Army Reserve.

JAG School Notes

1. Chicago Military Law Committee.

The Chicago Bar Association, the nation's second largest city bar with 12,500 members and 69 substantive law committees, has established a Military Law Committee to meet the needs of both civilian and active military lawyers in the Chicago area.

The Committee, which is composed of 29 members, conducts monthly luncheon meetings at the Association headquarters in Chicago to discuss current military and civilian legal problems of mutual interest, and to foster a greater interest in, and respect for, the military justice system.

Members include active duty Staff Judge Advocates stationed both at Fort Sheridan, Illinois and at the U.S. Naval Training Center, Great Lakes, Illinois; as well as civilian lawyers and judges, including one Illinois Appellate Judge. The Committee Chairman is James E. Caldwell, Colonel, USAR—JAGC, Assistant Detachment Commander, 7th JAG Detachment, Chicago. The Vice Chairman is Robert J. Dempsy, Judge, Colonel, USAR—JAGC Commander, 7th JAG Detachment, Chicago.

2. Preparing Returns and the Tax Reform Act of 1976.

Every federal income tax preparer should

be familiar with certain administrative sections of the Tax Reform Act of 1976. They are in effect for the current filing season.

According to the Internal Revenue Service the new law provides that income tax return preparers who are paid for return preparation are subject to fines of $25 for each failure to: (1) furnish their clients with completed copies of each federal return or claim for refund prepared; (2) sign the return, or claim, in the space povided; and (3) enter their identifying number (SSN or EIN) in the space provided. Additionally, preparers must keep a copy of each return or claim prepared for pay for a period of at least three years or must maintain a list containing the names and identifying numbers of all taxpayers served. Each failure to do so will subject the preparer or his or her firm to a $50 fine, up to a maximum fine of $25,000 in any given tax year.

In the future, tax preparing firms and self-employed preparers are also going to be required to file Form 5717 with the IRS once a year. The form, "Annual List of Income Tax Return Preparers," is to be filed with the IRS by July 31, 1977, and by July 31 of each year thereafter. The owner's name or firm name (if a corporation), address and employer identification number is put on top of the form. The social security number, name, and work address of each tax preparer employed at any time during the return period (January 1–June 30, 1977 and July 1–June 30 thereafter) is listed in the body of the form. For a sole proprietor with no employees, only the proprietor's name, address, and social security number will be required. The form is not due until this summer, and IRS offices should have a supply of the forms in time for the filing date.

In general, the new provisions apply to people who fill out income tax returns for pay and those who employ one or more persons to complete returns for pay.

CLE Notes

1. 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.

2. 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.

3. Negotiations Course. The Negotiations Course will be held 2–4 May 1977. This is a basic course designed to develop an understanding of the negotiated competitive procurement method. The course will focus on (1) when and how to use this method (2) development of source selection criteria (3) source selection evaluation process (4) competitive range (5) oral and written discussions and (6) techniques.

All students must be an active duty or reserve component commissioned officer of an Armed Force or civilian employee of the United States Government, with some procurement experience and a member of the bar of a federal court or of the highest court of a state. Successful completion of the Procurement Attorney's Course (5F–F10) (or equivalent) is a course prerequisite. No security clearance is required.

The Course will focus on the selection of the procurement method and the use of the negotiation process in the development of source selection.

4. 2d Civil Rights Course. During the period 14–18 March 1977, the Administrative and Civil Law Division, TJAGSA, will offer the 2d Civil Rights Course. This four and one-half day course is designed to provide information for military lawyers and other federal agency attorneys on the general nature of individual civil rights with emphasis on their applicability to the military community. Course material will include discussion and guest speakers in such areas as Open Housing and Public Accommodations; Sex Discrimination; Race Relations; Government Information Practices; Equal Employment Opportunity; Equality of Justice; and Free Speech in the Military. Inquiries regarding enrollment quotas should be addressed to Director, Academic Department, ATTN: Mrs. Head, The Judge Advocate General's School, Charlottesville, Virginia 22901 (804–293–6286; AUTOVON 274–7110 ask for 293–6286).

5. 2d Defense Trial Advocacy Course. The 2d Defense Trial Advocacy Course will be offered from 18 to 21 April 1977. This 3½ day course is open only to active duty counsel with 6 to 12 months of trial experience who are or who shall be immediately assigned to trial defense duties. The course focuses on the distinctive role of the defense counsel; addressing such matters as pretrial activities, admission of evidence, professional responsibility, judicial rules of procedure, extraordinary writs, and post trial responsibility. The course will povide an opportunity for experienced counsel to polish their defense skills through an interchange of ideas and experience pertaining to the tactics of trial preparation, the use of arguments, objections, witnesses, and negotiation.

6. 1st International Law II Course. This course dealing with the law of war, will be held at TJAGSA from 16–27 May 1977.

7. 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.

8. 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. The 70th Procurement Attorney's Course will be held during 11–22 April 1977.

9. TJAGSA Courses.

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

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

March 21–23: 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 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 Course (5F–F14).

May 2–6: 7th Staff Judge Advocate Orientation Course (Selection by The Judge Advocate General) (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: 3d Criminal Trial Advocacy Course (5F–F32).

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

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 (71D50).

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).

September 12–16: 35th Senior Officer Legal Orientation Course (5F–F1).

September 19–30: 72d Procurement Attorneys' Course (5F–F10).

* Tentative

10. Civilian Sponsored CLE Courses.

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.

April

3–6: NCDA Institute on Prosecution of Crime Against Person, Denver, CO. Contact: National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone: 713–749–1571.

5–7: LEI, Paralegal Workshop, 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.

17–20: NCDA, Pre-Trial Problems, Phoenix, AZ. Contact: National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phne: 713–749–1571.

19–1 May: ABA Standing Committee on Environmental Law, National Conference of the Environment, Sheraton Conference, Reston, Va.

20–21: LEI, Preparation of Litigation Reports 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.

21–23: ABA National Institute, Federal Rules of Evidence and RESPA, Contemporary Hotel, Orlando, FL.

JAGC Personnel Section

From: PP&TO, OTJAG

1. JAGC Representative at MILPERCEN. Captain John F. DePue, presently assigned to the United States Army Legal Services Agency, has been detailed by The Judge Advocate General as his representative at the United States Army Military Personnel Center (MILPERCEN). He will report for duty at MILPERCEN in late January 1977.

Captain DePue will coordinate the assignment and professional development of enlisted personnel, maintain liaison with the field regarding enlisted legal clerks and court reporters, and maintain liaison with the Office of The Judge Advocate General.

Correspondence concerning legal clerks and court reporters should be addressed to:

Commander
US Army Military Personnel Center
ATTN: DAPC-EPM-A/CPT DePue
Alexandria, Virginia 22332

Captain DePue may be telephonically contacted at AUTOVON 221-7664 or commercial (202) 325-7664.

2. Promotion.

AUS LIEUTENANT COLONEL

LASNER, Edwin J. 8 Sep 76

Current Materials of Interest

Articles

Vacketta & Wheeler, *A Government Contractor's Right to Abandon Performance,* 65 GEO. L.J. 27 (1976).

Larkin & Munster, *Military Searches and Seizures,* 29 JAG J. 1 (1976).

Lehman & McClatchey, *The Prospectivity Doctrine: Which Way Out of the Morass?* 29 JAG J. 65 (1976).

Vogel, *Duress: An Affirmative Defense to Criminal Prosecution,* 29 JAG J. 85 (1976).

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

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