VOLUME 2 — NUMBER 9 — SEPTEMBER 1972

THE ARMY LAWYER

PUBLISHED BY: THE JUDGE ADVOCATE GENERAL'S SCHOOL CHARLOTTESVILLE, VA. 22901

21st ADVANCED CLASS UNDERTAKES NEW CURRICULUM

The School's 21st Judge Advocate Officer Advanced Class convened on 28 August 1972 with 35 Army officers, four Marines (including one lady Marine), a Navy officer, and allied officers from Iran, Pakistan, and the Philippines in attendance. Seven of the Army officers (including 4 USMA graduates) are recent law school graduates under the Excess Leave Program.

The purpose of the course is to prepare the officers for their future service in staff judge advocate assignments. To fulfill this purpose more effectively, substantial changes have been made in the curriculum. The required (core) course element of the curriculum has been reduced and the range of electives expanded. Core courses continue to include military criminal law, personnel (military and civilian) and administrative law, procurement law (with new emphasis on non-appropriated funds), legal problems of installation and organizational command (including race relations), and two areas of international law—respectively, status-of-forces agreements and the law of war. New this year is a separate course on office, fiscal and personnel management for military lawyers.

Elective courses include some which formerly were required, such as claims and litigation, advanced procurement law seminars, a seminar on proposed or pending military justice legislation, and the international law of human rights. Added to this range of electives are courses on personal affairs law, and seminars on contemporary judge advocate problems, current U. S. military problems, and administration of military justice.

In each of two semesters, the students will receive the equivalent of 11 semester or credit hours of core courses and 3 semester hours of electives. In lieu of some of the elective credits, students may pursue selected courses in the University of Virginia School of Law or Graduate School of Arts and Sciences (Woodrow Wilson Department of Government and Foreign Affairs).

The thesis program, which TJAG has described as essential to fulfilling the Corps' need for in-depth research and analysis, remains an important part of the Advanced Course curriculum. Added time has been made available for thesis preparation, and the thesis will be given increased weight in the final grading process. Other elements of the formal curriculum include participation in the annual JAG Conference, field trips, guest speakers, and a new program involving SJA visits to Charlottesville for practical discussions with the class. Of a less formal nature, but essential to the development of staff judge advocates, are programs designed to foster contacts with Basic Course students, allied officers, and the local community.

Present staff judge advocates should have every reason to look forward to being joined by the members of the class upon their graduation in June 1973.

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The Army Lawyer is published monthly by The Judge Advocate General's School. By-lined articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Manuscripts on topics of interest to military lawyers are invited to: Editor, The Army Lawyer, The Judge Advocate General's School, Charlottesville, Virginia 22901. Manuscripts will be returned only upon specific request. No compensation can be paid to authors for articles published. Funds for printing this publication were approved by Headquarters, Department of the Army, 26 May 1971.

SUPREME COURT REVIEW

By: Cpt. Stephen Buescher, Editor, The Army Lawyer

The following is a review of some of the Supreme Court cases for the October 1971 term, recently ended, which may be of special interest to the military lawyer. It is not a review of all Supreme Court opinions, but rather selects those felt to be most significant. Further, the case discussions are intended only to indicate the holdings for reference purposes, and are not in-depth analyses. Readers are invited to prepare short in-depth articles for The Army Lawyer on these, or other recent significant federal cases. Those interested should contact the Editor, The Army Lawyer, TJAGSA, Charlottesville, Virginia 22901.

1. *Search* and *Seizure*: *United States v. Biswell,* 92 S. Ct. 1593 (1972), stands as one of the most important cases in this area for the military in that it deals with inspections. Biswell was a pawn shop owner, licensed to deal in sporting weapons. He was visited by a Treasury agent who requested entry into a locked gun storeroom, citing Section 923g of the Gun Control Act of 1968 as his authority. This Act authorizes entry, during business hours, into "the premises (including places of storage) of any firearms . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises." Biswell opened the storeroom in the face of the statutory authority and the agent found illegal firearms. The Court stated that Biswell's submission to lawful authority in permitting the inspection was akin to a person acquiesing to a search pursuant to a warrant. Finding the statute to be lawful, the inspection held thereunder was held to be equally lawful. It was noted that requiring a warrant could defeat the purpose of the Act.

In *Adams v. Williams,* 92 S. Ct. 1921 (1972) a police officer was on early morning patrol car duty in a high crime area, when a person known to the police officer informed him that an individual in a nearby car was carrying narcotics and had a gun at his waist. The officer approached the car, and asked the suspect to open the door. He

rolled down the window instead, and the officer reached into the car and removed a gun from accused's waistband. The gun was not visible from outside the car. Accused was arrested for unlawful possession of the gun and a subsequent search revealed narcotics and other contraband.

The Court held that the informer's tip carried enough indicia of reliability to justify the stopping of accused. Further, it was stated that the seizure of the gun, to ensure the officer's safety, was reasonable, that probable cause existed to arrest for unlawful possession of the gun, and that the search incident to the arrest was lawful.

2. *Speedy Trial.* The Supreme Court decided two cases in the speedy trial area last term. The first was *United States v. Marion,* 404 U.S. 307 (1972). This case involved a three year lapse between the occurrance of the offense and the filing of the indictment. No specific prejudice was alleged by the accused. The Court held that there was no denial of speedy trial. It was stated that the Sixth Amendment does not apply "until the putative defendant in some way becomes an 'accused' an event which occurred in this case only when the appellees were indicted." Thus, pre-indictment delays, without more, are not prejudicial. Indictment, information or actual restraint must occur to trigger the speedy trial protections. The statute of limitations guards against delays occurring prior to the time the speedy trial protections are engaged. However, the Court also stated that actual prejudice, if shown, might be grounds for dismissal on a due process argument.

The second decision in this area was *Barker v. Wingo,* 92 S. Ct. 2182 (1972). Barker was arrested and charged, with other suspects, for murder. His trial was scheduled for September 1958, but delayed until October of 1963. The reason for the delay was the difficulty the state experienced in convincing another suspect, whose testimony was deemed essential to the state in petitioner's case. Barker was granted bail and obtained his release after 10 months in jail. He made no objection to the first 11 continuances granted by the trial court but did file a motion to dismiss the indictment, which motion was denied, on the twelfth continuance request. He did not object to two further continuances, but did object to a fifteenth continuance which was granted due to the illness of a witness. One additional continuance was granted for the same reason. Petitioner's motion at trial to dismiss the indictment for lack of speedy trial was denied and he was convicted.

The Court stated that speedy trial is a "more vague concept than other procedural rights" incapable of precise definition. The Court refused to quantify the right into a specific number of days or months. On the other hand, the Court also refused to hold that there can be no denial of speedy trial unless the accused makes a demand. It was stated that the accused has "no duty to bring himself to trial." Rather the Court treated the failure to assert the right as one factor, along with the length of delay, to be considered in determining whether there had been a denial of speedy trial. These two factors, plus the reasons for the delay and prejudice to the accused are the four factors identified by the Court to be considered. Using these factors, the Court held the delay in this case not to have been a denial of speedy trial.

3. *Right to Counsel. Argersinger v. Hamlin,* 92 S. Ct. 2006 (1972), extended the right to counsel to trials for misdemeanor and petty offenses. The DA message concerning the effect of this case on summary courts-martial was reproduced at 2-8 AL 7 (August 1972).

United States v. Tucker, 405 U.S. 443 (1972), held that the use in sentencing of prior convictions which were invalid for reason of being obtained without benefit of counsel was improper and required resentencing of Tucker. Similarly, in *Loper v. Beto,* 405 U.S. 473 (1972), the Court held that the use of convictions, constitutionally invalid under *Gideon v. Wainwright,* 372 U.S. 335, to impeach a defendant's credibility deprives him of due process of law. Accordingly, if the previous convictions obtained in violation of *Gideon* played a part in the determination of guilt, the conviction would have to be overturned. The case was remanded to the Court of Appeals for further proceedings.

4. *Line-ups:* Line-ups were considered in *Kirby* v. Illinois, 92 S. Ct. 1877 (1972), which held that the Sixth Amendment does not require counsel at a police arranged investigatory confrontation held prior to indictment. Thus, *United States v. Wade,* 388 U.S. 218 and *Gilbert v. California,*

388 U.S. 263 have been limited to those situations following final commencement of the adversary proceedings, i. e., following arraignment, information, formal charges, preliminary hearing or indictment.

5. Immunity: Two cases, *Kastigar v. United States,* 92 U.S. 1653 (1972) and *Zicarelli v. New Jersey State Commission of Investigation,* 92 U.S. 1670 (1972), held that testimony may be compelled by conferring immunity from use of the compelled testimony and use of any evidence derived from the testimony. In accepting use and derivitive use immunity the Court rejected accused's argument that only transactional immunity is consonant with the Fifth Amendment.

6. *Miscellaneous Criminal Law and Procedure*: The burden of proof for the admissibility of confessions was considered in *Lego v. Twomey,* 404 U.S. 477 (1972). It was held that the burden is only a preponderence of the evidence that the confession was voluntary. Once found to be voluntary by the trial judge, the accused is not entitled to relitigate the voluntariness of a confession before the jury. However, an accused may raise the circumstances of the taking of a confession before a jury for purposes of questioning its accuracy and reducing the weight to be given to it by the jury, but this information will not relate to admissibility or voluntariness.

Violation of a pretrial agreement was involved in *Santobello v. New York,* 404 U.S. 257 (1971), where a New York prosecutor recommended the maximum sentence in an inadvertent breach of his predecessor's guilty plea agreement not to do so. The Court held that the state court must determine whether the accused was entitled to withdraw his plea or merely to be resentenced.

Finally, In *Apodaca v. Oregon,* 92 S. Ct. 1620 (1972), and *Johnson v. Louisiana,* 92 S. Ct. 1643 (1972), the Court considered state provisions for less than unanimous jury verdicts in criminal cases except capital offenses and found that such provisions are not violative of constitutional rights.

7. *Conscientious Objectors*: The major case in this area was *Parisi v. Davidson,* 405 U.S. 34 (1972), already reported in 72-3 JALS 7.

The question of jurisdiction over conscientious objectors was considered in *Strait v. Laird,* 92 S. Ct. 1693 (1972). An Army Reserve officer not on active duty filed an application for discharge as a conscientious objector. His nominal commanding officer was the commanding officer of the Reserve Officer Component's Personnel Center at Fort Benjamin Harrison. However, his application was processed at Fort Ord, California, petitioner's state of domicile. The application was disapproved and Strait filed a petition for a writ of habeas corpus in a California District Court. Based on the decision in *Schlanger v. Seamans,* 401 U.S. 487, the Court of Appeals dismissed the action, holding that the District Court had no jurisdiction. In *Schlanger* a serviceman on active duty in the Air Force was studying in Arizona on assignment from Ohio. There was no officer in Arizona who was his custodian or in his chain of command, or to whom he was to report. In the absence of such a person the Court held that the District Court in Arizona was without jurisdiction.

The Court distinguished *Schlanger* from the present case. Strait was commissioned in California, which had always been his home. He was never on active duty. His application for a CO discharge was processed at Fort Ord. His only meaningful contact with the Army was in California. Unlike *Schlanger* which evidenced a total lack of normal contacts between that petitioner and the military in the district, all of Strait's contacts with the military had been in California. Accordingly, it was held that the District Court in California did have jurisdiction to hear Strait's petition.

8. *Military Reservations*: Two cases are of special interest in this area. The first is *Flower v. United States,* 92 S. Ct. 1842 (1972), reported in 72-8 JALS 7. In this per curiam opinion the Court held that the Army could not prevent handbilling on what was essentially a public street at Fort Sam Houston. However, this case must be read with *Lloyd Corp. Ltd. v. Tanner,* 92 S. Ct. 2219 (1972), which held that a privately owned shopping center could bar handbilling unrelated to the shopping center's operations. The shopping center, a closed mall type, was held not to be so dedicated to public use as to require a contrary result under the First Amendment.

9. *Legal Assistance*: Several cases of special interest to the legal assistance officer were reported during the past term. *Carleson v. Remillard,* 92 S.

Ct. 1932 (1972), affirmed the lower court holding that California could not deny eligibility for AFDC benefits when the parent was absent from home because of military service.

Reed v. Reed, 404 U.S. 71 (1972), and *Stanley v. Illinois,* 405 U.S. 645 (1972), dealt with sex discrimination. In *Reed* the Court held that the State could not give preference to males in the appointment of administrators of estates. In *Stanley* the Court found discrimination in the presumption that unwed fathers are unfit for custody of their children upon the mother's death and can be deprived of custody without a hearing.

D. H. Overmyer Co. v. Frick, 405 U.S. 174 (1972), and *Swarb v. Lennox,* 405 U.S. 191 (1972), dealt with cognovit notes and found them to be constitutional on their face. However, dicta in both cases indicated displeasure with these instruments. Specifically mentioned were situations of contracts of adhesion, unequal bargaining power, and the absence of consideration received for the cognovit provision, which might dictate a different result.

Replevin laws in Florida and Pennsylvania were the subject of *Fuentes v. Shevin,* 92 S Ct. 1983 (1972), which held that prejudgment replevin laws, authorizing summary seizure of personal property without affording the possessor an opportunity for a hearing, were violative of the due process clause.

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972), discussed a new revenue raising device. This airport, and several others, began levying a fee on passengers for deplaning in their airports. The levy was to be collected by the airlines. The court found the charge not to be unconstitutional.

Finally, *Dunn v. Blumstein,* 405 U.S. 330 (1972), considered Tennessee's residence requirement for voting. Blumstein was an Assistant Professor of Law who moved to Tennessee on 12 June 1970. On 1 July 1970 he attempted to register to vote. The County Registrar refused to register him on the ground that Tennessee law authorizes the registration of only those persons who, at the time of the next election, will have been residents of the State for a year and residents of the county for three months. The durational residence requirement was the sole issue in the case. Tennessee's power to restrict the vote to bona fide Tennessee residents was not disputed nor was it questioned that Blumstein was a bona fide resident of the state and county when he attempted to register.

The court stated that durational residence laws penalize those persons who have gone from one jurisdiction to another during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel. Turning to the question of whether the State had shown that durational residence requirements were needed to further a substantial State interest, it was stated that an appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community. However, duration residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard. The Court rejected Tennessee's arguments that the requirement was necessary. The 30-day waiting period between the close of election registration and election day was seen as sufficient to guard against the evils asserted by the State.

10. *Miscellaneous*: Three other cases merit attention by military attorneys. *Laird v. Nelms,* 92 S. Ct. 1899 (1972), discussed in 2-8 A.L. 8 (August 1972), affirmed the prohibition against absolute liability under the Federal Tort Claims Act. *S&E Contractors, Inc. v. United States,* 92 S. Ct. 1411 (1972), considered limitations on review of administrative decisions. This case is discussed at 2-6 A.L. 16 (June 1972).

The last case is *Sierra Club v. Morton,* 405 U.S. 727 (1972). The Sierra Club, a membership corporation with special interests in conservation, brought suit for a declaratory judgment and an injunction restraining Federal officials from approving an extensive skiing development in the Sequoia National Forest. On the theory that this was a public action involving questions as to the use of natural resources, the Sierra Club did not allege that the challenged development would affect the club or its members in their activities or that they used the area in question. The Court held that a person has standing to seek review under the Ad-

ministrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action.

LABOR-MANAGEMENT RELATIONS - RECENT CHANGES

By: Cpt. Walter W. Christy, Civilian Personnel Law Office, OTJAG

The term "labor-management relations" for many JAG officers probably evokes no thoughts of service-connected legal work, but, instead, is associated with the private sector of the law. Traditionally, this view has been justified in fact. In the recent past, however, a series of Executive orders (hereinafter referred to as E.O.), dealing with and authorizing Federal employees to organize and/or associate with labor organizations and to negotiate with the respective Federal agencies on certain matters, has changed this.

Prior to 1962, the right of Federal employees (except postal workers) to organize was not recognized. E.O. 10988, issued in that year, authorized Federal employees' activity in the labor organization field. Substantial modifications in this area were brought about by E.O. 11491, which became effective 1 January 1970. The most recent changes in the program resulted from the August 1971 amendment to E.O. 11491 by E.O. 11616, which changes are the subject of this article.

Organization among Federal employees has been substantial since 1962; hence, the chances are that a JAG officer may be called upon to provide expertise in the labor-management relations area during his career. Prominent among the numerous ways a JAG officer could become involved in labor-management relations is the situation where an installation commander requests the officer to review a proposed agreement between a Federal civilian employee union and the local installation. Another example is where the JAG officer is assigned to the negotiating team of the installation to work with and furnish legal support to the civilian personnel officers who negotiate the agreement with the union.

JAG officers should, then, have a general working knowledge of the provisions dealing with this burgeoning field, and should know what sources to consult for particular information when needed. This article will point out these sources and touch upon some of the more significant changes brought about by the August 1971 amendment of E.O. 11491.

The amendment makes substantial modifications in the area of grievance procedures and arbitration. One of the basic problems in this regard had been the overlapping and intermixing of rights and remedies afforded employees by statutes and regulations with the collective rights of employees established by negotiated agreement. Prior to its amendment, E.O. 11491 did not delineate a clear policy for the appeal of grievances for which there was no appeal right established by law. (Where such appeal rights are established by law, such matters should not be included in negotiated grievance procedures.) The amendment provides that the agreement may set forth negotiated grievance procedures and arbitration of only those matters involving the interpretation or application of the agreement and not matters outside the agreement. It further provides that the agreement is the exclusive vehicle for consideration of such grievances.

Before amendment, the E.O. allowed an employee to choose any representative, including one from a rival union, to represent him in a grievance over interpretation of the agreement negotiated by the exclusive representative. The amendmend rectifies this anomaly and provides that only a representative of the exclusive union or one approved by the union may represent the employee(s) in the unit or the exclusive union. The employee(s) may present the grievance himself without the intervention of the exclusive representative, but in such cases the exclusive representative must be given the opportunity to be present at the adjustment and, additionally, the adjustment by the agency cannot be inconsistent with the terms of the agreement.

That section of E.O. 11491 dealing with unfair labor practice complaints was revised both procedurally and substantively by the amendment. All unfair labor practice complaints are now to be processed and decided under the exclusive jurisdiction of the Assistant Secretary of Labor for Labor-Management Relations (Assistant Secretary) and the Federal Labor Relations Counsel (FLRC). Where a grievance includes an alleged unfair labor practice, the complainant has the option of proceeding under either the grievance procedure or under the unfair labor practice procedure established by the Assistant Secretary and the FLRC, but not both. Once the option is exercised, this becomes the employee's exclusive remedy for that particular grievance/complaint and he cannot thereafter invoke the other procedure.

E.O. 11491, prior to amendment, prohibited employees who represent a labor organization from negotiating an agreement with agency management on official time. The amendment establishes that the parties, union and management, may agree to a reasonable amount of official time for employees who represent the union in negotiating during regular working hours. There are limitations on the use of official time, however. Each employee representative involved in the negotiation of the agreement may spend during regular working hours a maximum of forty hours or a maximum of one-half the total time spent in negotiations during regular working hours. The number of such employee representatives on official time is generally limited to the number of management representatives.

The foregoing represents some of the more prominent changes made by the amendment. Reference should be made to E.O. 11616 for a complete recapitulation of such changes. E.O. 11491, as amended, is attached to DOD Directive 1426.1. This directive implements E.O. 11491, and it, in turn, is appended to the recently amended "Legal Guide to Negotiations" prepared by the Civilian Personnel Law Office of OTJAG. Hence, the guide represents the comprehensive source book for this area as well as an excellent step-by-step directive on negotiating with unions. Copies of the guide may be obtained by writing to the Civilian Personnel Law Office, Office of The Judge Advocate General, Department of the Army, Washington, D.C. 20310, or calling Area Code 202 - OX - 59300, 57897, 59476, or 59481.

Have the employees of your local PX organized yet? They may be doing so now. It is recommended that the materials referred to above be reviewed by all JAG officers and kept at hand for use when needed.

SJA SPOTLIGHT—U.S. ARMY ALASKA

By: Captain John K. Plumb, Assistant Staff Judge Advocate

To understand the role of the Judge Advocate stationed in Alaska, it is important that one appreciate the uniqueness of the 49th State and the position that the military occupies within it.

Alaska, called "The Great Land" by her native peoples, is today a vast wilderness characterized by contrast: It is a land of frozen arctic tundra as well as a land of plush, green rain forests; a land where temperatures range from 60-70 degrees below zero during the winter months to 85-90 degrees above in the summer; it is a land which at times is in complete darkness for several months and a land over which the sun never sets during other times of the year. The Army has been present in Alaska since October of 1867, when Russian sovereignty over Alaska was transferred to the United States. During the later part of the 19th Century, the Army maintained various posts throughout the Territory and it was charged with not only the performance of its military duties but also with the civil administration of Alaska.

The military has contributed greatly to the development of America's last frontier; for example, the military established a communication system throughout Alaska and linked the many small towns and outposts to the "Lower 48"; the Corps of Engineers constructed the Alaskan Highway during World War II, giving the Territory its only overland link with "The outside world"; also, during World War II, enemy forces invaded portions

of this state along the Aleutian Chain and the military met the task of dispersing them. In times of natural disaster, the military has served and continues to serve the citizens of Alaska, whether it be in the evacuation of isolated villages threatened by flooded, ice-jammed rivers, or in the assistance of fire-fighting operations throughout the state forests, or in the cooperation with mountain rescue teams.

The Army forces in Alaska today are located at three major installations: Fort Richardson in the Anchorage area, Fort Wainwright in the Fairbanks area; and at Fort Greely. The combined military strength composes United States Army, Alaska, which in turn is assigned to the Alaskan Command, the nation's first unified command staffed jointly by Army, Navy, and Air Force Officers. The headquarters for USARAL is located at Fort Richardson, also the home of the 172d Infantry Brigade. At Fort Wainwright the 171st Infantry Brigade is established, while at Fort Greely, a small post approximately 100 miles southeast of Fairbanks, the U.S. Army Northern Warfare Training Center is found. USARAL's major subordinate commands are the three posts; the two Brigades; the 222d Aviation Battalion; the 43d Artillery Battalion (Air Defense); and the Northern Warfare Training Center. The United States Army Strategic Communication Command Signal Group (Alaska) provides communications and photographic support.

The present physical structure of the Judge Advocates in Alaska finds the Staff Judge Advocate, the Deputy Staff Judge Advocate, and seven Captains located at Headquarters, USARAL; three Captains at Fort Wainwright; and one Captain at Fort Greely. While most of the significant legal problems confronting other Staff Judge Advocates throughout the military are also present in Alaska, in addition many unusual situations arise here due to the uniqueness of the Alaskan environment.

Military Law:

Although the amount of the court-martial load may at first seem small compared to the larger military installations throughout the world, it must be remembered that the Alaskan Command, although large in area, is small in number and that only one trial and one defense counsel litigate cases at Fort Richardson and similarly at Fort Wainwright. A synopsis of the entire court docket for USARAL during the months of January through April, 1972 (inclusive), reveals that there were thirty-three summary courts-martial; twenty-eight special courts-martial; twenty-five BCD specials; and seven general courts-martial. The type of cases vary a great deal, and there seems to be a relatively few number of the AWOL offenses that are encountered elsewhere.

At present there is no military judge assigned to USARAL, and thus the court calendar must be arranged pursuant to the availability of military judges from the "Lower 48". Generally, members of the Judiciary from Fort Lewis, Washington, make regular flights to Fort Richardson and Fort Wainwright to hear cases; however, recently they have come from as far away as Hawaii to adjudicate trials.

It should be noted that within the entire USARAL command there is but one general court-martial convening authority, namely the Commanding General, U.S. Army, Alaska; and, there are eight special court-martial convening authorities; the Post Commander of Fort Richardson, the 172d Infantry Brigade Commander, the Fort Wainwright Commanding General, the 171st Infantry Brigade Commander, the Post Commander of Fort Greely, and the Commanding Officers of STRATCOM-Alaska, the 43d Artillery Battalion and the 222d Aviation Battalion. Frequently the Army lawyers working in the field of military justice find themselves traveling from one post to another; as Fort Richardson and Fort Wainwright are over 300 miles apart a good deal of flying time is logged by these JAG officers. To be fully aware of the great distances confronting the Alaskan attorney, the trying of a general court-martial in Fairbanks can be compared to convening a court in Frankfurt to be tried at Berlin with a military judge from Fort Dix, New Jersey.

Administrative Law

a. *Military Affairs:*

Frequently issues concerning State law and its applicability to the military will confront the officers involved in military affairs work, as concurrent jurisdiction exists over military property within Alaska. It is essential that the Judge Advocate

officer have a working knowledge of both military and State law when dealing with problems which may involve both jurisdictions. Interesting to note is the fact that since Alaska has been a state for a very short period of time (statehood having been obtained in 1959), her laws are, in many instances, still in the early stages of development; in many other cases, there just isn't any precedent for certain issues. A close liason is required between the USARAL attorneys and the various State agencies such as the Departments of Fish and Game, Health and Welfare, or Taxation, and again, the problem frequently arises that due to their relative newness, not all questions of law have been answered.

Recently, representatives of the National Forest Service, the National Park Service, the State Department of Fish and Game, and JAGC personnel from USARAL entered into an agreement of submission to a unified federal magistrate's program. The system grants the magistrate jurisdiction over all the lands within the State which these agencies represent, and it is characterized by a forfeiture of collateral schedule. At the time of this writing, the system has received approval by the U.S. District Court in Anchorage, Alaska, and will soon become an effective operating program upon finalization of administrative formalities. It is expected that the majority of cases to affect the military under this new system will be minor traffic violations, and it is hoped that the new program will provide a uniform method for handling such infractions.

It is the responsibility of the military affairs branch of the USARAL Staff Judge Advocate's Office to review reports of survey from various Alaska National Guard Units throughout the State. In most cases these reports relate to incidents in tiny, remote Eskimo villages, hundreds of miles away from Fort Richardson. It should be noted that the Alaskan National Guard units are composed of a very proud group of people, many of them Eskimo or Alleuts, and that these men contribute greatly to the strength of USARAL for they, more than anyone else, have an unsurpassed knowledge of the Arctic terrain.

Of more and more importance each day to the Army lawyer in Alaska is the issue of environmental law. The concern for protecting man's environment is magnified by the fact that Alaska is indeed America's last frontier. A close watch is kept on all military exercises conducted on military, federal, and/or state land, by both the Corps of Engineers as well as the Staff Judge Advocate's Office. Environmental assessments are presented to both the JAG and the Engineers with a view toward the need for possible environmental impact statements and compliance with federal and state environmental laws. With the recent publicity given to construction of the Alaska pipeline, it is interesting to note that the Army has had in operation for several years pipelines within the State of Alaska. A close relation between the Federal Environmental Protection Agency representatives and the Petroleum Directorate of USARAL is maintained and issues concerning the pipelines are discussed and analyzed freely between both groups.

b. *Procurement:*

The Judge Advocate finds himself in a position of advising Post Commanders, purchasing and contracting officers, as well as the Head of Procuring Activity (HPA) of USARAL, on matters relating to government procurement. He is also in the position of a reviewing authority of Invitations for Bids (IFB) as well as contracts to be awarded.

An area of concern to most attorneys in the procurement field is that of nonappropriated fund (NAF) contracting. Recently efforts were undertaken to formulate standard contracts to be utilized by the non-appropriated funds, and to have all NAF contracts pass through both the Purchasing and Contracting Office as well as the SJA Office. Furthermore, at present, efforts are being undertaken to establish an S.O.P. for NAF Contracting.

One of the difficulties in procurement within Alaska is the transportation problems involved with shipping products not only to, but also within, the State. The severity of the winter months (September to May) creates a very short construction season, and contractors must adjust their schedule according to the weather.

It is estimated that procurement on an annual basis amounts to approximately 14 million dollars from Fort Richardson and 11 million dollars from Fort Wainwright (to include Fort Greely).

c. *Claims:*

Each of the three posts within USARAL has a Claims Office with approval authority of $1,000.00. All action on claims over $1,000.00 are forwarded to Headquarters, USARAL, where a Command Claims service has been established. The size of Alaska is reflected by the fact that the Claims Office at Fort Richardson can receive claims from as far away as the remote military outpost of Shemya, 1500 miles to the West, from Ketchikan, 1000 miles to the southeast, or 1000 miles to the north from Point Barrow on the Arctic Ocean.

Recent military emphasis on adventure training over mountainous terrain, on Arctic ice caps, or down icy cold rivers, creates an unusual problem of investigating claims due to the great distances involved. In addition, winter training and the conditions encountered during that season results in dealing with increased motor vehicle accidents. Often it is difficult to replace or repair many damaged items, and the extremely high cost of living in Alaska adds to the problem of restoration, a factor that is also true for personal claims.

A unique claim recently arose when many privately-owned recreation boats of military personnel were damaged or destroyed when the government Storage facility at Whittier, Alaska, collapsed under weight of record deep snows.

The Claims Office has emphasized over the past two years the need to decrease processing times on small claims and to improve recovery actions, both against carriers and third party tortfeasors.

d. *Legal Assistance:*

The military attorney involved in legal assistance will encounter on a daily basis questions concerning family problems, landlord-tenant rights, and financial issues. The extremely high cost of living in Alaska frequently causes difficulties for the young enlisted man and his family upon their arrival in the Command, difficulties which the JAG officer may eventually help to resolve. One of the goals of the program has been to operate on a non-appointment type basis and assure that every client is counselled without having to wait more than 15 minutes at one time.

The military attorney in Alaska has the advantage of working within a relatively small office, while at the same time assuming a great deal of responsibility in his professional capacity. During his off duty hours he has available some of the best hunting, fishing, skiing, hiking, and photography, in the world.

A UNIFORM FILING SYSTEM FOR ADMINISTRATIVE LAW OPINIONS

By: Jack F. Lane, Jr. CPT, JAGC Civil Law Division, TJAGSA

Soon after his arrival at Fort Blank, the new deputy staff judge advocate was asked to review a proposed change to a local policy directive. He asked the Chief of the Administrative Law section, Captain Jones, if they had previously reviewed the policy directive when it was initiated or changed.

"Well, we probably did. I'll see if I can find anything in the files on it."

"What do you mean you'll see if you can find anything in the files?" queried the deputy.

"I'll look through the opinions we have saved from the year that directive was published and see if we have an opinion on it. As for any later changes, I'll just have to sort through the files for each year since then."

Needless to say, Captain Jones and the deputy are in for many wasted, frustrated hours of research" for administrative precedence. This frustration is not necessary if a modest amount of time is devoted to organizing the precedent files for easy reference, using the system that several JAG offices around the country have instituted. This system was published in a TJAGSA text entitled *Effective Research Aids for the Preparation of Military Affairs Opinions,* and, in a revised form, will appear in the Military Administrative

Law Handbook now being prepared at the School. Here's the system.

(1) *Assignment of Case Numbers.* A case number is required for each case on which action is taken by the division. Every case will be numbered consecutively beginning with the number one on the first day of January of each year. For example, the division secretary will assign the first case received or prepared in the division in 1972, the number AL 72/1; the next will be AL 72/2, etc. Memorandums of telephone conversations, etc., will be assigned the number next available at the time of preparation.

(2) *Controls.* Action papers which come to the division will be entered in a log maintained by the division secretary. This log shall contain columns for the following entries:

(a) Administrative Law Case number.

(b) Date received.

(c) Subject (e.g., LOD, Report of Survey).

(d) Action requested (e.g., coordination, concurrence, comment).

(e) Requesting office.

(f) Name of Action Officer.

(g) Suspense date, if any.

(h) Date out.

(i) Where filed (i.e., Permanent Policy and Precedent File or Convenience File).

The use of a file cover sheet (Appendix) will also provide a control for all on-going opinions in the Administrative Law section.

(3) *Topical Card File.* The division secretary will maintain an Administrative Law Division Topical Card File. Each card will contain a digest or statement of the subject matter of a particular case as prepared by the Action Officer. The card will also include the topic heading indicated by the Action Officer, the case number, the date, and any references indicated by the Action Officer. In many cases several digest cards will be prepared because a single opinion will touch on several topics. The case number on the topical card is the reference used for locating any particular case. The card file will have dividers for each topic and subtopic heading listed in the List of Topical Headings in the School text. Each divider will have a tab on which the topic or subtopic is typewritten and will be arranged alphabetically in the file container. When a digest card is completed it will be filed behind the proper divider chronologically according to the assigned case number. As new topics and subtopics are suggested, the secretary will prepare and insert new dividers and tabs in the existing file. No distinction is made in this file as to whether the opinion referenced is filed as a precedent or temporary convenience opinion.

(4) *Documents Files.* The division secretary maintains two separate opinion document files. They are the permanent policy and precedent file and the temporary convenience file. The convenience file will contain all opinions prepared in the current and preceding years (e.g., 1971 and 1972), arranged by case numbers. The policy and precedent file, arranged by years, will contain selected opinions prepared prior to the preceding year (e.g., 1970 and earlier), and the opinion will be filed by case numbers within each group. The Action Officer on each case will indicate in which of the two documents files the file copy should be filed. Documents in the convenience file from the preceding year (1971) should be reviewed at the end of the current year (1972) or at the start of the new year (1973) to determine if any opinions should be placed in the policy and precedent file. Those not selected to remain as precedent will be destroyed, along with all topical index cards, according to applicable disposition instructions. The documents in the policy and precedent file and their related index cards will be destroyed only when they are no longer needed for reference. It is important to note that the SJA office is frequently the only staff office in the headquarters with a record of prior actions.

One useful variation for jurisdictions having a large number of boards or similar routine actions is to maintain a name file. Thus, a routine elimination board would be filed by the name of the respondent only, and not under the other categories, such as "Discharge," "AR 635-212" or "Boards of Officers." The latter file topics would be used only if a novel question was considered in reviewing a board case and such cross referencing was desirable. The advantage of the name file is that

most requests for information in these routine actions is simply by the name of the individual concerned. While most name cards will not be retained past the two year limit, some may remain as precedent when there is some indication of possible litigation in the future.

Utilization of this system in every JAG office maintaining a precedent file of opinions will save valuable research time and insure greater consistency in the rendering of advice to the commanders and their staffs. Additionally, if the system is instituted Corps-wide, it will be a great assistance to all officers as they move from post to post. Sound management dictates having a good, easy-to-maintain indexing system for office precedent, and any lawyer should be able to see the advantages of such a system, especially in as rapidly expanding an area as administrative law.

Appendix

Administrative Law Division
File Cover Sheet

Case No..... Subject:.....

.....

Action Officer:..... From:.....

Policy & Precedent: ..... Temporary Convenience File: .....

Topic	*Digest of Opinion*
Statutes	
Regulations	
Prior Opinions	
Other	

LEGAL CLERKS COURSE IN FULL SWING

The MOS producing legal clerks course at Ft. Benjamin Harrison is now in full operation. By 1 September three classes will have graduated. From that time forward a class of approximately 45 legal clerks will graduate every two weeks. Thus, the input of new legal clerks, intended to fill the newly authorized position for legal clerks at the battalion level, will begin reaching the field in sufficient numbers to have a real impact.

Staff judge advocates are urged to be on the lookout for these new legal clerks as they reach their commands. Many have no prior practical experience in either the day to day activities of an Army unit or of a general court-martial jurisdiction staff judge advocate office. It has been suggested that the new legal clerks spend a week in the staff judge advocate office to become acquainted with post and office procedures and personnel. This orientation would be of great value to the legal clerk and will give the staff judge advocate an opportunity to evaluate the schooling program. Equally important is insuring that the ultimate assignment of the legal clerk is to a non-JAG office at the battalion level where he can be of assistance with the legal tasks of the battalion commander. These new legal clerks must not be wasted in positions not requiring their special skills. With the help of all staff judge advocates this program will greatly enhance the quality of legal service to the field.

MILITARY JUSTICE ITEMS

From: Military Justice Division, OTJAG

USE OF MILITARY JUDGE SEARCH WARRANTS TO BE ENCOURAGED

The May Consolidated Military Judge Report indicates that only three search warrants were requested of military judges during the reporting period. These three were requested of special court judges. During May, no requests for the issuance of search warrants were directed to general court judges.

Change 8, AR 27-10, was designed to provide a method whereby a trained legal officer would be available to determine if probable cause existed so as to justify a search and seizure and to authorize the search if he found it. Searches authorized by military judges, as opposed to those authorized by commanders acting on their own, will have a greater probability of withstanding legal challenge. Change 8 has been expanded by Change 9, AR 27-10, effective 1 August 1972, under which certain commanders may authorize part-time military judges to issue warrants.

Staff judge advocates are encouraged to communicate and publicize the substance of Changes 8 and 9, AR 27-10, as they relate to the issuance of search warrants, to their local provost marshals, criminal investigators, and commanders. These individuals should be encouraged to obtain search warrants from military judges in all cases where a military judge is reasonably available.

Comments in regard to the value of judge-issued search warrants and any of the problems of implementation involved therewith should be forwarded to the Military Justice Division, Office of The Judge Advocate General, Department of the Army, Washington, D. C. 20310.

New Argersinger Message

SUBJ: Sentence to Confinement

1. Reference DA message 1012037 Jul 72, subject as above.

2. Prior guidance on counsel requirements based on Supreme Court decision in case of Argersinger v. Hamlin is clarified as follows:

a. Confinement may be adjudged and approved when a knowing and intelligent waiver is made of the representation at trial by lawyer counsel.

b. A knowing and intelligent waiver of counsel is permissible only after consultation with lawyer counsel, or, after accused affirmatively declines such consultation.

c. The military judge or summary court officer will verify whether the accused has consulted with lawyer counsel or affirmatively declines such consultation.

d. The military judge or summary court officer will ascertain whether the accused waives representation by lawyer counsel at trial, and, if aplicable, will indicate such waiver in the record.

Power of Courts-Martial to Adjudge Certain Sentences

It is the opinion of The Judge Advocate General that a court-martial may not legally adjudge a sentence which includes correctional custody. Neither may a convening authority mitigate any sentence to correctional custody. However, extra duty is still a permissible punishment either as a legally adjudged sentence or as a less severe sentence to which some sentences may be mitigated by the convening authority when taking action on the sentence.

Court Reporters

It sometimes becomes necessary to locate the court reporter that prepared a record of trial. If that court reporter has departed the command or has been separated from service, it facilitates locating the current address of the individual if the social security account number is known. It is suggested that all records of trial include the reporter's social security account number.

REPORT FROM THE U.S. ARMY JUDICIARY

STATISTICS

Comparative Year End Statistics.

a. *U.S. Army Judiciary**

	FY 1972	*FY 1971*
Records Received for Review or Examination		
GCM	2291	2751
BCD SPCM	1028	1191
Trials by Military Judge Alone		
GCM	72%	86.4%
BCD SPCM	91.8%	98.3%
Guilty Pleas		
GCM	51.5%	47.6%
BCD SPCM	57.1%	45.5%
Decisions by Army Court of Military Review	3156	3206
Findings & Sentence Affirmed	2293 (72.7%)	2430 (75.8%)
Findings Affirmed, Sentence Modified	634 (20.1%)	543 (16.9%)
Other	229 (7.2%)	233 (7.3%)
Actions by Examination Division (Article 69 cases)		
Legally Sufficient or Jurisdiction noted	456	374
Referred to COMR	45	33
Applications for Relief under Art. 69		
On Hand, Beginning of Year	106	235
Received	463	449
Granted	92	152
Denied	396	399
Other	12	27
Pending, End of Year	69	106

b. *United States Court of Military Appeals.*

Petitions for Review Granted	54	63
Petitions for Review Denied	702	421
Certifications by TJAG	15	11
Decision of COMR Affirmed	29	39
Decision of COMR Reversed	33	38

*Figures are based on records received or reviewed in the U.S. Army Judiciary during the designated periods and such figures refer to the number of persons.

ADMINISTRATIVE NOTES

Realignment of Judicial Areas and Circuits. General Order Number 20, Office of The Judge Advocate General, 27 July 1972, realigns judicial circuits, with the result that judicial areas have been abolished and the number of judicial circuits has been reduced from 17 to 6. The senior trial judge (Chief Judge) of each circuit and the geographic boundaries of each are as follows:

First Judicial Circuit (COL Peter S. Wondolowski): Maine, New Hampshire, Vermont, Connecticut, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Pennsylvania, Maryland, District of Columbia, Virginia, West Virginia, Ohio, Kentucky (less Fort Campbell), Indiana, Michigan, Puerto Rico, and the Canal Zone.

Second Judicial Circuit (COL Richard L. Jones): North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, and Kentucky (Fort Campbell only).

Third Judicial Circuit (COL Don W. Adair): Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Kansas, Missouri, Illinois, Wisconsin, Iowa, Nebraska, Wyoming, North Dakota, South Dakota, and Minnesota.

Fourth Judicial Circuit (COL Rawls H. Frazier): Arizona, California, Nevada, Utah, Oregon, Washington, Idaho, Montana, and Alaska.

Fifth Judicial Circuit (COL Carl G. Moore): Europe, Africa, and Middle East.

Sixth Judicial Circuit (COL Harold V. Martin): Hawaii and Far East.

The change of name from Area to Circuit conforms to the federal designation of its larger administrative jurisdictions. This realignment eliminates the former cumbersome and unnecessary division of Judicial Areas into sub-units (circuits) with its concomitant administrative burdens. The Chief Judge of each Circuit will be the direct administrator of all military judges within his circuit. He will maintain an up-to-date judges' calendar for his circuit so that he can readily ascertain the availability of judges and program requirements. By following generally the lines of the present Army Areas, better coordination between Army Staff Judge Advocates and the Chief Judges of the Circuits should result.

JAG-2(R8) Quarterly Reports

Staff Judge Advocates of each command having general court-martial jurisdiction are reminded that the JAG-2(R8) report for the period of 1 Jul-30 Sept 1972 should be forwarded to HQDA (JAAJ-CC) not later than 11 Oct. 1972.

RECURRING ERRORS AND IRREGULARITIES

July 1972 Corrections by COMR of Initial Promulgating Orders.

(a) Failure to show a charge and its specification.

(b) Failure to show amended specifications—five cases.

(c) Failure to show under PLEAS that the pleas to certain charges and specifications had been changed to not guilty—two cases.

(d) Failure to show under PLEAS that the pleas to a certain charge and specification had been changed to guilty.

(e) Failure to show under PLEAS that a certain charge and its specification had been dismissed on motion of defense.

(f) Failure to show that the sentence was adjudged by a military judge—five cases.

(g) Showing, incorrectly, that the sentence was adjudged by a military judge.

(h) Failure to show that a previous court-martial conviction was considered—four cases.

(i) Failure to show the date of the ACTION.

(j) Failure to show in the authority paragraph that the CMCO had been amended—two cases.

(k) Showing, incorrectly, the accused's Social Security Number—three cases.

CLAIMS ITEMS

From: U.S. Army Claims Service, OTJAG

Explosive Ordnance Cases. The inadequate investigation of explosive ordnance accidents is a matter of increasing concern. Recent investigations indicate a lack of close liaison between claims officers and explosive ordnance disposal detachments which are established by major Army commands to insure explosive ordnance disposal service on a 24-hour basis.

In a recent case, an old 40 mm artillery shell with casing and projectile intact was found near Highway U.S. 54 on the Fort Bliss reservation. The shell was taken by several teenage boys to the home of one of them in El Paso where a hole was drilled in the percussion primer which caused the primer to detonate. As the powder was wet the cartridge case erupted but the illuminant of the projectile did not burn and the projectile did not detonate. Subsequently, the local EOD team destroyed the projectile in a test. Identifying information on the projectile was not preserved. Difficulty is now being encountered in attempting to trace the origin of the shell due to the absence of the projectile. If the shell was issued to units other than those at Fort Bliss, this could be crucial as to the question of liability of the United States.

The responsibilities and procedures for explosive ordnance disposal are set forth in AR 75-15. These EOD detachments are located on most major Army posts and have a geographical area of responsibility. Claims officers should establish liaison to insure that they become aware of explosive ordnance accidents involving military explosives which cause incidents giving rise to potential claims requiring investigations as provided in paragraph 2-3, AR 27-20. Upon receipt of notice of an incident, claims officers should gather information from the members of the EOD team who were involved in the disposal mission. Such information should include but not be limited to: statements from the members of the team involved which include all details known to them; establishment on a map the exact place where the military ordnance was originally discovered prior to the incident; the exact location where it exploded; the circumstances of the explosion itself; whether other ordnance was located within the area of discovery; and, if so, the exact nature and number of such ordnance and whether such ordnance had explosive capabilities.

Explosive ordnance disposal teams are being requested through Army channels to preserve the fragments or other explosive particles involved in an explosion. They are also being requested to photograph such items from various angles and to show the dimensions of the items. Similar photographs are requested to be taken of accompanying unexploded devices to show all identifying markings.

If the explosive ordnance was found outside the used impact area or outside Government property, the investigation should include information as to how the item arrived at the place where it was found. This can be accomplished by mailing fragments or accompanying ordnance to the U.S. Army Claims Service which can then attempt to trace them through procurement channels to establish the place and date of manufacture, and point of issue.

In explosive ordnance cases this information should be carefully developed to determine if the defense of intervening cause exists, e.g., how many hands the device passed through. In regard to the defenses of the assumption of risk and contributory negligence, questioning of the explosive ordnance team may furnish leads as they are frequently among the first on the scene and may overhear information bearing on these issues. In this regard, queries should be made as to the exact source of the information, e.g., local police, neighbors. Early investigation in this respect will prove much more fruitful than delayed efforts. Also, in this regard, medical personnel should be questioned as to any utterances made by the victim during the early stages of medical treatment.

In regard to the area in which the explosive was originally discovered, photographs should be taken showing the nature of the area. Land records available in the office of the U.S. Army Engineer District having jurisdiction should be scrutinized and copies obtained whenever there is an indica-

tion that the area in question was a former impact area, whether it is now located on or off a military reservation. In the event the land has been relinquished by the Army for private use, land transfer documents should be scrutinized and copies obtained showing any restrictions contained in the use of the property. Additionally, in such cases, the extent of the sanitation efforts to clear the land of explosives prior to transfer should be developed as well as the history concerning the number of explosive devices found on the land since discontinuance of its use as an impact area.

Depreciation During Storage. Paragraph 11-15*e* (1) of AR 27-20 provides that no depreciation is to be charged against durable hard goods during periods of storage and also provides for depreciation during storage against nondurable goods. Note number five of Table 11-2 of AR 27-20 provides that no depreciation will be taken for periods of storage of property regardless of the type of property. It was the intent of this Service to apply the policy announced in note number five, effective 1 June 1972. Pending a subsequent change in AR 27-20, so much of paragraph 11-15 *e*(1) as is inconsistent with note number five should be disregarded. Effective 1 June 1972, no depreciation will be taken for periods of storage of property *regardless* of the type of property.

MEDICAL CARE RECOVERY ACT

By: Captain Michael A. Brodie, Litigation Division, OTJAG

On 7 June 1972, the United States Court of Appeals for the Fourth Circuit confirmed a District Court ruling that permitted the United States to sue as a third party beneficiary under the medical payments provision of the insured's automobile insurance policy.

In the case a retired serviceman was in an automobile accident and the United States furnished the needed medical services. There was no tortious conduct on the part of a third party, which would invoke the Federal Medical Care Recovery Act, 42 U.S.C. §§2651-53, so the United States sought to recover under the insurance contract itself.

The medical payments provision obligated the insurer to pay "all expenses incurred by or on *behalf of" (emphasis added)* the insured in connection with an accident. The court in this case, following the rationale of an earlier decision of the Fifth Circuit Court of Appeals which had construed a like provision (*United States* v. *United Services Automobile Association,* 431 F. 2d 735 (5th Cir. 1970), *cert denied,* 400 U.S. 992, *reh denied,* 401 U.S. 984 (1971)), again permitted the United States to collect. (*United States* v. *Government Employees Insurance Company,* 330 F. Supp 1097 (E.D. N.C. 1971) aff'd—F. 2d—(4th Cir. 1972)).

ARMY COLLECTIONS 2nd QUARTER CY 1972

	AR 27-38	*AR 27-37*
TOTAL	$663,790.81	$159,367.14
CONUS		
First U.S. Army	174,830.90	20,391.64
Third U.S. Army	144,882.10	17,063.21
Fifth U.S. Army	102,267.07	12,797.50
Sixth U.S. Army	93,301.44	43,580.15
MDW	25,514.06	4,878.54
DA	30,850.00	12,555.00
OVERSEAS		
USARAL	1,627.00	1,762.67
USAREUR	74,203.10	38,530.02
USARPAC	16,315.14	7,808.41
USARSO	xxxxxx	xxxxxx

MEDICAL MALPRACTICE STANDARD

By: Miss Rachael G. Henderson, Legal Intern, Litigation Division, OTJAG

Recent medical malpractice cases reflect a trend away from the "locality rule" in favor of a more liberal "minimal" general standard rule. These decisions are indicative of an intent to do away with the local physician establishing his own standard. Although there have been no cases specifically applying a general standard, a considerable number of cases make approving reference thereto.[1]

An example would be the recent Ninth Circuit case, *McBride* v. *United States,* No. 26,771 (Jun 14, 1972). Commander McBride, a retired naval officer, spent five days in January 1968 in Tripler Army Hospital, Hawaii, undergoing testing to diagnose the source of pain in his lower chest. After tests proved negative, he was released. Three nights later, he experienced severe chest pains and went to the emergency room at Tripler.

The physician on duty, a young resident, examined McBride and took an electrocardiogram to determine any abnormalties in heart beat. This physician, however, erroneously interpreted McBride's electrocardiogram as normal, and then told McBride that his pain probably resulted from a gastrointestinal disturbance. Based on this advice, McBride decided to return home even though the physician advised admission to the coronary care unit as a precaution. McBride died shortly after reaching his home.

The importance of the McBride case is not precisely representative of the trend as regards the "locality rule." Rather it is, in part, the Ninth Circuit Court of Appeals questioning the trial court's application of the facts even though the trial court had correctly stated the law as to the standard of care to be used. The Appeals Court felt that the trial court's comments and questions suggested strongly that the doctor was judged on the basis of what one could reasonably expect from a young resident, instead of measuring his acts against a community standard. The Court pointed out that the duty of care owed to a patient does not vary according to the doctor's individual knowledge or education.

Although possibly dicta, *McBride* also involves the issue of proximate cause in medical malpractice cases. At trial an expert witness, on the basis of specific information about McBride's condition as well as his knowledge of cornonary care unit survival rates, concluded that McBride's chances of living would have been improved at least 50 percent by admission to Tripler. No evidence contradicted this opinion or undermined its factual basis.

The Ninth Circuit held that the absence of a positive certainty that injury would not have occurred after proper medical treatment, should not bar recovery if the negligent failure to provide proper medical treatment deprives a patient of a significant improvement in his chances for recovery. Thus, a plaintiff need only show a reasonable medical probability that proper medical treatment would have successfully prevented the patient's injury.

Notwithstanding this fact, *McBride,* in conjunction with other more important transition cases, is in keeping with the purpose in this article: To make Army lawyers more cognizant of the fact that there are significant changes occurring as regards the standard of care to which medical doctors will be held.

Typically, the nineteenth century *strict* geographic "locality rule" has been applied in medical malpractice cases. Malpractice criteria was determined on the basis of the physician's non-access to adequate communication facilities, the inaccessibility of other physicians for consultation, and the unavailability of modern equipment in a restricted community. Originally, the rule was propounded to protect rural doctors who might provide the only source of medical care in a designated community. In such instances this allowed the doctor to establish his own standards of care.

The community standard has in recent years come under increasing criticism on the grounds that a community with only one hospital or doctor should not be allowed to establish its own negligence standard.

In response to this criticism, the locality rule per se was expanded to include "similar communities." See Restatement (Second), Torts Section 299A.

Originally, the term "similar communities" was strictly construed. Geographical proximity continued to dominate in determining similarity.

A shift away from this rigid adherence to geographical locale was reflected in several decisions which held that because hospitals must comply with the Hospital Accreditation Commission's rigid standards, its personnel should also be measured by the same degree of care as is imposed upon the hospital.[2]

Following this trend several jurisdictions suggested that medical facility and professional standards of care are co-extensive in any center which purports to be readily accessible for the treatment of patients.[3] Subjecting the physician to a more stringent standard in light of present day scientific knowledge had led gradually to the abandonment of any fixed rule, and to treating the community as merely *one* factor to be taken into account in applying the general professional standard.

The criteria now governing defendant's responsibility includes: accessibility of textbooks, expert testimony (regardless of witness's locale), availability of experts throughout the country for consultation, and the standards set forth by the commission responsible for hospital accreditation. These criteria completely reverse the original concept establishing the "locality rule."[4]

Today the acts of a physician appear to be judged simply on the basis of whether or not he failed in the circumstances of the particular case to exercise the degree of skill and knowledge that is usually exercised by other physicians in similar instances, irrespective of the general locale in which he or they may practice[5]—an objective as compared to a subjective standard.[6]

Those courts not abrogating the locality rule have alluded to such possibility by adopting a more liberal "similar communities" rule. In conclusion, most of the decisions indicate that the "locality rule" has been entirely discarded in North Carolina, New Jersey, Washington, Florida, Kansas and Massachusetts.

CITATIONS

1. See e.g., *Kapuschinsky* v. *United States,* 248 F. Supp. 732 (D.C.S.C. 1966).
2. *Bourgeois* v. *Dade County,* 99 So. 2d 575 (Florida 1956).
3. *Pederson* v. *Dumouchel,* 72 Wash. 2d 73, 431 P. 2d 973 (1967).
4. *Cooper v. United States,* 313 F. Supp. 1207 (Nebraska 1970).
5. *Carbone v. Warburton,* 11 N.J. 418, 94 A. 2d 680 (1953).
6. *McBride v. United States,* No. 26,771 (Jun 14, 1972); *Incollingo* v. *Ewing,* 444 Pa. 263, 282 A 2d 206, 244 (1971); *Downs v. American Employees Insurance Company,* 423 F. 2d 1160 (5th Cir., 1970).

LEGAL ASSISTANCE ITEMS

From: Legal Assistance Office, OTJAG

Soldiers' & Sailors' Civil Relief Act

I. Default Judgements

Section 200 of The Soldiers' and Sailors' Civil Relief Act (50 U.S.C. App Section 520) seeks to protect persons absent in military service from the effect of default judgements which would otherwise be secured against them, by imposing certain general conditions on the imposition of such judgements. Thus under Section 200(1) (50 U.S.C. App. Section 520(1), of the act, a party seeking a default judgement must file an affidavit disclosing any available information concerning the military status of the defaulting party. If the affidavit does not affirmatively disclose that the defaulting party is *not* in military service, no judgement may be entered except on order of the court; and, if the defaulting party is in fact in military service, no such order may be made until an attorney has been appointed to represent the absent party.

While the language in Section 200(1) making appointment of an attorney mandatory before a default judgement may be entered seems to conflict with the language of Section 200(3) which states that the court *may* appoint an attorney to represent a person in military service who does not appear in an action or who is not represented by an authorized attorney, it must be noted that Section 200(1) establishes a pre-condition to entry

of a default judgement, while Section 200(3) merely deals with the appointment of counsel at any time during the proceedings.

Section 200(1) does not preclude the entry of a default judgement against one in military service. The provisions of the act are intended to protect a person in military service from entry of a default judgement against him without his knowledge and not to prevent a judgement by default where he was fully informed of the pendency of the action and had adequate time and opportunity to appear and defend or otherwise protect his rights, if any. *King v. King* 193 Misc. 750, 85 N.Y.S. 2d563 (Sup Ct, 1948); *Burgess v. Burgess* 3 Misc. 2d 126, 234 N.Y.S. 2d 87(Sup. Ct, 1962).

Most courts are agreeded that non-compliance with the provisions of Section 200, including appointment of counsel for an absent serviceman, render a judgement voidable rather than void. *Allen v. Allen* (1947) 30 Cal 2d 433, 182P 2d 551,552, *Winterdink v. Winterdink* (1947) 81 Cal. App 2d 526, 184P 2d 527, contra, *McDaniel v. McDaniel* (1953) 259 sw 2d 633. Thus a default judgement entered without appointment of counsel for the absent serviceman would be valid until properly attacked by the serviceman under the provisions of Section 200(4) (50 U.S.C. App. Section 520(4)).

Section 200(4) provides that if any judgement shall be entered in any action or proceeding against any person in military service during the period of such service or within 30 days thereafter, and it appears that the person in service was prejudiced by reason of his military service in making his defense, the judgement may, upon application of the person in military service or his legal representative, not later than 90 days after the termination of such service, be opened by the court which rendered it and the serviceman or his legal representative may be let in to defend, if it is made to appear that there is a meritorious or legal defense available.

Thus, in order for the serviceman to have a default judgement set aside under the provisions of the Act, he must show that he was prejudiced in the action by reason of his military service and, further, that he has a meritorious or legal defense available to him.

The success of a movement by a serviceman to reopen, vacate, or set aside a default judgement, particularly in matrimonial actions, is not automatic. A line of cases indicates that courts, in acting on a motion under Section 200(4), will place great emphasis on the existence of actual prejudice to the serviceman as a result of his military service and will take into consideration such factors as actual notice to the serviceman of the pendency of the action, availability of the serviceman within the jurisdiction, intentional use of the provisions of the Act as a lever against the plaintiff, failure of the defendent to protect his interests by requesting a stay of proceedings after having received actual notice of the pending litigation, the availability of counsel and the serviceman's efforts made in seeking the advice of counsel. *King v. King,* supra., *Burgess v. Burgess,* supra, *Bedwell v. Bedwell* (1948) 68 Idaho 405, 195P 2d 1001. See, 13 *JAG L. Rev.* 128, 135.

Certainly these cases cannot be read to stand for the proposition that failure by the serviceman to take any action to protect his rights after receipt of actual notice of the proceedings will create an absolute bar to later reopening of the judgement under Section 200(4). However, they do indicate that without a showing of actual prejudice as a result of military service the serviceman will encounter difficulties in doing so.

As noted in 13 *JAG L. Rev.* 128, 135, n.61 this presents a dilemma for the serviceman involved in a divorce proceeding. His choice is between intentionally remaining away from the action or appearing to seek a stay of the proceedings under Section 201 (50 U.S.C. App. Section 521) (which latter course of action may be unsuccessful if he is readily available in the jurisdiction and his ability to defend the action is not materially affected by his military service). If he fails to appear he will often be penalized for this when he later seeks to reopen the judgement. Yet if he appears he will be unable to later reopen the judgement under Section 200(4) and, by appearing, subjects himself to the personal jurisdiction of the court thus opening the possibility of a decree for support and alimony if his motion for a stay of the proceedings is not granted.

II. The Role of Appointed Counsel

The appointment of counsel for the defaulting serviceman by the court can alleviate this dilemma to some extent, since the appointed counsel can move for a stay of the proceedings on the serviceman's behalf without subjecting the serviceman to the personal jurisdiction of the court Section 200(3) (50 U.S.C. App. Section 520(3)). (Although appointment of counsel will not diminsh the possibility that failure of the serviceman to appear will be a material factor in any decision concerning re-opening or setting aside the judgement at a later date).

The role of appointed counsel under the Act is an ambiguous one. While he is charged with the responsibility of representing the serviceman defendant and protecting his interests under Section 200(1), he is powerless to "waive any right of the person for whom he is appointed or bind him by his acts. "SSCRA Section 200(3), 50 U.S.C. App. Section 520(3), nor, as noted above, do any acts of court-appointed counsel amount to an appearance on the part of the serviceman.

Obviously, the first duty of the appointed counsel should be to make every reasonable effort to establish contact with the absent serviceman (which may not be a difficult task in the case of a serviceman who intentionally defaults) and to attempt to formulate a course of action with regard to the litigation. It may be, and often is, appropriate for the attorney to move for a stay of the proceedings under Section 201 if he can show that the serviceman's military service will materially affect his ability to defend the action. If the attorney is unable to obtain a stay of the proceedings, several courses of action may be open. Such as an attack on the sufficiency of the pleadings, assertion of a special defense or arrangement of an out of court settlement. However, few of these will be successful without the cooperation of the serviceman since the attorney is unable to bind the serviceman by his actions or waive any of the serviceman's rights, including the right to apply to re-open a judgement entered in default of his appearance 33 *N.Y.U.L. Rev.* 975, 980-1. Such cooperation may be difficult or impossible to obtain, either because the serviceman is unavailable for consultation or because he refuses to appear or in any way cooperate in his defense.

It should be noted that, although the court appointed attorney's actions are not binding on the serviceman and any judgement or settlement obtained in the absence of an appearance by the serviceman will later be subject to attack under Section 200(4), once the serviceman begins to cooperate with his appointed attorney and to authorize actions on his behalf he will ordinarily be bound by those actions. The fact that the attorney was originally appointed by the court is not determinative of the question of whether the serviceman will be bound by any acts of the attorney. *Sanders v. Sanders* (1964) 63 Wash. 2d 709, 388P 2d 942, 945.

III. Compensation of Appointed Counsel

In general, acceptance of appointment as counsel for a defaulting serviceman is considered to be "a patriotic duty for which no compensation would be expected by members of a profession deeply inbued with a sense of public responsibility." *In re Cool's Estate* 19 N.J. Misc. 236, 18A 2d 714, 717 (1941). However, some compensation has on occasion been afforded to the court appointed counsel. *In re Cool's Estate,* supra, held that, while such service should be considered a patriotic duty, where an attorney is appointed to represent a party in which allowances are generally made according to usual probate practice, there is no reason why compensation should not be awarded to the attorney so appointed.

In re Cool's Estate, supra and similar cases in which compensation has been awarded to attorneys appointed under the Act have generally involved the distribution of an estate or some fund under the control of the court from which fund the attorney was compensated. It is questionable whether a court, in the absence of specific legislation regarding compensation, would award compensation in an action where no such fund exists.

It should be noted here that, while services rendered only under the authority of court appointment are generally uncompensated, *active* representation subsequent to such appointment on behalf of a cooperating serviceman is of a different nature and the serviceman will usually be expected to defray reasonable expenses and fees. *In re Estate of Ehlke,* 250 Wis. 538, 27 nw 2d T54 (1947). (This case may be questionable authority since it

seems clear that the services rendered by the attorney were not authorized, and were not even useful, but the principle is sound.)

POW/MIA TAX RELIEF BILL P.L. No. 279, 92nd Cong. 2d Sess (April 26, 1972), signed by President Nixon on 26 April 1972, exempts from taxation all compensation received for active service as a member of the Armed Forces of the United States or as a civilian employee of the United States for any month during part of which the service member or civilian employee was missing in action, a prisoner of war, or detained as a result of the Vietnam conflict.

The law provides for such exemptions to be retroactive to 28 February 1961. The running of the statute of limitations against a claim for refund of taxes paid on compensation received after that date is suspended while the individual is in Vietnam. Any such claim may be filed on or before 26 April 1973 or two years after the date on which the individual's missing status is terminated, whichever is later.

The following procedure may be followed by the wives of a POW/MIA who seek a refund generated by this new public law. If the wife has chosen to defer filing of returns until the termination of her husband's POW/MIA status, she may now file a joint return for those years for which no return has yet been filed. If the wife has been filing joint returns in her husband's absence, she may now amend those returns by filing a 1040X for each of the years affected by P.L. 92-279. Finally, if she has been filing separate returns, she may amend to a joint return and claim any refunds due on the 1040X's. All returns, original or amending, should be clearly and conspiculously marked "Wife of POW/MIA" so that they may be easily identified and given preferential treatment by IRS. The forms should be forwarded to the IRS Service Center to which the taxpayer's returns have customarily been sent.

No matter which of the above courses is pursued, the IRS will issue any refund check due the couple in the names of both the wife and the POA/MIA. If the wife is unable to negotiate the income tax refund check either because she lacks power of attorney for her husband or does not have a joint bank account with her husband in which the check may be deposited, then a refund check can be reissued in her name if she presents the joint check, together with proof as to the status of her husband, to any Internal Revenue Service office. Certified or registered mail is recommended in returning the joint check if it cannot be personally delivered to the IRS office.

Water Water Everywhere. "Water Water Everywhere And Not A Drop To Drink." The old rhyme of the "Ancient Mariner" was less then a cliche for Virginia and Maryland residents who went several days without drinking water following the devastation of Hurricane Agnes. Flood waters ravished many residential neighborhoods destroying homes and business property with no prejudice to the particular owners.

The Small Business Administration immediately announced provisions that supplied disaster loans to restore victim's personal property, homes or business property, as nearly as possible to its pre-disaster condition.

Washington area residents qualified for millions of dollars in low interest Federal loans. In all the communities declared disaster areas by the SBA, residents applied for long term low interest loans up to $50,000 on their homes and up to $10,000 on personal property. The SBA even supplied an exotic dancer with a $65 loan to replace her pet python which was swept away by flood waters.

President Nixon's declaration of both Virginia and Maryland as major disaster areas allowed residents $2500 forgiveness for any federal disaster loan of up to $3000. Borrowers will repay the first $500 of the loan and all amounts in excess of $3000 ($500 plus $2500 for forgiveness).

SBA Disaster Loans will generally be repaid in equal monthly installments including interest. The first payment is usually due no later than five months after the applicant signs the note. An additional deferment may be granted where the borrower's income is seasonal and a different schedule may be arranged.

The SBA announced that the Disaster Loans were not to exceed the actual tangible loss suffered by the disaster victim except to the extent of permitted debt refinancing, less any recovery from insurance or other sources, such as a Red Cross

grant. SBA limited some disaster loans to the amount the applicant apparently could repay as indicated by his past earnings.

For future reference, the borrower should make every effort to supply needed papers and information promptly to enable SBA to close a loan as quickly as possible. For personal property losses the borrower should make a list (two copies—one for his record and one for SBA) of the damaged, destroyed, or lost personal property, showing its original cost and reasonable replacement costs. For damaged home property, furnish a detailed statement of the loss incurred and obtain a signed estimate from a reliable contractor showing the costs of repairing the damaged property or replacement costs if it is beyond repair. If the loan is to repair your home or property, a copy of the deed is required if the loan request is over $5000. Also furnish a copy of last year's income tax return if the loan request is $5000 or more.

After filling out an application the applicant should file it with SBA or with the cooperating bank along with a list of the property that was destroyed, damaged or lost in the disaster and an instrument prepared by a reliable contractor, supplier or repairman of the cost of repairing the destroyed property to its pre-disaster condition. SBA will consider such an application without delay.

SBA disaster loans may not be used to upgrade a home or business property unless this upgrading is required by applicable codes or ordinances. This means that no funds will be provided for by SBA which will increase the size or capacity of any structure nor will any funds be provided which would upgrade the quality, size or capacity of household goods or machinery and equipment.

A firm or individual may use its own labor to restore property, but in such cases SBA loans will only cover cost of materials whenever a controlled or affiliated contractor is used, SBA funds shall be approved only for the actual labor and material used and no profit or overhead costs may be allowed.

Damaged mobile homes if used as a year round residence qualify as homes rather than personal property and owners could receive up to $50,000 in loans for repair or replacement.

For further information write or call the Small Business Administration, Washington, D.C. 20416. The next flood *might* be yours!

PROCUREMENT LEGAL SERVICE

By: The Procurement Law Division, TJAGSA

Buy American Act: Cost elements to be included in meeting the "50 per cent test."

The Buy American Act, 41 U.S.C. 810, is designed to assure preferential procurement treatment for supplies and construction materials produced in the United States over those considered. The statutory provisions are implemented and interpreted by Executive Order 10582, 19 Fed. Reg. 8723 (1954) as amended by Executive Order 11051, 27 Fed. Reg. 9683 (1962). These orders contain the following basic statement of policy concerning the determination of an item origin:

> Sec. 2(a) For the purpose of this order materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per cent or more of the cost of all the products used in such materials.

As implemented by ASPR the policy gives preferential treatment to "end products" in which the value of the components produced in the United States exceeds 50 per cent of the cost of all its components. In any procurement involving the application of the Buy American Act it is necessary to determine what is the "end product", what are the components, and what is the value of these components. ASPR 6-001(a) defines "end products" as the items to be delivered to the Government, as specified in the contract. While seemingly straight forward, this definition has caused some difficulty for the Comptroller General. Initially the GAO determined that the concept "end product" meant the line item appearing on the con-

tract schedule. In 43 Comp. Gen. 306 (1963), the specifications called for chlorinated lime packed in 20 pound pails. The protestant offered lime of foreign origin which would be packed in the United States in pails of domestic origin. Viewing the end product as "lime packaged in a 20 pound pail", the Comptroller General ruled that the product's components were the lime and the pail. Stating that the costs of combining the components of an end product cannot be considered in a Buy American evaluation, the GAO excluded from consideration the cost of labor, overhead, and administration involved in the packaging of the lime.

In 1967 the GAO dropped the literal contract schedule approach in favor of an "ultimate use" test in the sulfa tablet decision, 46 Comp. Gen. 784 (1967). In this instance the low offeror for a contract to supply bottles of sulfa tablets containing 1000 tablets each proposed delivery of German sulfa tablets which would be bottled and packaged in the United States. The bottle, cotton and other packing materials would be of domestic origin. Overruling its previous decisions, the GAO held that the end product was the drug in a tablet form. All costs connected with bottling and packaging were excluded on the grounds that they were not manufacturing steps in the production of the end item. The bottle and the packaging were only intended as a convenient means of transportation and storage and had no effect on the intended ultimate use of the item. Relying on the ultimate use test, the GAO ruled that German sulfa tablets could not be transformed into American tablets by simply being poured into domestic bottles, regardless of the costs of the bottles and packaging.

In applying the principles of the sulfa tablet decision to Buy American evaluations, the automatic elimination of packaging costs is not justified in every procurement. In this decision, the Comptroller General recognized, at 790, that the packing of a product in a container may serve a special function in its ultimate use. In that event, the packaged product would be the contract end item.

The second problem in a Buy American evaluation is the determination of the components of the end item. ASPR 6-001(b) defines "components as those articles, materials and supplies directly incorporated in the end item. If, as in the sulfa tablet decision, the end item is defined to exclude all packaging, by definition the packaging costs can not be considered as a component in an evaluation. The GAO has excluded from consideration as components the costs of assembling, testing, freight, profit, overhead, and administration related to the final production of the end item even though these costs have a direct impact on the price paid for the end item. See 35 Comp. Gen. 7 (1955); 45 Comp. Gen. 658 (1966); 46 Comp. Gen. 784; 48 Comp. Gen. 727 (1969). Apparently the GAO considers a component to be a tangible item combined with other such components in the production or assembly of the end item.

While these decisions indicate the approach of the Comptroller General to the questions of defining the end product and it's constituent components, the problem of comparing equitably the value of the domestic and foreign components remains to be considered. In most cases the GAO seemed satisfied with a simple comparison of the bidder's costs for purchasing the components. If the bidder paid more to his supplier for the domestic components than for the foreign ones, the product was American. However, in 48 Comp. Gen. 727, 729, it appeared that the GAO was seeking a more detailed analysis of component cost. In that decision the GAO informed the protestant that included in the "price to be paid by you under . . . subcontracts, . . . a substantial part thereof must represent labor costs, which are clearly excluded from consideration . . ." This decision seemed to hold that when comparing the components of the end item certain costs such as labor were to be excluded. In effect the components would be broken down into their constituent parts. In practical terms, the evaluation would be a monumental task in any procurement if the end item was composed of more than a few components.

In a more recent decision the Comptroller General has moved away from this position toward a more simplified practical evaluation process. In a procurement for electronic equipment, the offeror proposed to purchase components, both foreign and domestic, and to produce one component in house. In 50 Comp. Gen. 697 (1971), the GAO included in the cost of the component manufactured in house, the costs of labor, overhead and general administrative expenses connected with

the production of that component. Stating that the price of any purchased component would include such cost items, the GAO held that the principle of evaluation on a similar basis required inclusion of these cost items in the value of a component produced in house. While indicating that there is a limited basis for the inclusion of the prime contractor's labor, overhead and G & A costs in a Buy American evaluation, the Comptroller General also implicitly adopted the simplier evaluation test. The Buy American evaluation is made by the prime contractor for the components of the end item. Thus, for the present, the procuring activity is relieved of the necessity of making a detailed cost analysis of each component for the purposes of the Buy American Act.

A close reading of this group of GAO decisions clearly demonstrates that the correct Buy American evaluation requires a careful exercise of judgement rather than an arbitrary application of a definition or maxim extracted from one or more decisions. In each decision the deceptively broad principle is in actuality rather carefully tailored to the given facts. Thus the parties to any protest involving a Buy American evaluation have considerable leeway in the concepts of the end product, its components and their value.

AGENT'S SCOPE OF AUTHORITY: Unauthorized Contract. Ms. Comp. Gen. B-176039, 13 July 1972.

The claim presented to the GAO was based on a contract allegedly executed by an employee of a Veterans Administration hospital. During discussions with X's sales representative the employee, the chief of the hospital's engineering division, showed interest in obtaining a quantity of X's packing and diaphragm material in order to determine if the materials would meet hospital needs. The sales representative was informed that the engineering division was not authorized to make purchases, but that a request for the purchase of such materials would be sent to the hospital's procurement division. The hospital employee requested pricing and description information about these materials in order to initiate the purchase request. The sales representative inserted this information on X's order form and requested that the hospital employee sign it. The chief of the engineering division repeated to the sales representative that only the procurement division could authorize purchase of the materials. The chief did sign the form, after being informed by the representative that a signature was needed to verify that a contact had been made with the hospital. Sometime later, the hospital received the materials from X but declined liability for them since the hospital's procurement division never ordered the goods.

Relying on the fact that the chief of the hospital's engineering division was without authority to contract on behalf of the hospital, the Comptroller General disallowed X's claim. The decision of the GAO was based on two fundamental principles of government contract law. Agents of the United States must have actual authority in order to bind the Government. Individuals entering into purported contracts with the Government are, as a matter of public policy, charged with the responsibility of accurately ascertaining the extent of an agent's authority to act on behalf of the United States. *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947).

The GAO recognized that there was the possibility of either express or implied ratification. Express ratification would occur if the unauthorized contract was ratified by an officer who had authority to enter into that particular contract at the time of award of the original contract and at the time of ratification. Ratification could occur by implication if someone, who had authority to contract, accepted the benefits of the contract with knowledge of the circumstances. In this instance, the Comptroller General could find neither express ratification nor acceptance of the benefits of the unauthorized acts, for the hospital was merely holding the materials for X and simultaneously requesting shipping instructions from X.

COMMENT: The problem of Government liability for unauthorized performance by private contractors is a recurring situation in many aspects of Government contract law. While the VA hospital decision illustrates the basic principles of law involved in such situations, the application of the principles may vary depending on the contractual situation and the forum which hears the matters.

Strictly construing the principles outlined in the VA hospital decision, the GAO authorizes payment only if the Government has received a benefit and there is a clear showing of either express or implied ratification. Ms. Comp. Gen. B-164087, 1 July 1968. When payment has been authorized, it has been on a *quantum meruit* basis for services rendered (reasonable value of work and labor) and on a *quantum valebat* basis for goods (reasonable value of goods sold and delivered). Ms. Comp. Gen. B-173765, 18 November 1971. In those instances where the procuring activity has not expressed a willingness to pay the contractor, the GAO has accepted this refusal to ratify and has denied the claimant any compensation. Ms. Comp. Gen. B-164087, 1 July 1968.

It should be noted that most GAO decisions involve a question of contract formation rather that the problem of an unauthorized agent requiring the contractor to perform additional work under the contract. In the latter fact situations, the contractor's claim is usually based on a constructive change theory. The Boards have refused to adhere to the strict letter of the contract "changes" clause that valid changes must be issued in writing only by the contracting officer or his duly authorized representative. Looking at the facts of a given situation, the boards have imputed to the contracting officer knowledge of the actions of the unauthorized agent. Based upon this inputed knowledge the Boards have held that the unauthorized change was ratified. *W. Southard Jones, Inc.,* ASBCA 6321, 61-2 BCA §3182 (1961); *Lox Equipment Co.,* ASBCA 8985, 1964 BCA §4463; *Carroll Co., Inc.,* ENG BCA 2525, 65-2 BCA 4966 (1965), rehearing denied, 65-2 BCA 4997 (1965). All of these cases involved situations where the contracting officer or his authorized representative visited the work site or production line on nearly a daily basis and either did see or should have seen that the work was being performed in a manner different from that specified in the contract. When the changed work was being performed under the eyes of the contracting officer, the Boards have placed the effective burden of proof on the Government to show an actual lack of knowledge on the part of the contracting officer. *Carroll Co., Inc., supra.* Absent a convincing denial by the Government of contracting officer's knowledge of the change in the manner of performance, the Boards have generally found ratification and allowed compensation on the constructive change theory.

In some cases it is quite difficult to find a link between the agent who ordered the unauthorized change and the contracting officer. However, the Boards have still allowed recovery on the constructive change theory. *Moore Brothers Co.,* IBCA 336, 1963 BCA §3910. The rationale for recovery is based on a benefit being conferred on the Government combined with Government participation in the decision to perform the extra work. This approach recognizes the real life problems of a contractor who must deal with and satisfy a multilayered procurement bureaucracy. It especially recognizes the power of the Government inspectors at the site who seem to initiate a large proportion of these changes. The theory has been proposed that the Boards acting as the duly authorized representatives of the agency heads are actually ratifying the acts of unauthorized agents. R. Nash and J. Cibinic, *Federal Procurement Law,* 103 (2d ed. 1969).

When comparing decisions of the GAO and the Boards, it should be recognized that the former involve the issue of alleged contract formation while the latter involve situations arising during the performance of a clearly valid contract. Practical policy might dictate that contractors already engaged in performance cannot be expected to stop work to ascertain the actual authority of every Government agent inspecting, supervising, or otherwise directing the manner of performance. However, prior to entering into a contractual relationship, it is not unreasonable to expect a company to ascertain, at its own risk, the actual authority of an agent to bind the Government. On one occasion the Court of Claims has held that an implied contract arose when the work (seal coating of the roads) took place wholly within the installation where the contracting officer was located. The contracting officer's knowledge, either actual or constructive, of the agreement and his inaction thereafter, served to ratify the agreement. *Williams v. United States,* 130 Ct. Cl. 435, 127 F. Supp. 617 (1955).

JAG SCHOOL NOTES

1. August Busiest Month. Seldom has the School population been so big as the last weeks in August. The arrival of the 65th Basic Class plus a Civil Affairs Course, Military Justice Course and a Procurement Attorneys Course, the latter two over-subscribed, taxed the resources of the School as well as some of the downtown restaurants and motels (and the parking facilities).

2. Evidence Text. The first complete new evidence text in several years will go to the printer in September. It was written by Major Dick Boller of the Criminal Law Division before his departure for Korea. The text will be in handbook format with extensive citations to cases and a complete index. The text is designed for both instructional and reference purposes.

3. ABA Election. Major Charles White, assigned recently as a student in the 21st Advanced Class, was narrowly defeated in an election for Secretary of the Young Lawyers Section. The election was held during the ABA convention in San Francisco in August.

4. JAG Cannon. The two cannons which have long stood guard over the School are again on duty. During the May student demonstrations at the University of Virginia these antique weapons were torn from their stanchions and dumped on the ground. The smaller of the two disappeared for three hours until it was recaptured by non-rioting UVA students and returned. The Buildings and Grounds people of UVA have again "firmly" fastened them on the pillars in front of the School. The cannons were the gift of Rear Admiral Chester Ward, United States Navy.

5. Faculty Member Teaches At District Attorney's College. Captain Jan Horbaly who has just joined the faculty spent four weeks as an instructor at the National College of District Attorneys. This college co-located with the University of Houston Law School runs continuing legal education courses for prosecutors from throughout the United States. Dean George Van Hoomissen was a guest instructor at the Military Justice Course at Charlottesville in August.

6. JAG Conference. Planning and programming is in full swing for the 1972 Worldwide JAG Conference to be held at the School. The banquet speaker will be Justice Tom Clark. The conference running 1 through 5 October will feature a number of nationally known speakers as well as time for workshops by the conferees on current JAG problems.

7. Service School Mug Collection. The Officers' Open Mess, TJAGSA, is initiating a service school beer mug collection to be displayed in the Open Mess. Anyone who would like to donate a large mug bearing the crest of one of our sister service schools may do so by sending the mug to Custodian, OOM, TJAGSA, U.S. Army, Charlottesville, Virginia 22901. Appropriate recognition will be given all donors.

BAR NEWS

Law Day Efforts Net Two Awards for JAGC.

The Judge Advocate General's Corps received the American Bar Association Award of Merit for its Law Day 1972 Activities. The Young Lawyers Section of the American Bar Association similarly honored young Army lawyers contribution to Law Day 1972 by presentation of the Young Lawyer's Award of Achievement to the Army Judge Advocate General's Corps. These two awards are firsts in two ways. They are the first bar awards made by the ABA to organizations other than bar associations and they are the first awards made by the ABA to a military legal corps.

The Award of Merit was received on behalf of the Corps by Major General Prugh, The Judge Advocate General and Captain William Robie, Law Day Project Officer. The Young Lawyer's Award was received by Major James A. Endicott, Jr., Armed Forces Executive Council Member to the Young Lawyers Section.

New Army Delegates Names to Young Lawyers Section.

Captain Kenneth E. Gray, PP&TO, was named Army Delegate to the Young Lawyers Section Assembly of the ABA by Major General Prugh. Captain Gray and delegates from the Navy, Air Force, Marines, and Coast Guard represented the young lawyers of the five armed services at the August American Bar Annual Meeting in San Francisco. Captain William R. Robie, TJAGSA, was named alternate Army Delegate.

Federal Bar Annual Meeting.

The Federal Bar Associations annual convention will be held in Washington, D.C., 12-16 September 1972 at the Shoreham Hotel. The Lawyer in Uniform Committee will present a program "The Military Attorney—A Man or Woman for All Reasons" at 1400 on Wednesday, 13 September, in the Palladian Room of the Shoreham. The program will feature the senior legal officers of the five armed services and be moderated by Major Francis D. O'Brien, OTJAG.

PERSONNEL SECTION

From: PP&TO, OTJAG

1. RETIREMENTS. On behalf of the Corps, we offer our best wishes to the future to the following officers and warrant officers who retired after many years of faithful service to our country.

COL HUNT, James W.	30 June 1972
COL PINTO, Ralph D.	31 July 1972
COL REESE, Thomas H.	7 July 1972
LTC CASEY, Joe P.	31 July 1972
LTC SIMMONS, John L.	31 July 1972
CW3 JOHNSON, Ole M.	31 July 1972
CW3 WOODRUFF, Cedric A.	31 July 1972

2. PROMOTIONS. Congratulations to the following officers who were promoted to the grade of *COLONEL* and *LIEUTENANT COLONEL* on the date indicated.

COL SMITH, Elizabeth R., Jr.	10 July 1972
COL WOOD, Robert L.	21 July 1972
LTC ANDREWS, Thomas T.	18 July 1972

3. ORDERS REQUESTED AS INDICATED:

COLONELS

NAME	*FROM*	*TO*	*APPROX DATE*
HAUGHNEY, Edward W.	USAREUR	USAG Carlisle Bks, PA	Oct 72
YORK, Dennis A.	USAREUR	Hq 3d USA Ft McPherson	Jul 72

LIEUTENANT COLONELS

DORSEY, Frank J.	USA Jud	6th USA Pres of SF	Sep 72

MAJORS

DANCHECK, Leonard	OTJAG	TJAGSA 21st Adv C1	Aug 72
KILE, Daniel A.	Stu Det, MDW	OTJAG	Sep 72
RANKIN, Thomas M.	TJAGSA	USATC Ft Jackson	Sep 72
WOSEPKA, James L.	DLI	Phy Dis Agy Wash, DC	Aug 72

CAPTAINS

NAME	*FROM*	*TO*	*APPROX DATE*
APGAR, Robert F.	USAIC Ft Benning, GA	USATCI Ft Dix, NJ	Oct 72
BERNHARD, George K.	TNG Cen Inf, Ft Dix, NJ	S-F USMA	Sep-72
BIRCH, John O.	Qm Ctr, Ft Lee, VA	USAREUR	Nov 72
CARNAHAN, David C.	Korea	Hq 3d USA Ft McPherson, GA	Jan 73
CASPER, Joseph W.	Trans Ctr, Ft Eustis, VA	AMC, Wash, DC	Oct 72
COLEMAN, Jimmy C.	USAADC Ft Bliss, TX	USA Eng Ctr Ft Belvoir, VA	Nov 72
CROW, Harry B., Jr.	MACV	USAREUR	Dec 72
CURRIE, Stephen L.	Alaska	SafGrdSys, Langdon, ND	Sep 72
CURTIS, David M.	USA Fld Arty Ft Sill, OK	USAG Ft Campbell, KY	Oct 72
DALY, Dennis D., Jr.	VN	USA Jud, Falls Church, VA	Dec 72
DESO, Robert E., Jr.	MACV	USA Jud, Falls Church, VA	Oct 72
DORT, Dean R., II	USAREUR	USA Jud, W/STA GOEPPENGEN	Aug 72
DOYLE, Brooks S., Jr.	VN	3d USA, Ft McPherson	Dec 72
FINNEGAN, Richard	USAG Ft Meade, MD	Inst. Path, WRAMC, Wash, DC	Sep 72
FOLEY, Robert M.	Hq 6th USA Pres of SF, CA	USA Judw/sta Ft Sill, OK	Aug 72
FRIESNER, Wayne L.	USAREUR	USAA Depot, Corpus Ch, TX	Nov 72
HARROLD, Dennis E.	USAG Ft B. Harrison, IN	USAG WSMR, NM	Nov 72
HILL, James R., Jr.	USAIC Ft Benning, GA	Hq XVIII Abn Cp Ft Bragg	Oct 72
HOPPER, James D., II	USA Jud, Falls Church, VA	Fld Arty Ft Sill, OK	Sep 72
HYDE, James D.	USARSO	USA Jud, Falls Church, VA	Jan 73
LUNDVALL, Robert E.	USARSO	USAG Ft Devens, MA	Nov 72
MARTIN, Lawrence D.	USAG Ft Huachuca, AZ	USA Jud, Falls Church, VA	Nov 72
MATHIS, Peter H.	Hq. MDW	Hq, 1A Ft Meade, MD	Oct 72
MCSPADDEN, Gary R.	USA Fl Arty Cen, Ft Sill, OK	USATC Ft L'Wood, MO	Nov 72
MORGAN, Jack H.	USATC Ft L'Wood, MO	Flt Tng Ctr Ft Stewart, GA	Oct 72
PROSSER, John R.	USAREUR	OTJAG	Aug 72
RECCHUITE, Martin	USAREUR	OTJAG	Sep 72
RICHARDSON, John W.	USAREUR	USA Jud w/sta Frankfurt	Jul 72
RODRIQUEZ, Jaime A.	USAREUR	Hq, USA Ft Buchanan, PR	Sep 72
SEVERSON, Lawrence	USA-DTC Salt Lake City, UT	Hq, USARSO Ft Amador, CZ	Nov 72
STEGER, John T.	2d Armored Div, Ft Hood, TX	USA Jud, Falls Church, VA	Oct 72
TAYLOR, Robert H.	VN	USAIC Ft Benning, GA	Sep 72
TROMEY, Thomas N.	USAG Ft Harrison, IN	USAREUR	Nov 72
TURNBAUGH, Charles	Fld Arty Ctr Ft Sill, OK	USA Jud Falls Church, VA	Nov 72
VICKERY, Arnold A.	Stu Det, 3d USA	Hq 5th USA Ft Sam Houston	Aug 72
WATTS, Theodore H.	Hq, XVIII Abn Cp Ft Bragg, NC	USAREUR	Sep 72
WING, Dennis J.	Fitzsimons Gen Hosp	USAREUR	Nov 72

WARRANT OFFICERS

YOUNG, Seburn V.	USATC Ft Lewis, WA	Hq 6th USA, Pres of SF	Jul 72
TRAVIS, Harry B.	Stu Det, 3d USA	S-F TJAGSA	Aug 72

4. ASSIGNMENT - DIVERSION.

CLARKE, Robert B., COL	USA Jud	Hw US EUCOM APO NY 09128	Aug 72
MCNEIL, Darrell O., COL	Hq 3d USA Ft McPherson, GA	CDC, Ft Belvoir, VA	Jul 72
CREEKMORE, Joseph, MAJ	Korea	Stu Det, MDW	Sep 72

5. Congratulations to the following officers who received awards as indicated:

COL ROBINSON, George R.	Army Commendation Medal (Second Oak Leaf Cluster)	1Jun71-1Jul72
COL TALBOT, James S.	Meritorious Svc Medal	Aug69-Feb72
COL NORTON, Jack	Meritorious Svc Medal	10Mar69-2Jun72
MAJ MC GOWAN, James J., Jr.	Joint Svc Commendation Medal	Jun70-May72
CPT BRAWLEY, Michael J.	Army Commendation Medal	4Jan72-21Jan72
CPT CHRISTIAN, Bertrand E.	Army Commendation Medal (1st Oak Leaf Cluster)	Dec70-May72
CPT DESO, Robert E.	Army Commendation Medal (1st Oak Leaf Cluster)	1Jun72-30Jun72
CPT DEWEY, Thomas F. Jr.	Army Commendation Medal	26Mar71-1Aug72
CPT EHRHARD, Lawrence R.	Army Commendation Medal	Jan70-Jun72
CPT FOLEY, Patrick J.	Army Commendation Medal	11Nov71-4Aug72
CPT GOOCH, James C.	Army Commendation Medal	28Dec68-23Sep72
CPT FRAZEE, Robert M.	Army Commendation Medal (First Oak Leaf Cluster)	5Aug71-26Jul72
CPT MULHERIN, Brian C.	Army Commendation Medal	27Dec68-15Aug72
CPT RODGER, Frederic B.	Army Commendation Medal (Second Oak Leaf Cluster)	28Sep70-30Apr72
CPT SCANLON, Jerome W., Jr.	Meritorious Svc Medal	Jul69-Jul72

6. DA Civilian Attorney Positions

TITLE & GRADE	*ORGANIZATION OR AGENCY*
General Attorney (CONTRACTS) GS 905-13	USA Korea Procurement Agency Office of General Counsel Hq, 8th US Army APO San Francisco 96301

All interested personnel please submit Standard Form 171 to Chief, Personnel, Plans and Training Office, Office of the Judge Advocate General, Washington, D.C. 20310. Anyone interested in other civilian attorney positions under the jurisdiction of the Judge Advocate General should submit Standard Form 171 to the address listed above.

Title and Grade	*Experience Required*
Attorney-Advisor (Contracts) GS-13	Government Procurement experience required.
Attorney-Advisor (Contracts) GS-12	Government Procurement experience required.
Attorney-Advisor (General) GS-13	Military Justice and Military Affairs experience required. Labor Relations experience desired.
Attorney-Advisor (General) GS-13	Government Procurement experience or Trial experience required, both desired.

These positions are at HQ, US Army Aviation Systems Command, St. Louis, Missouri. Absence of stated experience requirements will not preclude consideration and hire at a reduced grade. Interested persons may submit Standard Form 171 to Chief Counsel, US Army Aviation Systems Command, P. O. Box 209, St. Louis, Missouri 63166.

7. Policy Concerning Advanced Course Attendance.

a. *General.* The Judge Advocate General considers attendance at the JAGC Advanced Course essential for the full professional development of a career judge advocate and as the major basis for the training, development, and selection of officers destined to serve as Staff Judge Advocates and Deputy Staff Judge Advocates. The course provides in-depth training and exposure in each major functional area of military law, with emphasis on the role of a senior legal adviser to an important command, and affords an officer the opportunity to exchange ideas and experiences with his col-

leagues in an atmosphere free from operational requirements. Upon successful completion of the course, each officer is considered fully qualified to perform all types of legal duties at all levels of command. The Advanced Course is also a prerequisite for higher level military schooling, such as Command and General Staff College and Armed Forces Staff College.

The JAGC follows Department of the Army policy that *all qualified* officers should attend their branch Advanced Course between the fourth and eighth year of service. Because of the professional nature of the JAGC mission and the level of instruction provided at TJAGSA, officers with longer service occasionally will be selected. Judge Advocate officers should seek advanced course attendance at the earliest possible time in their careers. While attendance is voluntary, declination could adversely affect both an officer's professional development and his future career opportunities. Efficiency reports and officer record briefs reflect military school development which is an important item of consideration by selection boards. Thus there is no substitute for attendance at the advanced course.

b. *Constructive Credit.* An officer who is no longer being considered for attendance at the Advanced Course may be granted constructive credit where equivalent knowledge and experience is clearly demonstrated. This credit will be granted on a case-by-case basis. Applications should be addressed to TJAG, Attn: Chief, Personnel, Plans and Training Office, Office of The Judge Advocate General, Department of the Army. The Commandant, The Judge Advocate General's School, may recommend to TJAG the granting of constructive credit to members of the faculty, The Judge Advocate General's School, under such conditions as he may prescribe, upon successful completion by the officer concerned of at least two academic years as a member of the teaching faculty.

c. *Specialty Areas of the Law.* The Judge Advocate General recognizes the importance of developing officers with specialized abilities to enable the Corps to provide legal services in areas requiring technical expertise. The Corps needs both "generalists" and "specialists." However, legal specialists are most valuable after they have become thoroughly grounded, through experience, schooling, and training in all the principal areas of the law. The Advanced Course provides schooling and much of the training and fills in voids in an officer's professional background. For these reasons, officers who desire to specialize in a particular area of the law should normally do so following attendance at the Advanced Course.

d. *Advanced Civil Schooling.* JAGC officers are encouraged to pursue graduate legal studies at civilian education institutions, either in their individual capacity, or as a participant in the JAGC civil schools program. It is important to realize, however, that while a graduate legal degree complements a diploma from TJAGSA, it is not a substitute for actual attendance at the Advanced Course. Preference is given to Advanced Course graduates in selecting officers to attend civil schools at Government expense.

8. Policy Concerning Advanced Civil Schooling.

a. Each year, the Judge Advocate General's Corps is allocated a definite number of positions for advanced civil schooling, based upon validated requirements. Immediately upon completion of advanced civil schooling the officer normally will be required to serve a 3-year utilization tour in a validated position. Validated requirements are almost exclusively in OTJAG and the Judiciary located in Washington, D. C. or at The Judge Advocate General's School, Charlottesville, Virginia. An officer entering the program should expect repetitive tours in such positions.

b. Priority for advanced civil schooling is given to outstanding officers who are graduates of the Judge Advocate General's Corps Advanced Class. To insure full utilization of advanced schooling opportunities, other outstanding officers who volunteer may be selected for advanced civil schooling prior to attendance at the Advanced Class. From this category, officers who have indicated a desire to attend the Advanced Class in the future will be given priority. Officers who attend advanced civil schooling will be required to serve a utilization tour upon completion of civil schooling.

Individuals who attend advanced civil schooling and who do not subsequently attend the Advanced Course are not precluded from selection for C&GSC

or other advanced schooling, but Advanced Class graduates are given priority for such schooling. Constructive credit for the Advanced Course will be granted only in accordance with the constructive credit policy outlined in the policy concerning attendance at the Advanced Course.

CURRENT MATERIALS OF INTEREST

Articles

Emerson, "War Powers: An Invasion of Presidential Prerrogative," 58 ABAJ 809 (Aug. 1972).

AR's and Other Official Publications

AR 608-8, 4 Aug. 1972, eff. 20 July 1971 "Mortgage Insurance for Service Members" implments §222 of the National Housing Act as amended.

FM 19-5, "Civil Disturbances" has been revised. The new addition is dated March, 1972.

Cir 600-85, effective immediately, "Alcohol and Drug Abuse Prevention and Control Program," supersedes AR 600-32 and makes substantial changes in this program.

Courses

"Prosecution and Defense of Drug Cases" ABA National Institute, New York City, Sept. 29-30; Los Angeles, Oct. 13-14. Cost: $100. Write to ABA National Institutes, ABA, Division of Legal Practice and Education, 1155 E. 60th St., Chicago, Illinois 60637.

COMING EVENTS

12-16 September	Federal Bar Annual Convention, Washington, D.C.
1-5 October	Army JAG Conference, Charlottesville, Virginia
8-11 October	AUSA Annual Meeting, Washington, D.C.
30 Nov.-2 Dec.	Army JAGC USAR Conference, Charlottesville, Virginia

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7-13 Feb.	ABA Mid-Year Meeting, Cleveland, Ohio
4-7 Mar.	National Guard JAGC Conference, Charlottesville, Virginia

Please inform Editor, The Army Lawyer, of any events which should appear.

UNITED STATES GOVERNMENT PRINTING OFFICE: 1972—513—790/2