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Lesser Included Offenses in Drug Cases

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In *United States v. Long*[1] the Army Court of Military Review held for the first time that when an accused is charged with sale of drugs in violation of a regulation, it is proper to find him guilty of the lesser included offense of delivery of drugs in violation of the same regulation.[2] The determination of whether an offense is included within the offense alleged is not always easy to make.

The "basic test" to determine whether the court-martial may properly find the accused guilty of an offense other than that charged is whether the specification of the offense on which the accused was arraigned "alleges fairly, and the proof raises reasonably, all elements of both crimes" so that "they stand in the relationship of greater and lesser offenses".... Both aspects of the "basic test" of allegation and proof must be satisfied....[3]

The leading case involving lesser included offenses for drug offenses is *United States v. Maginley*.[4] In that case the accused was charged and convicted of the wrongful sale of marihuana in violation of Article 134. At trial he contended that he was merely an agent for the buyer and therefore not a seller of drugs. Although the defense of agency was rejected at the trial, it was sufficient to cause the Army Board of Review to set aside the finding of guilty.[5] In addition, the Board held that there was no lesser included offense of sale of marihuana. The case was certified to the Court of Military Appeals to determine whether the offense of sale of marihuana contained any lesser included offenses.

The court stated that a bare allegation of sale refers only to the transfer of title, and since title can pass without physical possession, such a bare allegation does not fairly imply that marihuana was physically possessed or was physically transferred. Since transfer and possession involve an element, *i.e.*, physical possession, not always included in a sale, the court found that bare allegation of sale does not fairly inform the accused that he is expected to defend against such offenses. Accordingly, it held that transfer and possession were not lesser included offenses of sale.[6]

To affirm the conviction in *Long* the Army Court of Military Review had to find that either delivery was fairly included within the allegation of wrongful sale or that there was something peculiar about allegations laid under Article 92 which were significantly different from the Article 134 allegations discussed in *Maginley*. The court chose the latter course. It found that the regulation proscribed all unauthorized drug activities and that the gravamen of the offense alleged is the violation of a regulation "irrespective of the manner in which it is done".[7] Moreover, it found that drug offenses charged under Article 134 make punishable the specific conduct alleged and not a general class of offenses as did the regulation, and therefore cases decided under Article 134 were distinguishable.

In finding this distinction to be controlling, the court found that the crucial issue was not whether delivery was a lesser included offense of sale, but whether the findings were a permissible variance.[8] Since the record amply demonstrated that the accused was not misled in the preparation of his case and was protected against double jeopardy, the court held that the findings were a permissible variance and were not prejudicial to the accused's rights.

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Although the Army Court of Military Review's findings may be viewed as correct by those who daily fight the war against illegal drug activity, the route it took to achieve the result is questionable. The court makes two fundamental decisions in order to reach its holding: that there is a meaningful distinction between Article 92 and Article 134 drug offenses; and that there is a significant difference between findings of guilty to lesser included offenses and findings of guilty by variance.

In *United States v. Courtney*,[9] the United States Court of Military Appeals held that all marihuana offenses charged under Article 134 are punishable by the maximum punishment available for Article 92 offenses. It is arguable that sale is a more serious offense than delivery or transfer because the former involves money while the latter does not. Similarly it may be argued that possession is the least severe offense because it involves only one person. However, because of other variables such as the amount of money involved, the nature of the buyer (adult or child), and the amount of drugs involved, some possession offenses might be viewed as more severe than sale cases. Accordingly the easiest approach appears to be to deal with all drug offenses on an equal basis and allow the sentencing authority to indicate the seriousness of the offense by the severity of the sentence.

It is submitted that there is no meaningful distinction between Article 92 and Article 134 drug offenses. Without the allegation of the regulation violated, the specifications are virtually identical.[10] Both the general article and the regulation prohibit the same activity. Each drug activity set out in the regulation is prejudicial to good order and discipline and violative of Article 134.[11] Moreover, the form specification set out in the *Manual for Courts-Martial* indicates that the specific manner in which the regulation was violated must be alleged.[12] It seems clear that Article 134 and the regulation have the same purpose; the proscription of all unauthorized drug activity. Accordingly the law affecting drug offenses should be the same regardless of which article is alleged in the charge.

It is axiomatic that decisions should not be based on labels attached to various issues by the parties to a lawsuit. It is the substance and not the label which should control the decision. In *Maginley* the accused was charged with sale, he defended on the basis of agency and was ultimately acquitted because transfer was held not to be a lesser included offense of sale. In the instant case, the accused was charged with sale, he defended on grounds of agency but was convicted of delivery[13] because such a finding, while not a lesser included offense, was a permissible finding based on the evidence. With the exception of the drug involved, heroin, as opposed to marihuana, and the different codal articles alleged, the conduct of both accused was identical. The different codal articles do not call for different results and the different nature of the substances involved is immaterial. Accordingly, these are identical cases and should have identical results. Calling one issue variance and the other issue lesser included offenses should not result in different findings. Both the concepts of variance and lesser included offenses demand that the pleading be such that the accused is put on notice so he is able to adequately prepare for trial. Since both concepts require the same degree of notice, the results in similar cases should be similar. The Court in *Long* found the concept of lesser included offenses inapplicable because both delivery and sale are equivalent prescriptions under the regulation. Because all drug transactions prohibited by Article 134 carry the same maximum punishment[14] they too are equivalent prescriptions under the general article.[15]

Although as a matter of stare decisis the decision of the court in *Long* is erroneous, it does not necessarily follow that as a matter of public policy it is also wrong. A specification alleging the wrongful sale of drugs at a specific time and place is sufficient to put the accused and his counsel on notice that he is charged with violating the law by being involved in illegal drug activities at the time and place alleged. Although not every drug sale involves actual possession and the actual transfer of drugs, many such sales do involve actual possession and transfer. Most military drug sales, usually involve small quantities of drugs and money, and the physical possession and transfer of drugs. It is clear that an allegation of sale when viewed in accordance with the common experience of mankind places an accused on notice of other drug offenses, including possession and transfer.[16]

An accused may not be found guilty of an included offense unless both aspects of the "basic test of allegations and proof"[17] are satisfied. The first portion of the test is satisfied by the mere allegation of sale. The fact that not every sale involves physical possession or transfer should not be controlling on that portion of the test. It should be and is controlling on the proof portion and if evidence of actual delivery or possession is lacking, those offenses cannot be submitted to the members nor may a finding of guilty to those offenses be rendered.

United States v. Long provides a vehicle for the Court of Military Appeals to reexamine its holding in *Maginley* and to bring its decision in line with the common experience of those who deal daily with military drug activity.

Notes

1. 54 C.M.R. Adv. Sh. 612 (A.C.M.R. 1976).

2. Army Reg. No. 600-50, Standards of Conduct for Department of the Army Personnel, para. 4-2*a*(7)(a)(1) (C2, 19 Apr. 1972).

3. United States v. Thacher, 16 C.M.A. 408, 410, 37 C.M.R. 28, 30 (1966).

4. 13 C.M.A. 445, 32 C.M.R. 445 (1963).

5. United States v. Maginley, 32 C.M.R. 842 (A.F.B.R. 1962).

6. United States v. Maginley, 13 C.M.A. 445, 446-47, 32 C.M.R. 445, 446-47 (1963).

7. United States v. Long, 54 C.M.R. Adv. Sh. 612, 614 (A.C.M.R. 1976).

8. "One or more words or figures may be excepted and, when necessary, others substituted, provided the facts as so found constitute an offense by the accused which is punishable by the court and provided such an action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such

fense." MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 74*b*. *See* United States v. Lee, 23 C.M.A. 384, 50 C.M.R. 161 (1975); United States v. Craig, 8 C.M.A. 218, 24 C.M.R. 28 (1957); United States v. Hopf, 1 C.M.A. 584, 5 C.M.R. 12 (1952).

9. United States v. Courtney, 24 C.M.A. 280, 51 C.M.R. 769 (1976).

10. *Compare* form specification No. 27 *with* form specification Nos. 144, 145. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), app. 6 [hereinafter cited as MCM, 1969].

11. *E.g.* United States v. Williams, SPCM 11283 (A.C.M.R. 2 Dec. 1975) (possession and use of LSD is violation of Article 134(1) and (2); United States v. Martin, 50 C.M.R. 314 (A.C.M.R. 1975) (possession of amphetamines violates Articles 134(1) and (2)).

12. Form specification 27, MCM, 1969, app. 6.

13. The Army Court of Military Review in United States v. Long, 54 C.M.R. Adv. Sh. 612 (A.C.M.R. 1976), considered the terms transfer and delivery to be synonymous. See 21 U.S.C. § 802(8) which defines delivery as the "actual, constructive or attempted transfer of a controlled substance whether or not there exists an agency relationship."

14. MCM, 1969, para. 127.

15. In *Maginley* it was noted "that identical punishments have been prescribed for sale, possession, or use of (drugs). . . . The tendency, therefore, in military law seems to have been to treat the crimes as separate and equal. We believe that is the correct view." United States v. Maginley, 13 C.M.A. 445, 447, 32 C.M.R. 445, 447 (1963). *See* United States v. Courtney, 24 C.M.A. 280, 51 C.M.R. 769 (1976).

16. The only practical alternative to the decision in United States v. Long, 54 C.M.R. Adv. Sh. 612 (A.C.M.R. 1976), is a charge sheet filled with a variety of drug offenses to meet the exigencies of proof. The law should not create charge sheets that resemble laundry lists. *See* United States v. Hughes, 24 C.M.A. 169, 170 n.3, 51 C.M.R. 388, 389 n.3 (1976).

17. United States v. Thacker, 16 C.M.A. 408, 37 C.M.R. 28 (1966).

Hard Blows, But Not Foul

A Survey of Recent Significant Cases Concerning Final Argument of Trial Counsel in Light of the American Bar Association Standards, The Prosecution Function

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> He may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to bring about a just one. . . . *Berger v. United States*, 295 U.S. 78, 88, (1935)

With the above words Mr. Justice Sutherland pointed, in 1935, to the moral obligation of a prosecutor to perform his duties with an eye toward his function. On February 8, 1971, the House of Delegates of the American Bar Association approved the Standards Relating to the Prosecution and The Defense Function, which included the standards approved in the tentative draft of March, 1970, with amendments recommended by the Special Committee on Standards for the Administration of Criminal Justice.[1] The standards are not designed to determine when a conviction should be overturned by reason of misconduct of counsel.[2] They are, however, to be an ethical guide to the nature of the lawyer's function in the criminal justice system.[3]

Some of the hardest "blows" dealt by a trial counsel occur during argument. Sections 5.8 and 5.9 of the Standards Relating to the Prosecution Function deal specifically with argument of a prosecutor to the court and jury. That these standards have application to military practice is without question; they have been specifically referred to by the United States Court of Military Appeals in two recent cases.[4] Significantly, one case concerned alleged improper argument of the trial counsel during the findings portion of the court-martial,[5] the other during the sentencing portion.[6] As does the court, the author regards the standards as equally applicable to both portions.

This article examines recent significant decisions dealing with argument of trial counsel in light of the Sections 5.8 and 5.9. Its purpose is to determine how valid the standards are as a practical as well as ethical guide to trial counsel in formulating such arguments. While the standards do not provide hard and fast rules to dictate when a case will be reversed, a thorough knowledge of them by trial counsel will not only enable him to conform to ethical guidelines governing argument, but also to help avoid reversal for improper argument.

APPLICATION OF SECTION 5.9 and CLAUSE (A), SECTION 5.8

Section 5.9 and Clause (A) of Section 5.8 deal with argument of facts outside the record and reasonable inferences from evidence of record. Since they closely parallel each other, they will be considered together. The text of Section 5.9 reads as follows:

> 5.9 Facts outside the record.
>
> It is unprofessional conduct for the prosecutor intentionally to refer or argue on the basis of facts outside the record whether at trial or appeal, unless such facts are matters of common knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Clause (a) of Section 5.8, "Argument to the Jury," states:

> The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to inferences it may draw.[8]

The key word in both Section 5.9 and Clause (a) of Section 5.8 is the adverb *intentionally*. In the analysis of the cases which follows, it is not possible to determine whether the arguments were intentional. Be that as it may, the cases do illustrate instances where trial counsel has failed to adhere to facts of record and the allowable inferences from such facts.

One of the major problems for a trial counsel is determining what is a fact of record for purposes of argument. *United States v. Nelson*[9] involved an accused charged with two specifications of sale of heroin. At the Article 32 hearing he elected to make a statement, but did not put forth any evidence as to his whereabouts on the date of the first alleged offense. At trial he asserted an alibi defense, calling a witness to corroborate the same. Trial counsel argued the inconsistency between the testimony at trial and the former testimony, asking why the accused's memory "suddenly became better" after he had had an opportunity to talk to the alibi witness, "his friend."[10] The court held this to be a fair comment on the alibi defense.[11]

If the Article 32 investigation is part of the record and subject to proper comment, it would seem logical that so are matters brought out in the guilty plea providency inquiry. But not so. In *United States vs. Brooks*,[12] the accused was charged with and pleaded guilty to violation of USARV Regulation 600-291 by, in part, purchasing money orders without a valid commander's certificate. During the providency inquiry, the accused admitted to dealing with the black market. Trial counsel, apparently feeling it was legitimate to comment on this part of the record, argued in presentencing the gravity of black marketeering. The Army Court of Military Review reassessed the sentence in part on the theory that it is improper to argue matters brought out solely as a result of the inquiry.[13]

An easier case is the impropriety of arguing administrative attempts to settle a case short of trial. *United States v. Pinkney*[14] involved not only argument of such efforts to the detriment of the accused, but also expansion of the record to justify the argument. In *Pinkney* the accused unsuccessfully sought a discharge in lieu of trial by court-martial pursuant to Chapter X, AR 635-200, 19 April 1972. In extenuation and mitigation he testified under oath but made no mention of a desire to complete his term of service or to be honorably discharged. Trial counsel in cross-examination

then asked the accused whether he wished to complete his term and be honorably discharged. The accused replied affirmatively. Trial counsel then inquired about the Chapter X request and argued that the accused was unconcerned about staying in the military and had been willing to accept less than an honorable discharge.[15] The United States Court of Military Appeals held this tactic improper on the policy basis that to do otherwise would discourage the legitimate use of administrative alternatives to trial.[16] An alternate theory of decision proposed by the author is that such proceedings are not part of the record.

Just as it is sometimes difficult to determine what is or is not part of the record for purposes of argument, it is also sometimes difficult to determine what is a proper inference to be drawn from a fact of record. The classic example is the prohibition against comment upon the failure of the accused to testify. A direct reference to such is clearly prejudicial.[17] But even here there are grey areas.[18] The chief such area seems to be the comment that certain government testimony is "unrebutted." Apparently the United States Court of Military Appeals is going to take a case-by-case look at such argument. In *United States v. Saint John,*[19] the accused was charged with wrongful possession and sale of marihuana. An informant made the alleged buy, and shortly thereafter the accused was apprehended and his car searched. The search did not produce the alleged bag from which the accused supposedly transferred the contraband to the informant, but did result in seizure of marihuana seeds from the glove compartment and marihuana from a field jacket which had the name of the accused stenciled on it. In his prefindings argument the trial counsel referred to the testimony about discovery of the field jacket and seeds as "unchallenged" and "unrebutted."[20] Apparently as a tactical decision trial defense counsel did not object to this argument. The Army Court of Military Review reversed on the theory that only the accused could have rebutted the testimony and as such the argument was impermissible comment on the failure of the accused to testify. The United States Court of Military Appeals disagreed and held that on the facts it was convinced that the court members did not regard the comments as an invitation to weigh the accused silence against him.[21]

While trial counsel may have some difficulty in determining when it is proper to argue the "rebutted" evidence, he is duty bound to remember the limited purpose for which his evidence was admitted, and this is an easier task. A failure to remember can lead to reversal. In *United States v. Salisbury,*[22] the accused, charged with murder of his girlfriend, asserted her possible suicide as a defense. During the government's case-in-rebuttal the military judge allowed the introduction of a prior court-martial conviction of the accused. The conviction was for communicating a threat by use of the phrase "I'm going to stick one of these bullets right through your brain."[23] Extracts of the court-martial order were read to the members. The conviction was admitted solely to rebut the contention that decedent's death was the result of suicide, and the members so instructed.[24] In spite of this, trial counsel directly argued this evidence as an indication of a propensity toward violence with the following language:

> Gentlemen, keep in mind again what that conviction was for. "I'm going to stick one of these bullets right through your brain" . . . What did he do to (decedent). He stuck a bullet right through her brain.[25]

Reversal from this and other error followed.

APPLICATION OF CLAUSE (B), SECTION 5.8

The text of Clause (b), Section 5.8, ABA Standards relating to the Prosecution Function, reads as follows:

> It is unprofessional conduct for the prosecutor to express his personal opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendent.[26]

This portion of Section 5.8 is easier to apply in practice than Section 5.9 and Clause (a) of Section 5.8 discussed above. Yet it is easy and something of a habit to "personalize" the ar-

gument, in effect putting personal belief and the role of trial counsel as officer of the court before the trier of fact.

United States v. Nelson,[27] an Army Court of Military Review case previously mentioned, involved a trial counsel who expressed his personal belief as to the testimony. The accused called as his alibi witness one *D*, who testified that the government informant had offered to sell *D* a kilogram of cocaine, and was therefore an unreliable informant. In argument on findings the trial counsel argued as follows:

> ... That is the most preposterous story I've ever heard. I think *D*'s tactic is the same as that used by Hitler. Tell the biggest lie you can imagine and they'll believe it ... *D* is not a man to be believed. He is simply incredible and his testimony is nothing but nonsense.[28]

This was held to be error, but not so great an error as to trigger the military judge's obligation to act sua sponte, there being no objection from the defense. Interestingly, the court did not discuss the argument in terms of an expression of personal belief by the trial counsel, but rather in terms of the inflammatory nature of the argument and reference to facts outside the record.[29]

APPLICATION OF CLAUSE (C), SECTION 5.8

Clause (c), Section 5.8, ABA Standards Relating to the Prosecution Function, states that "the prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.[30]

Better examples of an appeal to passion than *Nelson* are those cases in which the trial counsel has asked the court members to equate themselves or a close relative with the plight of the victim. In *United States v. Wood,*[31] the accused was charged with taking indecent liberties with three minor boys, members of the Boy Scout troop of which he was the scoutmaster. In argument on sentence, trial counsel asked the following question:

> Would you want Sergeant *W* to have access to other young boys, your friend's sons, or your own sons?[32]

The court agreed with the contention of appellate defense counsel that this argument asked the members to put aside their impartiality and judge from a perspective of personal interest. It analogized that if a court member had been a victim's father, he would have been disqualified from sitting by reason of Paragraph 62(f) of the *Manual for Courts Martial.* Therefore it was improper argument to ask him to put himself in that position.[33]

While *Wood* was decided before adoption of the ABA Standards Relating to the Prosecution Function, a recent case involving similar argument directly cited Clause (c) of Standard 5.8 as a basis for decision. *United States v. Shamberger*[34] involved an accused charged with rape. The victim testified that she was pulled from an automobile parked on a secluded road and her husband restrained. Trial counsel in his presentencing argument asked the members to put themselves in the place of the victim's husband with:

> Put yourself in the position that *S* says Sergeant *C* was put, right here. Put yourself next to your car or a borrowed car at night; put yourself being forced down by one or two men, big men; picture being told to keep your head down but being able to glance out from the side; and picture your wife having her clothes ripped off her and then being raped, once, twice, three times, four times, five times. You picture that. That's not a bar down on *H* Street.... You think of Sergeant *C* pinned to the ground and in no way able to do anything about three men taking turns.[35]

A second type of argument that might be regarded as inflammatory, at least when unsupported by any evidence of record, is argument of the effect of the accused's conduct upon his fellow soldiers, particularly if that effect is exaggerated. In *United States v. Brooks,*[36] discussed previously, where the accused admitted to black market activity in the

providency inquiry although not charged with such conduct, trial counsel argued:

> Here is a man who knew what he was doing and yet knowing that his fellow commarades (sic) are out there fighting and dying for a particular cause; he, in his own way, in Saigon was fighting against that cause and in turn his brothers in the field are dying because of it . . .[37]

APPLICATION OF CLAUSE (D), SECTION 5.8

The text of Clause (d), Section 5.8, ABA Standards relating to the Prosecution Function is:

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by introducting evidence broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.[38]

It is this clause that parallels the growing trend against any predictions about the effect of a verdict other than its effect upon the particular accused involved. In *United States v. Wood*,[39] mentioned above, trial counsel asked the members to consider the consequences of their verdict upon themselves. He asked, in presentencing, a series of rhetorical questions such as whether the members wished to have a "sex pervert" living in their society, and then argued that if the rhetorical questions were answered in the negative and yet the members voted to retain the accused in the service, then the members were "selfish, self-centered, and not . . . fulfilling (their) responsibility to society or the Air Force."[40] The court in part regarded this as the interjection of a threat of contempt or ostracism if the members rejected trial counsel's request.[41] It logically is also a prediction of such consequences.

Just as arguing the effect of the sentence on the members is improper, so also it has now been held that arguing the effect of the sentence on service members other than the accused is improper. This is slightly different than the argument in *Brooks* where the trial counsel suggested fellow soldiers were dying in part because of the accused's activities. Here trial counsel argues deterrence of others by the sentence. In *United States v. Mosely and Sweisford*,[42] the two accused were tried in common by general court-martial and convicted of wrongful possession of amphetamines and wrongful possession of hashish in violation of AR 600-50. Trial counsel argued in presentencing that attention should be paid to the nature of the "criminal activity" and that attention should also be paid, in determining a sentence, to the "deterrent effect" of the sentence on others who "might venture" into such an activity.[43] The United States Court of Military Appeals agreed with the contention of appellate defense counsel that this argument was improper. Judge Cook, writing the unanimous opinion, pointed out the two-pronged nature of deterrence, that of deterring the general public as well as the particular accused. While not rejecting the former, the Court reasoned that in the military the general deterrence aspect is satisfied by the table of maximum punishments. It further reasoned that the general deterrence aspect is not diminished by the offense of the particular accused. As to him, deterrence must be individualized by the particular sentence. General deterrence will not be allowed as a basis for additional punishment.[44] In a per curiam opinion, the Army Court of Military Review subsequently applied *Mosely*.[45]

It is an open question whether if defense counsel argues the predictions of a sentence upon other service members, trial counsel may also do so. This question has not been addressed by either the United States Court of Military Appeals or by the Army Court of Military Review. In a case decided prior to *Mosely*, *United States v. DiMinious*,[46] the Navy Court of Military Review considered the issue. There the accused pleaded guilty to two specifications of unauthorized absence and one specification of desertion. In argument on sentencing trial defense counsel stated that if the court did not adjudge a long period of

confinement, the "effect on command" would be "negligible".[47] Trial counsel responded that such a sentence would affect the command. Specifically he advised that in adjudging a sentence the members were not only ". . . punishing the man, but . . also affecting members within the command," and that this general deterrence aspect should be considered.[48] The Court did not comment on the ultimate issue of whether reference to the general deterrence aspect is proper, but simply reasoned that viewing the arguments as a whole, trial counsel's comment was not prejudicial, and that defense counsel had "opened the door" with his argument.[49]

In light of Clause (d), Section 5.8, it would seem logical that two wrongs do not make a right, and that such argument would still not be permissible. It should be noted, however, that trial defense counsel is likewise constrained in his argument.[50]

CONCLUSION

As stated in the introduction, the Standards do not provide hard and fast rules to determine when a case will be reversed. Yet a knowledge of them should cause a trial counsel to ask several questions in formulating his arguments:

1) What facts are part of the record?

2) For what purpose were those facts allowed into evidence?

3) What are the reasonable inferences from those facts?

4) Am I personalizing my argument?

5) Am I interjecting issues broader than the guilt or innocence of the accused and an appropriate disposition of this particular case?

There is no substitute for a knowledge of the substantive law governing proper argument. The results of all of the cases mentioned are certainly not dictated by the language of Sections 5.8 and 5.9. The Sections do not define "record", "inflame", and other terms. Still a familiarity with the Sections and the posing of the questions mentioned might well have led to further inquiry into the substantive law, or different argument, or both in the cases cited. At the least such familiarity leads to fairer blows in the final argument of trial counsel and consequently more intelligent argument.

Notes

1. ABA STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION 1 (Approved Draft 1971) [hereinafter cited as STANDARDS].

2. *Id.*, General Introduction, at 11.

3. *Id.* at 9.

4. United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976). United States v. Nelson, 24 C.M.A. 49, 51 C.M.R. 143 (1976).

5. United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976).

6. United States v. Nelson, 24 C.M.A. 49, 51 C.M.R. 143 (1976).

7. *Standards*, at 129.

8. *Id.* at 126.

9. *See* United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976); United States v. Nelson, 24 C.M.A. 49, 51 C.M.R. 143 (1976).

10. United States v. Nelson, 24 C.M.A. 49, 50, 51 C.M.R. 143, 144 (1976).

11. *Id.* at 51, 51 C.M.R. at 145.

12. 43 C.M.R. 817 (A.C.M.R. 1971).

13. *Id.* at 820.

14. 22 C.M.A. 595, 48 C.M.R. 219 (1974).

15. *Id.* at 596, 48 C.M.R. at 220.

16. *Id.* at 597, 598, 48 C.M.R. at 221, 222.

17. Griffin v. California, 380 U.S. 609 (1965).

18. *See* Annot., 68 A.L.R. 1108, 1121 (1930).

19. 23 C.M.A. 20, 48 C.M.R. 312 (1974).

20. *Id.* at 22, 48 C.M.R. at 314.

21. *Id.* at 23, 48 C.M.R. at 315.

22. 50 C.M.R. 175 (A.C.M.R. 1975).

23. *Id.* at 182.

24. *Id.* at 190.

25. *Id.* at 184.

26. STANDARDS, at 126.

27. *See* United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976); United States v. Nelson, 24 C.M.A. 49, 51 C.M.R. 143 (1976).

28. United States v. Nelson, 24 C.M.A. 49, 51, 51 C.M.R. 143, 145 (1976).

29. *Id.* at 52, 51 C.M.R. at 146.

30. STANDARDS, at 126.

31. 18 C.M.A. 21, 40 C.M.R. 3 (1969).

32. *Id.* at 26, 40 C.M.R. at 8.

33. *Id.*

34. United States v. Shamberger, 24 C.M.A. 203, 51 C.M.R. 448 (1976).

35. *Id.* at 204, 51 C.M.R. at 449.

36. 43 C.M.R. 817 (A.C.M.R. 1971).

37. 43 C.M.R. at 820.

38. STANDARDS, at 126.

39. 18 C.M.A. 21, 40 C.M.R. 3 (1969).

40. *Id.* at 28, 40 C.M.R. at 10.

41. *Id.*

42. 24 C.M.A. 173, 51 C.M.R. 392 (1976).

43. *Id.* at 174, 51 C.M.R. at 393.

44. *Id.* at 174, 175, 51 C.M.R. at 393, 394.

45. United States v. Miller, 24 C.M.A. 181, 51 C.M.R. 400 (1976).

46. 47 C.M.R. 574 (N.C.M.R. 1973).

47. *Id.* at 579.

48. *Id.*

49. *Id.*

50. Clause(d) of Section 7.8, Standards Relating to the Defense Function, states that "A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict," thus being identical to the prosecution standard with the exception of substitution of the phrase "A lawyer" for the phrase "The prosecutor."

Contractual Recovery for Medical Care

Tort Branch, Litigation Division, OTJAG

Staff Judge Advocates and their recovery judge advocates can increase medical care recoveries by recognizing that a significant alternative to reliance on the Medical Care Recovery Act,[1] presents substantial recovery opportunities in certain cases. This alternative is recovery based upon the contractual obligations contained in the provisions of existent insurance policies.

Free medical care is furnished to active duty and retired servicemen and their dependents as required by law.[2] Only in an exceptional case is repayment for the reasonable cost of the care furnished required.[3] However, a third party (*e.g.*, tortfeasor or *insurer*) is expected to honor a proper obligation to furnish or pay for reasonable cost for such care.

Prior to 1947, certain medical expenses in tort cases were administratively recovered. In *United States v. Standard Oil Company of California,*[4] the Supreme Court held that absent statutory authority the government had no right to recover medical expenses from third-party tortfeasors. Thereafter recovery for medical costs virtually ceased until passage of the Medical Care Recovery Act (MCRA) in 1962. The MCRA creates a claim in favor of the United States in any case in which the United States is authorized or required by law to furnish care to a person who is injured or suffers a disease under circumstances creating third party tort liability.

The clear language of the MCRA limits its applicability to third party tort liability cases. The recent emergence of no-fault automobile insurance (which in varying degrees eliminates the third party tortfeasor) has limited further the applicability of the MCRA. It is important, then, to consider medical care recovery theories other than the MCRA in many cases. The primary alternative source of recovery is the insurance policy purchased by the person requiring treatment. Recovery is based not on tort liability, but rather on con-

tractual obligations. It is possible to categorize insurance contract recoveries by the policy type (*e.g.*, no-fault insurance and personal injury protection (PIP), uninsured motorists coverage, and medical care provisions (Med-Pay)). However, these contractual recoveries all have the common denominator of being actions under an insurance policy covering the government beneficiary of the medical treatment.[5] The recoveries are reliant on these policies giving rise to a right of recovery in the United States, usually as a third-party beneficiary.

II

Insurance contract recoveries are predicated primarily on state contract and insurance law. Therefore, a thorough knowledge and understanding of the appropriate state law is essential prior to beginning recovery efforts.[6]

In the initial insurance company challenges to government contract recovery, the courts sometimes struggled with the problem of the absence of a viable action against a third party tortfeasor (as is required by the MCRA)[7] An increasing number of courts applying state contract and insurance law have held that the government is a third party beneficiary under the contract of insurance, entitled to recover without regard to the MCRA.[8] Several courts have emphasized that the government is not a volunteer in furnishing medical care.[9] Notwithstanding these favorable court decisions, in order to recover, the government must qualify as a third-party beneficiary under the insurance policy. Policy interpretation, then, is crucial.

A typical automobile policy defines the scope of coverage by referring to a named insured or insureds, people physically present in the vehicle with the consent of the named insured, and also "any person or organization responsible for use" of the automobile. The United States has consistently been found to be an additional insured or third party beneficiary under the latter clause.[10] For example, in *United States v. Myers*,[11] the court said it was well settled that the United States was an insured under this language since GEICO was using the same policy language despite previous interpretations favorable to the government. Following *Myers*, GEICO continued to use the same policy language and it was once again interpreted favorable to the government.[12] Similar provisions in both a Commercial Union Insurance Group and United States Automobile Association policy (uninsured motorist provision) were held to include the government as a third party beneficiary.[13] However, an Allstate Insurance Company policy defining insured's as only the named insured, his relatives and residents of his household, and other persons while in or upon, entering into or alighting from the named vehicle was held not to include the United States.[14]

Contractual recovery is necessarily limited to benefits payable under a particular policy. While policies usually speak of expenses incurred "to and for" or "by or on behalf of" a named insured (or employ similar language), the medical care provided by the government is either furnished directly to the insured or paid for by the government. Expenses incurred for care furnished in private hospitals to the policyholder under circumstances where he would be liable for the bill if the government did not pay (*e.g.*, Champus situations) are quite obviously medical expenses incurred within the meaning of the contract.[15] Medical care furnished directly to the policyholder by the government arguably is not an incurred medical expense under the policy language. However, courts have rather uniformly held that these medical expenses are still "incurred" under policy language notwithstanding the fact that the recipient did not pay for the care.[16]

Insurance companies (primarily those issuing a substantial number of policies to service members) have challenged the government's third-party beneficiary rights under various policies by raising the following significant legal issues: (1) the United States is not a person or resident within the meaning of the statutes or policies, or is not an insured within the meaning of the policy; (2) the insured

"incurred" no charges because the government furnished treatment or paid the bills at no cost to the claimant; (3) the government was a volunteer not entitled to third party beneficiary status; (4) exclusionary language in the policy bars recovery by the government; and (5) the Medical Care Recovery Act limits recoveries to tort liability cases.

The government has prevailed in many decisions addressing the issues raised by insurance companies. For example in *United States v. Whitcomb*,[17] the court rejected the argument that the United States was barred from recovery because it did not meet the residency requirements under the Maryland Unsatisfied Claim and Judgment Fund Law. It was rather summarily concluded that the United States was a resident of every state. Similarly, in *United States v. Commercial Union Insurance Group*,[18] the United States was found to be a "person" within a policy which provided that "... any person with respect to damages is entitled to recover for care ... because of bodily injury ..."

Insurance companies frequently contend that a policy exclusion related to "Workers' Compensation or similar benefits" excludes the United States from recovering medical costs. The courts have rejected this contention.[19] However, it is possible to draft policy provisions which specifically exclude the United States.[20] The validity of such an exclusion may depend on whether the insured is informed of the exclusionary provisions[21] and granted some reduction in the premium. Of course, the courts should not presume or create an exclusion in the absence of specific exclusionary language.[22] The government may challenge the validity of exclusionary policies by administratively presenting the matter to state insurance commissioners.

III

The importance of understanding the differences between MCRA-tort and contract-insurance recovery actions is well illustrated by *United States v. Farm Bureau Insurance Co.*[24] The government sued the *tortfeasor's* insurance company prior to any judgment against the tortfeasor himself (the victim's insurance company was not involved). In dismissing the complaint, the court held that the MCRA permits tort liability actions only, and the insurance company's obligations were contractual. Simply stated, in order to recover medical costs under the MCRA from an insured tortfeasor, a tort suit must be brought against the tortfeasor himself (even though, as a practical matter, the source of recovery is the insurance company via the issued policy).[25] On the other hand, to recover medical costs from the injured party's insurance company, a contract action must be brought against the insurance company.

Although most contract cases do not involve assessing tort liability questions, a thorough investigative file must be developed. The file should include, at a minimum, military and civilian police reports, copies of the insurance policies, statements of witnesses, full details regarding residency, driver's licenses, vehicle registrations, photographs, hospital records and evidence of reasonable medical expenses.[26]

The contractual obligations set forth in insurance policies provide a sometimes overlooked opportunity for effecting medical care recoveries. Thorough factual development and initimate knowledge of the applicable state contract and insurance law will result in increased recoveries by Staff Judge Advocates and their recovery judge advocates.[27]

Notes

1. 42 U.S.C. §§ 2651–2653 (1962).

2. 10 U.S.C. §§ 1074, 1076 (1966), *amending* 10 U.S.C. §§ 1074, 1076 (1958).

3. Army Reg. No. 27–40, Legal Services Litigation, para 5–14c(2) (15 June 1973).

4. 332 U.S. 301 (1947).

5. Med-Pay coverage is offered by the recipient's own insurer; responsibility to pay is without regard to liability and amounts recoverable are limited by the policy. Uninsured motorist coverage is also contractual but liability arises out of actions of a third party tortfeasor (not a party to the contract) who causes damage to the

insured; the right to recovery is again under the insured's own policy of insurance and is limited by its terms. No-fault, sometimes called personal injury protection (PIP), varies in its terms and limitations depending on the legislative plan. Commonly it sets a monetary limit below which claims are processed under the policy of the insured. Pain and suffering, as an element of damage, is commonly excluded with recovery being limited to actual medical expenses, loss of wages and other out of pocket expenses. Claimants are frequently restricted from recovery for monies paid to them from certain sources, such as Workers Compensation plans. Above certain limits, the prevailing tort law applies. All three policy types generally include a provision to the effect that payment may be made directly to those third parties furnishing treatment to the assured and the benefits payable to him offset by the amount of payments to third parties. Another area affected, Worker Compensation, was treated in Litigation Division, OTJAG, *Medical Care Recovery from Workmen's Compensation*, THE ARMY LAWYER, Nov. 1971, at 17; Litigation Division, OTJAG, *Medical Care Recovery from Workmen's Compensation Continued*, THE ARMY LAWYER, Dec. 1971, at 14; Litigation Division, OTJAG, *Medical Care Recovery Under Workmen's Compensation—Conclusion*, THE ARMY LAWYER, Jan. 1972, at 14.

6. Although the usual rule is that state statute of limitations are not binding on the United States, it has been determined that a one-year California statute was a prerequisite to recovery and that failure to file within this one-year period barred recovery by the United States. United States v. Hartford Accident & Indem. Co., 320 F. Supp. 648 (E.D. Cal. 1970), *aff'd*, 460 F.2d 17 (9th Cir.), *cert. denied*, 409 U.S. 979 (1972).

7. Government Employees Ins. Co. v. United States, 376 F.2d 836, 836–837 (4th Cir. 1967); United States v. United Servs. Auto. Ass'n, 312 F. Supp. 1314, 1316 (D. Conn. 1970).

8. United States v. Automobile Club Ins. Co., 522 F.2d 1, 3 (5th Cir. 1975); United States v. Government Employees Ins. Co., 461 F.2d 58, 59–60 (4th Cir. 1972); United States v. State Farm Mut. Auto. Ins. Co., 455 F.2d 789, 790, 792 (10th Cir. 1972); United States v. Government Employees Ins. Co., 440 F.2d 1338, 1339 (5th Cir. 1971); United States v. United Servs. Auto. Ass'n, 431 F.2d 735, 737 (5th Cir. 1970), *cert. denied*, 400 U.S. 991, *reh. denied*, 401 U.S. 984 (1971); United States v. California State Auto. Ass'n, 385 F. Supp. 669, 672 (E.D. Cal. 1974); United States v. Government Employees Ins. Co., 330 F. Supp. 1097, 1099 (E.D. N.C. 1971). *See also*, Transnational Ins. Co. v. Simmons, 19 Ariz. 354, 507 P.2d 693, 696 (Ct. App. 1973); Declaratory Ruling No. 7554, Insurance Comm'n of the State of Oregon, 15 May 1975. The Arizona case, although somewhat complicated by arbitration aspects, appears to be in accord with the above cases.

9. United States v. Government Employess Ins. Co, 461 F.2d 58, 60 (4th Cir. 1972); Smith v. United Serv. Auto. Ass'n, 52 Wis. 2d 672, 190 N.W. 2d 873, 874–75 (1972).

10. Government Employees Ins. Co. v. United States, 349 F.2d 83, 84 (10th Cir. 1965), *cert denied*, 382 U.S. 1026, *reh. denied*, 383 U.S. 939 (1966).

11. United States v. Myers, 363 F.2d 615, 618 (5th Cir. 1966).

12. United States v. Government Employees Ins. Co., 440 F.2d 1338, 1339 (5th Cir. 1971).

13. United States v. United Servs. Auto. Ass'n, 312 F. Supp. 1314, 1316 (D. Conn. 1970); United States v. Commercial Union Ins. Group, 294 F. Supp. 768, 771 (S.D. N.Y. 1969).

14. United States v. Allstate Ins. Co., 306 F. Supp. 1214, 1215 (N.D. Fla. 1969).

15. American Indem. Co. v. Olesijuk, 353 S.W. 2d 71, 73 (Tex. Ct. Civ. App. 1962).

16. United States v. Automobile Club Ins. Co., 522 F.2d 1, 4 (5th cir. 1975); United States v. California State Auto. Ass'n, 385 F. Supp. 669, 671 (E.D. Cal. 1974); United States v. Government Employees Ins. Co., 330 F. Supp. 1097, 1099 (E.D. N.C. 1971); United States v. United Servs. Auto. Ass'n, 312 F. Supp. 1314, 1316 (D. Conn. 1970); United Servs. Auto. Ass'n v. Holland, 283 So. 2d 381 (Fla. Dist. Ct. App. 1973); Smith v. United Servs. Auto. Ass'n, 52 Wisc. 2d 672, 19 N.W. 2d 873, 874–75 (1972). *But see* Lefebvre v. Government Employees Ins. Co., 110 N.H. 23, 259 A.2d 133 (1969), a notable exception to this line of reasoning, holding that expenses are "incurred" only when the insured becomes legally liable to pay for them.

17. United States v. Whitcomb, 314 F.2d 415 (4th Cir. 1963).

18. United States v. Commercial Union Ins. Group, 294 F. Supp. 768, 770 (S.D. N.Y. 1969); *See also* Government Employees Ins. Co. v. United States, 376 F.2d 836 (4th Cir. 1967); Government Employees Ins. Co. v. United States, 349 F.2d 83 (10th Cir. 1965). These are typical of a number of cases determining that the government is an "insured" because it qualifies as a "person" and the policy uses the word person in describing who is an insured. The implication of these latter cases is that the status of the government as a person is obvious.

19. United States v. Automobile Club Ins. Co., 522 F.2d 1, 4 (5th Cir. 1975); United States v. Government Employees Ins. Co., 440 F.2d 1338, 1339 (5th Cir. 1971); United States v. United Servs. Auto. Ass'n, 312 F. Supp. 1314, 1316 (D. Conn. 1970); United States v. Commercial Union Ins. Group, 294 F. Supp. 768, 771 (S.D. N.Y. 1969); American Indem. Co. v. Olesijuk, 353 S.W. 2d 71, 73 (Tex. Ct. Civ. App. 1962).

20. Government Employees Ins. Co. v. United States, 400 F.2d 172, 175 (10th Cir. 1968).

21. *Id.*

22. American Indem. Co. v. Olesijuk, 353 S.W. 2d 71, 73 (Tex. Ct. Civ. App. 1962).

23. United States v. Automobile Club Ins. Co., 522 F.2d 1, 3 (5th Cir. 1975); United States v. State Farm Mut. Auto. Ins. Co., 455 F.2d 789, 791 (10th Cir. 1972); United States v. United Servs. Auto. Ass'n, 431 F.2d 735, 737 (5th Cir. 1970); United States v. California State Auto. Ass'n, 385 F. Supp. 669, 672 (E.D. Cal. 1974). *See also* United States v. Nationwide Mut. Ins. Co., 449 F.2d 1355, 1358–59 (9th Cir. 1974) (remanded for further factual findings); United States v. Government Employees Ins. Co., 461 F.2d 58, 59 (4th Cir. 1972). These cases have concluded that words used in connection with provisions for reduced payment, such as "to or for," "by or on behalf of," establish the government as a beneficiary.

24. United States v. Farm Bureau Ins. Co., 527 F.2d (8th Cir. 1976).

25. If the government can avail itself of a local direct action statute, this statement must be modified accordingly.

26. The possibility of a tort action against a third party under the MCRA cannot reasonably be eliminated, or a contractual basis of liability established, without these documents and statements. Further, it may be advantageous to simultaneously assert recovery claims based upon the insured's policy and the tort liability of the negligent third-party.

27. For an analysis of the application of state law in these cases, *see*, United States v. Nationwide Mut. Ins. Co., 499 F.2d 1355, 1358–59 (9th Cir. 1974).

Reorganization of JAGSO Detachments

Reserve Affairs, TJAGSA

Since 1959, when the Judge Advocate General's Service Organization (JAGSO) Detachments were first organized, there have been many changes in the administration and scope of military law and in the organization of the active Army. Consequently, the organization for administering military law has also changed. Lessons learned from past mobilizations showed quite clearly that a reorganization of the JAGSO detachments was necessary in order to adjust to these changes and to meet partial or full mobilization needs.

The reorganization was initiated at the request of The Judge Advocate General and is based on staff studies conducted by members of The Judge Advocate General's School and reserve component Judge Advocate officers from First, Fifth and Sixth CONUS Armies. Comments and suggestions from mobilization designee general officers and from active Army Judge Advocates directly involved in the reserve program were also incorporated.

The objective was to identify a type of organization that would permit flexibility in assignment, and, at the same time, meet immediate mobilization requirements, in accordance with Total Force planning. Thus, the new JAGSO organization (TOE 27-600H) reflects the type of units which will support the active Army upon mobilization and incorporates, in the organization structure and mission, the changes in military law.

Military Law Centers were organized to provide a capability for military justice, as well as, other areas of military law. They represent a consolidation of presently fragmented capabilities for legal assistance, claims, administrative and international law into a large single unit for the purpose of providing comprehensive legal services. The Military Law Centers also form the base organization for attachment of additional JAGSO teams whenever there is a substantial increase in workload or as the force requires.

The Military Law Centers have the capabilities to provide military legal services to nondivisional troops on an area basis, including trial and review of general, special, and summary courts-martial; review of nonjudicial punishment; legal advice on claims and international law; and legal assistance. They are responsible for the command, control, administration, and operational supervision of assigned or attached judge advocate functional teams.

JAG detachments organized as cellular units of varying sizes with specialized functions and capabilities to augment organic staff judge advocate sections or to be organized as

a separate judge advocate unit to support a force are organized pursuant to TOE/MTOE 27-600 and have the following capabilities:

(1) *Claims team (FA).* To perform all investigative service and preparation for, and adjudication of all types of claims for or against the United States arising in the area to which assigned.

(2) *International Law team (GA).* To perform all judge advocate duties related to international law, including investigation and reporting of violations of the law of war, and preparation of trials resulting from such investigation.

(3) *Court-martial trial team (HA).* To perform all the duties of trial counsel in court-martial cases. To perform legal assistance and claims duties as required.

(4) *Court-martial defense team (HB).* To perform all duties of defense counsel in court-martial cases. To perform legal assistance and claims duties as required.

(5) *Legal service team (IA).* To perform administrative law and legal assistance functions and to render legal advice and assistance in all areas of the law not encompassed by military justice, international law, claims, and procurement law.

(6) *Procurement law team (JA), contract law.* To review contracts and related documents for legal sufficiency and conformance with regulations and policy. To assist contracting officers in the negotiation of contracts and contract clauses. To interpret laws and regulations pertaining to contracts, promulgate necessary regulations, maintain liaison with other governmental agencies, and furnish legal advice as to all phases of the administration of contracts.

(7) *Procurement law team (JB), property law.* To act for the commander on legal problems concerning the disposal, sale, lease, and loan of property, and use thereof by military or civil authorities; interpret and promulgate regulations appertaining thereto; review industrial facilities utilized in government-owned, contractor-operated contracts and render advice as to all aspects of the administration of these contracts.

(8) *Procurement law team (JC), frauds.* To take appropriate action on matters involving suspected criminal conduct or fraudulent activity on the part of military personnel; civilian employees of the Department of the Army; or by private companies, organizations, or individuals in connection with procurement activities.

(9) *Procurement law team (JD), labor relations.* To act for the commander to prevent labor stoppages which might adversely affect military procurement; consider noncompliance with labor laws by government contractors, and maintain liaison with other government agencies in this specialty.

(10) *Procurement law team (JE), fiscal law.* To take appropriate action on all matters pertaining to taxes imposed by governmental taxing authorities against Army contracts or Army instrumentalities; government financing by advance payments and guaranteed loans, import-export duties, and excise taxes.

The final effect of the reorganization left 106 JAG Detachments converted, 93 detachments inactivated and 11 detachments reorganized and relocated. The effective conversion date was 8 November 1976 while the effective date for detachments being relocated was 28 February 1977.

American Bar Association Supports Pre-Mobilization Legal Counseling

Reserve Affairs, TJAGSA

At the American Bar Association's mid-winter meeting, held 10-15 February in Seattle, Washington, the House of Delegates unanimously passed a resolution in support of the recently developed Pre-mobilization Legal Counseling Program.

The following resolution was adopted upon recommendation of the Standing Committee on Legal Assistance for Military Personnel, Captain William R. Robie, JAGC, USAR, Chairman.

Be It Resolved, That, in view of the fact that under modern circumstances the response of the Reserve Components of the Armed Forces of the United States to an order to active duty in time of national emergency may not permit them time to place their legal affairs in order, the American Bar Association supports the concept of Armed Forces programs providing legal counseling, assistance, or services to members of the Reserve Components prior to actual mobilization in order that their personal legal affairs might be in order at the time of mobilization; and

Be It Further Resolved, That the American Bar Association encourages all state and local bar associations to support and play a meaningful role in these programs.

Brigadier General Edward D. Clapp, JAGC, USAR, the Assistant Judge Advocate General for Special Assignments (MOB DES), and Lieutenant Colonel James N. McCune, Director, Reserve Affairs, TJAGSA, appeared and gave a presentation on the program, to the Military Lawyers Committee of the General Practice Section.

A letter of instruction on the implementation of the program will be forthcoming from U. S. Army FORSCOM, in the near future.

Lieutenant Colonel Sbarboro Elected Illinois Circuit Judge

Lieutenant Colonel Gerald L. Sbarboro, JAGC, IL ARNG, was elected on 2 November 1976, as Judge of the Circuit Court of Cook County, Chicago. In his category of 30 candidates seeking new judgeships in Cook County, Lieutenant Colonel Sbarboro was the leading vote-getter.

Judge Sbarboro, formerly an attorney in private practice, attended law school at Catholic University and holds a Doctorate of Law degree from Harvard Law School. In addition to his judicial duties Judge Sbarboro is also on the faculty of De Paul University. He has served as a member of the Chicago Board of Education; President of the Catholic Lawyers Guild of Chicago; President of the Justinian Society of Lawyers of Illinois and as a member of the Board of Governors of the Illinois State Bar Association.

Third United Nations Conference on the Law of the Sea

International Affairs Division, OTJAG

The Fifth Session of the Third United Nations Conference on the Law of the Sea met in New York City from 2 August to 17 September 1976. Consensus was reached on a number of issues before the Conference, but some important issues remain unresolved. The Conference is scheduled to reconvene in New York City in May of 1977.

The negotiations, which began in 1958, have produced legal instruments dealing with the territorial sea and contiguous zone, the high seas, fishing and conservation of living resources, and the continental shelf. Agreement has not yet been reached on the breadth of the territorial sea and fishing limits.

The present conference has now had substantive sessions in Caracas, Venezuela in 1974, in Geneva, Switzerland in 1975 and in New York in 1976. These three sessions have produced a Revised Single Negotiating Text (RSNT) which represents a broad consensus on a number of issues: a 12 mile territorial

sea, passage through straits, establishment of a 200 mile coastal state resource zone, protection of navigation rights and marine pollution.

A number of unresolved important issues remain before the Conference. The major outstanding issues include agreement upon: a system of exploitation for deep seabed resources, the legal status of the 200-mile coastal state resources zone, rights and duties of the coastal states and of other states in the zone, right of access of land-locked states to and from the sea and freedom of transit, payment and contribution in respect to the exploitation of the seabed beyond 200 miles, scientific research in the coastal state resource zone and settlement of disputes procedures.

On 25 January 1977, President Carter nominated Elliot L. Richardson to serve as Ambassador at Large and Special Representative to the President for the Law of The Sea Conference to be convened in May 1977 in New York City. In announcing Ambassador Richardson's appointment President Carter made the following remarks.

> The oceans comprise over two-thirds of the earth's surface. But we have been slow to appreciate their increasing importance—the importance of their environmental integrity to our quality of life; their vast potential as a source of minerals, energy and protein; and the essentiality of their freedom of use for the security and well-being of all nations. While there has been some progess toward the negotiation of a satisfactory treaty, many important issues remain unresolved. At stake are competing national interests in freedom of navigation and use of the seas, in ocean science, and in environmental protection. The Secretary of State and I consider the Law of the Sea negotiations to be a very high priority. My nomination of Elliot Richardson, with his extensive experience and abilities, testifies to the importance I personally attach to achieving success in these negotiations. Elliot Richardson brings to this challenge a unique combination of legal and international experience—including direct experience with the complex issues involved in Law of the Sea negotiations. I am confident that the United States will be most ably represented in these negotiations—and hopeful that, with the good will of other nations, a treaty may be successfully negotiated to serve the interests of all mankind.

JAG School Notes

1. Sixth Kenneth J. Hodson Lecture. Dean A. Kenneth Pye delivered "The Role of Defense Counsel in the Avoidance of Justice," the sixth Kenneth J. Hodson Lecture in Criminal Law, on 3 March 1977. The lecture series is named in honor of Major General Kenneth J. Hodson, USA (Ret.). General Hodson served as The Judge Advocate General, U.S. Army, from 1967 until 1971 and then as the first Chief Judge of the U.S. Army Judiciary from 1971 until 1973. The Hodson Chair of Criminal Law is currently held by Lieutenant Colonel Dennis R. Hunt, Chief, Criminal Law Division, TJAGSA.

A. Kenneth Pye is currently the Chancellor of Duke University. His title of Dean derives from his terms as Dean of the Duke University School of Law (1968–1970 and 1973–1976) and Associate Dean of the Georgetown Law Center (1961–1966). Dean Pye was a member of the commission to study West Point in 1976 and is currently President of the Association of American Law Schools.

In addition to members of the TJAGSA staff, faculty and Advanced Class, the Hodson Lecture was delivered to a large number of visitors. Among the guests were former Dean John Ritchie III and Dean Emerson G. Spies of the University of Virginia School of Law.

General Hodson and his wife made a special trip to Charlottesville to hear the lecture.

2. Carter Administration Taps TJAGSA For Talent. Lieutenant Colonel Daniel J. Meador, a mobilization designee of TJAGSA's Administrative and Civil Law Division, was sworn in on 11 March 1977 as Assistant Attorney General by Supreme Court Justice Louis F. Powell, Jr. As reported in the March issue of *The Army Lawyer*, Daniel J. Meador will head the newly created Office for Improvements in the Administration of Justice.

3. Fourth Fiscal Law Course Success. TJAGSA's Fourth Fiscal Law Course was a success. The course featured a three hour lecture on budget formation and fund distribution delivered by Major Steven J. Marques, Institute of Administration, Fort Benjamin Harrison.

4. Major General Williams Meets With Advanced Class. On 17-18 March 1977 Major General Lawrence H. Williams, The Assistant Judge Advocate General, U.S. Army, visited the School. General Williams disucssed current developments in the JAG Corps with the Advanced Class and the TJAGSA staff and faculty.

Accompanying General Williams and his wife was Mrs. Creighton W. Abrams.

CLE News

1. 2d Annual Homer Ferguson Conference on Appellate Advocacy. On May 19 and 20, 1977, the U.S. Court of Military Appeals, in conjunction with the Military Law Institute, again will sponsor a two-day seminar primarily for appellate lawyers and judges at the Georgetown University Law Center in Washington, D.C. Among the invited speakers at the conference will be Justice Arthur Goldberg, F. Lee Bailey, and Judge John Godbold. To assure adequate seating, those wishing to attend the conference should forward their name, current position, and business address together with a check made payable to the Military Law Institute in the amount of $10 *no later than May 1, 1977.* Registrations should be mailed to the Court Executive, U.S. Court of Military Appeals, Washington, D.C. 20442.

2. TJAGSA CLE Courses. Information on the prerequisites and content of TJAGSA courses is printed in CLE News, March issue of *The Army Lawyer.*

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 (5F-F41).

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

3. Civilian Sponsored CLE Courses.

May

2–4: Univ. of Santa Clara School of Law-Federal Publications, Government Contract Costs, Sheraton National, Arlington, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $425.

3–5: Federal Publications, Practical Labor Law, Chicago, IL. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $425.

6–7: ALI–ABA, Construction Contracting in the Middle East: Problems and Solutions, San Francisco, CA. Contact: Director, Courses of Study, ALI–ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: 215–387–3000.

9–11: Federal Publications, Changes in Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $425.

10–12: LEI, Seminar for Attorney-Managers, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202–254–3483. Cost: $250.

11–12: American Bar Association Section of Public Contract Law, Public Contract Law, Los Angeles, CA. Contact: American Bar Association National Institutes, American Bar Association, 1155 E. 60th St., Chicago IL 60637. Phone: 312–947–3950.

11–13: Univ. of Baltimore School of Business-Federal Publications, Small Purchasing [Small Purchase Procurement], Sheraton Natl., Arlington, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $425.

12–13: Pepperdine Univ. School of Law—Federal Publications, Terminations of Government Contracts, Sheraton National, Arlington, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $350.

12–14: American College of Legal Medicine, 17th Annual Conference, Camelback Inn, Scottsdale, AZ. Contact: Executive Secretary, American College of Legal Medicine, 1340 N. Astor St., Suite 2608, Chicago, IL 60610.

13–14: ICLE, 28th Annual Advocacy Institute [lectures and trial demonstrations—the 1977 theme is "Persuasion: The Key to Success in Trial!"], Univ. of Michigan, Ann Arbor, MI. Contact: ICLE, Hutchins Hall, Ann Arbor, MI 48109. Phone: 313–764–0533. Cost: $90.

16–18: George Washington Univ.-Federal Publications, Equal Employment Claims & Litigation, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $425.

16–18: Federal Publications, Procurement for Lawyers, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $425.

17–20: American Law Institute, Annual Meeting, The Mayflower, Washington, DC.

17–20: Federal Publications, Fundamentals of Government Contracts, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202–337–7000. Cost: $500.

18–20: U.S. Court of Military Appeals—Military Law Institute, 2d Annual Homer Ferguson Conference on Appellate Advocacy [primarily for appellate lawyers and judges], Georgetown Univ. Law Center, Washington, DC. Contact: Court Executive, U.S. Court of Military Appeals, Washington, DC 20442. Cost: $10.

19–20: FBA, Equal Employment Conference, Hyatt Regency Washington, Washington, DC. Contact: FBA, 1815 H St. NW, Washington, DC 20006. Phone: 202–638–0252.

23–25: George Washington Univ., Patents and Technical Data [procurement aspects of patents and technical data in government contracting], George Washington Univ., Washington, DC. Contact: Government Contracts Program, George Washington Univ., 2000 H St. NW, Washington, DC 20052. Phone: 202–676–6815. Cost: $400.

23-25: Federal Publications, Medical Malpractice, Berkeley, CA. Contact; Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-7000. Cost: $425.

24-26: LEI, Institute for New Government Attorneys, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483. Cost: $200.

25-27: Univ. Of Santa Clara School of Law—Federal Publications, Government Contract Costs, Olympic Hotel, Seattle, WA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-7000. Cost: $425.

June

1-3: Federal Publications, Changes in Government Contracts, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-7000. Cost: $425.

2-3: Pepperdine Univ. School of Law—Federal Publications, Terminations of Government Contracts, Holiday Inn, Golden Gateway, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-7000. Cost: $350.

5-10: Institute for Court Management, Caseflow Management and Juror Utilization, Keystone, CO. Contact: Institute for Court Management, Suite 1800, 1405 Curtis St., Denver, CO 80202. Phone: 303-534-3063.

6-17: LEI, Procurement Law Course, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483. Cost: $400.

8-10; Federal Publications, Contracting for Services, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-7000. Cost: $425.

12-17: American Academy of Judicial Education, Appellate and Trial Judges Writing Programs, Univ. of Colorado, Boulder, CO. Contact: American Academy of Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005.

13-15: George Washington Univ.-Federal Publications, The Practice of Equal Employment, Las Vegas, NV. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-7000. Cost: $425.

13-30: NCDA, Career Prosecutor Course, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone: 713-749-1571. Cost: $402.50.

21-23: LEI, Environmental Law Seminar, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483. Cost: $250.

26-8 July: National College of the State Judiciary, Criminal Law/Sentencing—Graduate, Univ. of Nevada, Reno, NV. Contact: National College of the State Judiciary, Univ. of Nevada, Reno, NV 89557. Phone: 702-784-6747.

29-1 July: George Washington Univ.-Federal Publications, Cost Accounting Standards, Sun Valley, ID. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: 202-337-7000. Cost: $450.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

A. Federal Decisions

1. (Federal Labor Relations, General) **Agency Decision That A Transfer Of A Civilian Employee Was Not An Adverse Action Upheld.** *Leefer v. Administrator. Nat't Aero. & Space Admin.*, 543 F.2d 209 (D.C. Cir. 1976). In a recent case dealing with the transfer of a federal civilian employee, the United States Court of Appeals, District of Columbia Circuit, emphasized that courts defer to decisions of federal agencies as to whether a particular management decision is an adverse action requiring certain procedural rights be granted an effected employee. In this case a GS-15 was being transfered from Washington, D.C., to a position in Cleveland, Ohio. Although both positions were rated at the GS-15 level, the employee argued that the Ohio position was a reduction in rank because the responsibilities in that job were less extensive. The Civil Service Commission had upheld the agency's

finding that in fact there was no adverse action because there was no reduction in rank. The court cited the Seventh Circuit for the observation that the adverse action regulations do not state "... how and by whom it is to be decided whether a given action constitutes one of the 'adverse actions' to which the regulations apply." The court went on to say that great weight would be given to agency interpretation of their own regulations and in this case the court was "unable to say that the governing regulations were dishonored. . . ."

2. (Federal Labor Relations, General) **The Army And Air Force Reserve Civilian Technician Programs May Require That Technicians Maintain Membership In The Reserves.** *American Federation of Gov't Emp. v. Hoffman*, 543 F.2d 930 (D.C. Cir. 1976). The United States Court of Appeals, District of Columbia Circuit, has recently upheld the legality of the Army and Air Force Reserve civilian technician programs' requirement that civilian personnel in the programs must maintain membership in the Army and Air Force Reserves. The court appointed out that, "Since the task of civilian support personnel obviously is to promote the effectiveness of reserve operations, a condition of employment which promises to enhance the reserves ability to fulfill their combat mission is not unreasonable."

3. (Claims, General) **A United States Congressmember Has Only A Qualified Immunity From Suit Based On His Discharge Of A Member Of His Office Staff.** *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977). The Fifth Circuit in a recent opinion added another category of federal officials—a member of the U.S. House of Representatives—who have only a qualified immunity from suit for acts done within the scope of their employment. In this case a female staff member of a Congressmember alleged that she was discharged because of her sex. The court held that the fifth amendment afforded her a damage remedy against the Representative and the speech or debate clause of article I, section 6, of the U.S. Constitution did not afford protection to the Representative because his decision to discharge the employee did not involve "legislative tasks". The court pointed out that because the Representative was not "legislating" he had no absolute immunity, but like other government officials he had the right to assert the defense of qualified immunity that was discussed in *Wood v. Stickland*, 420 U.S. 308 (1975) and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The *Scheuer* case stated that qualified immunity is available "in varying scope", "... the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." The case was reversed and remanded for trial on the merits.

4. (Federal Labor Relations, Employee Discipline) **Procedural Error In The Employee Disciplinary Process Does Not Always Cause Reversal Of The Action.** *Pascal v. United States*, 543 F.2d 1284 (Ct. Cl. 1976). A question often arises in dealing with civilian employee discipline cases about the effect of procedural errors committed by the government during the disciplinary action process. This issue was recently addressed in a Court of Claims case dealing with the removal of an Internal Revenue Service employee for falsifying travel, work, and per diem records. The court found that findings reached by the CSC Board of Appeals and Review on the falsifications were fully supported, and then went on to discuss the employee's attack on the procedure the agency followed in effecting the removal. Employee complaints included a protest that the Civil Service examiner considered hearsay evidence and a charge that the penalty of removal was too severe under the facts of the case. After upholding the use of hearsay and disagreeing with the employee as to the severity of the punishment, the court discussed the need to consider the effect of any procedural error alleged. The court pointed out that, "Like many other claimants, plaintiff makes the mistake of believing that any procedural lapse, no matter how unrelated to the end-result, endows him automatically with a right

to judgment and back-pay. We do not take that position, but look to see not only whether an error occurred, but whether it substantially affected plaintiff's rights in the removal process." Labor counselors should be aware that procedural error does not of itself require reversal of disciplinary actions taken.

5. (Claims, General) **Look To State Statutes Of Limitations For Constitution Tort Actions Filed Against Individual Federal Officials.** *Regan v. Sullivan*, 417 F. Supp. 399 C.E.D.N.Y. 1976). *Bivens v. Six Unknown Unnamed Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), established that there is a cause of action against federal officials in their individual capacities founded directly upon the Constitution, but the question of what statute of limitation applies to this cause of action has not been established. The United States District Court for the Eastern District of New York has held that state law should be turned to for resolution of this problem. In a case dealing with law enforcement officials, the court held that a New York statute which provides for a one year period in actions against such officials would be the appropriate time period to control. The court, finding no policy need for federal uniformity, stated that, "There appears to be no good policy reason for allowing a plaintiff claimed to be injured by such law enforcement action to have more than one year in which to discover whether his constitutional rights were violated. Law enforcement officers would be placed at a distinct disadvantage and effective action in making arrests would inevitably be inhibited if such officers had to wait for two, three or more years to find out whether or not they would be subject to some large civil liability at a time when memories were dim and witnesses and records perhaps not available."

6. (Claims, General) **Postal Officials Not Individually Liable For Late Mail And Nondelivery Of Mail.** *Sportique Fashions, Inc. v. Sullivan*, 421 F. Supp. 302 (N.D. Cal. 1976). Federal officials continue to receive protection from individual liability by the theory of qualified immunity. In a case out of the Northern District of California, the United States District Court held that postal officials were not individually liable for the late delivery and nondelivery of the plaintiff's mail. Citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974), for the proposition that any immunity from suit would be only a qualified immunity, the court nevertheless found that the protection was sufficient under the facts of the case. The court in denying liability held that, "Each defendant herein was clearly acting within the scope of his duties at all times, and there has been no showing that any defendant acted other than reasonably and in good faith. Each defendant has established that his position involved discretionary and supervisory functions; none had any responsibility for physically accepting, processing or delivering the mail in question here."

7. (Claims, By the Government) **The United States May Be A Proper Third-Party Beneficiary Under An Automobile Accident Insurance Policy.** *United States v. Government Emp. Ins. Co.*, 421 F. Supp. 1322 (N.D.N.Y. 1976). The United States District Court of the Northern District of New York became the first court in the Second Circuit to consider whether the United States was eligible as a third-party beneficiary under an automobile accident insurance policy belonging to a service member. The United States had provided medical care to the service member after he had been injured in an automobile accident. In consideration of the care he received, the service member assigned to the United States his rights under the insurance policy he had with GEICO. GEICO denied liability to the government under the theory that the service member had not "incurred" medical expenses as required in the insurance policy. The court joined decisions out of the Fifth [*United States v. Automobile Club Ins. Co.*, 522 F.2d 1 (5th Cir. 1975)], the Fourth [*United States v. Government Emp. Ins. Co.*, 461 F.2d 58 (4th Cir. 1972)], and the Tenth Circuits [*United States v. State Farm Mut. Automobile Ins. Co.*, 455 F.2d 789 (10th Cir. 1972)], holding that the government was a third-party beneficiary that was permit-

ted recovery against the defendant insurance companies.

8. (Federal Labor Relations, Equal Employment Opportunity.) A Class Action Where The Class Has Not Exhausted Administrative Remedies May Not Be Joined With A Proper Individual Plaintiff In An EEO Action Against The Government. *Marimont v. Mathews*, 422 F. Supp. 32 (D.D.C. 1976). The United States District Court for the District of Columbia recently held that various women's rights organizations were not able to join as a class action the suit of a plaintiff against the federal government under the Civil Rights Act of 1964 *as amended.* The individual plaintiff had exhausted her administrative remedies as required, but the court found that the organizational plaintiffs had not. In denying the joinder of the class action the court observed that, "...what they [the organizational plaintiffs] are asking this Court to do is to recognize that they can, as a matter of right, sidestep the requirements imposed in § 2000*e*-16 simply by joining their claims in federal court to the claim of a person who has made similar allegations and who has in fact fulfilled those statutory requirements. If the Court allowed this, then it would have little power to insure that the policies behind these requirements were adequately protected. The Court cannot ascribe such an intent to Congress and, therefore, holds that the organizational plaintiffs may not join in this suit."

B. The Judge Advocate General's Opinions

1. (Separation from the Service, Grounds) A Board Of Officers Is Not Required For A Parenthood Discharge. DAJA-AL 1976/4448, 14 June 1976. In response to an inquiry from a staff judge advocate, The Judge Advocate General expressed the opinion that paragraph 5-40, AR 635-200 (DA Msg DAPC-EPA-A 302228ZMAR 76), gives no right to a board of officers to members being separated for the conveniences of the government because of parenthood. Discharge under this regulatory provision is involuntary in nature and may result in the issuance of an honorable or general discharge certificate. Members being separated must be provided the opportunity to consult with consulting counsel in order to prepare a written statement or rebuttal if desired. Counsel responsibilities were further delineated to include explanation of the potential consequences of a general discharge, where recommended, as well as plausible alternatives, such as adoption, in cases where the service-member desires to remain on active duty.

2. (Enlistment and Induction, Enlistment; Separation from the Service, Discharge) Concealment Of Arrest (Felony Or Misdemeanor) Without Conviction Is Not A Basis For Separation For Fraudulent Entry, But Concealed Felony Arrest May Be A Basis For Discharge UP Paragraph 5-38*a*, AR 635-200. DAJA-AL 1976/5253, 13 Sept. 1976. The Judge Advocate General's opinion was requested on the following three questions: 1) whether concealment of an arrest (felony or misdemeanor) without conviction is information which disqualifies an individual for enlistment, thus establishing a fraudulent entry UP Chapter 14, AR 635-200; 2) whether concealment of a nonfelonious arrest without conviction is covered by paragraph 5-38, AR 635-200; and 3) if the answers to 1) and 2) are negative, is any other course of separation action available to the commander?

TJAG expressed the opinion that while paragraph 3-9, AR 601-210, requires an applicant to reveal all arrests, convictions or adverse juvenile adjudications, paragraph 3-11*a* of the same regulation provides that no waiver is required for arrests which do not result in a determination of guilt. Appendices *A* and *C*, AR 601-210 do not list such arrests as disqualifications. The only reason for requiring the arrest information is to ascertain whether the case is still pending or has resulted in a determination of guilt. Thus, an arrest alone is not a disqualification for enlistment and its concealment is not a basis for separation for fraudulent entry.

The opinion went on to state that the concealed arrest must be for a felony offense

before the concealment may support a discharge under paragraph 5-38, AR 635-200.

As to question 3), a commander may forward such cases to HQDA for consideration UP paragraph 5-3, AR 635-200 (separation for convenience of the government under authority of the Secretary of the Army).

3. (Separation From The Service, Discharge Characterization) **Preinduction Waiver Of Civil Convictions Provides Valid Basis For Court-Martial Jurisdiction and Punitive Discharge.** DAJA-AL 1976/5289, 13 Sept. 1976. A service member was convicted by general court-martial for repeated AWOLs and his sentence included a bad-conduct discharge. The ABCMR requested an opinion regarding the service member's claim that preinduction civil convictions constituted a nonwaivable disqualification for induction under AR 601-210, and that the civil convictions therefore precluded valid exercise of court-martial jurisdiction.

Noting that AR 601-210 applied to enlistments, The Judge Advocate General responded that paragraph 3-9, AR 601-270, as changed, permits any civil conviction to be waived for purposes of induction by the Armed Forces Moral Waiver Determination Board (AFMWDB), which operates under CDR, U.S. Army Recruiting Command. The submitted file, although not complete, appeared to indicate that the convictions were waived in accordance with the cited paragraph. Therefore, proper military jurisdiction attached and the subsequent conviction and punitive discharge were valid.

4. (Separation From The Service, Discharge, Grounds) **Administrative Double Jeopardy Provisions Of AR 635-200 Do Not Preclude Discharge For Unsuitability Because Of Personality Disorder.** DAJA-AL 1976/5363, 22 Sept. 1976. The provisions of paragraph 1-13*a*(3), AR 635-200, prohibit the administrative discharge of a member because of conduct which is considered by a general or special court-martial, if a sentence to a punitive discharge was authorized to be adjudged, but was not adjudged or was disapproved or was suspended and remains suspended. The Judge Advocate General's opinion was requested on whether these provisions in fact precluded administrative discharge for unsuitability because of personality disorder in accordance with paragraph 13-5*b*(2), AR 635-200. TJAG expressed the opinion that a determination of personality disorder alone is not sufficient for discharge under Chapter 13, AR 635-200. Only when the condition is chronic, does not respond to attempts at rehabilitation, and interferes with the servicemember's ability to adequately perform his duties, does it reach the level of a personality disorder warranting discharge under the regulation. This type of situation calls for a blend of medical and command considerations, and when such circumstances exist, elimination for unsuitability based upon personality disorder will be outside the ambit of the double jeopardy provisions of paragraph 1-13*a*(3), AR 635-200.

5. (Separation From the Service, Discharge) **AR 635-206, Discharge For Conviction By Civil Court, Can Be Suspended For Period Of Confinement Adjudged And Set Time Thereafter. Member's Request To Be Discharged No Basis To Vacate Suspension.** DAJA-AL 1976/5505, 1 Oct. 1976. Inquiry was directed to The Judge Advocate General regarding the authority to discharge a service member convicted by a civilian court prior to expiration of the evaluation period specified in a suspension action. A review of the facts revealed that an enlisted member was convicted by a California court of assault with intent to murder in 1971 and sentenced to from six months to 14 years in prison. He was found undesirable for further service by a board of officers because of the conviction and recommended for discharge with a general discharge. The convening authority approved the separation, but suspended execution "for the period of such confinement, and six months thereafter, at which time this order for separation will be set aside unless the suspension has been sooner vacated." The convening authority took this action because he considered the member to have a strong po-

tential for rehabilitation. The service member returned to military control in July 1976 and immediately requested release from the service due to the lengthy period of civil confinement served and consequent bad time.

TJAG noted that the language of paragraph 13, AR 635-206, provides that the convening authority may suspend execution of an approved discharge "for a period not to exceed 6 months." After reviewing analogous opinions, TJAG concluded that the suspension in this case did not take effect until the service member's return to military control in July 1976, thereby allowing a more meaningful period of probation. The opportunity for rehabilitation in a civilian prison would not comport with governing regulations which contemplate the member be given an opportunity to perform his assigned duties efficiently (para. 13*a*, AR 635-206).

The service member's desire not to remain on active duty was not considered a basis for vacating the suspension. None of the bases prescribed by paragraph 13*c*, AR 635-206, for vacating suspended discharges was found in the case. As an alternative, it was pointed out that the Secretary of the Army could exercise his plenary power UP paragraph 5-3, AR 635-200, to separate the member. This action would have the effect of setting aside the discharge UP AR 635-206.

6. (Separation From the Service, General) **Enlisted Reservists Must Be Sentenced To Confinement In A Federal Or State Penitentiary Or Correctional Institution To Be Dropped From Rolls UP AR 135-178.** DAJA-AL 1976/5654, 7 Oct. 1976. An opinion was requested whether enlisted reservists who have been convicted in state criminal actions and sentenced to confinement in city or county jails or correctional institutions may be dropped from the rolls UP para. 10-3*c*, AR 1 5-178. Citing past opinions, The Judge Advocate General noted that 10 U.S.C. § 1161*b* and 10 U.S.C. § 1163*b* provide for dropping members from the rolls of an armed force only where the member is "sentenced to confinement" in a federal or state penitentiary or correctional institution. Members *sentenced* to confinement in a federal or state penitentiary, but actually incarcerated in a city or county jail for administrative convenience, are subject to being dropped from the rolls. The cited statutes may also be applicable in the less obvious situations where county or municipally operated correctional institutions may in fact be state institutions, under the laws of the state in which they are located.

7. (Contributions and Gifts; Prohibited Activities and Standards of Conduct) **Monetary Gift By Army Hospital Patient To Dependent Of Service Member Does Not Violate Standards Of Conduct Provided No Solicitation Occurred.** DAJA-AL 1976/5647, 20 Oct. 1976. A patient at an Army hospital gave a check for $100.00 to an Army Medical Department captain for the latter's infant son. The check was made payable to the minor and annotated as a "christening gift." A note was inclosed with the gift indicating it was for the minor when it was delivered to the captain. An opinion was requested whether the son could retain the check.

The Judge Advocate General expressed the opinion that the transaction satisfied all requirements for a valid gift in the jurisdiction where the transaction took place. TJAG noted, however, that 18 U.S.C. §§ 201(f) and (g) prohibit the gift and receipt of anything of value "for or because of any official act" performed by a public official. Further, paragraph 1-5*b*, AR 40-1, prohibits Army Medical Department personnel from accepting payment or other compensation for providing medical services to a person authorized to receive care in an Army medical treatment facility. TJAG found no solicitation by the captain nor any mention of duties or requests for favors by the donor and opined there was no causal connection between the gift and the captain's performance of duty. Thus, retention of the money by the dependent did not violate conflict of interest provisions and acceptance of the gift was sustained.

C. Federal Labor Relations Council Decisions

1. (Federal Labor Relations, Representation.) **Council Confirms Representational Rights of Employees At Formal Discussions.** FLRC No. 759-2, Release No. 116, 2 Dec. 1976. In a major policy statement consistent with past decisions of the Assistant Secretary of Labor, the Federal Labor Relations Council confirmed that Section 10(e) of E.O. 11491, *as amended,* requires management to afford an exclusive representative union the right to represent their unit employees at formal discussions between management and employees whenever the formal discussions concern grievances, personnel policies and practices or employee working conditions in the unit. To fulfill this representational obligation, the Council implies that management must extend reasonable notice to both the exclusive representative and the concerned employee. The Council statement carefully distinguishes "formal" discussions from "nonformal" discussions and investigative interviews, where no right to union representation exists absent a specific grant in the collective bargaining agreement. The Council's announcement does not fully elaborate on criteria for determining when a management meeting is formal or informal, but one-on-one investigative interviews and initial management counselling in an adverse action procedure are said by the Council *not* to be formal meetings as would entitle an employee to union representation.

2. (Federal Labor Relations, Collective Representation.) **Council Reverses Three Assistant Secretary Unit Determinations.** FLRC Nos. 75A-14, 75A-128, 76A-4, 30 Dec. 1976. In three factually similar appeals by management from unit determinations by the Assistant Secretary, the Federal Labor Relations Council upheld management. Each case involved operations by a regional headquarters and various subordinate offices located in adjoining states. Employees in the regional and subordinate offices had common supervision and a common mission, shared similar duties, and were subject to like personnel policies. Union efforts to represent local offices as separate units were sustained by the Assistant Secretary, but rejected by the Council on the basis of previously established policy to favor a single, consolidated unit over smaller subgroupings where there was no separate and distinct community of interest. The Council reiterated past interpretations giving equal weight to the three tests for unit appropriateness set forth in § 10(b) of the Order.

D. Defense Privacy Board Opinions

The Defense Privacy Board was established by Department of Defense Directive 5400.11 to ensure the preservation of individual privacy within the Department of Defense. The Board publishes guidance on questions referred to it for consideration. In addition to its guidelines concerning release of information from health care records (41 Fed. Reg. 39356 (1976)), and release of personal information to commercial enterprises (42 Fed. Reg. 5119 (1977)), the Board has published a number of opinions. A selection of those opinions follows.

1. (Privacy Act) **Implications On Various Modes Of Releasing Leave and Earning Statements.** The question presented is the distribution of leave and earning statements (LES) in consideration of good management practices, cost effectiveness, and the requirements of the Privacy Act.

There are basically three modes of distribution within the DoD: (1) the LES is mailed to the individual's home address; (2) the LES is handed out by office clerical personnel either with or without the pay check; or (3) the LES is handed out in an envelope by office clerical personnel either with or without the pay check.

Leave and earning statements do contain personal information which is protected by the Privacy Act. Distribution may be made in any manner so long as the information is not disclosed to persons other than those that have a requirement to process the statements in the course of their official duties. Hence, any of the modes presented would be acceptable under the Privacy Act if the procedures preclude unauthorized disclosure to individuals outside the leave and earnings system.

2. (Privacy Act) **A Parent Or Guardian May Have Access To Medical Determinations From A Minor's Medical File.** In accordance with the definition of an "individual", contained in DoD Directive 5400.11, dated August 4, 1975, a legal guardian or the parent of a minor has the same rights as the individual and may act on behalf of the individual. The question presented is at what age is a dependent considered a minor for parental or guardian access to medical records under the Privacy Act. This must be determined on an individual basis by the state law governing the situs of the medical facility where the records are maintained. Although a determination may be made that the individual concerned is a minor under state law, and the information releasable to a parent or guardian, various state laws afford protection to certain types of medical records about individuals, *e.g.*, drug abuse treatment, abortion, birth control devices, etc. This type of information should not be released if the state law prohibits release. This determination is not intended to suggest that minors are precluded from exercising rights on their own behalf. Except as otherwise provided in DoD Directive 5400.11, a minor does have the right to access a medical record pertaining to him or herself.

3. (Privacy Act) **Requests For Home Addresses of DoD Personnel Who Stand To Benefit From The Release.** Normally the release of home addresses and home telephone numbers of current or former service members would constitute a "clearly unwarranted invasion of personal privacy." However, when considering such a release, either under the structures of the Privacy Act or the Freedom of Information Act, one must always balance the benefits of release against the privacy rights of the affected individuals. Further matters of appropriate consideration are the severity of the invasion of privacy, whether an invasion occurs at all, and the public purpose sought to be served by the requestor. When the requestor certifies in writing that his sole purpose in requesting the information is to enable him to confer a benefit upon an individual, such a disclosure would not rise to the level of a "clearly unwarranted invasion of personal privacy", and therefore should be permitted. This rationale holds true whether the release of home address is from systems of records subject to the Privacy Act or from records in general. Under the Privacy Act a nonconsensual release from a system of records subject to the Act is permissible where the release would be required under the Freedom of Information Act. Therefore, under the sixth exemption to the Freedom of Information Act, release of home addresses would only be prohibited where the release would constitute a "clearly unwarranted invasion of personal privacy." In the case where a benefit is sought to be conferred by the requestor the release would not rise to the level of a "clearly unwarranted invasion of personal Privacy."

4. (Privacy Act) **Files Indexed By Non-Personal Indentifier Containing Personal Information Retrievable By Memory, As Opposed To Any Index Keyed To Personal Identifiers, Does Not Fall Under The Criteria Of The Act.** The labelling of files by non-personal identifiers makes the access requirements of the Privacy Act inapplicable, unless such files are in fact retrieved on the basis of an individual identifier through a cross-reference system or some other medium or method. The human memory alone does not constitute a cross-reference system and consequently is not a criteria.

Legal Assistance Items

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

1. ITEMS OF INTEREST

Family Law—Domestic Relations—Alimony, Child Support, Custody and Property Settlement; Support of Dependents—Judicial Enforcement of Support Obligations. In a recent suit, wherein the United States was joined as a defendant, the plaintiff attempted to use 42 U.S.C. §§ 652–660 to require the federal government to withhold one-half of each of her former husband's monthly retirement checks, which he earned during the existence of their community property marital regime for service in the United Air Force. Since statutes waiving immunity are strictly construed, the court examined the statutes in question, and held that the immunity surrendered thereunder dealt only with child support and alimony, while plaintiff's claim is that of a property right. Therefore, the court held, the United States did not waive its immunity in this case. The court further held that it had no jurisdiction over the claim against the government. The court noted with regard to jurisdiction, "[E]ven if the statute upon which plaintiff relies could be applied by analogy, we would lack subject matter jurisdiction over plaintiff's claim. There are no circuit court decisions we can find, but the federal district courts' decision are legion concerning the following points: (1) a debt owned by the United States only as garnishee is not a basis for jurisdiction in federal courts; (2) 42 U.S.C. § 659 does not grant jurisdiction to federal courts; it merely waives sovereign immunity in two specific situations; (3) 42 U.S.C. § 660 refers to 42 U.S.C. § 652(a)(8), and when the statute is read as a whole, it grants the plaintiff a cause of action in federal court to hear only certain alimony and child support claims; (4) receiving consent and certification from the Secretary of H.E.W. is a jurisdictional prerequisite to sue in federal court for alimony or child support; and (5) that traditional means of obtaining federal jurisdiction under 28 U.S.C. § 1331 (federal questions), 28 U.S.C. § 1346(a) (original jurisdiction of federal courts), 28 U.S.C. § 1441 (actions generally removal), and 28 U.S.C. § 1442(a) (removal of suits against federal officers or agencies) *are unavailing to plaintiffs suing under 42 U.S.C. §§ 652–660*" (emphasis added). *See Morrison v. Morrison*, 408 F. Supp. 315 (N.D. Tex. 1976), *West v. West*, 402 F. Supp. (N.D. Ga. 1975), *Wilhelm v. United States Department of the Air Force*, 418 F. Supp. 162 (S.D. Tex 1976). *See also Golightly v. Golightly*, 410 F. Supp. 861, 862 note 2 (D. Neb. 1976). *But see Williams v. Williams*, ___F. Supp. ___ (D. Md. 1976), [1977] 3 Fam. L. Rep. (BNA) 3033. [Ref: Chs 20, 26, DA PAM 27-12].

Family Law—Domestic Relations—Alimony, Child Support, Custody and Property Settlement—Alimony. Absent a rational justification or a compelling state interest, the law is moving toward eliminating and minimizing sexual discrimination. The New York alimony statute allows women to collect alimony from men, but absolutely forbides men from collecting alimony from women. N.Y. DOM. REL. LAW § 236. Also, the court may direct husbands to pay their wives' attorneys' fees in a domestic relations case, but may not direct wives to so pay. N.Y. DOM. REL. LAW § 237. The Nassau County New York Supreme Court, using *Frontierio v. Richardson*, 411 U.S. 677 (1963) and *Weinberger v. Wiensenfeld* 420 U.S. 636 (1975) as springboards, applied the "suspect criteria requires a compelling state interest" standard and found the two statutes failing to pass the constitutional musters of both the United States and the State of New York. While the facts in the instant case were hard ones (the husband was a statutorily unemployable non-immigrant alien and the wife a working United States citizen), the language used by the court compelled no other interpretation but the statutes are unconstitutional per se. The court found the statutes to

be solely gender-based, offering arbitrary value judgements on male-female roles, and hence no compelling state interest in the discrimination therein. In fact, the court found a state interest in eliminating the distinctions. *Thayler v. Thayler*, N.Y. Sup. Ct. (Nassau County, Jan. 21, 1977), [1977] 3 FAM. L. REP. (BNA) 2217. [Ref: Ch 20, DA PAM 27-12].

Family Law—Domestic Relations—Separation Agreements. The North Carolina Court of Appeals has put domestic relations attorneys on notice as to how carefully they must draw separation agreements which impact on alimony and future activities of the supported ex-spouse. In *Riddle v. Riddle*, ___N.C. App. ___, ___S.E. 2d ___(1977), the defendant, (the supporting husband) argued that his ex-wife's relationship with another person constituted a defense to the enforcement of the separation agreement. The separation agreement provided that the defendant pay the plaintiff $600 per month until she "either remarries or dies, whichever occurs first." The agreement further stated that it is the intention of the parties that each shall "go his or her way, and live his or her personal life unmolested, unhampered, and unrestricted by the other. . . ." The court held that an agreement containing the above quoted language must be enforced according to its own terms, and that plaintiff's relations with other people, short of marriage, do not offer the defendant any defense to the enforcement of the provisions of the separation agreement. [1977] 3 FAM. L. REP. (BNA) 2206. [Ref: Ch 20, DA PAM 27-21]

Taxation—State and Local Income Tax—New Jersey. The State of New Jersey in its general instructions for completing a resident return for 1976 (NJ-1040-P), distinguishes between living in government quarters and living in non-government quarters when defining a "permanent place of abode". Under the instructions, a servicemember domiciled in New Jersey, but assigned to another state, who lives on a military installation or in assigned or rented government quarters is not considered to be maintaining a "permanent place of abode" outside of New Jersey for purposes of defining "resident taxpayer". At the same time a servicemember domiciled in New Jersey, but assigned in another state, who buys or rents non-government quarters off the military reservation is considered to be maintaining a permanent place of abode outside of New Jersey. You will recognize that this is the same distinction the state of New York made prior to the decision in *Matter of La Vigne v. State Tax Commission*, 38 App. Div. 2d 775, 328 N.Y.S. 2d 10, *affirmed* 33 N.Y. 2d 678 (1973), which held that the determination of a permanent place of abode outside the state should not depend merely upon whether petitioners lived on or off the military base. [Ref: *The Army Lawyer*, Sept. 1976 at 16 and Dec. 1976 at 25.]

Correction. In Legal Assistance Items, *The Army Lawyer*, Dec. 1976 at 22 the second article under 1. ITEMS OF INTEREST should be labeled "Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Consumer Leasing Act." Please make this pen-and-ink change, which will conform to the pending change to DA PAM 27-12.

2. ARTICLES AND PUBLICATIONS OF INTEREST.

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Truth in Lending Act. Comment, *Truth in Lending and the Statute of Limitations*, 21 VILL. L. REV. 904 (1975-1976). [Ref: Ch 10, DA PAM 27-12]

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections—Preservation of Consumer Claims and Defenses. 21 VILL. L. REV. 984 (1975-1976). [Ref: Ch 10, DA PAM. 27-12]

Domestic Relations. Carsola, *First Steps in Divorce—Initial Client Contact, Litigation Financing, Investigation, and Self-Help*, [1977] 3 FAM. L. REP. 4019. [Ref: Ch 10, DA PAM 27-12]

Taxation—Federal Income Tax. Gallagher, *Primer on Section 101—Federal Income Taxation of Life Insurance Proceeds*, 49 TEMP. L.Q. 831 (1976). [Ref: Ch 41, DA PAM 27-12]

Taxation—Federal Income Tax. Tucker, *Analyzing the Impact of the 1976 Tax Reform Act on Real Estate Investments*, 45 J. TAX 346 (1976). [Ref: Ch 41, DA PAM 27-12]

3. RECENTLY ENACTED LEGISLATION

Decedent's Estates and Survivors Benefits—Survivor's Benefits —Dependency and Indemnity Compensation. Public Law 94-433, approved on 30 September 1976, amends the amount of the dependency and indemnity compensation payable to a surviving spouse, surviving children, and supplemental compensation for surviving children. The amendment increases the amount of payment in each case. The same law amends Chapter 13 of Title 38, United States Code (Dependency and Indemnity Compensation for Service-Connected Deaths) by striking out "his", "he", "his widow", and "widow" and inserting in lieu thereof "such veterans's", "such veteran's surviving spouse", "such person", and "surviving spouse". [Ref: Ch 16, DA PAM 27-12]

Judiciary Notes

U.S. Army Judiciary

NOTES FROM THE CHIEF JUDGE, A.C.M.R.:

1. The Court of Military Review is considering making a number of changes concerning the printing, publication and distribution of opinions. Before making a final decision, a pilot program will be initiated after this notice appears in *The Army Lawyer*.

2. The contemplated changes are designed to do several things. First of all, we wish to improve the appearance of the opinions rendered by the court. We also want to reduce the printing and distribution cost.

3. During the pilot program, the use of manifold sets heretofore used for opinions called "short" and "modified short" opinions will be greatly reduced. As many opinions as possible will be reproduced by the offset printing process. Should the printing burden placed on the Service Center in the Nassif Building become too great, some of the opinions may be reproduced by the xerographic process.

4. A decision of the court that is to be published will be entitled OPINION OF THE COURT. A decision of the court that will not be published will be entitled MEMORANDUM OPINION. The OPINION OF THE COURT format will replace decisions formally known as published longholdings. The MEMORANDUM OPINION will replace the short, modified short and unpublished longholdings.

5. We anticipate that the vast majority of the memorandum opinions will be printed on one side of one sheet of paper, although in some cases, both the front and back of one sheet of paper will be required. Opinions of the court, of course, normally will require printing on both the front and back of two or three sheets of paper.

6. The distribution of memorandum opinions basically will be the same as presently used for short and modified short opinions. The significance of this reduced distribution scheme will be that those now receiving unpublished longholdings will no longer have access to these decisions. We do not believe that there is any need for the present practice of a fairly widespread distribution of these opinions. We intend to adhere to the publication standards set out below in determining which opinions will be published and those that will not be published. The publication

decision will govern the format to be used and the distribution to be made of the decision. We intend to include in the SOP for the court, which is not being revised, a provision which will prohibit citing unpublished opinions in briefs before the court and to preclude the use of unpublished opinions during oral argument.

7. The distribution of opinions of the court during the pilot program will be the same as presently made for published longholdings. We intend to reduce the costly widespread distribution of these types of opinions when a new contract is let for the printing of advance sheets and bound volumes. It appears at this point that when a new contract is let, advance sheets will be printed and distributed by the contractor directly to those who subscribe to the reporter service within three to five weeks after a decision to be published is rendered. We do not believe, therefore, that as widespread distribution of the slip opinion of a decision that is to be published will be necessary. If the decision is of sufficient importance that SJAs and others need to know about the decision earlier than three to five weeks after the decision is rendered, the Chief of the Criminal Law Division, OTJAG, will compose and dispatch an electrical message to the field as soon as possible after the decision is rendered. Although no one in the Army will be directly affected, we also intend to eliminate distribution of published opinions presently being made to law schools, newspapers and wire services. Our theory is, it is too costly for us to distribute slip opinions to these agencies. If they wish to continue to receive our published opinions, they can subscribe to the reporter service that will print our advance sheets and bound volumes.

8. An opinion will be published if it meets one or more of the following standards:

a. Establishes a new rule of law or alters or modifies an existing rule.

b. Resolves an apparent conflict of authority.

c. Presents a novel application of existing law.

d. Criticizes or questions existing law.

e. Involves a legal issue of continuing public interest.

f. Constitutes a significant contribution to military law because of its historical or interpretive review of prior jurisprudence.

9. Current procedures as outlined in Chapter 15, AR 27-10, will govern processing of A.C.M.R. opinions by general court-martial authorities during the pilot program. Prior to full implementation of the new procedures, Chapter 15, AR 27-10, will be revised.

JAGC Personnel Section

PP&TO, OTJAG

1. Assignments

COLONELS

NAME	*FROM*	*TO*	*APPROX DATE*
BEDNAR, Richard J.	OTJAG	8th Army, Korea	Jul 1977
COMEAU, Robert F.	OTJAG	USATC, Fort Polk, LA	Aug 1977
FINKELSTEIN, Zane E.	HQ, 8th Army, Korea	Army War College	Aug 1977
HARRELL, George W., Jr.	USALSA/Stuttgart	Sig Ctr, Fort Gordon, GA	Jul 1977
LASSITER, Edward A.	193d Inf Bde, Canal Zone	FT Cen, Fort Sill, OK	Jun 1977
TALIAFERRO, Wallace C.	FA Cen, Fort Sill, OK	USALSA	

NAME	FROM	TO	APPROX DATE
	LIEUTENANT COLONELS		
ANDREWS, Thomas T.	Army War College	101st Abn Div, Fort Campbell, KY	Jul 1977
BRIGGS, David B.	Army Proc Agcy, APO 09710	OTJAG	Aug 1977
BROWN, Terry W.	172d Inf Bde, AK	Army War College	Jul 1977
DOWNES, Michael M.	2d Inf Div, Korea	Army War College	Jul 1977
JACOB, Gustave F.	USALSA/Bde Kreuznach	USALSA/Mannheim	Jun 1977
LASSETER, Earle F.	MAAG, China	Army Sch/Tng Ctr, Fort McClellan, AL	Jul 1977
MITTELSTAEDT, Robert N.	VII Corps, Germany	Army Claims Svc, Fort Meade, MD	Aug 1977
MOONEYHAM, John A.	FORSCOM	USALSA/Fort Amador, Balboa, Canal Zone	Aug 1977
MOSS, Frederick E.	Command and General Staff College	Pacific Command, HI	Jul 1977
MULLINS, Jack A.	8th Army, Korea	193d Inf Bde, Canal Zone	Jun 1977
SCHEFF, Richard P.	QM Ctr, Fort Lee, VA	USALSA/Fort Gordon, GA	Aug 1977
STONE, Frank R.	Pacific Command, HI	172d Inf Bde, AK	Jun 1977
TOCHER, Patrick A.	Army War College	4th Inf Div, Fort Carson, CO	Jul 1977
WILSON, Norman S.	USALSA/Mannheim	USALSA/Fort Leonard Wood, MO	Jul 1977
	MAJORS		
ALDINGER, Robert R.	USALSA/Goeppingen	USALSA/Baumholder	Jun 1977
ARMSTRONG, H. Jere	OTJAG	Armed Forces Staff College	Aug 1977
BASHAM, Owen D.	USALSA/Fort Amador, Balboa, Canal Zone	S&F, TJAGSA	Aug 1977
BEANS, Harry C.	25th Inf Div, HI	TRADOC	Aug 1977
BONFANTI, Anthony J.	172d Inf Bde, AK	XVIII Abn Corps, Fort Bragg, NC	Aug 1977
BOREK, Theodore B.	USALSA/Schweinfurt	OTJAG	Jun 1977
BRANDENBURG, Andrew L.	Army Intel Cmd, Fort Meade, MD	USATC, Fort Polk, LA	Aug 1977
BURNS, Thomas P.	USALSA, Europe	RCPAC, St. Louis, MO	Jun 1977
CARROLL, Bartlett J., Jr.	OTJAG	MAAG, China	Jun 1977
CORRIGAN, Dennis F.	S&F, TJAGSA	Command and General Staff College	Jul 1977
CRAIG, David B.	3d Inf Div, Germany	JFK Ctr, Fort Bragg, NC	Aug 1977
CUNDICK, Ronald P.	United States Army, Berlin, Germany	Command and General Staff College	Aug 1977
DORT, Dean R., II	S&F, TJAGSA	I Corps, Korea	Jun 1977
ECKHARDT, William G.	USAG, Pres of SF, CA	Command and General Staff College	Aug 1977
FRANKS, Mitchell D.	Command and General Staff College	OTJAG	Jul 1977
GIDEON, Wendell R.	Sig Sch, Fort Gordon, GA	Command and General Staff College	Aug 1977
GILLIGAN, Francis A.	Sch Tng Ctr, Fort McClellan, AL	Command and General Staff College	Aug 1977
GIUNTINI, Charles H.	2d Inf Div, Korea	OTJAG	Aug 1977
GREEN, Herbert J.	USALSA/Fort Gordon, GA	USASTC, Fort Gordon, GA	Aug 1977
HANDCOX, Robert C.	Walter Reed AMC, Washington, DC	Command and General Staff College	Aug 1977
HEMMER, William J.	Command and General Staff College	SETAF, Italy	Jun 1977
LAGRUA, Brooks B.	Command and General Staff College	32d ADDCOM, Germany	Jul 1977

NAME	*FROM*	*TO*	*APPROX DATE*
LURKER, Ralph L.	Command and General Staff College	USALSA/Fort Lewis, WA	Aug 1977
MANN, Richard G.	USALSA/Fort Lewis, WA	HQ, USAREUR, Europe	Sep 1977
MITCHELL, Kenneth M.	USALSA/Fort Leonard Wood, MO	Army Intel Agcy, Fort Meade, MD	Aug 1977
MURRAY, Charles A.	82d Abn Div, Fort Bragg, NC	Command and General Staff College	Aug 1977
NAUGHTON, John F.	USALSA/Baumholder	USALSA/Bde Kreuznach	Jun 1977
NICHOLS, John J.	I Corps, Korea	National Guard Bureau	Aug 1977
NORTON, William J., II	Command and General Staff College	OCLL, Pentagon	Jun 1977
O'BRIEN, Maurice J.	USALSA	HQ, USAREUR, Europe	Jul 1977
PIOTROWSKI, Leonard R.	S&F, TJAGSA	7th Inf Div, Fort Ord, CA	Sep 1977
RICE, Leonard E.	Eng Ctr, Fort Belvoir, VA	Korea	Jun 1977
SCHNEIDER, Loyson E.	25th Inf Div, HI	USAG, Fort Drum, NY	Aug 1977
WHITTEN, William M., III	OTJAG	Army Proc Agcy, APO 09710	Jun 1977
WOODWARD, Joe L.	Command and General Staff College	2d Inf Div, Korea	Jun 1977

CAPTAINS

BARBEE, Jon R.	Air Def, Fort Bliss, TX	Korea	May 1977
BOHLKEN, Alfred B.	3d Inf Div, Germany	USAG, White Sands Range, NM	Jun 1977
BOYLE, Martin J.	Letterman Hospital, Pres of SF, CA	Army Claims Svc, Fort Meade, MD	Jul 1977
CARTER, Lyman A.	USAG, Yongson, Korea	172d Inf Bde, AK	Jun 1977
CURTIS, Robert W.	Army Armor Ctr, Fort Knox, KY	USALSA	Jun 1977
DALMUT, Pete M.	USALSA	OTJAG	Apr 1977
DOWNEN, Allan T.	Sig Ctr, Fort Gordon, GA	USALSA	Jun 1977
DYCUS, Jewel E.	2d Inf Div, Korea	USAG, Fort Sam Houston, TX	Aug 1977
EDELFSEN, Gregory	19th Sup Gp, Korea	26th Adv Cls, TJAGSA	Aug 1977
EDWARDS, John T.	USALSA/Fort Benning, GA	25th Inf Div, HI	Jul 1977
FINKLEA, Alfred M.	25th Adv Cls, TJAGSA	XVIII ABN, Ft Bragg, NC	Jul 1977
FISCHER, William G.	JFK Ctr, Fort Bragg, NC	5th Sig Cmd, APO 09056	Jun 1977
FRIDDLE, Ronald C.	1st Sup Bde, Germany	1st Rgn Crim Inv, Fort Meade, MD	Jul 1977
FROTHINGHAM, Edward, III	4th Inf Div, Fort Carson, CO	United States Army, Japan	Aug 1977
GIBB, Steven P.	2d Inf Div, Korea	OTJAG	Jul 1977
GILLIAM, James G.	USAG, Fort Meade, MD	172d Inf Bde, AK	Jun 1977
GODFREY, Thomas G.	V Corps, Germany	3d Rgn Crim Inv, Fort Gillem, CA	Aug 1977
GOO, Lester M.	USACC, Taiwan	USAREUR, Europe	Aug 1977
GROTTENDIECK, William J.	32d AADC, APO 09227	USAG, Indiantown Gap, Annville, PA	Aug 1977
HARRITY, Bernadine T.	Army Eng Ctr, Fort Belvoir, VA	OTJAG	Apr 1977
HEALY, Maurice D.	2d Armd Div, Fort Hood, TX	USALSA	Jun 1977
HENNESSEY, David L.	172d Inf Bde, AK	USAREUR, Europe	Jul 1977
HEWITT, James W.	Air Def, Fort Bliss, TX	USALSA	May 1977
HOLEMAN, Jacob J.	3d Armd Div, Germany	USALSA	Jun 1977
JACOBSEN, Craig C.	25th Adv Cls, TJAGSA	USALSA/Fort Bragg, NC	Aug 1977
JACOBSON, Paul W.	FA Ctr, Fort Sill, OK	USALSA	Jun 1977
KEMP, Terry G.	193d Inf Bde, Canal Zone	Army Aviation Sys, St. Louis, MO	Jul 1977
KLEFF, Pierre A.	III Corps, Fort Hood, TX	Korea	Aug 1977
LEELING, Gerald J.	2d Inf Div, Korea	26th Adv Cls, TJAGSA	Aug 1977
LESLIE, Robert L.	USAG, Pres of SF, CA	USALSA	Aug 1977
MARTIN, Joanna R.	United States Army, Berlin	Recruiting Cmd, Fort Sheridan, IL	Aug 1977

NAME	*FROM*	*TO*	*APPROX DATE*
MC CALL, Richard H., Jr.	5th Sig Cmd, APO 09056	USAG AHS, Arlington, VA	Jul 1977
MEYER, Carl F.	Rocky Mt Arsenal, Denver, CO	Korea	Jun 1977
MORA, Raul E.	United States Army, Berlin	MAAG, China	Aug 1977
MUELLER, Patrick A.	2nd Regn Crim Investigation Cmd, Europe	5th Army, Fort Sam Houston, TX	Jun 1977
NAPPER, Steven E.	1st Armd Div, Germany	USALSA	Jul 1977
NOLLY, Joseph J.	TC, Fort Eustis, VA	USALSA	Jun 1977
RHODES, Robert C.	USALSA/Ft Belvoir, VA	2d Rgn Crim Inv, Europe	Jun 1977
RIGNEY, Marvin G.	TC, Fort Eustis, VA	USALSA	Aug 1977
SAXON, David P.	FA Ctr, Fort Sill, OK	USALSA	Jun 1977
SCHMIT, Charles F., Jr.	9th Inf Div, Fort Lewis, WA	USALSA	Jun 1977
SISSON, George H.	Claims Svc, APO 09166	26th Adv Cls, TJAGSA	Jun 1977
STEARNS, James N., Jr.	USAG, Fort McPherson, GA	Korea	Jul 1977
STOKESBERRY, John G.	101st Abn Div, Fort Campbell, KY	Korea	Jul 1977
TAPP, Barry M.	8th Army, Korea	MTMC	May 1977
TAYLOR, Paul J.	USALSA	Army Proc Agcy, APO 09710	Jun 1977
THOMAS, William P.	1st Armd Div, Germany	USALSA	Jul 1977
TYRRELL, John P.	Army Claims Svc, APO 09166	Army Claims Svc, Fort Meade, MD	Jun 1977
WHITACRE, William L.	TC Ctr, Fort Eustis, VA	USALSA	Jun 1977
YUSTAS, Vincent P.	38th ADA Bde, Korea	S&F, TJAGSA	Jul 1977
ZIJLSTRA, Eduard T.	Army Claims Svc, APO 09166	Army Dep, Seneca, Romulus, NY	Aug 1977

2. AUS Promotions

COLONELS

Fred Bright, Jr.	1 Mar 77
Joseph A. Dudzik	1 Mar 77
Ronald M. Holdaway	1 Mar 77
James A. Mundt	1 Mar 77
Thomas E. Murdock	1 Mar 77

MAJORS

Thomas P. DeBerry	1 Mar 77
Donald A. Deline	1 Mar 77
John T. Edwards	1 Mar 77
John W. Richardson	1 Mar 77
Edgar O. P. Smith	1 Mar 77
Peter M. Smith	1 Mar 77
Charles Zimmerman	1 Mar 77

3. RA Promotions

MAJOR

Richard G. Mann	1 Mar 77

CAPTAINS

Billie D. Murphree	15 Feb 77
Robert D. Newell	15 Feb 77

Current Materials of Interest

Articles

Note, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel, and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants*, 11 COLUM. J.L. & SOC. PROB. 403 (1975).

Crockett, *Toward A Revision of the International Law of Piracy*, 26 DEPAUL L. REV. 78 (1976).

Note. *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 COLUM. L. REV. 1029 (1976).

Levie, *Combat Restraints*, NAVAL WAR C. REV., Winter, 1977, at 61. Howard S. Levie is a

retired member of the Army JAG Corps and currently Professor of Law at St. Louis University.

Case Note

Military Justice—Right to Counsel—Servicemen Tried Before Summary Courts-Martial Have No Constitutional Right to Counsel. Middendorf v. Henry, *425 U.S. 25 (1976)*, 54 TEX. L. REV. 1471 (1976).

Reports to Regulatory Law Office

In accordance with AR 27-40, all judge advocates and legal advisers are reminded to continue to report to Regulatory Law Office (DAJA-RL) the existence of any action or proceeding involving communications, transportation, or utility services which may be of interest to the Army.

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 720-191/7 1-3