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The Allowability of Attorneys Fees in Government Contracting

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Section 15 of the Armed Services Procurement Regulation (ASPR) governs allowability of cost recovery under defense contracts with the government. That section sets out general and specific tests which must be satisfied if contractors are to be reimbursed for expenditures in connection with their work.

This article reviews general criteria and particular provisions that relate to the recovery of attorneys fees and their interpretation by the Court of Claims and the Armed Services Board of Contract Appeals. Part 2 of ASPR § 15, Contracts with Commercial Organizations, serves as the means by which the analysis is accomplished. The judicial and administrative board treatment of the attorney expenses reimbursement provisions in Part 2 offers an example of an uncomfortable tendency to disregard regulatory language and measure allowability criteria against a reasonable businessman standard. The tendency finds increasing application with respect to all of ASPR § 15.

ASPR § 15-201.1 (1 July 1976) [hereinafter cited without date], Composition of Total Cost, states that "[t]he total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits." How is "allowable" determined?

ASPR § 15-201.2, Factors Affecting Allowability of Costs, lists various tests, all of which must be considered. They are: "reasonableness, allocability, standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise generally accepted accounting principles and practices . . . and any

limitations or exclusions set forth in this Part 2 . . ." [emphasis added]. The tests relating to reasonableness, allocability, and especially the Part 2 limitations, provide significant guidance as regards the allowability of lawyers expenses.

ASPR § 15-201.3, Definition of Reasonableness, states that a "cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business."

Court and board determinations rarely deny cost recovery pursuant to this limitation. The decisions rendered under *Bruce Construction Corp.*¹ and *General Dynamics Corp.*² teach that reasonableness should not be measured against any universal standard; rather, the contractor's actions under the particular circumstances must be considered and if reasonable, costs incurred pursuant thereto are to be held reasonable.³ Furthermore, if a contractor incurs costs, they are presumed to be reasonable.⁴

The government rarely prevails when attempting to deny an "unreasonable" expenditure. Yet in *Optimum Designs, Inc.*,⁵ costs resulting from unnecessary management were found unreasonable. But in *Cyro-Sonics, Inc.*,⁶ it was held that an attorneys fee of \$100 per hour, under circumstances requiring particular expertise, was not unreasonable. The holding is indicative of most decisions concerning reasonableness. If there is a plausible justification (e.g., "particular expertise required"), the contractor often prevails.

The Army Lawyer

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The second general requirement is that the cost incurred be allocable to the government contract. ASPR § 15-201.4 provides this definition of allocability.

A cost is allocable if it is assignable or chargeable to one or more cost objectives ... in accordance with the relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable ... if it: (i) is incurred specifically for the contract; (ii) benefits both the contract and other work, ... and can be distributed to them in reasonable proportion to the benefits received; or (iii) is necessary to the overall operation of the business

The definition is in the disjunctive so that only one of the criteria need be satisfied. Disputes in this area, however, usually involve the appropriate category for a cost. If direct ("i") the entire amount of the expenditure is recoverable; if indirect ("ii") or necessary to overall business operation ("iii") only an appropriate *portion* can be recovered. If a contractor wants to directly charge certain costs which normally are treated as overhead, he must demonstrate, by a preponderance of the evidence, that such action was based on sound business judgment.⁷ If successful ASPR § 15-202(a) requires the contractor to exclude costs of a similar nature (but not directly allocable to the contract) from any indirect cost pool or overhead account for which the government bears financial accountability.

Often, litigation in this area is sharply focused on the issue whether there was "bene-

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fit" to the government, a question with which a contractor usually has little difficulty. For example, in *Riblet Tramway Co.*,⁸ it was held that legal fees incurred in the defense of a claim which, if successful, would have been an allowable cost were recoverable since the government received a benefit. There is no requirement that such benefit be susceptible of precise mathematical measurement.⁹

What then does cause an expenditure to be held unallowable due to non-allocability? Problems under the allocability test arise primarily as a result of performance as a "mere volunteer" or running afoul of the terms of an ASPR § 15-205 cost principle. If a contractor incurs a cost for which there is no legal obligation and which is not necessary to the overall operation of the business, recovery for such generosity should not obtain. The government should not be obligated to refund expenditures incurred on a purely voluntary basis because this allows the contractor to usurp the responsibility of the contracting officer with respect to the appropriate expenditure of government funds. However, except for violating this "mere volunteer" rule, a contractor need not be too concerned about the allocability tests unless there is conflict with an ASPR § 15-205 provision.

Before considering these standards, it must be reemphasized that the contractor should meet *all* the allowability tests outlined under ASPR § 15-201.2. For example, it was determined in *General Dynamics Corp.*¹⁰ that if an expenditure is prohibited under a cost principle (ASPR § 15-205), questions of allocability and reasonableness are not even relevant.¹¹ On the other hand, if not in accordance with contractor's consistent accounting practices, costs are not necessarily allowable, even if in compliance with these cost principles!¹² Even prior approval of a contractor's accounting practices does not guarantee reimbursement.¹³ Therefore, notwithstanding the apparent finality and conclusiveness of the language in the ASPR § 15-205 cost principles, it is important to keep in mind that the contractor should also satisfy the other ASPR § 15-201.2 criteria.

Nevertheless, courts and boards often direct discussion primarily to the principles when confronted with a cost allowability issue. (Yet, the *rationale* of the decision may be based on concepts and language peculiar to other allowability factors, especially reasonableness and the "necessary to the overall operation of the business" test of allocability!) Of the fifty ASPR § 205 principles, five are relevant to the recovery of attorneys fees. They are: Professional and Consultant Service Costs—Legal, Accounting, Engineering and Other (ASPR § 15-205.31), Bad Debts (205.2), Organization Costs (205.23), Patent Costs (205.26), and Termination Costs (205.42).

Professional and Consultant Service Costs. This section contains the key pronouncements concerning the recovery of attorneys fees. In general they are allowable "when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government."¹⁴ Subparagraph (c) of the principle declares even retainer fees allowable if "supported by evidence of bona fide services available or rendered." (Recently the Armed Services Procurement Regulation Committee suggested tighter controls on the ASPR treatment of retainer fees. It was proposed that reimbursement be proscribed unless the contractor can demonstrate that the covered services are necessary, customary, and reasonable in comparison with maintaining an in-house capability.)

Subparagraph (d) has generated the most controversy.

Costs of legal, accounting, and consulting services, and related costs, incurred in connection with organization and reorganization, defense of antitrust suits, and the prosecution of claims against the Government, are unallowable. Costs are legal, accounting, and consulting services, and related costs incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the contract.

Litigation reveals that the prosecution of

claims prohibition is not always strictly applied. Of course, there is no proscription against recovery of legal expenses in connection with the *defense* of a government defective pricing claim, even though "the Dispute clause requires that the contractor present the claim and be characterized as the appellant . . ." ¹⁵ Nor is there any disallowance for expenses related to the defense of a civil rights suit ¹⁶ or the prosecution of a claim against an insurance carrier. ¹⁷

Other decisions have not been so predictable. Legal fees and related transportation expenses involving the presentation of an appeal before the Armed Services Board of Contract Appeals have been determined unallowable. ¹⁸ However it was recently held in *Baifield Industries, Division of A-T-O, Inc.*, ¹⁹ that legal expenses incurred in preparing a "settlement" memorandum for a government contracting officer, work-product material from which was later used by the contractor to establish before the Board the impropriety of a default termination, were recoverable. And only a few months before *Baifield* a contractor was awarded the cost of legal fees relating to the submission of an application for increased progress payment rates and a request for equitable adjustment. ²⁰ Regarding the application for increased progress payments, the Board explained that legal fees related thereto were allowable "because such application was not a claim of right, albeit a request of a type for money." (Of course, *earlier* payment of a sum due represents, of itself, an additional cost.) The Board offered the following in support of its determination of allowability concerning "legal fees incurred as a cost in connection with a contractor's request for an equitable adjustment arising out of the government's failure to meet its obligation under a Government-furnished property clause . . ."

[They] were incurred as an incident of contract performance and were therefore allowable. Whatever may be the demarcation line between the ordinary interchanges of supplier and customer and a

claim against the government, the conflict between the parties here never became so disputatious as to reach the level of a claim against the government, the prosecution costs of which are unallowable under ASPR's cost principles. ²¹

The "incident" of contract performance" language has no relevance apart from a consideration of *allocability*; this is not a test of ASPR § 15-205.31(d). Nor does this ASPR paragraph distinguish slightly and terribly disputatious claims. Similarly, the Court of Claims ruled in *Kalvar Corporation Inc. v. United States* that a contractor's recovery of legal fees should be allowed in suits against the government where a claim for contract breach is converted to a termination for convenience. ²² The court explained that when a government breach is treated as a constructive termination, the contractor is entitled to legal expenses equal to those he would have incurred in preparing an actual termination settlement. Previously, the court allowed legal fees incurred in an unsuccessful termination settlement even though the expenses related to work performed *after* the filing of an administrative appeal. ²³ (In response to the increasingly liberal interpretation of the professional fees provision, the ASPR committee recently proposed an amendment strengthening the prohibition against allowing such fees in appeals. The proposal makes professional fees unallowable when incurred in the "prosecution of claims" against the government before the issuance of a contracting officer's final decision, and in appeals under the Disputes clause "without regard to the nature of the appeal" after a final decision.)

Bad Debts. This ASPR paragraph informs that "(b)ad debts, including losses (whether actual or estimated) arising from uncollectible customers' accounts and other claims, related collections costs, and related legal costs, are unallowable." Despite this clarity it was held in *Wyman-Gordon Co.* ²⁴ that collection expenses to recover an uncollectible loan advanced to a "necessary subcontractor" under the same contract need not be disallowed as a

bad debt, if reasonably incurred. In response to the government's cost principle argument the board stated that it "ignored business realities." More in line with this article is *American Electronics Laboratories, Inc.*,²⁵ wherein the board determined that a cost plus fixed fee contractor was entitled to legal fees related to collection expenses incurred in the normal course of business since ASPR § 15-205.2 does not include "normal collection expenses."

These cases illustrate that it is unsatisfactory to rely solely upon the language of an ASPR provision. Close attention to the analysis of and possible reaction to particular language is critical. Where do we stand with respect to ASPR § 15-205.2? Obviously, there is conflict between the apparent message and recent interpretations. Legal fees under this category probably will be disallowed at the contracting officer level; however, if the contractor can marshal strong equitable arguments with respect to reasonableness and necessity an appeals board may allow recovery.

Organization Costs. The section offers this guidance.

Expenditures in connection with (i) planning or executing the organization or reorganization in the corporate structure of a business ... or (ii) raising capital, are unallowable. Such expenditures include but are not limited to incorporation fees and costs of attorneys (and) accountants ... whether or not employees of the contractor.

Such expenses (also disallowed under ASPR § 15-205.31(d)) must be considered in light of ARPR § 15-205.24, *Other Business Expenses*. It is therein stated that "recurring expenses as ... preparation and submission of required reports and forms to taxing and other regulatory bodies ... and similar costs are allowable when allocated on an equitable basis."

In addition to the possibility of conflict between ASPR §§ 15-205.23 and 15-205.24,

case law must again be considered. For example, in *Navgas, Inc.*,²⁶ it was determined that legal expenses for efforts to obtain a favorable classification for state tax purposes, in connection with the firm's incorporation, were allowable because "the effect of a successful effort would be a lower (cost) to the Government." ASPR § 15-205.23 makes no exception for financially beneficial expenditures. Although perhaps an equitably correct solution, there is little support therefor under the cost principle. It is again apparent that reliance on ASPR provisions is unsatisfactory. If the contractor can provide a sound equitable argument, as in *Navgas*, reimbursement is possible.

Patent Costs. This section covers two categories of patent expenses, those related to the government contract (generally allowable) and those unrelated (unallowable).

(a). Costs of (i) preparing disclosures, reports, and other documents required by the contract and of searching the art to the extent necessary to make such invention disclosures; (ii) preparing documents and any other patent costs, in connection with the filing and prosecution of a United States patent application where title or royalty free license is required by Government contracts to be conveyed to the Government; and (iii) general counseling services relating to patent matters ... are allowable. (But see 15-205.31.)

(b). Costs of preparing disclosures, reports, and other documents and of searching the art to the extent necessary to make invention disclosures, if not required by the contract, are unallowable. Costs in connection with (i) filing and prosecuting any foreign patent application, or (ii) any United States patent application with respect to which the contract does not require conveying title or a royalty free license to the Government are unallowable. (Also see 15-205.36.)

ASPR § 15-205.31(d) reinforces the latter paragraph: "Costs of legal, accounting, and consulting services, and related costs, incurred in connection with patent infringement litiga-

tion, are unallowable unless otherwise provided for in the contract."

But, the double coverage fails to render the prohibition more forceful. In *TRW Systems Group of TRW, Inc.*,²⁷ a contractor was permitted to allocate to a government contract a portion of the cost of his patent program including the procurement of patents, because these costs, being "absolutely necessary" to the conduct of his business, were beneficial to government contracting work. (This "necessary to the overall operation of the business" concept derives from ASPR § 15-201.4, pertaining to *allocability*, a test completely separate from and in addition to the § 15-205 principles. ASPR §§ 15-205.26 and 205.31(d) make no reference to a benefitting government work test.) The pattern remains unbroken; the language of the cost principle often is not dispositive of the allowability issue.

Termination Costs. Subparagraph (f) of this provision is the language appropriate to our consideration.

Settlement expenses including the following are generally allowable: (1) accounting, legal, clerical, and similar costs reasonably necessary for—(i) the preparation and presentation to contracting officers of settlement claims and supporting data with respect to the terminated portion of the contract, and (ii) the termination and settlement of subcontracts

Here again board results parallel the holding in *Kalvar*;²⁸ legal expenses devoted to converting the government action to a termination for convenience are recoverable pursuant to ASPR § 15-205.42(f), if reasonable. (See *Southland Mfg. Corp.*,²⁹ *Sunstrand Corp.*,³⁰ and *Baifield Ind.*³¹) However, allowability of legal fees likely will not obtain if related to an appeal of the contracting officer's decision as to termination settlement quantum. Thus, in *E.A. Cowen Construction, Inc.*,³² a contractor whose work was terminated for government convenience was allowed counsel fees allocable to the preparation of a settlement proposal; but, such expenses relat-

ed to the *presentation of a claim upon appeal* were not granted.³³

A review of the treatment of the ASPR provisions as regards the allowability of attorneys fees in government contracting reveals that the regulatory language often is only a starting point. The treatment of the Professional and Consultant Service Costs principle's proscription against recovery of legal fees connected with claims against the government has been liberally construed. The Bad Debts section has been accorded similar treatment. If an expenditure to recover a bad debt (*e.g.*, legal fees) is found reasonable and necessary, it may be allowed notwithstanding clear ASPR § 15-205 language to the contrary. The Organization Costs provision, in addition to suggesting *potential* conflict with the Other Business Expenses section, is susceptible to equitable considerations (*e.g.*, lower cost to the government). Similarly, the Patent Costs provision is subject to a "necessary to the overall operation of the business" exception. With respect to Termination Costs, court and board interpretations have forged a liberal twist. Attorneys fees incurred to cause government action to be translated into a termination for convenience have been allowed, though no recovery is permitted when an appeal is taken from a contracting officer's decision regarding a termination settlement. What are the reasons for deviations from the regulatory language and how are they justified?

In support of their decisions, the Court of Claims and the boards often rely on such arguments as "reasonableness of the expenditure," "necessary for the conduct of the contractor's business," the "action of a prudent businessman in the circumstances," and "necessary to the overall operation of the business." Although important, the phrases constitute only a *portion* of the allowability test.

The first three phrases formulate a part of the reasonableness standard. The last has reference to the general and administrative category of the ASPR definition of *allocability*. Under ASPR § 15-201.2, Factors Affecting

Allowability of Costs, reasonableness and allocability are indeed to be considered; however, so are three other factors, including "any limitations or exclusions set forth in this Part 2" (most notably the ASPR § 15-205 cost principles).

Notwithstanding the foregoing, the quoted justifications continue to be advanced. Although only speculation, the possible explanation is not difficult to understand. The ever increasing complexity of modern business operations as well as the incredible myriad of government contract requirements make legal services almost essential. Big business recognizes and appreciates this to the extent that it is now the "rule" to integrate corporate legal departments into everyday manufacturing operations. So complete and thorough is the integration that it becomes ridiculous as a matter of consistency in logical application to separate such expenses from other necessary ongoing (and generally allowable) costs (*e.g.*, executive salaries, research and development, and quality control).

But, while these considerations are not without considerable appeal, the dilemma persists: what is the proper line between judicial interpretation and ASPR "legislation?"

The solution for the attorney who endeavors to provide the complete analysis is not to rely solely on the ASPR provisions, *no matter how clear*. He must also devote substantial study to their interpretation.

Notes

1. Bruce Construction Corp. v. United States, 423 F.2d 516 (Ct. Cl. 1963).
2. General Dynamics Corp. (Corvair Div.) ASBCA Nos. 8759, 9264, 9265 & 9266, 31 Jan. 1965, 66-1 B.C.A. para. 5368.
3. *Id.*
4. Bruce Construction Corp. v. United States, 423 F.2d 516 (Ct. Cl. 1963).
5. Optimum Designs, Inc., ASBCA No. 15441, 25 Apr. 1973, 73-2 B.C.A. para. 10,072.
6. Cyro-Sonics, Inc., ASBCA No. 13219, 25 May 1970, 70-1 B.C.A. para. 8313.
7. Planetronics, Inc., ASBCA Nos. 7202, 7535, 13 Apr. 1962, 1962 B.C.A. para. 3356.
8. Riblet Tramway Co., ASBCA No. 11164, 30 Mar. 1966, 66-1 B.C.A. para. 5488.
9. General Dynamics/Astronautics, ASBCA No. 6899, 17 May 1962, 1962 B.C.A. para. 3391.
10. General Dynamics Corp. (Corvair Division), ASBCA Nos. 12814 & 12890, 30 Sept. 1968, 68-2 B.C.A. para. 7297.
11. See also Lockheed Aircraft Co., ASBCA No. 11424, 2 Nov. 1966, 66-2 B.C.A. para. 5948.
12. Federal Electric Corp., ASBCA No. 11324, 23 June 1967, 67-2 B.C.A. para. 6416.
13. Chrysler Corp., ASBCA No. 14385, 17 Mar. 1971, 71-1 B.C.A. para. 8779.
14. Armed Services Procurement Reg. § 15-205.31(a) (1 July 1976).
15. Hayes International Corp., ASBCA No. 18447, 28 Jan. 1975, 75-1 B.C.A. para. 11,076.
16. Hirsch Tyler Co., ASBCA No. 20962, 23 Aug. 1976, 76-2 B.C.A. para. —
17. Farrell Lines, Inc., ASBCA No. 15768, 20 July 1973, 73-2 B.C.A. para. 10,177.
18. See Keco Industries, Inc., ASBCA Nos. 7882, 8002 & 8092, 31 Dec. 1963, 1963 B.C.A. para. 3992.
19. Baifield Industries, Division of A-T-O, Inc., ASBCA No. 20006, 15 Oct. 1976, 76-2 B.C.A. para. —
20. Allied Materials and Equipment Co., Inc., ASBCA No. 17318, 28 Feb. 1975, 75-1 B.C.A. para. 11,150.
21. *Id.* at 17318, 76-1 B.C.A. at para. 11,150.
22. Kalvar Corporation, Inc. v. United States, 543 F.2d 1298 (Ct. Cl. 1976).
23. Acme Process Equipment Co. v. United States, 347 F.2d 538 (Ct. Cl. 1965).
24. Wyman-Gordon Co., ASBCA No. 5100, 10 Sept. 1959, 59-2 B.C.A. para. 2344.
25. American Electronic Laboratories, Inc., ASBCA No. 9879, 30 July 1965, 65-2 B.C.A. para. 5020.
26. Navgas, Inc., ASBCA No. 9240, 18 Nov. 1964, 65-1 B.C.A. para. 4533.
27. TRW Systems Group of TRW, Inc., ASBCA No. 11499, 11 July 1968, 68-2 B.C.A. para. 7117.
28. Kalvar Corporation, Inc. v. United States, 543 F.2d 1298 (Ct. Cl. 1976).
29. Southland Mfg. Corp., ASBCA No. 16830, 29 Nov. 1974, 75-1 B.C.A. para. 10,994.

30. Sunstrand Turbo, A Division of Sundstrand Corp., ASBCA No. 9112, 29 Jan. 1965, 65-1 B.C.A. para. 4653.

31. Baifield Industries, Division of A-T-O, Inc., ASBCA No. 20006, 15 Oct. 1976, 76-2 B.C.A. para. ____

32. E.A. Cowen Construction, Inc., ASBCA No. 10669, 28 Dec. 1966, 66-2 B.C.A. para. 6060.

33. See also Acme Coppersmithing & Machine Co., ASBCA Nos. 4473 & 5016, 17 Aug. 1959, 59-2 B.C.A. para. 2314.

The JAG Liaison at MILPERCEN—Some Initial Reflections

Captain John F. DePue, JAG Liaison, MILPERCEN

The February 1977 issue of *The Army Lawyer* announced the assignment of a Judge Advocate General's Corps liaison team to the U. S. Army Military Personnel Center (MILPERCEN). The function of this team is to provide the Enlisted Personnel Management Directorate (EPMD) at MILPERCEN with technical advice concerning the professional development of enlisted legal clerks and court reporters, and to assist it in the long-range planning of force and utilization requirements of enlisted personnel. Concurrently, the team provides The Judge Advocate General and SJA offices in the field with information concerning Department of the Army policies and procedures affecting enlisted personnel. Although this arrangement contemplates that the JAG representatives will afford EPMD with information and guidance concerning enlisted assignment priorities, the responsibility for the actual assignment of legal clerks and court reporters remains the function of the commander, MILPERCEN, and is governed by present policies and applicable Army regulations. Consequently, individual requests and inquiries concerning enlisted assignments should be made in the manner prescribed by AR 614-200 and not by directly contacting the JAG liaison. The primary task of the liaison is comprehensive planning, and not involvement in the daily operations of the assignment team.

The initial task of the Corps' liaison involved determining the reasons for the apparent misallocation of enlisted court reporters (MOS 71E) among SJA offices, leaving some offices with excess assets while depriving others of personnel. At the time this project was initi-

ated, the Enlisted Master File—a statistical compilation of the total number of enlisted personnel serving in each MOS—indicated that MOS 71E was only at 80% of its authorized strength; that is, 98 enlisted court reporters were authorized but there were only 78 enlisted personnel who held the PMOS of 71E. Analysis of this data revealed that it was incomplete, largely because a number of graduates of the court reporters' course at the Naval Justice School were not correctly reported by the SIDPERS system as possessing MOS 71E as their primary MOS. As a result of this MOS misidentification, requisitions for the assignment of court reporters were often initiated and filled for installations and commands where they were not actually needed, leaving other commands without sufficient resources.

To assist in identifying the Army's court reporter assets, and, ultimately, in updating the data which reflects their strength and affects their distribution, The Judge Advocate General initiated a one-time survey which, among other things, requested a recapitulation of court reporter authorizations at each installation and the names of the persons filling these authorized positions or, otherwise, serving as court reporters. The responses to this survey have been of significant assistance in attaining these objectives and, with the graduation of the April 1977 class of the Naval Justice School court reporters' course, 103 qualified court reporters are now identified and available for duty. Nevertheless, PCS or ETS losses, coupled with PCS fiscal year and other policy constraints may, yet, lead to shortages of court reporters at any given

installation. Such shortages can normally be rectified as soon as valid requisitions are received at MILPERCEN and qualified personnel become available for reassignment.

Much can also be done at the installation and unit level to assist in eliminating the misallocation of the Corps' enlisted soldiers. Particularly important are accurate requisitioning practices and continuing judge advocate involvement in assuring that the information, which triggers the requisitioning process, is correct. Presently, the requisitioning process begins when the local military personnel office (MILPO) recognizes that an enlisted vacancy exists or can be projected with respect to an authorized position within the command. Typically, this information is obtained by evaluating computerized data printouts which indicate vacancies or projected losses. Requisitions to fill these positions are then submitted to MILPERCEN allowing five months lead time for CONUS assignments and nine months for oversea assignments. Upon arrival at MILPERCEN, the requisitions are, initially, validated by evaluating them from the perspective of the installations' currently-reported authorizations, strength, projected losses, and projected gains. Validated requisitions are subsequently filled through the assignment of an available serviceman who meets their requirements.

The impact of inaccurate personnel and authorization data upon this process is readily apparent. If the information which triggers the requisition or provides the basis for its validation at MILPERCEN is incorrect or incomplete, either actual requirements will not be filled or installation SJA offices will suddenly find themselves overstaffed. This latter result can occur if, for example, a court reporter, MOS 71E, filling an authorized court reporter position is erroneously characterized on the installation's SIDPERS data as a legal clerk, MOS 71D, filling a legal clerk position. If this error is not detected, a court reporter vacancy will be apparent to the installation MILPO; a requisition will be initiated; it will be validated, and filled at MILPERCEN; and,

ultimately, the staff judge advocate's office will be overstrength in court reporters at the expense of another installation or command.

Consequently, it is essential that each staff judge advocate or JA office manager assures that the unit manning report (UMR) for his office correctly reflects the positions authorized, and that information concerning the persons filling these positions is correct. The SJA should also encourage his enlisted soldiers to be certain that their DA Forms 2 are completely accurate. Finally, the SJA or his office manager should informally coordinate with the local MILPO to assure that necessary requisitions are made whenever a vacancy is anticipated, and, in addition, request that the originators of such requisitions notify him whenever computerized data indicates that it is necessary to requisition a legal clerk or court reporter.

Measures to assure the accuracy of authorization and personnel data will assume an even greater importance in the near future. It is presently anticipated that during 1978, a streamlined system for filling military personnel requirements will be introduced at MILPERCEN. Designated the "Personnel Deployment and Distribution Management System" or "PERDDIMS" for short, the new process will eliminate local requisitions as the initiating force in making personnel assignments. In their place, new personnel requirements and projected vacancies in existing positions will be identified by the relationship of an installation's force authorization data with its personnel data as reported by the SIDPERS system. Again, if this force and personnel information is not absolutely accurate and current, requirements will not be identified and filled. Consequently, it is essential that judge advocates assure that the installation's manning documents as displayed on UTAADS correctly reflect their present and projected authorizations, and that data concerning their enlisted force is accurately recorded in the SIDPERS data base. Such efforts will prepare the Corps for the advent of PERDDIMS and its significant impact upon the personnel assignment system.

In summary, the active involvement of judge advocates in the management of enlisted assets is vital to the efficiency of the Corps. The measures which have been suggested to assure the accuracy and timeliness of authorization and personnel data are neither time consuming nor complex, and should

become the personal responsibility of each officer manager. This initiative will go far toward assuring that the Corps' enlisted personnel are assigned when and where they are needed, and that the price of *United States v. Dunlap* is never again exacted as a result of the absence of a court reporter.

Foreign Sovereign Immunities Act of 1976

International Affairs Division, OTJAG

State Department initiatives begun in the late 1960's came to fruition on 21 October 1976 when President Ford signed into law the "Foreign Sovereign Immunities Act of 1976," Public Law 94-583. The broad purposes of the Act are to facilitate and depoliticize litigation against foreign states in United States courts and to minimize irritations in foreign relations arising out of such litigation. This is accomplished by providing for the resolution of questions of sovereign immunity by the judicial branch of government rather than the former reliance on "suggestions of immunity" provided the courts by the Department of State. The Act codifies and refines the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction since 1952. It also replaces the absolute immunity now accorded foreign states from execution of judgement with an immunity from execution conforming more closely to the "restrictive theory" of immunity from jurisdiction.

Section 1605(a)(2) of the Act, contained in Chapter 97 of Title 28, U.S.C., sets forth the most important instances in which foreign states are denied immunity:

Section 1605. General Exceptions to the Jurisdictional Immunity of a Foreign State.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a

commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Section 1603(d) of new Chapter 97 of Title 28, U.S.C., defines the term commercial activity: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." The legislative history explains further what the Congress intended:

Paragraph (d) of Section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

....

As the definition indicates, the fact that

goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if the ultimate object is to further a public function. . . .

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition. [S. Rep. No. 94-1310, 94th Cong., 2d Sess., pp. 15-16.]

Thus, as can readily be seen, the Act codifies as a matter of federal law the so called "restrictive theory" of sovereign immunity which now has been adopted by most major jurisdictions of the world. Under this doctrine, the immunity of foreign states is restricted to cases involving acts of a foreign state which are sovereign or governmental in nature (acts *jure imperii*), as opposed to acts which are either commercial in nature or those which private persons normally perform (acts *jure gestionis*).

Of special interest to the United States armed forces, because of the possibility of reciprocal treatment abroad, is Section 1611(b)(2) of new Chapter 97 of Title 28 U.S.C., which provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of

two conditions: the property is either (a) of a military character or (b) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, war ships, tanks, and communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments. The second condition is intended to protect other military property such as food, clothing, fuel and office equipment, which although not of a military character is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military. Therefore, military equipment which was deemed surplus and is withdrawn from military use would not be immune. The broad ranging effects of this military exception, were discussed in a recent Military Law Review article. See Coleman, *Proposed Codification of Governmental Immunities and Its Effect on Economic Privileges Extended United States Forces Abroad*, 72 Military Law Review 93 (1976).

The Department of Justice has notified the Department of the Army that in the representation of the United States and its agencies and instrumentalities in suits brought before foreign tribunals, the Justice Department will follow the restrictive theory of sovereign immunity as codified in the Act. This does not mean that the Justice Department is prepared to waive any other procedural or substantive defenses which may be properly raised in a given case. This policy will, however, necessitate that in the future agencies who refer to

the Justice Department cases for the defense of an actual or imminent litigation against the United States abroad, place heavier emphasis on the reporting of the relevant facts. In addition, the defense of suits against the

Government on the merits is likely to require more extensive assistance by the referring agencies in such matters as furnishing documentary evidence and identifying prospective witnesses.

Professional Responsibility

Criminal Law Division, OTJAG

The OTJAG Professional Ethics Committee recently rendered an advisory opinion to the Chief, Defense Appellate Division, on the question whether a defense counsel may or must reveal his former client's avowed intention to appear as a witness before a court of law and give perjured testimony. The pertinent provisions of the ABA Code of Professional Responsibility considered by the Ethics Committee are:

- a. DR 4-101(B), which states in pertinent part: Except when permitted under DR 4-101(C), a lawyer shall not knowingly ... [r]eveal a confidence or secret of his client.
- b. DR 4-101(C), which states in pertinent part: A lawyer may reveal ... [t]he intention of his client to commit a crime and the information necessary to prevent the crime.

An American service member, while stationed with his wife and children in Germany, was convicted by general court-martial of aiding and abetting his wife in the commission of a felony. After his conviction, he was returned to the United States as a prisoner at the United States Disciplinary Barracks. His wife was held for trial by West German authorities.

The appellate defense counsel appointed to represent the convicted service member before the Army Court of Military Review informed the service member that he would be

subpoenaed to testify at his wife's trial. Subsequently, the service member informed his appellate counsel that he would appear voluntarily before the German court and perjure himself. Thereafter, he dismissed his appellate counsel, thereby terminating the latter's relationship as attorney. The appellate counsel was convinced beyond a reasonable doubt that his former client meant his statement that he intended to perjure himself before the Berlin court.

The Ethics Committee concluded that the appellate counsel had a duty to disclose his former client's avowed intention to commit perjury, as well as the information necessary to prevent an actual commission. His announced intention of a plan to commit a crime was not, under DR 4-101, a confidence which an attorney was bound to respect. Rather, it was squarely within one of the recognized exceptions under which disclosure was proper. With respect to a duty to disclose, sound public policy dictates that a lawyer not be permitted to remain silent where he is satisfied that a former client intends to commit a crime.

The Committee recommended that the appellate counsel be advised to make disclosure to the extent necessary to alert the German court of his former client's avowed intention to perjure himself if called as a witness at his wife's trial.

Reappraising the Legality of Post-Trial Interviews

Captain Fredric I. Lederer, Criminal Law Division, TJAGSA

Enshrined by custom, the peculiar institution of the post-trial interview is coming under

new attack.¹ Originally designed primarily as a device to secure clemency information for

the convening authority subsequent to sentencing by a general court-martial, the practice consists of an interview of the newly sentenced accused by either the staff judge advocate or, more usually, a member of the SJA's staff. At the interview information is sought regarding the accused's perception of his recent trial and sentence, whether the accused was satisfied with his trial defense counsel, and any information which might be helpful in the preparation of the post trial review and its sentencing recommendations.² Despite its possible beneficial effects, the post-trial interview closely approximates a minefield: with some luck the accused may make it to the other side alive and well—perhaps even in a slightly better tactical position. But with a misstatement the accused may hit a mine—reveal some past criminal act or negative attitude³—which may destroy him.⁴ It is this very chance for disaster which has brought the post trial interview to the attention of the Court of Military Appeals.

The origins of the post-trial interview are unclear. At one time it appears to have been supported, encouraged, and perhaps even required by both Air Force and Army policy.⁵ At present, however, there does not appear to be any statutory or regulatory requirement for post-trial interviews in the Army. Indeed some Army commands are known to have abandoned them completely. Perhaps as a result of this lack of a regulatory requirement, the procedure used to conduct post-trial interviews appear to vary by location. While the Air Force and some Army commands utilize privacy act statements,⁶ including the statement that the interview is voluntary, most commands do not warn the interviewee of his right to have counsel present or of his rights under Article 31 of the UCMJ.⁷ At some posts, counsel may attend the interview but customarily choose not to do so,⁸ and in at least one case the refusal of an accused to make a statement at the post-trial interview was included in the post-trial review.⁹ As a result, the key legal issues involved in an appraisal of the post-trial interview are the application

of the right against self-incrimination and the right to counsel at the post-trial interview.

The application of the right against self-incrimination at the post-trial interview is far from a simple matter, and there is a surprising lack of cases dealing with the point at which a convicted defendant loses his privilege. However, what precedent does exist appears to support the proposition that a convicted defendant retains his privilege not only through sentencing but until completion of the appellate process.¹⁰ In short, for self-incrimination purposes the "trial" continues until finality attaches. This should be particularly true for military proceedings because in the most fundamental sense, the actual trial of a court-martial is not complete until the convening authority has taken action on the trial court's "recommendations."¹¹ Further, Article 31(a)'s language¹² prohibits compulsory self-incrimination without reference to trial. The accused at a post-trial interview is in a position in which anything he says may supply material that would support not only the trial court's sentence but also its findings—which remain to be approved. Thus, it appears clear that the accused retains his right against self-incrimination in the military *at least*¹³ until the convening authority has acted. Consequently the application of the Article 31(b) warning requirements must be considered. The few cases dealing with the application of Article 31(b) warnings to the post-trial interview unanimously hold it inapplicable although perhaps desirable.¹⁵ The rationale used by the courts, however, is questionable at best, as the courts appear to be saying that an accused who is warned of his right to remain silent might choose to exercise it and thus frustrate the purpose of the interview.¹⁶ This is akin to saying that the fifth amendment right against self-incrimination should be inapplicable to trials because it might interfere with the defendant's right to be convicted and rehabilitated. Dismissing then the few precedents in the area, one must reevaluate Article 31(b)'s application. By its very language, it would appear to apply to a post-trial interview, unless one can presume

that the basic right against self-incrimination under Article 31 has already terminated, a conclusion rejected above. While the Court of Military Appeals has in the past held Article 31(b)'s warning requirements inapplicable to the court-martial trial proceeding,¹⁷ the reasoning involved, suspect in any event in the light of recent judicial developments, is distinguishable inasmuch as it emphasizes doubts as to the propriety of either defense counsel or trial counsel warning a witness of his rights and thereby frustrating the presentation of evidence.¹⁸ While the "post-trial" interview is in fact part of the trial of the accused, it is a distinct part of trial which lacks both the problems and protections afforded by the judicial phase which is carefully guided by a trial judge. While the Article 31(d) exclusionary rule excludes evidence taken in violation of either Article 31 or the voluntariness doctrine from "trial by court-martial," even if the exclusion is inapplicable to post-trial reviews (a doubtful conclusion) the remainder of Article 31 renders warnings mandatory. Just because a criminal act—in this case a breach of the warning requirements—may not suppress evidence does not render the act any less illegal. It has also been argued¹⁹ that recent Supreme Court decisions limiting prisoners' rights in the area of self-incrimination dispose of post-trial interview complaints. However, even if constitutional decision can be equated with interpretation of the military's statutory privilege, that position ignores the fact that the major precedents involved deals with convicted prisoners whose appeals have been concluded and who are subjected to an "administrative" proceeding. The conclusion one reaches, then, is that Article 31(b) is fully applicable to the post-trial interview, and that accused persons must be advised of their right to remain silent, and that anything said may be used against them at trial by court-martial.

Current post-trial interview litigation emphasizes failure to warn the defendant of his right to counsel. Indeed, in one case, *United States v. Simpson*,²¹ the Army Court of Military Review, considering itself bound by

United States v. McOmber,²² found that the failure to notify defense counsel of the forthcoming interview to be error.²³ In view of the unique nature of the court-martial proceeding, as discussed above, *McOmber* and any civilian cases dealing with the application of *Miranda v. Arizona* to post-trial matters are really irrelevant. The post-trial interview is taking place as a *part* of the court-martial proceeding—the post-trial review. Consequently the basic right to counsel under both Article 27 of the UCMJ²⁴ and the sixth amendment require that counsel be present or that the Supreme Court's standards for appearing pro se²⁵ be met. Even if "post-trial" proceedings are not a basic part of a court-martial, *McOmber*, by extending the statutory right to counsel to pre-trial proceedings,²⁶ would surely extend it to such a "critical stage" as the post-trial interview.

The post-trial interviewee would thus appear to be entitled to both the right to silence and the right to counsel and to be warned of those rights. This conclusion could well doom most post-trial interviews. But, why should they be continued in any event? Military law has changed drastically since post-trial interview began. Defense counsel must now scrutinize the post-trial review,²⁷ and defense representation must continue until conclusion of all proceedings without hiatus.²⁸ Surely defense counsel not only can but ethically *must* bring forth any clemency information not within the record of trial, and counsel can always *request* a post-trial interview. Adverse material may well be eliminated in this fashion, but shouldn't the convening authority's action be taken on the record of trial in any event? What then would be eliminated—only the questionable ability of a member of the SJA office to judge demeanor without the need of visiting the court-room, and the possibility of the accused raising a claim of inadequacy of counsel. Yet, civilian defendants denied the comfort of a post-trial interview and seeking to challenge their attorney's representation do not appear hesitant to do so regardless of circumstances, and they do so without

the added protections given by the Defense Appellate Division.

In summary, the post-trial interview is of questionable legality within its current procedural context, of little practical value to the accused, a waste of vitally needed legal resources, and an unnecessary source of litigation. Staff judge advocates would do well to abolish it before the Court of Military Appeals does so.

Notes

1. See *e.g.* United States v. Lanzer, 3 M.J. 60 n. 6 (C.M.A. 1977) in which Chief Judge Fletcher stated: "As should be evident from the body of this decision we have doubts as to the vitality of post-trial interviews, especially those in which the accused does not have benefit of counsel. Our disposition of this case makes it unnecessary to address this precise issue, and we will reserve judgment until the proper case." The court seems to have found the proper case in United States v. Kelly, *position for review granted*, 3 M.J. 87 (C.M.A. 1977) in which the court agreed to determine whether a post-trial interview held in the absence of counsel and which yielded adverse material was a denial of due process.
 2. The day to day post-trial interview appears often to be merely a ritualistic gesture more likely to yield advance matter than important clemency material. It may however provide a helpful defense to trial defense counsel whose services are praised at the interview but attacked later.
 3. There are numerous cases in which the interview yielded damaging material. See *e.g.* United States v. Foer, SPCM 12265, *appeal pending* [at trial, Foer stated that he wanted to "stay in the service," while at the post-trial interview he stated that he did not want to return to duty.]; United States v. Albert, 31 C.M.R. 326 (A.B.R. 1961) [accused confessed at the post-trial interview to an unrelated larceny which was then commented upon in the post-trial review].
 4. In one sense, of course, the post-trial action of the convening authority cannot hurt the accused because the convening authority cannot approve a sentence greater than that adjudged by the trial court. However this view is to ignore reality as sentences are frequently if not almost always modified by the convening authority or by the Courts of Review. Thus, it can be presumed that there is usually a sentence which the accused would have received, lesser in degree than the one given by the court, but for consideration of adverse material given at the post-trial interview.
 5. See *e.g.* United States v. Clisson, 5 C.M.A. 277, 281, 17 C.M.R. 277, 281 (1954) [referring to Air Force regulations requiring post-trial interviews]; United States v. Fleming, 9 C.M.R. 502, 505-06 (A.B.R. 1953).
 6. The Air Force has promulgated a model privacy act statement for post-trial interviews and some Army commands are using privacy act statements. See *e.g.* Reply to the Assignment of Errors at 2, United States v. Foer, SPCM 12265, *appeal pending* [Fort Carson].
 7. 10 U.S.C. § 831 (1970). Many commands do in one respect or another tell the accused that participation in the post-trial interview is voluntary. Compliance with Article 31(b)'s warning requirements is virtually unknown, however.
 8. *cf.* Reply to the Assignment of Errors at 2, United States v. Foer, *supra* note 6.
 9. Assignment of Error and Brief on Behalf of Appellant at 2, United States v. Minor, CM 434910, *appeal pending*. In view of the fact that neither counsel nor judge may comment on the silence of the accused at trial, affirmative reference in the post-trial review to the fact that the accused remained silent on advice of counsel, as was the case in *Minor*, would seem highly questionable under both Article 31 and the fifth amendment. Certainly it presents a classic dilemma to the accused who is afraid to participate for fear of revealing incriminating materials.
 10. See Goodrich, *The Effect of a Guilty Plea on the Right Against Self-Incrimination and Its Effect on Requested Testimony* (Mar. 1977) (unpublished paper submitted in partial satisfaction of the diploma requirements of the 25th Advanced Class, The Judge Advocate General's School, U.S. Army) citing *State v. Johnson*, 77 Idaho 1, 287 P.2d 425 (1955), *cert. denied*, 350 U.S. 1007 (1956) [privilege intact until completion of appeals since the pending appeal could result in a new trial]; *People v. Den Uyl*, 318 Mich. 645, 29 N.W.2d 284 (1947) [appellate process prevented infringement of the privilege until completion]; *In re Bando*, 20 F.R.D. 610 (D.C. N.Y. 1957), *rev'd on other grounds*, United States v. Miranti, 253 F.2d 135 (2d Cir. 1958), *Annot.*, 9 A.L.R. 3d 1003 (1966) [conviction had been affirmed but defendant was preparing to seek a writ of certiorari; held that mere preparation of a writ is insufficient to continue the privilege]. See also MCCORMICK ON EVIDENCE § 121 (2d ed. 1972); *cf.* United States v. Wilson, 488 F.2d 1231, 1233 n. 3 (2d Cir. 1973) *rev'd on other grounds*, 421 U.S. 309 (1974). *Contra*, *Knox v. State*, 234 Md. 203, 198 A.2d 285 (1964).
- It is interesting to note the recent decision of the Pennsylvania Supreme Court in *Commonwealth v. Rogers*, 21 Crim. L. Rep. (BNA) 2195 (Pa. Apr. 28, 1977) in which the court held that even post appeal collateral relief may occasionally justify a defendant in exercising his privilege and refusing to testify at trial. The trial judge in such a case, said the court, must determine

whether the witness has "reasonable cause to apprehend danger of self-incrimination." In *Rogers*, the court was faced with the question of whether a defendant was improperly denied his right to full cross examination when the witness, a convicted co-participant in a robbery-murder, exercised his privilege to remain silent.

11. The court-martial is not yet identical with civilian trials. Regardless of the merits of its present format and procedure, the court-martial is still a creature of command not yet fully divorced from its history. Despite the important consequences of completion of the court phase of a trial, both findings and sentence are virtually advisory recommendations (recommendations, whether as to findings or sentence, which can be completely ignored by the convening authority so long as his action is favorable to the accused) until acted upon by the convening authority. Historically, courts-martial were simply extensions of the commander, and even today for purposes of finality, the trial is merely an introduction to the commander's action. See e.g. *United States v. Occhi*, 25 C.M.A. Adv. Sh. 93, 96, 54 C.M.R. Adv. Sh. 93, 96 (1977) [Judge Cook stating that "The Court recently held . . . [that] the legal effect of a court-martial depends upon the action of the convening authority rather than that of the trial court."]. But see Judge Perry dissenting in part, 54 C.M.R. Adv. Sh. at 99.

12. 10 U.S.C. § 831(a) (1970): "No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him."

13. Under the precedents and analysis discussed in note 10, *supra*, most general and some special courts-martial will not be final until after completion of the automatic appeal to the Court of Military Review and perhaps until the running of any time allowed for further appeal to the Court of Military Appeals.

14. See *United States v. Albert*, 31 C.M.R. 326 (A.B.R. 1961); *United States v. Powell*, 26 C.M.R. 521 (A.B.R. 1958); *United States v. Fleming*, 9 C.M.R. 502 (A.B.R. 1953). See also *United States v. Simpson*, SPCM 11744 (A.C.M.R. 14 Apr. 1977).

15. *United States v. Powell*, 26 C.M.R. 521, 526 (A.B.R. 1958) ["... we think that it would be preferable to give such a [Article 31] warning routinely if only to avoid any question of unfair treatment."]

16. *United States v. Fleming*, 9 C.M.R. 502, 506 (A.B.R. 1953).

17. *United States v. Howard*, 5 C.M.A. 186, 17 C.M.R. 186 (1954); but see *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969* (Rev. ed.), ¶ 140a(2), indicating that the trial judge may warn a witness of his rights if he begins to incriminate himself.

18. The Court's reasoning in *United States v. Howard*, 5 C.M.A. 186, 17 C.M.R. 186 (1954), was questionable when it was decided and is long overdue for reappraisal. One

would think that a prosecutor might have an ethical duty to warn a government witness of his rights. In any event a trial judge, no longer a "mere referee," can certainly be called upon to do so—a possibility apparently not considered by the 1954 Court. Further, if one is to be concerned with considerations of "efficiency" alone, the *MANUAL FOR COURTS-MARTIAL*'s discretionary warning requirement, see note 17, *supra*, a quasi-legislative judgement, would seem to destroy the issue.

19. Reply to the Assignment of Errors at 3, *United States v. Foer*, SPCM 12265, *appeal pending*, citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976), a prison disciplinary proceeding.

20. Respect for the principles behind Article 31 might transmute the warning to indicate that statements might be used against the accused in later proceedings of this trial as well as other proceedings. In *United States v. Fleming*, 9 C.M.R. 502, 507 (A.B.R. 1953), the court restricted later use of evidence given during a post-trial interview to proceedings involving the same offenses for which he had been sentenced. While Article 31(b) normally requires that a suspect be warned of the offenses of which he is suspected, there is authority to dispense with that part of the warning when it is clear that the accused knows the nature of the accusation, *United States v. Nitschke*, 12 C.M.A. 489, 31 C.M.R. 75 (1961), and surely the post-trial interviewee knows the nature of the offenses involved.

21. See note 14, *supra*.

22. 24 C.M.A. 207, 51 C.M.R. 452 (1976) [hereinafter cited as *McOmber*]. In *McOmber*, the court held that a suspect or accused known to be represented by counsel cannot be interrogated pre-trial unless counsel is notified of the interrogation and given a reasonable opportunity to be present.

23. However, the court found the error to be non-prejudicial.

24. 10 U.S.C. § 827 (1970). It is important to note the emphasis that the Court of Military Appeals has placed on continuing representation of the accused "post-trial" and during the appellate process. *United States v. Palenius*, 25 C.M.A. Adv. Sh. 222, 229-31, 54 C.M.R. Adv. Sh. 549, 556-59 (1977). Counsel may have an ethical duty to attend post-trial interviews as well as a legal right to do so.

25. *Faretta v. California*, 422 U.S. 806 (1975).

26. The statutory basis of *McOmber* is questionable at best. Compare *McOmber* with *United States v. Clark*, 22 C.M.A. 570, 48 C.M.R. 77 (1974). However, the case is now a major precedent and its reasoning would appear to apply at least in part to "post-trial" proceedings if one accepts the proposition that modification of findings

and sentence are neither infrequent nor purely gratuitous in our system. In any event, United States v. Palenius, 25 C.M.A. Adv. Sh. 222, 229-31, 54 C.M.R. Adv. Sh. 549, 556-59 (1977), requiring that there be no hiatus in representation, would appear determinative.

27. United States v. Goode, 23 C.M.A. 367, 50 C.M.R. 1 (1975).

28. United States v. Palenius, 25 C.M.A. Adv. Sh. 222, 229-31, 54, C.M.R. Adv. Sh. 549, 556-59 (1977).

Judiciary Notes

U.S. Army Judiciary

Administrative Notes

Staff judge advocate offices in the field are reminded that the following matters relating to the appellate rights of an accused should be accomplished within their respective jurisdictions:

a. If charges are referred to trial, and proceedings are terminated either before arraignment or findings for any reason, the following actions must be taken to complete the disposition of the case:

- (1) Transcribe and authenticate a record of proceedings held;
- (2) Forward a copy of the transcript to the accused;
- (3) If a general court-martial, a review lim-

ited to the issue of jurisdiction must be prepared by the staff judge advocate;

(4) An initial special or general court-martial order should be promulgated reflecting the proceedings, disposition of the charges, the usual recitals up to the point where the pleas are shown, and the fact that the accused "appeared" rather than "was arraigned and tried" in the initial recital, if the proceedings were terminated prior to arraignment. Following the recitation of the charges and specifications, a statement should be included in the order reflecting the reason for the termination of the proceedings at an intermediate stage. In this connection, see *The Army Lawyer*, May 1973, at 18.

(5) The transcript of proceedings with the allied papers specified in Appendix 9e of the Manual should be forwarded in general court-martial cases to JAAJ-CC, Nassif Building, Falls Church, Virginia 22041.

**QUARTERLY COURT-MARTIAL
RATES PER 1000 AVERAGE STRENGTH
JANUARY—MARCH 1977**

	General CM	Special CM		Summary CM
		NON- BCD	BCD	
ARMY-WIDE	.41	.30	1.50	.64
CONUS Army commands	.28	.35	1.62	.77
OVERSEAS Army commands	.65	.22	1.29	.42
USAREUR and Seventh Army commands	.83	.20	1.35	.40
Eighth US Army	.20	.06	1.13	.20
US Army Japan	—	—	—	.31
Units in Hawaii	—	.11	1.00	.33
Units in Thailand	—	—	—	—
Units in Alaska	.52	1.56	1.42	.42
Units in Panama/ Canal Zone	—	.14	2.30	2.16

**NON-JUDICIAL PUNISHMENT
QUARTERLY COURT-MARTIAL
RATES PER 1000 AVERAGE STRENGTH
JANUARY—MARCH 1977**

	Quarterly Rates
ARMY-WIDE	54.16
CONUS Army commands	59.22
OVERSEAS Army commands	45.24
USAREUR and Seventh Army commands	43.66
Eighth US Army	60.63
US Army Japan	46.53
Units in Hawaii	47.98
Units in Thailand	—
Units in Alaska	37.70
Units in Panama/ Canal Zone	50.11

b. When vacation proceedings have been instituted pursuant to Article 72, *Uniform Code of Military Justice*, in a general or special court-martial, an original and two copies of

the proceedings, together with the vacating order, should be forwarded to the Army Judiciary (JAAJ-CC) for inclusion in the court-martial record file.

Attorney General's Guidance on Freedom of Information Act Requests

The following letter is from the Attorney General

Office of the Attorney General
Washington, D.C. 20530

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: *Freedom of Information Act*

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

- (a) Whether the agency's denial seems to have a substantial legal basis.
- (b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies.

- (c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and
- (d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical, employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,
(Signed)

Griffin B. Bell
Attorney General

The 9 March 1976 memorandum from the Deputy Attorney General, referred to in the letter, pertains to coordination of final denial

of FOIA appeals with the Department of Justice.

Military Discussions at ABA Annual Meeting

Active duty and reserve judge advocates attending the ABA Annual Meeting in Chicago are reminded that 10 August will be a "red letter" day for military lawyers. At 1330 on that date, the General Practice Section, the Section of Individual Rights and Responsibilities, the Standing Committee on Military Law, and the Chicago Bar Association's Military Lawyers Committee will co-sponsor a panel discussion on "Women and the Military." The panel's moderator will be Alan DeWoskin. Speakers will be Mrs. Jill Wine-Volner, General Counsel, Department of the Army; Lieutenant Colonel Verna Kellogg, USAF, Coordinator for Women in the Services, Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics); Ms. Susan Ross, Women's Rights Project, American Civil Liberties Union; and Congressman Abner Mikva, 6th Illinois District.

This panel will discuss EEO Policies and Procedures affecting women in the military services and academies, and the impact of ERA on the services.

On the same day, starting at 1530, another panel will discuss "Unionization and the Military." Moderator for this panel will be Mr. Alexander White. Major General Wilton B. Persons, Jr., The Judge Advocate General of the Army, will serve as the DoD spokesman and a member of the panel with representatives of the armed forces of the Netherlands, the Association of Civilian Technicians, the American Federation of Government Employees, the Department of Labor, and the Federal Labor Relations Council of the U.S. Civil Service Commission.

Both presentations will be held in the Holiday Inn, Chicago City Centre.

JAG School Notes

1. 25th Advanced Class Graduates. The 25th Advanced Class graduation was held at TJAGSA on 27 May 1977. Dean John F. T. Murray, Colonel, USA (Ret.), TJAGSA Commandant from 1961 to 1965, delivered the graduation address. Major General Lawrence H. Williams, Captain John A. Jenkins, USN, and Colonel David L. Minton distributed the special awards and diplomas.

Captain Joyce Plaut was the Distinguished Graduate. Captain Plaut had the highest overall class standing, and the highest standing in command and management, in communications, and in criminal law. Captain Michael Wentink (Honor Graduate) graduated with the second highest overall class standing and the highest standing in administrative and civil law. Captain Marshall Kaplan had the highest standing in international law and Captain Robert Kirby (Honor Graduate) the highest standing in procurement law. Captains Dowell and Smyser were the other Honor Graduates. Five captains made the Commandant's List.

The Advanced Class presented four prints to the School as a class gift.

2. Articles for the *Military Law Review*. The *Military Law Review* will consider for publication writings of judge advocates or civilians. Articles, comments, recent development notes, and book reviews should be submitted in duplicate, triple spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. In general, articles should be least fifteen typewritten pages long. Footnotes should be triple spaced and appear as a separate appendix at the end of the text. Citations should conform to the *Uniform System of Citation* (12th edition 1976) copyrighted by Columbia, Harvard, and University of Pennsylvania Law Reviews and the Yale Law Jour-

nal, and to *A Uniform System of Military Citation* (1977) published by The Judge Advocate General's School, U.S. Army. Although decisions concerning publication are made by the Editorial Board only after thorough review, and no advance commitment concerning publication can be given, nevertheless the Board encourages submission of writings which combine scholarly research and analysis with the insight gained from practical experience.

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

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

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CLE News

1. CLE Credit for FDS Seminar. On 9 June 1977 the Board of Continuing Legal Education for the State Bar of Wisconsin approved Field Defense Services Defense Counsel Seminars for use toward Wisconsin mandatory continuing legal education requirement. Up to 8.0 hours may be earned through attendance at the seminars. Actual attendance by the individual lawyer is the determinative factor.

FDS is currently requesting CLE certification for its seminars from Minnesota and Iowa.

2. TJAGSA CLE Courses. Information on the prerequisites and content of TJAGSA courses is printed in CLE News, *The Army Lawyer*, June 1977, at 24.

July 11-22: 1st 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 29-September 2: 16th Federal Labor Relations Course (5F-F22).

September 12-16: 35th Senior Officer Legal Orientation Course (5F-51).

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

October 3-5: 2d Government Information Practices Course (5F-F28).

October 3-7: 5th Law of War Instructor Course (5F-F42).

October 17-20: 5th Legal Assistance Course (5F-F23).

October 17-21: 3d Defense Trial Advocacy Course (5F-F34).

October 25-26: 1st Criminal Law Developments Course (5F-F35).

October 26-27: 1st Procurement Law Workshop (5F-F15).

October 31-November 11: 73d Procurement Attorneys' Course (5F-F10).

November 14-18: 36th Senior Officer Legal Orientation Course (5F-F1).

November 28-December 1: 5th Fiscal Law Course (5F-F12).

December 5-8: 4th Military Administrative Law Developments Course (5F-F25).

December 12-15: 5th Military Administrative Law Developments Course (5F-F25).

January 3-6: 2d Claims Course (5F-F26).

January 9-13: 8th Procurement Attorneys' Advanced Course (5F-F11).

January 9-13: 6th Law of War Instructor Course (5F-F42).

January 16-18: 4th Allowability of Contract Costs Course (5F-F13).

January 16-19: 1st Litigation Course (5F-F29).

January 23-27: 37th Senior Officer Legal Orientation Course (5F-F1).

February 6-9: 6th Fiscal Law Course (5F-F12).

February 6-10: 38th Senior Officer Legal Orientation Course (5F-F1).

February 13-17: 4th Criminal Trial Advocacy Course (5F-F32).

February 21-24: 39th Senior Officer Legal Orientation (War College) Course (5F-F1).

February 27-March 10: 74th Procurement Attorneys' Course (5F-F10).

March 13-17: 7th Law of War Instructor Course (5F-F42).

April 3-7: 17th Federal Labor Relations Course (5F-F22).

April 3-7: 4th Defense Trial Advocacy Course (5F-F34).

April 10-14: 40th Senior Officer Legal Orientation Course (5F-F1).

April 17-21: 8th Staff Judge Advocate Orientation Course (5F-F52).

April 17-28: 1st International Law I Course (5F-F40).

April 24-28: 5th Management for Military Lawyers Course (5F-F51).

May 1-12: 7th Procurement Attorneys' Course (5F-F10).

May 8-11: 7th Environmental Law Course (5F-F27).

May 15-17: 2d Negotiations Course (5F-F14).

May 15-19: 8th Law of War Instructor Course (5F-F42).

May 22-June 9: 17th Military Judge Course (5F-F33).

June 12-16: 41st Senior Officer Legal Orientation Course (5F-F1).

June 19-30: Noncommissioned Officers Advanced Course Phase II (71D50).

July 24-August 4: 76th Procurement Attorneys' Course (5F-F10).

August 7-11: 7th Law Office Management Course (7A-173A).

August 7-18: 2d Military Justice II Course (5F-F31).

August 21-25: 42d Senior Officer Legal Orientation Course (5F-F1).

August 28-31: 7th Fiscal Law Course (5F-F12)

September 18-29: 77th Procurement Attorneys' Course (5F-F10).

3. Civilian Sponsored CLE Courses.

AUGUST

1-3: NYU School of Continuing Education, Managerial Skills for the Developing Manager, New York, NY. Contact: SCENYU Registrations, New York Conference, Management Center, 360 Lexington Ave., New York, NY 10017. Phone: (800) 223-7450. Cost: \$445 for the first person and \$395 for each additional person.

1-5: George Washington Univ.—Federal Publications, Government Contract Claims, Costa Mesa, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: \$550

4-11: American Bar Association, Annual Meeting, Chicago, IL. Contact: American Bar Association, 1155 E. 60th St., Chicago IL 60637.

7-12: American Academy of Judicial Education, Citizen Judges Academy, Univ. of Colorado, Boulder, CO. Contact: American Academy of Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005.

8: FBA-ABA Special Committee on Lawyers in Government, Annual Breakfast at ABA Convention, Chicago, IL.

11-23: NITA, 3d Annual Intensive Program in Trial Advocacy for the Northeast Region, Cornell Law School, Ithaca, NY. Contact: Professor Abraham P. Ordovery, National Institute for Trial Advocacy Regional Co-Director, Hofstra Law School, Hempstead, NY 11550. Phone: (516) 560-3642. Cost: \$750.

14-17: American Academy of Judicial Education, Evidence II: Opinion, Competency, Privileges and Best Evidence, New England Center for Continuing Education, Durham, NH. Contact: American Academy of

Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005.

18-20: American Academy of Judicial Education, Criminal Law II: Pretrial Procedures, Confessions and Identification, New England Center for Continuing Education, Durham, NH. Contact: American Academy of Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005.

19-4 Sept.: INFORM, Medical Legal Symposium in Japan. Contact: Peggy Mikuni, Yamato Travel Bureau, 312 E. First St., Los Angeles, CA 90012.

20-27: CPI, Trial Advocacy Seminar, Chicago, IL. Contact: Mrs. A. Brueck, Court Practice Institute, Inc., 4801 W. Peterson Ave., Chicago IL 60646. Phone: (312) 725-0166.

21-26: Eighth World Conference of World Peace Through Law Center, Manila, Philippines. Contact: Charles S. Rhyne, 400 Hill Bldg., Washington, DC 20006.

22-26: Univ. of San Francisco School of Law—Federal Publications, Concentrated Course in Government Contracts, Marriott Inn, Berkeley, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: \$550.

26-28: National College of Criminal Defense Lawyers and Public Defenders, Forensic Science, Minneapolis, MN. Contact: Registrar, NCCDLDP, Bates College of Law, Univ. of Houston, 4800 Calhoun Blvd., Houston, TX 77004. Phone: (713) 749-2283.

28-4 Sept.: International Congress on Civil Procedure "Toward Law Courts With a Human Face," Ghent, Belgium. Contact: Int'l Congress, Coupure 3, B-9000 Ghent, Belgium.

29-31: Federal Publications, Construction Contract Modifications, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: \$425.

SEPTEMBER

8-9: Federal Publications, Labor Relations, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$350.

8-10: NCDA, Prosecutor's Education Institute, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

20-22: 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.

21-26: World Peace Through Law Center, Washington, DC, Eighth World Peace Through Law Conference, Manila, Philippines. Contact: World Peace Through Law Center, Washington, DC.

23-25: National College of Criminal Defense Lawyers and Public Defenders, The Trial Jury, Jackson Hole, WY. Contact: Registrar, NCCDLPD, Bates College of Law, Univ. of Houston, 4800 Calhoun Blvd., Houston, TX 77004. Phone (713) 749-2283.

25-29: Appellate Judges Conference, Judicial Education Seminar, Traverse City, MI. Contact: Appellate Judges Seminars, Howard S. Primer, American Bar Association, 1155 E. 60th St., Chicago, IL 60637.

25-30: NCSJ, Sentencing Felons (Graduate), Judicial College Bldg., Univ. of Nevada, Reno, NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747.

25-30: NCDA, Prosecutor's Investigators School, FBI Academy, Quantico, VA. Contact: Registrar, National

College of District Attorneys, College of Law, Univ. of Houston, Houston TX 77004. Phone (713) 749-1571.

25-14 Oct.: NCSJ, Regular Session, Judicial College Bldg., Univ. of Nevada, Reno, NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747.

26-1 Oct.: FBA, Annual Convention, Caribe Hilton Hotel, San Juan, Puerto Rico. Contact: FBA, 1815 H St. NW, Washington, DC 20006. Phone (202) 638-0252.

27-29: LEI, Law of Federal Employment 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.

27-1 Oct.: CAJ, Legal Drafting Techniques, Gramercy Inn, Washington, DC. Contact: ABA Center for Administrative Justice, 1785 Massachusetts Ave. NW, Washington, DC 20036. Phone (202) 797-7050.

***The Army Lawyer* Now Available from the Superintendent of Documents**

Beginning with this issue, the Superintendent of Documents is making *The Army Lawyer* available to the general public. Current infor-

mation on the subscription price and mailing address will appear next to the listing of the Editorial Board in this and all future issues.

Administrative and Civil Law Sections

Administrative & Civil Law Division, TJAGSA

Federal Decision

(Insurance) A Servicemember Can Change The Beneficiary Of His Servicemen's Group Life Insurance Policy After Obtaining Divorce Without Regard To The Divorce Decree. *Stratton v. Servicemen's Group Life Insurance Company*, 422 F. Supp. 1119 (S.D. Iowa 1976). The divorced wife of a deceased serviceman brought suit against the Servicemen's Group Life Insurance Company to recover the proceeds from her former husband's policy. The Insurance Company interplead as defendants the three children of the serviceman, and was then discharged from the case after paying the disputed amount into court.

The deceased servicemember and the plaintiff (his divorced wife) were married in 1957 and had three children before their divorce in 1970. As part of the divorce decree the servicemember was to maintain his SGLI policy in the amount of at least \$10,000 and keep his wife as the sole beneficiary of the policy. However, sometime after the divorce the servicemember changed the beneficiary of his SGLI policy by completing a DA Form 41, requiring that his SGLI benefits be distributed as provided "by law." After the servicemember's death, his wife requested payment of the SGLI proceeds and her request was denied by the Servicemen's Group Life Insurance Company.

The court held that the servicemember failed to give written notification to the appropriate Armed Force's office of the requirement of the divorce decree that he maintain his former wife as sole beneficiary of his SGLI as required by 38 U.S.C.A. §§ 770, 770(a). In addition, such a notice would not have prevented the servicemember from making a post-decree change of his SGLI beneficiary without his former wife's knowledge or consent. (The plaintiff conceded in oral argument that the federal statute governing distribution of SGLI proceeds preempted state law in the area of SGLI.) The court also held that the phrase "by law" referred to statutory provisions governing distribution of benefits rather than the divorce decree, absent evidence to the contrary. On this basis the court ordered that the children were the first designated beneficiaries under the controlling statute (38 U.S.C. § 779(a)) and entitled to all proceeds from the servicemember's SGLI policy.

New Army Regulation

A new regulation, AR 310-4, has been adopted and will be sent to the field in the near future. The regulation prescribes procedures and responsibilities for publishing certain Department of the Army policies, practices and procedures in the *Federal Register*. The regulation defines the term "rule" as the "whole or a part of any Department of the Army Statement (regulation, circular, directive or other media) of general or particular applicability and future effect, which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice of the Army." The regulation provides that no rule will be issued unless a statement is on file with The Adjutant General to the effect that it has been evaluated in terms of AR 310-4. If it is determined that the publication requirements of AR 310-4 do not apply to the rule in question, this determination must be explained in the statement. The regulation requires legal officers and staff judge advocates supporting the proponents of rules to provide legal advice and

assistance in connection with their responsibilities.

The Judge Advocate General's Opinions

1. (Separation From The Service, Discharge Characterization) Enlisted Soldier With Approved But Unexecuted BCD, Released From Active Duty With A Character Of Service Described As "Honorable" Can Be Issued New DD Form 214 And BCD If A Punitive Discharge Is Affirmed On Appeal. DAJA-AL 1976/5861, 18 Nov. 1976.

An enlisted member (EM) entered active duty in June 1974 for two years. In March 1976, he was convicted by a BCD special court-martial, sentenced to a BCD, confinement at hard labor for three months and ancillary punishments. The sentence was approved by the convening authority on 25 June 1976. On 13 September 1976, the EM was released from active duty upon "completion of required service (ETS)." His records reflected no flagging action and no fraud was involved in his release. An opinion was requested whether a new DD Form 214 and BCD could be issued if the punitive discharge is affirmed on appellate review.

The Judge Advocate General stated the failure to flag the EM's records was not clearly error; AR 600-31 makes suspension of favorable personnel actions permissive for personnel in grades E-5 and below in other than national security cases. Therefore, the release from active duty was valid. Para. 2-4b, AR 635-200, provides that an EM "under sentence" to a BCD will not be discharged prior to completion of appellate review. It does not preclude release from active duty. This provision contrasts with that of the same paragraph for an EM "awaiting trial or result of trial," who "will not be discharged or released from active duty until final disposition of the court-martial charges." This distinction is appropriate because the authority delegated to commanders to discharge does not include authority to discharge members under court-martial sentence to a punitive discharge prior

to the completion of appellate review, unless the discharge authority intends to remit the conviction (para. 2-2*k*, AR 635-200; DAJA-AL 1971/5377, 13 Dec. 1971).

Because the authority to discharge the EM before appellate review of his court-martial case is completed had not been exercised, he was still within the administrative jurisdiction of the Army. TJAG expressed the opinion that if the BCD adjudged against him is approved on appellate review, it may be executed and the Form 214 he received on 13 September 1976 should then be corrected as prescribed by para. 2-4*c*, AR 635-5, to reflect the character of service he actually rendered.

2. (Military Installations, Law Enforcement, Bar To Reentry) TJAG Cautions Against Issuing Bar Letters To All Members Separated Under The Trainee Discharge Program. DAJA-AL 1976/6147, 29 Dec. 1976.

An opinion was requested of The Judge Advocate General whether a commander of a training installation has the authority to bar from reentry all members discharged under the Trainee Discharge Program, para. 5-39, AR 635-200. The opinion of The Judge Advocate General noted that the authority to restrict entry of civilians on an Army post arises from the responsibility imposed on the installation commander to safeguard the interests of the government and to preserve law and order on the installation. The commander's authority may be exercised at his discretion subject to the limitation that he may not be arbitrary or capricious. In JAGA 1956/8970, 27 Dec. 1956, The Judge Advocate General expressed the opinion that commanders would have the authority to bar all members who had been given punitive or undesirable discharges. In a later opinion (DAJA-AL 1976/3923, 9 Mar. 1976), the practice of issuing bar letters to all individuals who had received discharges as "rehabilitation failures" under the Army's Drug Exemption Program was viewed with disapproval. The latter opinion relied on the fact that DoD guidance on drug exemption did not view such activities as "misconduct." The instant opinion then noted

that the Trainee Discharge Program is analogous to discharges for "rehabilitation failures" under the Army's Drug Exemption Program. That is, the Trainee Discharge Program contemplates the discharge of individuals who cannot become productive soldiers for a variety of reasons. While disciplinary problems do constitute one possible basis for the discharge and may also provide sufficient reason to warrant the individual's exclusion from the installation, the blanket exclusion of such discharges without an evaluation of each case would be arbitrary. The opinion concludes that the issuance of letters prohibiting reentry on a military installation (18 U.S.C. § 1382) of former members, solely because they were discharged under the Trainee Discharge Program, is legally objectionable as an arbitrary exercise of command authority. There would be no legal objection, however, to the commander examining cases involving such discharges and exercising his authority on a case by case basis.

Federal Labor Relations Decision

(Federal Labor Relations, Unfair Labor Practices) **Council Sustains Arbitrator's Decision That Employees Detained For Gate Search Are Entitled To Overtime. U.S. Marine Corps Supply Center, Albany, GA. FLRC No. 75A-98 (8 Mar. 1977).** A report of missing government property led to a gate search of vehicles during the installation's close of work rush hour. Union representatives did not contest the right of the activity to make necessary searches, but contended that affected civilian employees were entitled to overtime pay under the collective bargaining agreement for being required to remain on government premises for the benefit of their employer. In awarding overtime to each employee whose departure was delayed more than six minutes, the arbitrator apparently relied in part on a factual determination that the delay in deciding to implement the search had been unreasonable. Based upon an interpretation of relevant overtime provisions received from the Civil Service Commission, the Council sustained the arbitrator's award.

Warrant Officer Position Now Available to Court Reporters*Reserve Affairs Department, TJAGSA*

Under the recent reorganization of the Reserve Component JAGSO Detachments, TOE 27-600H, the Military Law Center is authorized a warrant officer position, Legal Administrative Technician, MOS 713A. This position may now be filled by qualified Court Reporters (MOS 713A, 7B) and permits the individual to continue performing court reporter duties. Qualifications for award of the MOS may be acquired by previous training and experience or attendance at a technical course of instruction leading to qualification for Warrant Officer appointment.

Those seeking appointment to the rank of Warrant Officer (Legal Administrative Technician) must satisfy requirements for appointment as commissioned officers, as well as demonstrate their technical proficiency in their chosen MOS. Unit commanders will forward applications, through intermediate commanders, to area commanders who will forward the application to the Commander, U.S. Army Reserve Components Personnel and Administration Center (RCPAC), ATTN: AGUZ-PAD-PR, 9700 Page Boulevard, St. Louis, Missouri 63132. The best qualified method of selecting applicants will be followed for appointments.

The requirements and procedures for appointment of USAR Warrant Officer MOS 713A and 713A 7B are as follows: Persons eligible for appointment as USAR warrant officers, as provided in AR 135-100, paragraphs 3-32 and 3-33, are enlisted personnel of the reserve components; former warrant officers who are now civilians; officers and former officers; qualified technical experts or specialists who are former members of any component of any U.S. Armed Force. In addition, warrant officers in the active military service holding only temporary appointments, without component, may request appointment as a reserve warrant officer at any time prior to release from active duty. Appointment of qualified applicants is limited to (1) ready

reserve TPU vacancies based on MOS requirements; (2) active duty requirements; (3) reinforcement control group applicants who are exceptionally well qualified.

Applicants are required to submit Application for Appointment, DA Form 61, Statement of Personal History, DD Form 398, forms required by AR 381-130 for personal security investigation, medical history forms, college transcripts, employment records, as well as other evidence of fitness and eligibility depending upon their military background and citizenship status. A more detailed description of requirements can be found in AR 135-100, paragraph 1-3b and 1-4b. These forms should be submitted to an applicant's unit commander if the applicant is a member of a troop program unit; or to the commander of the unit where assignment is requested; or, if assignment to a unit is not requested, to the CONUS Army commander. The commander receiving the application shall review it for completeness and forward it through the intermediate commander to the area commander. The area commander shall refer the application to the appropriate staff section for technical review; once found eligible and recommended by the staff section, the area commander shall initiate action to obtain security clearance; arrange for a Type A medical examination; refer application to a board of commissioned officers; and forward application to RCPAC.

The Court Reporter Warrant Officer (MOS 713A 7B) program is a specialty within the Legal Administrative Technician (MOS 713A) program and accordingly a court reporter warrant officer is expected to be able to perform both administrative and court reporting duties. AR 611-112 requires him to be familiar with the UCMJ and the administrative responsibilities of a legal administrative technician, and to be able to function as a law librarian. An applicant must establish that he meets these AR standards through MOS tests,

including those of enlisted 71D's and 71E's, or through evidence of civilian acquired skills. Because an applicant for court reporter warrant officer must possess knowledge and skill of a specifically military character, the direct appointment of a civilian who lacks a background in military law will only be made for exceptionally qualified applicants.

Other than former commissioned officers, chief warrant officers, and E-8's and E-9's, applicants shall be appointed to the rank of WO-1.

Enlisted personnel seeking to become qualified in the MOS of court reporter may obtain self-paced instructional materials that are used in the resident court reporter course given at Fort Benjamin Harrison by writing to U.S. Army Institute of Administration, ATTN: ATSG-AS-PE (Legal Clerk Course) Mr. Turner, Fort Benjamin Harrison, Indiana 46216.

JAGC Personnel Section

PP&TO, OTJAG

1. Professor and Head of Department of

Law Sought at the United States Military Academy. The Superintendent of the United States Military Academy has appointed a committee to nominate a Professor and Head of the Department of Law. Each applicant must have a Bachelor of Laws (LL.B.) or a Doctor of Jurisprudence (J.D.) degree. Each applicant should have substantial experience in legal education and possess an outstanding breadth and depth of military and legal experience at all levels of the Army to facilitate supervising a predominately military faculty. Applicants should have attended a Senior Service School, fully understand the commander-military lawyer relationship, and have demonstrated a high capacity for academic achievement. If any applicant does not have a Master of Laws (LL.M.) or Doctor of Juridical Science (J.S.D.), he or she must be willing to complete the LL.M. degree within four years of selection. Anyone interested should address an application, together with supporting materials, to LTC Tarey B. Schell, Office of the Dean, USMA, West Point, New York 10996, by 15 August 1977.

2. Assignments

COLONELS

NAME	FROM	TO	APPROX DATE
MEYER, Harvey B. (Diverted)	Test & Eval APG, MD	Avn Sys Cmd, St Louis, MO	Jul 77

LIEUTENANT COLONELS

MC HUGH, Richard K.	USAIC Ft Benning, GA	USALSA w/dy Ft Benning, GA	Jul 77
RAY, Paul H.	OTJAG	82d ABN Div, Ft Bragg, NC	Jul 77

MAJORS

DICKERSON, Harry A. (Diverted)	USAG, Pres of SF, CA	24th Inf Div, Ft Stewart, GA	Jun 77
MULDERIG, Robert J.	1st Armd Div, Germany	USALSA w/dy Ft Hood, TX	Aug 77
PAULEY, Earl A.	USACAC, Ft Leavenworth, KS	USALSA w/dy Ft Lewis, WA	Aug 77
SCHNEIDER, Loyson E. (Diverted)	25th Inf Div, HI	Korea	Sep 77

NAME	FROM	TO	APPROX DATE
CAPTAINS			
BUFKIN, Henry P.	Sig Cen, Ft Gordon, GA	S&F, USMA, West Point, NY	Aug 77
ESTEY, Russel S.	USALSA	S&F, USMA, West Point, NY	Jul 77
LIVINGSTON, David J.	USALSA	4th Inf Div, Ft Carson, CO	Oct 77
MARTIN, Robert W.	XVIII ABN Div, Ft Bragg, NC	S&F, USMA, West Point, NY	Aug 77
MILLER, Joel D.	USALSA	S&F, USMA, West Point, NY	Aug 77
MORGAN, Donald	1st Inf Div, Ft Riley, KS	S&F, USMA, West Point, NY	Aug 77
NEWELL, Robert T.	USACC, Taiwan, APO 96263	USAE MAAG, China, APO 96263	Jun 77
SCHNEIDER, Arthur W.	USAG, Ft Meade, MD	S&F, USMA, West Point, NY	Aug 77
WERT, Robert C.	USATCI, Ft Dix, NJ	26th Adv Crs, TJAGSA	Aug 77

WARRANT OFFICERS			
NAWAHINE, Joseph	Sup Cmd, HI	S&F, TJAGSA	Sep 77
WALSH, Michael F.	USAG, Ft Sam Houston, TX	USA Crim Inv, Wash, DC	Aug 77
RIVES, Christopher J.	USATCI, Ft Dix, NJ	82d ABN Div, Ft Bragg, NC	Jul 77

2. Revocations

COLONELS			
LAKES, Cecil T.	OTJAG	Avn Sys Cmd, St Louis, MO	Jul 77
LIEUTENANT COLONELS			
MORROW, Cecil R.	BMDC, Arlington, VA	NGB, Pentagon	May 77
CAPTAINS			
CORBIN, Robert P.	XVIII ABN Corps, Ft Bragg, NC	USALSA	Jul 77
KLEFF, Pierre A., Jr.	III Corps, Ft Hood, TX	Korea	Aug 77
TAYLOR, Thomas W.	S&F, USMA, West Point, NY	26th Adv Crs, TJAGSA	Aug 77

3. Promotions—AUS

	COLONEL		
Wagner, Keith A.		1 Jun 77	
	LIEUTENANT COLONEL		
Tommepuu, Tonu		1 Jun 77	
	MAJOR		
Brittigan, Robert L.		1 Jun 77	
Coppenrath, Gerald		1 Jun 77	
Gersten, Michael E.		1 Jun 77	
Russell, Richard D.		1 Jun 77	
	CAPTAIN		
Bowen, Gary W.		6 Jun 77	
Gaydos, Lawrence A.		6 Jun 77	
	FIRST LIEUTENANT		
Fenney, Thomas J.		4 Jun 77	
Nelms, Russel F.		4 Jun 77	
Riddle, David A.		1 Jun 77	

	CW3	
Black, Carl E.		1 Jun 77
Cushing, William G.		

4. Promotions—RA

	MAJOR	
Carroll, Bartlett J.		6 Jun 77
Eckhardt, William G.		22 Jun 77
Gideon, Wendell R.		5 Jun 77
Green, Fred K.		3 Jun 77
McNeill, Robert H.		5 Jun 77
Naughton, John F.		8 Jun 77
	CAPTAIN	
Fagan, Peter T.		3 Jun 77
Osgard, James L.		3 Jun 77
Pietsch, James H.		3 Jun 77
Pogge, Philip T.		3 Jun 77
Rovak, Stephen H.		3 Jun 77
Smith, Gregory E.		3 Jun 77

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Carnahan, *Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry*, A.F. L. REV., Vol. 18, No. 4, Winter 1976, at 32.

Note, *Malpractice Immunity for Military Doctors*, A.F. L. REV., Vol. 18, No. 4, Winter 1976, at 81.

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Mimelkos, *Book Review*, A.F. L. REV., Vol. 18, No. 4, Winter 1976, at 102. [Review of KENNETH R. REDDEN & STEPHEN A. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL (1975).]

Smith, *Book Review*, A.F. L. REV., Vol. 18, No. 4, Winter 1976, at 103. [Review of OCEANA EDITORIAL BOARD, HOW TO MAKE A WILL/HOW TO USE TRUSTS (1975).]

Guise, *Book Review*, A.F. L. REV., Vol. 18, No. 4, Winter 1976, at 104. [Review of W. NOEL KEYS, KEYES ENCYCLOPEDIA OF PROCUREMENT LAW (1976).]

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Errata

The June 1977 issue of *The Army Lawyer* contains a speech by Richard A. Wiley, "Current Developments in Standards of Conduct," which he delivered at The Judge Advocate

General's School while he was General Counsel of the Department of Defense. *The Army Lawyer* extends its apologies to Mr. Wiley for incorrectly stating his former position.

By Order of the Secretary of the Army:

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

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

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