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### G.I.A.D. DRAPER ADDRESSES JAG SCHOOL

On 10 September 1971, Colonel G. I. A. D. Draper, O.B.E. (Retired, United Kingdom Army), Professor of Law, University of Sussex, and International Law Expert addressed the Judge Advocate General's School on the Law of War and the role of the Judge Advocate. The following is a summary of his remarks:

Law is a reasonable alternative, and perhaps the only practical alternative, to despair resulting from man's inhumanity to man. The acts of inhumanity committed by man against his brother historically have been a part of the life experience. Man to man relationships always have some type of effect and too frequently the effect is an act of barbarism, cruelty or atrocity. History is filled with examples of relationships which border on the nonhuman and the highest form of nonhuman relationship has been war. The human spirit has consistently tried to overcome and control these nonhuman relationships. The basic response has been through law. Law has made possible an alternative to continued nonhuman relations. Without such a human response there is only despair which invites further barbarism and inhumanity.

The International Law of War is the oldest part of international law and yet is the most difficult area for law to control. It is the most difficult because it is directed toward that most barbaric relationship—war. As an alter-

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native to inhumanity and spiritual death, man has attempted to cope with this problem through law—specifically the law of war. The 1949 Geneva Convention for the protection of war victims is seen as a landmark in man's response to warfare. It is not, however, the launching point—the beginning of man's fight against inhumanity. Rather, it is the result of centuries of effort—a synthesis of the human spirit, the law, and inhumanity. It is necessary to be tolerant of treaties, particularly those involving many nations. These international agreements are not perfect, but represent man's compromise of many languages, many cultures, many national policies, and vast differences in the laws and legal systems of more than 100 nations. Much work remains to be done to perfect existing law to perfect human control over barbarism and inhumanity.

The law of war is generally divided into that concerned with combat and is based on the Hague Convention No. IV of 1907 and that law directed toward the victims of war as exemplified in the 1949 Geneva Conventions. The law of combat must be brought up-to-date in view of modern technology. Hague Convention No. VII is concerned with naval bombardments and yet is most inadequate for controlling modern naval bombardment which uses submarines and missiles. There has been very limited, if any, work done on aerial warfare. Yet the historical examples of Dresden, Tokyo, and Hiroshima, and perhaps Vietnam, demonstrate that aerial warfare is, in terms of results, the most barbaric of combat acts. Many individuals are reluctant to impose limitations on aerial warfare because "there is no law governing aerial warfare." Such an approach to law as an alternative to despair is an outspoken expression of ignorance. More is de-

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manded of man and the law if the human spirit is to survive. In the arena of combat law important work has been done in recent years to protect and to assist the soldier or the combatant engaged in warfare, but modern warfare and combat have direct effects upon civilians and here little work has been done to protect or to assist civilians in a combat war area.

Common Article III of the 1949 Geneva Conventions is an attempt to ameliorate the conflict between law and national sovereignty. Article III is addressed to internal conflicts. The parameters of its concern and effect and acceptance are subject to extensive debate and argument. Nonetheless, it is an expression by 129 nations that law in some respect must infringe upon national sovereignty and control the inhumanity of man to man, even within state boundaries. The human rights movement has clearly enforced itself upon the laws of war. Today this movement, centered in the United Nations, is demanding that the law progress further in controlling nonhuman relations and in protecting the human spirit. The question is presented as to whether we need more laws or whether we need means to enforce existing laws. The first approach seems to further state hypocrisy. Codification of laws in the past has not given adequate protection and control because states have said one thing and frequently have done another. The best approach would seem to be an effective means to enforce the laws of war. Historically, reprisals and self-help have been such a means, yet this is not a very human response. It is too much an act of punishing barbarism with greater barbarism. It is correcting evil with a greater evil. The use of war crimes trials too frequently serves as a stage of martyrdom, is open to the charge of victor vindication, and is directed toward only one nation rather than international difficulties. It must be remembered that the execution of a war criminal will not restore life to a murdered prisoner of war. The concept of enforcement in the 1949 Geneva Conventions is embodied in the articles concerning the Protecting Power. In the modern world this has

become a totally impractical solution. A nation who would permit an outside nation to come in and check its activities during war probably would not have gone into war in the first place. More important, the Protecting Power is conceived as a neutral power and in the modern world the concept of neutrality is outdated and impractical.

There is a possible means of enforcement and a means in which the lawyer, and most especially the military lawyer, plays an important role. That means is education—education not only of soldiers, but also of leaders, of parents, of high school children, of a whole society. The role of the lawyer includes the

role of an educator because he knows the law, he knows the inhuman relations and he works to have the former control the latter. The military lawyer is professionally equipped to be the leader in this educational endeavor. He of all lawyers is more familiar with the barbarism and inhumanity of war and he is the more familiar and knowledgeable not only with the laws of war but of the needs of an army in conducting warfare. He is ideally situated to relate the needs of warfare, the barbarism of warfare, and the means to protect and enhance the human spirit. It is a standard which the military lawyer can carry and if carried effectively can serve as a means to enforce the laws of war.

### REPLACEMENT FOR JUDGE FERGUSON NOMINATED

Justice Robert M. Duncan of the Ohio Supreme Court has been nominated by President Nixon to fill the vacancy on the United States Court of Military Appeals created by the re-

tirement of Judge Homer Ferguson.

Duncan, a Black and a Republican, is from Columbus, Ohio. If confirmed by the Senate his term will run to 1 May 1986.

### NATIONAL MOOT COURT COMPETITION TO DEAL WITH MY LAI CASE

The annual National Moot Court Competition is sponsored by the Young Lawyer's Committee of the Association of the Bar of the City of New York and participated in by law schools throughout the country. For this, the 22nd Competition, the Moot Court teams will be dealing with a fictitious My Lai type case. A synopsis of the factual situation used for the case, a statement of some of the possible issues and a bibliography of some of the recent works in this area are given both for your interest and to assist you in answering questions should you be called upon by local Moot Court teams. It should be noted that the Moot Court competitions are frequently in need of judges and brief graders and JAGS may wish to volunteer their services.

The name assigned this year's case is Packs v. Scott. Packs is currently confined pursuant to his conviction by a court-martial for pre-mediated murder. He was assigned to Viet-

nam as a Second Lieutenant and upon arrival in country received a package of materials containing a copy of "the rules of engagement" issued by the Commanding General, USARV, a directive from the Commanding General which stated that fire power should be used so as to avoid "instances involving friendly forces, noncombatants, and damage to civilian property," and a summary of the applicable portions of the Geneva Convention.

Packs was assigned as the Commanding Officer of the Second Platoon, Company C, Third Battalion of the DECAL Division under the command of Major General Custer. On 14 March 1968, Packs' unit was ordered into combat as a part of a major offensive. Neither the men assigned to Company C nor Packs had any substantial combat experience, but Company C had recently sustained some casualties and wounds from mines and booby-traps. Company C's commanding officer, Cap-

tain Ralph Whitehead, prior to the action, reminded the members of his command of the minefield incidents and ordered Company C to "neutralize" the village and "make sure there was no one left alive" except for a few inhabitants who were to be used to precede the troops in the event that a minefield was encountered. Captain Whitehead admitted at trial that such "neutralizing" of enemy strongholds was a standard American military practice in the Province and that he in fact ordered such neutralization on this occasion.

Immediately after Packs' platoon entered the village, Captain Whitehead ordered the extermination of "everything that moved" in an effort to speed the operation. Shortly thereafter Whitehead ordered the Company "to waste" even those civilians marked for the minefield operation. By this Captain Whitehead meant "kill." Packs did not question the legality of those orders, contending at trial that they were customary in Vietnam where military success was measured solely by the number of enemy reported killed.

Packs returned to the United States where charges were preferred against him. Shortly after the charges were referred to trial, both trial counsel and the appointed military defense counsel petitioned the military judge for injunctive and other relief against the pervasive and inflammatory pretrial publicity about the case. The military judge agreed that pretrial publicity had possibly been prejudicial but denied the joint petition nonetheless. He ruled that he lacked the power to issue injunctive relief or to issue any pretrial orders not directed to the parties or prospective witnesses.

Packs claims the following:

(1) That by virtue of the rulings with regard to the pretrial publicity he was tried by a tribunal without adequate judicial power to protect his constitutional rights.

(2) That his conviction was obtained in violation of even the most basic constitutional guarantees;

(a) the military judge, court members and both counsel were appointed by the convening authority who was at the same time their immediate military superior;

(b) the members of the court-martial were not randomly selected, but were instead hand-picked by the convening authority;

(c) he was deprived of his right of a jury of his peers, since no court-martial member was below the rank of major; and

(d) his military counsel was, because of Army policy, not permitted to appear on his behalf in a civilian court to seek relief following the military judge's pretrial rulings, and he was without sufficient funds to retain civilian counsel.

(3) The military judge erroneously excluded as irrelevant evidence relating to American military practices in Vietnam offered in support of Packs defense of obedience to lawful orders.

(4) Packs was deprived of his right to a fair trial because the United States Army itself was guilty of the crimes charged.

(5) He was wrongfully convicted because his guilt was not proven beyond a reasonable doubt.

Other testimony at trial revealed the following: (a) A Sergeant testified that he saw 22 dead adult men and women lying near one of the larger buildings in a village and that Packs was standing nearby with a M16 rifle in an apparent daze. (b) A Corporal testified that shortly after the alleged incident described by the Sergeant he came to the same building and found the 22 dead persons along with one wounded person who appeared to be a civilian woman. The Corporal stated that he took the woman to Packs and he never saw her again. (c) A First Lieutenant testified that on 17 March 1968 at an Officers' Club Packs had boasted of having shot 22 Vietcong and having wasted an entire Vietcong village. (d) Accused testified, denying that he shot any persons in the village, civilian or otherwise. He stated that he had come upon what

were apparently villagers and had ordered them to line up. He then left the scene and when he returned was stunned to find the 22 bodies.

The United States District Court, for purposes of the competition, dismissed Packs' petition. The Court held that the military judge was correct in excluding evidence of military practice in Vietnam and stated that petitioner's acts as charged and for which he was convicted were patently illegal under the rules of war and under applicable treaty commitments. The defense based on obedience to lawful orders could not be available to excuse "patently unlawful and inhuman murder." The Court also stated that the jurisdiction of the court-martial is exclusive and it was properly constituted in accordance with applicable law. The Court rejected the petitioner's claim that it was impossible for him to obtain a fair trial before such Court. Finally, the Court stated that the answer to petitioner's claim that the verdict was not sustained by the evidence was that the District Court lacked jurisdiction to review factual determinations of military tribunals. *Burns v. Wilson*, 346 U.S. 137 (1953).

The Court of Appeals, in a short opinion, ruled that the District Court lacked jurisdiction to review findings of fact by the court-martial, the only proper forum available to prosecute crimes committed by American servicemen in Vietnam. The court-martial itself was properly constituted and administered under governing statutes. Finally, the ruling on the defense of superior orders was held to be in accordance with the law of war. Accordingly, they affirmed the decision of the District Court.

The arguments in the case are now before the United States Supreme Court on a petition for Writ of Habeas Corpus. All facts as given

in the petition and summarized above are assumed to be true. The first and most obvious issue presented is whether or not obedience to orders can constitute a defense. The court-martial and Federal Courts both held that the order to kill the Vietnamese civilians was so patently unlawful that it could not be used as a defense to Packs' conviction of murder. The law in the area, while not totally unresolved, is fairly clear as to patently illegal orders and supports the conclusion of the Courts.

The case also contains a factual issue as to whether or not the evidence is sufficient to support accused's conviction. This may be the most arguable issue for the petitioner's counsel. There is no direct evidence that Packs actually shot and killed the Vietnamese. However, the holding that under *Burns v. Wilson* the federal courts have no jurisdiction to review the question is a major stumbling block that counsel for Packs will have difficulty in overcoming.

The issues as to the constitutionality of the court-martial system itself are tangential to the case. There is some question as to whether the questions can be raised in federal court under *Burns v. Wilson*. Also, the argument is weakest for crimes occurring overseas where the only possible forum for trial is a court-martial.

This Moot Court competition presents issues of obvious interest to military lawyers. It is possible that some of the arguments and approaches developed during the competition may provide new insight into these problems. Those wishing to assist in the competition may contact the regional sponsors listed below. This should be done promptly since the regional competition is due to be completed in November.

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## JAG SCHOOL BASIC STUDENTS TAKE NEW PHASE I TRAINING

The 61st Judge Advocate Officer Basic Class, currently receiving military legal instruction at The Judge Advocate General's School, was the first class to complete the new Phase I of the Basic Course conducted at the U. S. Army Military Police School, Fort Gordon, Georgia.

The Judge Advocate Officer Basic Course (5F-8101) is conducted in two phases. Phase II of the course is eight weeks in duration and continues to be given at The Judge Advocate General's School. This phase of the course provides instruction in military law to newly-commissioned members of the Judge Advocate General's Corps.

Phase I of the course provides new JAGC officers with a general military orientation. Phase I was formerly conducted at the U. S. Army Quartermaster School at Fort Lee, Virginia. Effective Fiscal Year 1972, significant changes were made in Phase I of the basic course. The scope of instruction was broadened, the course was lengthened from 2½ weeks to 4 weeks, and the training location was changed from Quartermaster School at Fort Lee to the Military Police School.

The purpose of Phase I is to prepare newly-commissioned JAGC officers for active duty by providing them with a general orientation on the total Army system including function,

organization, administration, and the military justice program of law enforcement. Criminal investigation and corrections with which JAGC officers have a direct and continuing interface are also covered. The Phase I program of instruction contains a total of 176 hours of academic and non-academic instruction and activity. Included are 55 hours in leadership, command and staff; 26 hours in Provost Marshal activities; 8 hours in civil disorder and dissent; and 22 hours of field trips and demonstrations. The program of instruction emphasizes leadership, military organization and procedures, and Provost Marshal and CID activities. In the revision and expansion of Phase I content, a working knowledge in the latter area was deemed especially desirable because members of the JAGS are so closely involved with Provost Marshal activity and work products.

With its expanded and altered content, and shift of emphasis, Phase I of the Basic Officer Course is considered by observing officers to be much improved over the old Phase I. The course now provides a more comprehensive general military orientation together with training in provost marshal activities. These are essentials for the military lawyer to function at maximum efficiency.

## REPORT ON RESERVE JAG OJT

One of the challenges for the Active Army of the Seventies is making the *One Army* concept a reality. The key to meeting this challenge is to foster a close association between full-time and part-time soldiers. From this close association will come a strong sense of professional kinship and an interchange of ideas that will benefit the Active Army now and help assure an efficient assimilation of Reserve personnel into the Active Army in the event of mobilization.

The JAG detachment On the Job Training program, begun last summer and planned for future years, is based on the *One Army* con-

cept. Reserve and Active Army JAGC officers working together during the training period have begun to develop the necessary professional relationship. At the same time, the SJA has additional manpower resources which can and should be used to help alleviate part of his current workload.

During the summer of 1971, eight JAG headquarters detachments and their subordinate functional teams performed OJT at installations throughout CONUS. Reserve Judge Advocates saw first hand the cases, clients and problems facing Active Army Judge Advocates on a day-to-day basis.

Reservists acted as assistant trial and assistant defense counsel in special courts-martial, adjudicated claims, reviewed procurement matters, and performed legal assistance. At many installations, Reservists visited stockades and attended seminars taught by military judges.

Colonel Charles Grim, SJA at Fort Gordon, utilized members of the 213th JAG Detachment to produce a training film to be used to train Active Army military police. Captain John Marshall, acting SJA of Fort Stewart, scheduled a GCM presided over by Colonel Reid Kennedy which was followed by a criminal law symposium focusing on the recent My Lai trials.

Colonel Dave Chase, SJA of First Army, and Lieutenant Colonel Charles Thompson, Fort Meade, were responsible for scheduling training for the 9th JAG Detachment from the Ohio area and divided the units between Aberdeen Proving Ground, Fort Holabird, Carlisle Barracks, Indiantown Gap Military Reservation, Fort Dietrick, Fort Ritchie, and Valley Forge Hospital. Reservists on duty at Fort Holabird went to civilian jails to interview military clients. Captain Paul Weinberg, Carlisle Barracks, used the Reservists assigned to his office to help prepare an estate plan for a senior officer assigned to the Army War College. This is the type of job few Active Army judge advocates have the time to complete.

COL Dan Lennon, SJA, Headquarters XVIII Airborne Corps, Major Bob Smith, 82nd Airborne Division, and Major Pedar Wold, JA, U. S. Army John F. Kennedy Center for Military Assistance, Fort Bragg, introduced Reserve JAG officers to Captain Michael Steffy's Army Drug Amnesty program, "Operation Awareness." Colonel D. B. McFadden, Assistant Chief of Staff, G-5, also at Fort Bragg, oriented them in the domestic action program in the Bragg-Fayetteville area. This program is designed to assist in community self-improvement.

The OJT program was well received by both Active Army Judge Advocates and Reservists

despite several problems which arose. At some installations housing was poor, especially for enlisted personnel. Some installations tried to "train" the Reservists by developing a training program separate from the office workload. A few of the functional teams were unable to perform their skills, either due to their own lack of training or lack of work at the installation in their particular field. Many procurement law teams were at installations during slack periods of procurement, others found themselves unable to perform due to lack of training. Finally at some installations, there were too many Reservists at one time to assimilate in the normal working routine.

The JAG School has attempted to solve some of the problems in planning next summer's OJT program. The OJT program will be expanded to a total of 32 installations next summer. By attaching Reservists to the judge advocate offices at a large number of installations, it will be possible to keep the number of Reservists at one installation at any one time to a workable level. This will also reduce the problem of finding suitable housing for both officers and enlisted personnel. Wherever possible, Reservists will be sent to installations where there is a demand for their specialty and at times when it appears the Active Army workload will be heavy.

The Reservists will be ordered to active duty at the installations in increments during the summer months. SJA's, therefore, will have additional manpower, at workable levels, for periods of six to eight weeks during the summer.

The SJA will be responsible for this training program for the USAR JAGSO detachments assigned to his installation. This training is simple in concept and execution: *Put them to work.* The Reservists are to be trained to perform post mobilization missions. Their mission after mobilization will be to function as Judge Advocate officers. The work the SJA is responsible for now is the work Reservists will be responsible for following mobilization. At the same time the Reservist

is performing his training, the SJA is able to reduce his backlog of work.

Last summer, at Fort Hood, incremental training was utilized for the 2d JAG Detachment. Small numbers of Reserve JAG's arrived on post throughout the summer and were put to work. This training prompted the following observation from Lieutenant Colonel Fred Moore, SJA of the 2d Armored Division: "From the first liaison visit of their commander, Lieutenant Colonel Ollie Brown, to the last day of training of the last increment, their enthusiasm, devotion to duty, appear-

ance, and legal expertise could only be characterized as outstanding. As a result of working with their extremely competent officers and enlisted men I have no doubt that, should they be called to active duty, integration into the Active Army could be accomplished quickly and effortlessly. Even within their short two weeks, they immediately became active productive members of the office. Our only regret was in losing the valuable services of the reservists at the end of each tour. I strongly recommend continuance during future summer training periods."

## SJA SPOTLIGHT – FIFTH U. S. ARMY

### CONSOLIDATION OF FOURTH AND FIFTH UNITED STATES ARMIES

*By Colonel Edwin F. Ammerman*

On 6 March 1970, the Department of Defense announced the decision to consolidate Fourth and Fifth US Armies with Headquarters of the consolidated Army to be at Fort Sam Houston, Texas. On 16 March 1970, Headquarters, Continental Army Command directed the consolidation. Excepted were the states of Colorado, Wyoming, and North and South Dakota, which were to be assigned to Sixth US Army. Completion of the consolidation and the phasing out of Headquarters, Fifth US Army, Fort Sheridan, Illinois, was to be completed not later than 1 July 1971. On 3 April 1970, Headquarters, Fifth US Army informed all subordinate commands and agencies of the realignment. Meanwhile, recognizing, though perhaps not in full, the work to be done to execute the decision, Headquarters, Fourth US Army buckled down to develop a detailed initial plan to accomplish the consolidation.

A CONARC master schedule of actions established a phase system to accomplish the actual consolidation. The system provided a time-table as follows:

**PHASE I (12 March-12 August 1970):** During this period, detailed plans for the Army

Headquarters consolidation, assumption by Sixth Army of additional territorial responsibilities, and a long range utilization study for Fort Sheridan were developed and forwarded to CONARC. A draft Table of Distribution and a revised Organizations and Functions Manual were also prepared.

**PHASE II (12 August-12 September 1970):** Headquarters CONARC reviewed and approved the detailed plans.

**PHASE III (12 September 1970-30 June 1971):** The Execution Phase. Functions were serially transferred from Headquarters Fifth US Army to Headquarters Fourth US Army (to be later designated as Fifth US Army) and to Sixth US Army (Colorado, Wyoming and the two Dakotas to Sixth US Army).

A unique aspect of the plan was to establish a Deputy Commanding General for Reserve Forces with a small staff in the Chicago area. He would be responsible for training and supervision of the reserve components, to include the Army Reserve, National Guard, and ROTC, in the seven northern states of the consolidated Army area. Additionally, he would provide general officer representation in the metropolitan area of Chicago. Another Deputy Commanding General for Reserve Forces, at Fort Sam Houston, would be responsible for the training and supervision of

reserve forces in the balance of the consolidated Army area.

With this background in mind, we turn to the Army SJA operation with comment on procedures followed and the major problems encountered. The Fourth Army SJA prepared a proposed office TDA estimated to be adequate to perform JA functions for the headquarters of the consolidated Army. After several workload statistical studies, this document was prepared with an honest appraisal of the personnel spaces required to perform the mission with reasonable efficiency and dispatch. Unfortunately, these proposals became entries in the "recognized requirements" column on the final TDA. The "authorized" column showed somewhat lesser figures. This resulted in the authorization of a lesser number of actual people aboard to perform the required functions. Hindsight suggests that the "recognized requirements" vs "authorization" should have been taken into consideration when submitting the proposal. However, it is not improbable that the same number of working people would have been granted. In any event, it was recognized that every working space would have to be completely justified. As a result of the TDA adopted personnel shortages to accomplish the work generated by the enlarged Army area are a serious problem.

The staff allowed the Deputy Commanding General, Reserve Forces, Northern Area, was limited — less than 100 personnel, military and civilian for all jobs and grades. Because the old Fifth Army SJA had an effective Reserve Affairs "branch" which provided the reserve officers in that Army area with established, recognized channels of communication and contacts, the Fourth Army SJA determined early in the consolidation that it would be advantageous to continue this operation at Fort Sheridan, if in any way possible. Moreover, soon after the initial announcement that the Department of the Army intended to close out Fifth Army Headquarters at Fort Sheridan, the United States Attorney in Chicago sent a plea to The Judge Advocate General that said, in effect, "please do not abandon

me!" The litigation caseload in which the then Fifth Army SJA was supporting and assisting the US Attorney was large and the US Attorney advised that he would be in extreme difficulty if that support were withdrawn. Thus, reserve affairs and litigation, plus the concept that a Major General representing the Army Commander in the Chicago metropolitan area should have a legal advisor readily available, provided the required justification for obtaining approval for the inclusion of a senior Judge Advocate officer and one civilian clerical space in the TDA for the Coordination Element Northern Area (CENA). The Judge Advocate, CENA, is also permitted to perform such other duties as may be required by the Deputy Commanding General, Northern Area, and the Army SJA.

The consolidation plan called for a detailed time-table for transfer of major functions by staff section. The approved plan provided for the assumption by the consolidated Army headquarters of all functions on or before 1 July 1971, and for transfer of specific functions at various dates ranging from the fall of 1970 to 1 July 1971. Some early transfer dates (before 1 July 1971) were necessary because operations which would take place after 1 July 1971, and therefore be the responsibility of the consolidated Army, had to be established and planned for in advance e.g., summer training for the Reserve, National Guard and ROTC. The SJA transfer-dated only two major actions, assumption of claims responsibility, and transfer of general court-martial jurisdiction, both with a completion date of 1 July 1971. The other JA functions, particularly military affairs and reserve forces functions, were expected to fall into place automatically as other staff sections with primary action responsibility assumed functions.

Not very far into the operation, problems relating to personnel turbulence began to surface. This was particularly true at Fifth Army Headquarters at Fort Sheridan. Military personnel departing Fifth Army Headquarters on PCS or retirement were in large measure not replaced. When the announce-

ment was made that Fifth Army Headquarters would be closed out, civilian personnel, fearing that their jobs would be terminated, began looking elsewhere for employment. As they found other positions, many left before the actual functions of the headquarters were transferred. Others retired. No replacements were recruited. The resultant personnel shortage adversely affected the ability of Fifth Army Headquarters to perform required missions in several areas. Recognition of potential personnel attrition undoubtedly contributed to a September 70 directive from CONARC to complete the functions transfers where possible by 1 April 1971 rather than 1 July 1971; the expressed reasons were for additional savings and because of manpower problems. Fifth Army, on 23 February 1971, announced by circular to all its concerned installations the transfer of all Headquarters Fifth Army claims functions to Headquarters Fourth Army effective 1 April 1971. Even so, a large number of unprocessed claims files were shipped to Headquarters Fourth Army for action. Only one space, a civilian Loss Damage Examiner, was authorized (two as recognized requirement) as augmentation to the existing Fourth Army Command Claims Service to form a consolidated Army headquarters claims staff to do the work previously accomplished by the two Command Claims Service staffs. The large backlog of claims actions overlaying the continuing current claims load of the enlarged Army area with the attendant delays, produced immediate claimant (and congressional) dissatisfaction because of slow processing. An extensive work overtime program "claimed" the Fourth Army Command Claims Service. The immediate crisis was met, but management problems for treating with the current claims load continue. A plea for authority to fill the other approved recognized requirement space in the Command Claims Service fell on deaf ears; the name of the game in the consolidation and closing of one headquarters was money-saving. The most immediate, certain and visible way to save is to pay less people. The actual figures are dramatic proof. Before consolidation Fifth Army SJA

office was authorized a total strength of 23, Fourth Army 19—total 42. The consolidated Army SJA is authorized 25.

While the Consolidation Plan Master schedule date of 1 July 1971 for transfer of general court-martial jurisdiction remained firm, personnel turbulence and speed-up of functions transfers did have a collateral effect. It became necessary for the Fourth Army staff to accomplish those administrative actions which required the action of the general court-martial convening authority, elimination actions, etc. Because the Fifth Army Commander's flag still flew at Fort Sheridan, he remained the general court-martial convening authority for headquarters troops and various units attached to that headquarters, Fort Sheridan, Fort Benjamin Harrison, and Camp McCoy, and final action on matters required to be acted upon by the GCM convening authority had to be taken by that commander. As a practical matter, the various cases in this category were staffed and worked up completely by the Fourth Army Staff at Fort Sam Houston, to include a recommended action for that commander's signature, and mailed to Fort Sheridan for his determination. The same jam-up of workload appeared in staff legal advice requirements as the other staff sections received their work backlog.

At the time of final consolidation of the two headquarters on 30 June 1971, at Fort Sam Houston, the Fifth Army Commander exercised general court-martial jurisdiction over Fort Sheridan, Fort Benjamin Harrison, and Camp McCoy, in addition to personnel of his own headquarters and attached units. By courtesy, jurisdiction remained there until he was relieved of command on 30 June 1971. On 2 April 1971, the Commanding General, Fifth US Army published a circular announcing that on 1 July 1971, that commander's general court-martial responsibility throughout that Army area was transferred to Fourth and Sixth Army, respectively.

The circular also provided instructions for records shipment and disposition. On 30 June 1971, the new Fifth Army Commander at Fort

Sam Houston assumed his added jurisdictional responsibility. This gave rise to further problems. Attempting to conduct an active general court-martial jurisdiction extending from Texas to Wisconsin by telephone and mail leaves much to be desired, for apparent reasons. The convening authority himself, traveling his vast domain on vital command visits, was not readily available for consultation with the SJA on the numerous questions requiring the commander's prompt personal decision. The obvious solution was to obtain general courts-martial jurisdiction for an appropriate commander on or nearer the scene and to place the other installations and units in that area under him for this purpose. This was eventually accomplished.

Another problem deserving of highlight arose from the necessity to provide fair and equal treatment of civilian employees of the two Army headquarters merging into one reduced force. Employees at Fifth Army were offered the opportunity to fill all jobs in the consolidated Army to which by reason of civil

service regulations they had greater entitlement than did "incumbent" Fourth Army employees. A prolonged period of determination of who "bumped" whom produced very noticeable harm to employee morale because of the uncertainty as to tenure, and, for the eventual unfortunates, certainty of lack of tenure.

Without slighting in the least the problems of planning, including constant watch over workload statistics, analysis of staff relationships to spot the "sleepers" to come into the JA office by referral, staff studies, and meeting planning deadlines, the personnel problem in its three aspects was by far the largest problem. To recapitulate, the three aspects were: maintaining an adequate work force in the vanishing headquarters; getting new people on board timely in the gaining headquarters; and keeping employee morale at a high enough level for effective production in the "interregnum". To recognize the problem is to know the solution. Try not to let it develop. But, like consolidation itself, it's easier said than done.

## PROCESSING OF COMPLAINTS UNDER ARTICLE 138, UCMJ

*By the Administrative Law Division, OTJAG*

Prior to the promulgation of Army Regulation 27-14, 13 May 1971, no single staff agency within Headquarters, Department of the Army was charged with the responsibility for review and final disposition of complaints under Article 138, Uniform Code of Military Justice. A review of those complaints submitted to the Office of The Judge Advocate General for comment indicates that cases were acted upon by The Inspector General, by The Provost Marshal General and by The Adjutant General, among others.

Army Regulation 27-14, *supra*, directs The Judge Advocate General to take final action on Article 138 complaints as the designee of the Secretary of the Army. Within the Office of The Judge Advocate General, responsibility for acting on these cases has been assigned to the Administrative Law Division. Experience

gained during recent months indicates that, as the law in this field develops, there are three areas in which a more uniform approach would be beneficial.

The first problem area relates to the depth of inquiry conducted into the complaint by the general court-martial authority. It is apparent from the definition of the term "wrong" appearing in subparagraph 2b, Army Regulation 27-14, *supra*, that the thrust of most complaints will be that the commander abused his discretion. In such cases, mere conclusions, such as "the complainant was not the best qualified" or "the request for leave was not justified," do not supply a sufficient basis upon which to make a final disposition of the case. It is essential that the inquiry identify and develop the factors which influenced the commander's decision. This should include proper documentation.

The second problem area relates to the granting of redress. Even though some cases clearly indicate that dissident elements are encouraging the use of Article 138 complaints as a deliberate harassing tactic, it appears reasonable to anticipate that there will continue to be cases in which a "wrong" has been done and in which redress is required. In the view of the Office of The Judge Advocate General, it would strengthen morale and discipline in the command concerned if redress were to be granted locally and quickly rather than at a later date on behalf of the Secretary of the Army.

The final point arises with respect to the processing of complaints against the commanding officer of a Class II activity which is located as a tenant on a major installation. The solution to this situation has been developed from the pragmatic approach that if a case were ever to arise the installation commander would be the convening authority who would dispose of charges against the Class II activity commander. Accordingly, a practice

has been developed under which the installation commander conducts the required inquiry. If redress is determined to be appropriate and if such redress extends to matters beyond the command jurisdiction of the installation commander, that officer forwards the case to the Office of The Judge Advocate General. He also forwards his recommendation as to redress to the officer to whom the Class II activity commander is responsible (e.g., The Provost Marshal General for the Commandant, United States Disciplinary Barracks). Final disposition of the case is deferred by the Office of The Judge Advocate General until information as to the redress granted. This procedure has worked well in practice.

It is recognized that the procedural aspects of Article 138 complaints present fewer problems than do substantive issues. Once sufficient precedents with respect to substantive matters have been developed, it is anticipated that an article on that subject will appear in the Army Lawyer. JAGA 1971/5034

### REPORT FROM THE U.S. ARMY JUDICIARY

#### Statistics

(a) The following court-martial statistics were compiled by the Records Control and Analysis Branch of the Judiciary for Fiscal Year 1971 (1 July 1970-30 June 1971). These statistics are based upon records of trial received by the Judiciary during the fiscal year and therefore will not coincide with the number of cases *tried* in fiscal year 1971. For comparison purposes the same statistics for fiscal year 1970 (1 July 1969-30 June 1970) have been included in parenthesis.

Records Received for Review or Examination by:

Court of Military Review		3420 (2701)
General		
Courts-Martial	2247 (2120)	
Special		
Courts-Martial	1173 ( 581)	
Examination Division		431 ( 440)
Total		3851 (3141)
Number of persons tried		3942* (3209)

\* The number of persons tried is greater than the total records received because of joint and common trials with more than one accused.

	Findings		Sentence		
	Conviction	Acquittal	DD	BCD	Dismissal
Officers	28 (39)	4 (4)			19 (30)
Warrant Officers	6 (6)	4 (5)	3 (4)		
Enlisted	3728 (2981)	172 (170)	786 (844)	2653 (1810)	
Total	3762 (3026)	180 (179)	789 (848)	2653 (1810)	19 (30)

(b) The following statistics show the actions taken by the Examination Division and the Army Court of Military Review during fiscal year 1971. These statistics will not correlate with the statistics relating to the records of trial received as many of the cases received in one fiscal year are not decided until the next fiscal year. Fiscal year 1970 statistics are included in parenthesis.

**EXAMINATION DIVISION**

Legally sufficient or noted	374	(467)
Referred to Court of Military Review	33	(30)
Total	407	(497)

**COURT OF MILITARY REVIEW**

Findings and sentence affirmed	2430	(1613)
Findings affirmed, sentence modified	543	(571)
Findings affirmed, sentence reassessed, or rehearing ordered as to sentence only	10	(28)
Findings affirmed, sentence disapproved—set aside	4	(5)
Findings partially disapproved, sentence affirmed	32	(13)
Findings partially disapproved, rehearing ordered	4	(10)
Findings—sentence affirmed in part, disapproved in part	78	(97)
Findings—sentence disapproved, rehearing ordered	45	(25)
Findings—sentence disapproved, charges dismissed	40	(46)
Returned to field for new SJA or C/A action	18	(11)
Motion for appropriate relief, denied	1	(1)
Sentence commuted	1	—
Order of ACOMR for psychiatric examination	2	—
Total	3208	(2420)

(c) **NON-JUDICIAL PUNISHMENT  
MONTHLY AVERAGE AND QUARTERLY  
RATES PER 1000 AVERAGE STRENGTH  
JANUARY - MARCH 1971**

	<i>Monthly Average Rates</i>	<i>Quarterly Rates</i>
<b>ARMY-WIDE</b>	17.37	52.12

CONUS (Excluding ARADCOM)	18.82	56.45
MDW	3.46	10.37
First US Army	16.95	50.84
Third US Army	18.44	55.31
Fourth US Army	16.38	49.15
Fifth US Army	25.07	75.22
Sixth US Army	24.74	74.23
USARADCOM	12.06	36.18
<b>OVERSEAS</b>	15.71	47.14
USA Alaska	15.92	47.76
USA Forces So Cmd	12.91	38.73
USAREUR	15.01	45.04
Pacific Area	16.16	48.47

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

(d) **MONTHLY AVERAGE COURT-MARTIAL  
RATES PER 1000 AVERAGE STRENGTH  
JANUARY - MARCH 1971**

	<i>General CM</i>	<i>Special CM</i>	<i>Summary CM</i>
<b>ARMY-WIDE</b>	.18	1.78	.95
CONUS (Excluding ARADCOM)	.25	2.37	1.35
MDW	.02	.11	.17
First US Army	.19	2.25	.76
Third US Army	.36	2.70	.82
Fourth US Army	.25	2.66	1.04
Fifth US Army	.23	1.63	1.56
Sixth US Army	.22	2.62	3.72
USARADCOM	—	.20	.13
<b>OVERSEAS</b>	.10	1.07	.46
USA Alaska	.05	.57	.30
USA Forces So Cmd	—	.86	1.67
USAREUR	.08	.83	.64
Pacific Area	.11	1.21	.35

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

(e) NON-JUDICIAL PUNISHMENT  
MONTHLY AVERAGE AND QUARTERLY  
RATES PER 1000 AVERAGE STRENGTH  
APRIL - JUNE 1971

	Monthly Average Rates	Quarterly Rates
ARMY-WIDE	17.42	52.25
CONUS (Excluding ARADCOM)	19.26	57.77
MDW	2.90	8.70
First US Army	18.23	54.70
Third US Army	19.79	59.36
Fourth US Army	17.86	53.58
Fifth US Army	38.76	116.28
USARADCOM	8.42	25.25
Sixth US Army	17.57	52.71
OVERSEAS	15.35	46.05
USA Alaska	14.77	44.31
USA Forces So Cmd	14.01	42.03
USAREUR	16.11	48.32
Pacific Area	14.93	44.78

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

(f) MONTHLY AVERAGE COURT-MARTIAL  
RATES PER 1000 AVERAGE STRENGTH  
APRIL - JUNE 1971

	General CM	Special CM	Summary CM
ARMY-WIDE	.17	1.76	1.11
CONUS (Excluding ARADCOM)	.22	2.28	1.61
MDW	—	.06	.10
First US Army	.27	2.25	1.58
Third US Army	.29	2.34	.86
Fourth US Army	.18	2.52	1.25
Fifth US Army	.25	4.22	2.46
Sixth US Army	.13	1.89	3.13
USARADCOM	—	.43	.18

OVERSEAS	.11	1.11	.49
USA Alaska	.03	.53	.34
USA Forces So Cmd	—	1.33	2.19
USAREUR	.11	.81	.57
Pacific Area	.11	1.33	.39

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

Recurring Errors and Irregularities.

(a) Many general and special court-martial promulgating orders are being received which do not comply with the provisions of paragraph 12-4b(3)(i), AR 27-10, which provides in part, "When trial is by a military judge alone the words 'BY MILITARY JUDGE' will follow the word 'SENTENCE' on the order." It is not necessary to show that the "Findings" were by the military judge.

(b) Recently, in a number of cases, the initial general and special court-martial orders did not reflect the specifications as amended during the course of trial in accordance with proper rulings by the military judge. In this connection, attention is invited to paragraph 12-4b(3)(f), AR 27-10. Trial counsel is responsible for the preparation of the record of trial (Paragraph 82a, MCM, 1969 Rev.) Therefore, when a specification has been amended during the course of trial, he should advise, preferably in writing, the individuals responsible for drafting and publishing the court-martial orders of the amendments concerned.

(c) There have been numerous instances in which an accused in an excess leave status, has refused to accept the Court of Military Review decision that has been mailed to him or, accepting the decision, has declined to sign the receipt. In those instances staff judge advocates should not publish the final court-martial order until 30 days following the date of the certificate of attempted service upon the accused.

## ARMY EXPERT WITNESSES

*From Military Justice Division, OTJAG*

The demand for expert witnesses in the trial of drug cases has rapidly increased. There is a limited number of these experts available. Because of their increased case load, both at the laboratory and as witnesses at courts-martial, an increasing backlog is accumulating. Trial counsel are requested to arrange for these witnesses to testify as soon as they arrive for a trial, even if this means

calling them out of turn. Trial counsel are urged to assist them with transportation arrangements so that they may return to their home station as soon as they have testified. Cooperation with these requests will double the effectiveness of the limited experts available to the Army and reduce the time required for analyses.

## RECURRING ERRORS, IRREGULARITIES AND DEFICIENCIES IN THE SETTLEMENT OF CLAIMS

*By Mrs. Rosalie A. McQueen, Chief, Post Settlement Review Branch, United States Army Claims Service, OTJAG*

1. The following errors, irregularities and deficiencies are recurring in claim files forwarded to this Service for post settlement review pursuant to paragraph 2-43, AR 27-20:

a. **OMISSIONS FROM FILES.** (1) Copies number 6 of the Individual Claims Data Report (DA Form 3) required by paragraph 2-43c, AR 27-20, are being omitted. See paragraph 8c, Claims Administration Letter No. 4/70, subject: Implementation of Chapter 14, AR 17-20 (Administrative and Affirmative Claims Report), dated 1 November 1970, as changed. In addition, these forms are frequently incorrect, i.e., the claimant's name is wrong or incomplete (especially when it is a joint claim of insured and insurer), columns 48-50 reflect the wrong chapter and type of claim, and amounts paid are incorrect.

(2) Vouchers as prepared and required in accordance with paragraph 2-24, AR 27-20, are being omitted. See Figures 2-5 through 2-12, AR 27-20.

(3) Claim forms (SF 95 or acceptable letter and DA Form 1089) as required by paragraph 2-10d(1), AR 27-20, are being omitted. In addition, claims are frequently submitted on wrong claim form, i.e., DA Form 1089 when SF 95 is applicable and vice versa. See Figures 2-1 and 11-1, AR 27-20.

(4) Cash Collection Vouchers (DD Form 1131) required by paragraphs 2-42a(3) and 11-43b(1), AR 27-20, are being omitted.

(5) Settlement Agreements (DA Form 1666) required by paragraph 2-23, AR 27-20 (involving personal injuries, deaths, compromise settlements, and incompetency, e.g., minors), are being omitted. See Figure 2-4, AR 27-20.

(6) Powers of attorney as required by paragraph 2-10a(5), AR 27-20, are being omitted from files when the claim forms and settlement agreements are signed by claimants' representatives.

(7) Actions of approving and settlement authorities as required by paragraphs 2-12 and 2-13, AR 27-20 (seven-paragraph memorandums or Small Claims Certificates, with exception of claims approved and paid under Chapter 11), are being omitted. Frequently, a claim paid in excess of \$500 is received with the action taken on a Small Claims Certificate (DA Form 1668) in lieu of the required seven-paragraph memorandum. See paragraph 2-33, AR 27-20.

(8) Substantiating evidence as required in paragraphs 2-7, 2-8, 2-17, and 2-18, AR 27-20, and translations of these documents, when applicable, are being omitted.

(9) Reports of claims officers (DA Forms 1208, 1089, or 1668, as applicable) as required by paragraph 2-8, AR 27-20, are being omitted.

(10) Disapproval letters as required by paragraph 2-28, AR 27-20, are being omitted, which indicates they are not being sent to the claimants. It is understood that there may be instances when, because of local conditions, it is not practical or even possible to notify the claimants by letter of the action taken on their claims. In such cases the files should contain notations as to the manner in which the claimants were notified.

**b. VOUCHER ERRORS.** (1) Certified copies of the paid vouchers (comeback copies from the finance and accounting offices, evidencing that cash or check payment was in fact made to the claimants) are not being included in the claims files as required by paragraphs 2-24 and 2-42, AR 27-20.

(2) Vouchers are being received with erroneous descriptions cited in the "Articles or Services" blocks and with the wrong accounting classification information, i.e., appropriation symbol and allotment serial. See Figures 2-5 through 2-12, AR 27-20; also Claims Administration Letter No. 3/71, subject: Special Fiscal Year 1972 Instructions for Preparation of DA Form 3 and Accounting Classification Under DOD Army Claims Appropriation, dated 22 June 1971.

(3) Cash Collection Vouchers (DD Form 1131) are being received with improper allotment serials, i.e., 01-2501 in lieu of proper 01-3501. See Claims Administration Letter No. 3/71, *supra*.

(4) Vouchers are being received with improper payees. (E.G., where a claim is filed jointly, the voucher should be made payable to both parties. Individuals acting under powers of attorney are erroneously designated as payees. Vouchers in these instances should be made payable to the claimant and mailed to the claimant in care of the attorney-in-fact, except under FTCA where the voucher

should be made payable to the claimant and the attorney).

(5) Improper vouchers are being received in claim files, i.e., SF 1145 (Vouchers for Payment Under Federal Tort Claims Act) when SF 1034 (Public Voucher for Purchases and Services Other Than Personal) is applicable and vice versa. See Figures 2-5 through 2-12, AR 27-20.

**c. IMPROPER PAYMENTS.** (1) Files are being received that reflect that claimants are being paid in excess of the amounts claimed; are approved in one amount and vouchered in a different amount, with no explanation for the difference in the files.

(2) Small items of substantial value (e.g., expensive cameras, watches, jewelry, furs, and coin collections) which are lost or missing during shipment by ordinary means are being erroneously paid. See paragraph 11-6j, AR 27-20.

(3) Loss of monies during shipment or storage with baggage or household goods are being erroneously paid. See paragraph 11-6h, AR 27-20.

(4) Persons who are not proper party claimants are being erroneously paid (e.g., members of other services under Chapter 11; assignees; subrogees under Chapters 5 and 11; NCO and EM Open Messes, which are instrumentalities of the United States Government). See paragraphs 1-5f, 2-10c, 5-5a, 6-2b, and 11-3a, AR 27-20.

(5) Nonappropriated fund claims are being erroneously paid from appropriated funds. All claims payable from nonappropriated funds should be marked with the symbol "NAF" to preclude erroneous payment from appropriated funds. See paragraph 12-2, AR 27-20.

(6) Payments under ETCA exceeding \$2,500 are being made from Army claims funds. Such payments must be made from Treasury funds by transmitting the necessary documents to GAO. See paragraphs 4-11b, AR 27-20.

**d. UNAUTHORIZED ACTIONS.** (1) Many files received show payments approved for an amount in excess of the monetary jurisdiction of the approving or settlement authority. Delegations of claims approving and settlement authority under each claims statute are contained in the implementing chapter of AR 27-20 and should be referred to by claims authorities.

(2) Files are being received with unauthorized disapproval action taken on claims which have been filed in an amount in excess of the monetary jurisdiction of the settlement authority. See paragraphs 3-14, 4-15, 5-9, 6-19, 8-9, 10-17, 10-19, 11-45, and 12-6, AR 27-20.

(3) Actions are being taken and vouchers certified by unauthorized officers, i.e., improperly signed by an "Assistant" or "Deputy," "Commissioner" or "Chief, ——— Branch." In the absence of the person properly appointed as "Judge Advocate" or "Staff Judge Advocate," the next senior officer should sign as "Acting Judge Advocate" or "Acting Staff Judge Advocate." Signing "For" an approving or settlement authority is not authorized.

(4) Files are being received with unauthorized reconsideration actions taken by settlement authorities who previously disapproved the claims. If a claims supervisory authority is unable to grant the relief requested on reconsideration, the claim should be forwarded with his recommendation to this Service for final action. See paragraphs 3-17, 4-18, 5-10, 6-22, 9-8f, 10-20, and 11-27, AR 27-20.

(5) Ratification of action is frequently necessary on claims received for post settlement review. This is necessary where files show payments in excess of the delegated authority; or where field settlement authorities have disapproved claims in excess of their jurisdictional amount prescribed by each particular chapter; or when the action has been taken by an "Assistant" or "Deputy," "Commissioner" or "Chief, ——— Branch," in lieu of an "Acting Judge Advocate" or "Acting Staff Judge Advocate"; or when settle-

ment or approving authorities have paid claims of members of other services when not authorized (e.g., under Chapter 11).

**e. MISCELLANEOUS ERRORS/IRREGULARITIES:** (1) Supplemental payments are not being made when applicable. See paragraphs 11-32 and 11-35, AR 27-20.

(2) Claim forms included in files forwarded to this Service for review are incomplete. Amounts claimed and signatures of claimants and witnesses are being omitted. DA Forms 1089 do not have Sections II and III completed. Columns "m" and "n", showing the basis of adjudication on DA Form 1089-1, are repeatedly not completed, precluding post settlement review of these claims.

(3) Disapproval letters dispatched under FTCA are not being sent by certified or registered mail; nor do they notify claimants that they must bring suit within six months of the receipt of these notifications if they do not accept or are dissatisfied with the actions taken. See paragraphs 4-10g(1) and (2), AR 27-20.

(4) Registered mail and laundry claims are frequently being processed under Chapters 4, 5, and 11, in lieu of the applicable Chapter 3. See paragraphs 3-4c(2) and (4), AR 27-20.

(5) Transfer of funds or reimbursement is necessitated when appropriated funds are erroneously expended for nonappropriated fund claims; when tort claims exceeding \$2,500 are paid from claims appropriations (properly payable from GAO funds); when subrogated claims are paid under Chapter 5, which action is clearly prohibited by statute and paragraph 5-5a(5), AR 27-20; or when paid to an improper claimant (e.g., a State or Commonwealth or any agency thereof which maintains the unit to which the Army National Guard personnel causing the injury or damage are assigned under Chapter 6, AR 27-20; a military dependent or subrogee under Chapter 11, AR 27-20; an assignee).

(6) Assertion of claims in favor of the Government under AR 27-37 and AR 27-38,

which arises out of incidents giving rise to claims against the Government, are not being asserted.

(7) Numerous claims files forwarded to this Service for post settlement review are being returned for disposition as organizational records in accordance with the provisions of AR 340-18-4. Included amongst these are files where apparently no claim has been asserted and no action has been taken thereupon (evidently abandoned before assertion of actual claim), as well as those where replacement in kind has been issued in full. See paragraphs 2-43 and 11-17, AR 27-20.

2. For the past year this Service has been conducting a survey. Claims questionnaires have been widely disseminated to ascertain what complaints the claimants have with respect to the claims system. Replies to these

questionnaires repeatedly reveal that claimants are not always being counselled by the origin Transportation Office, nor is the expedited mode of shipment (HI VAL) being explained to them. These areas should be strongly stressed.

3. Another recent survey indicates that all claims authorities could be utilizing to a greater extent the small claims procedure outlined in Section V, Chapter 2, AR 27-20, and DA Pam. 27-70-16. Where a claim may be settled for \$500 or less this expeditious procedure for the *investigation* and *payment* of these small claims should be employed, thereby eliminating much of the work and man-hours involved in fully documenting the files. It is suggested that all commands push for greater utilization of the small claims procedures, when applicable.

### MEDICAL CARE RECOVERY ACT

On 18 August 1971, the District Court for the Eastern District of North Carolina issued its opinion in a case dealing with the Government's claim under the medical payment section of an injured retired member's automobile insurance policy. The retired member suffered personal injuries as a result of a collision between his automobile and another. Because of his military status the Government furnished to him medical care and treatment. At the time of his injury, he was afforded protection under the medical payment provision of his policy. However, the insurance company refused the Government's demand for payment of the value of the medical services rendered to the member. The Court held that the Medical Care Recovery Act was not grounds for relief. The insurance com-

pany was not liable to the insured or to the Government in tort, nor was the Government an "insured" under the terms of the policy. However, the Court also held that the United States is a third party beneficiary under policies with the type of medical payment provision present in this case. (*United States v. United Services Automobile Association*, 431 F. 2d 735 (1970), cert. den. 400 U.S. 992 (1971).) The medical payment provision stated that the insurance company would "pay all reasonable expenses incurred . . . to or for the named insured." The fact that the insured incurred no out of pocket expenses did not affect the Court's determination that the insurance company was liable to the United States Government. (*United States v. Government Employees Insurance Co.*, CA 1519)

### ARMY CONSTRUCTION CONTRACTS

*By The Litigation Division, OTJAG*

#### State May Not Require the Licensing of Subcontractors

In 1956 in the case of *Leslie Miller v. Arkansas*, 352 U.S. 187, the U.S. Supreme Court

held that a state could not impose its licensing requirements on contractors working on Government construction contracts. The reasoning behind this holding was that Congress

had provided in the Armed Services Procurement Act of 1947, 10 U.S.C. 2305(c) that awards on advertised bids should be made to the lowest responsible responsive bidder, and the procurement regulations adopted pursuant to the act set forth the guiding considerations in defining a responsible contractor. The State of Arkansas could not through its licensing statutes, impose stricter requirements and thereby limit the number of eligible bidders on Government contracts and, presumably raise the Government's cost.

In the latter part of 1969, the Arizona Registrar of Contractors decided to test whether this rule extended to subcontractors on Government contracts. He felt that his State was not only losing license fees, but its resident contractors were losing subcontracting jobs to out-of-state, unlicensed contractors. He chose as a test case a U.S. Army Corps of Engineers construction contract at Davis Monthan Air Force Base, and in the Superior Court of the State of Arizona (Pima County) he sought an injunction to enjoin performance by eight unlicensed subcontractors.

The injunction, granted by the Superior Court, was stayed pending the appeal of the Electric Construction Co., Inc., one of the subcontractors. The Court of Appeals of Arizona, 472 P.2d 111, upheld the lower

court's right to grant injunctive relief. It stated that "there is no conflict between our licensing requirements as to subcontractors and the federal statutes and regulations, hence the Registrar of Contractors may lawfully require a subcontractor to obtain a license as a condition precedent to doing business to engaging in contracting within the state."

This was a case of first impression, for no one heretofore had challenged the Government's broad interpretation of *Leslie Miller v. Arkansas* as applying both to contractors and subcontractors. To require state licenses of subcontractors as a condition precedent would necessarily limit the bidding on Government contracts (particularly in sparsely populated states) to those contractors who would use local subcontractors. The case was appealed to the Arizona Supreme Court, which on 27 May 1971, unanimously reversed the judgment of the lower courts. It held that subcontractors are selected pursuant to Armed Services Procurement Regulations and that in the final analysis they are the responsibility of the Federal Government. Arizona's contractor's licensing statute thus has no application to subcontractors engaged in the performance of duties for the benefit of the United States. *Electric Construction Co. Inc., v. Kenneth G. Flickinger*, 485 P.2d 547 (1971).

## LEGAL ASSISTANCE ITEMS

*From Legal Assistance Division, OTJAG*

**Federal Income Tax—Deductibility of Bank Credit Card Finance Charges as Interest—**In a recent ruling, the Internal Revenue Service dealt with bank credit cards and the Truth-in-Lending Act as they relate to the interest deduction. Rev. Rul. 71-98, IRB 1971-8, 8, holds that where a bank operates a credit card plan under which retail customers in a particular geographical area may purchase from participating merchants by use of the credit card, with the participating merchant paying a fee to cover all expenses incurred

by the bank measured by a percentage of his credit card sales except charges for the use of money, the *entire amount* of the "finance charges" paid by the cardholder is deductible as interest under IRC § 163(a). The limitation of IRC § 163(b) of the interest deduction on installment purchases to 6% of the average monthly unpaid balance is held inapplicable because the entire amount of the cardholder's "finance charge" can be determined to be interest.

In explaining this holding, the Service notes that the Truth-in-Lending Act, PL90-321, and Regulation Z issued thereunder by the Board of Governors of the Federal Reserve System, require *all* charges made for the use of credit (including interest, service charges, credit investigation fees, etc.) be stated as a "finance charge" and as an annual percentage rate of the amount financed. The Service states that this neither converts non-interest charges into interest, nor makes interest charges non-deductible. Where, as with the bank credit cards in the ruling, it can be shown that *no* part of the "finance charge" is for non-interest charges, the entire amount will be regarded as being for the use or forbearance of money and therefore, deductible as interest. Otherwise, taxpayers must rely upon arms-length designation by borrower and lender in the loan contract of the amount of deductible interest. Rev. Rul. 69-189, 1969-1 CB 55 holds that normally such determinations will be accepted by the Service.

#### Veterans Administration Benefits

a) Benefits. Public Law 91-584, effective December 24, 1970, authorizes educational

assistance to wives and children, and home loan benefits to wives, of members of the Armed Forces who have been carried in "missing status" for more than 90 days under section 556, Title 37, United States Code, any educational assistance used by such a wife or child will be deducted from an entitlement to which the member may subsequently become entitled. However, home loan assistance to such a wife will not reduce the member's entitlement. Application for educational assistance or home loan benefits should be made to the Veterans Administration.

b) Home Loan Guaranty. Public Law 91-506, effective October 23, 1970, expanded the authorization of guaranteed loans to include loans (1) to refinance existing mortgage loans on dwellings or farm residences owned and occupied by a veteran as his home, or (2) to purchase a one-family residential unit to be owned and occupied by him as his home in certain condominium housing developments or projects, or (3) to purchase mobile homes and mobile home lots.

## PROCUREMENT LEGAL SERVICE

*By The Procurement Law Division, TJAGSA.*

**Nonapparent Condition Impairing Performance. Duty of Government to Inform Bidders.** *Hempstead-Maintenance Service, Inc., GSBGA 3127.*

Contractor had received award to clean pivot-type windows in Government building. In preparing its bid the contractor had inspected the building to check such things as the height of the windows off the floor and the obstacles in front of them, but he did not test to see if the windows opened properly.

Commencing performance, the contractor allegedly discovered that one out of three windows would not open without the use of tools (hammer, chisel, etc.). Concluding that it was useless to spend 15 minutes trying to open windows which took only three minutes

to clean, the contractor refused to continue performance unless the Government checked all windows and placed them in good working order. Denying that the windows did not perform properly, the Government terminated the contract for default.

Holding that the contractor had the right to assume that the windows would function properly, the Board held that the contractor was under no obligation to conduct a pre-bid test of the window operation. Furthermore the Board held that the Government had the duty to disclose to bidders any unusual characteristics of the undertaking which (1) are not apparent to them, and (2) would inhibit contract performance to them. In this case many of the windows were unusually difficult to open, and this fact was disclosed to the

contractor when it bid. Based upon these findings, the Board held that the contractor's default was excusable under the contract's Default clause. Accordingly, the contractor could not be held liable for the excess costs incurred by the Government in having the work completed by another firm.

**COMMENT:** This case follows the theme of *Helene Curtis Industries v. United States*, 160 Ct. Cl. 437, 312 F. 2d 774 (1963) in which the Court wrote: "Although it is not a fiduciary toward its contractors, the Government—where the balance of knowledge is so clearly on its side—can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word." This problem could have been avoided if the Government had either informed the bidders of the nature and extent of the condition or had required the contractors to inspect the windows to determine that they functioned properly.

**Cost-Reimbursement Contracts—Cost Limitations Regarded as Cumulative for Two Related Contracts.** *Mar-Pak Corp.* ASBCA ¶9034.

Contractor during the performance of two related cost-reimbursement contracts assigned cost vouchers to either contract at the pleasure of the Government. Costs were allocated on an indiscriminate basis to the two contracts. Although only one of the contracts required sales of parts for the benefit of the Government, the contractor had sold parts for the benefit of the Government under both contracts. Government auditors visited the contractor's field office once or twice a week and were presumably aware of the contractor's cost accounting methods. The Limitation of Cost clauses in both contracts required that the Government be notified prior to incurring costs in excess of those contractually estimated. On one of the contracts costs had been incurred in excess of the contract estimate, but the total costs incurred on the two contracts did not exceed the aggregate cost estimate.

Board determined that the parties treated the contracts as merged for the purposes of

cost accounting and references to the separate contracts were not reliable indications of actual events. Thus, through the conduct of the parties "the aggregate . . . rather than the respective amounts, became the measure of the maximum cost obligation of the Government."

**COMMENT:** ASPR 3-405.1(b) states that it is essential for the proper administration of cost-reimbursement contracts that the contractor's cost accounting system be adequate for the determination of the costs applicable to the contract and that there is appropriate Government surveillance to prevent inefficient or wasteful methods. It is questionable whether these criteria were satisfied in this procurement. In letting cost type contracts, care should be taken in reviewing the pre-award survey to insure that the contractor's accounting methods are adequate to provide a basis for the necessary Government surveillance to prevent an occurrence of events similar to those discussed in this case.

**Late Bids—Return to Bidder Does Not Automatically Preclude Consideration.** *Comp. Gen. Ms. B-173143* (25 June 1971).

ASPR 2-303.3(a) (ii) provides that a late mailed bid received before award may be considered for award if it was received at the Government installation in sufficient time to be in the proper office at the time of bid opening and, except for delay due to Government mishandling at the installation, would have been received on time at the offices designated in the invitation for bids.

In this case, the procuring activity returned the late mailed bid unopened to the bidder prior to award. Upon receiving it, the bidder informed the agency that it had timely mailed the bid and returned the bid unopened to the agency by registered mail. The agency then determined that the bid was late due to mishandling by the activity's postal personnel. Proposing consideration of the bid for award, the agency inquires whether this would be proper as the bid had been returned to the

bidder. (ASPR 2-303.7 states that late bids shall be held unopened until after award and then returned to the bidder.) Granting that once the bid had left the control of the agency, an opportunity for tampering was present, the Comp. Gen. submitted the sealed bid the Post Office Dept's Crime Laboratory to determine whether the bid had been opened and resealed. Based on the crime lab's failure to find any evidence of irregularities indicating tampering with the bid, the Comp. Gen. held that the bid could be considered for award.

**Late Telegraphic Modification—Use as Evidence of Mistake.** Comp. Gen. Ms. B-170311 (3 June 1971).

A mere minute after bid opening on a building construction contract which showed that X's bid of \$182,000 was low, a telegraphic modification was received from X attempting to increase the price by \$10,000. ASPR 2-303.4 and 2-305 require a showing of Government mishandling of a telegraphic modification in order to be considered when

it arrives late. The Comp. Gen. found no such mishandling and ruled that the attempted modification could not be considered, (Comp. Gen. Ms. B-170311 (7 Dec. 1970).) Notwithstanding that ruling, he now held that the telegram could be used as evidence of a mistake in the original bid and the price that X intended to bid. With other evidence and the telegram, X could clearly and convincingly prove that the intended bid was \$192,000 rather than \$182,000 (the cost of a structural steel item had been omitted). As X was still the low bidder after the correction of the mistake, the contract price could be increased.

*COMMENT:* ASPR 2-406.3(2) states that a bidder can bring in evidence other than the invitation and the bid to establish clearly and convincingly the existence of a mistake and the intended bid, if that bidder is low, both as uncorrected and corrected. If the bid is not low as uncorrected, then ASPR 2-406.3(3) requires that mistake and the bid actually intended be ascertainable substantially from the invitation and the bid itself.

### PERSONNEL ACTIONS

*From Personnel, Plans & Training Office, OTJAG*

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

*RETIRED 1 August 1971*

LTC LANE, James C.

*RETIRED 31 August 1971*

COL HERROD, Ralph L.

**2. PROMOTION.** Congratulations to the following warrant officer who will be promoted on the date indicated.

CW3 BUTLER, Clayton L. 1 October 1971

**3. ORDERS REQUESTED AS INDICATED.**

<i>NAME</i>	<i>FROM</i>	<i>TO</i>	<i>APPROX. DATE</i>
<i>COLONELS</i>			
GRIMM, Charles C.	USA Sch Tng Cen Ft Gordon	USA Jud	Dec 71
HAMMACK, Ralph B.	USA Jud	USA Jud w/sta Saigon, VN	Dec 71
PETKOFF, Leonard	Korea	ASBCA, Wash, DC	Aug 71
<i>LIEUTENANT COLONELS</i>			
MOVSESIAN, Anthony A.	Vietnam	Hq III Corps, Ft Hood	Feb 72

## MAJORS

RABY, Kenneth A.	USAIC Ft. Benning	OTJAG	Oct 71
SHEA, Quinlan J., Jr.	Korea	OTJAG	Jan 72
YELTON, James M., Jr.	Hq III Corps Ft Hood	USAIS Ft Benning	Aug 71

## CAPTAINS

BECKER, Stephen C.	82d Abn Ft Bragg	Elect Cmd Ft Monmouth	Nov 71
BEHRENDT, John T.	Med Cen BAMC	Med Svc Sch Fld, BAMC	Oct 71
CARPENTER, Ronald	Hq 6th USA	Hq STRACOM Cmd Ft Huachuca	Jan 72
COOPER, Thomas R.	Thailand	USA MP Sch Ft Gordon	Dec 71
COUTURE, Michael P.	Hq 6th USA	USATCI Ft Dix	Oct 71
DAVIS, Montague E.	USA Msl Cmd Redstone, AL	USAADC Ft Bliss	Sept 71
DUFFIE, Jerry R.	HHC Ft Eustis	USA Jud w/sta Ft Eustis	Aug 71
FINKELSTEIN, George	MACV	OTJAG	Jan 72
FOLEY, Robert M.	Vietnam	Hq 6th USA	Feb 72
HATCHER, John W., Jr.	Vietnam	S-F TJAGSA	Dec 71
HELMS, Michael G.	Hq 6th USA	Hq III Corps Ft Hood	Oct 71
HOWAT, Bruce B.	Hq 6th USA	USA AMMO Cmd Joliet, IL	Oct 71
LUSSE, Arthur W.	USATC Ft Leonard Wood	Vietnam	Oct 71
MARTIN, Kenneth D.	2d Armd Div Ft Hood	82d Abn Div Ft Bragg	Nov 71
MOECK, Howard F., Jr.	Vietnam	Prmy Hcptr Ctr Ft Wolters	Feb 72
NORENE, Luther N.	Stu Det MDW	Europe	Apr 72
PALUMBO, Peter J.	Hq Ft Huachuca	USA MOBLEQ CMB St Louis	Nov 71
PHILLIPS, Stephen	Valley Forge Hospital	Beaumont Gen Hospital	Sept 71
RINGLER, Leonard E.	USAG Ft Bragg	Vietnam	Oct 71
ROETHE, Jeffrey T.	Hq USATCI Ft Ord	2d Armd Div Ft Hood	Oct 71
SCHNELL, William N.	Hq 6th USA	2d Armd Div Ft Hood	Oct 71

CAPTAINS—Cont.

SWANSON, Robert S.	4th CO Adm Ft Carson	MACV	Oct 71
TAYLOR, Thomas W.	Alaska	Europe	Nov 71
VON MAUR, Reed L.	DLI Pres Mont, CA	Europe	Nov 71
WALLACE, Thomas G.	USATC Ft Ord	USA Jud w/sta Ft Ord	Aug 71
WOOLDRIDGE, William C.	Europe	SAOSA, Pentagon	Sep 71

WARRANT OFFICERS

HIGHTOWER, Anderson	Europe	USAG Ft Campbell	Oct 71
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4. Vacancies in Europe are now open to career personnel with a recent short tour and OBV personnel who would be willing to extend for a three year tour. If interested contact your friendly Personnel, Plans and Training Office. Vacancies are also open at West Point.

5. AWARDS

CPT Thomas E. Abernathy, TJAGSA, Army Commendation Medal

Dr. Edgar F. Puryear, Jr., TJAGSA, Certificate of Achievement

6. Announcing PP&TO Answers.

We want to introduce you to a new column which will appear monthly in *The Army Lawyer*.

The concept of the column is that it will provide answers to your questions concerning the history, organization, policies, and other

aspects of The Judge Advocate General's Corps.

Only questions of a general nature will be answered. Questions pertaining to what's bugging you about your individual situation, assignment or other injustice will have to go through regular channels. If you would like, the author (who prefers to remain anonymous for reasons which will probably become apparent in subsequent months) will write you a letter about his individual assignment, situation, and injustice.

Send your questions to the Personnel, Plans, and Training Office, ATTN: PP&TO Answers, Office of The Judge Advocate General, Department of the Army, Washington, D. C. 20310. The answer to your question will either be published or provided by letter. Hopefully there will be too many questions to answer them all in print. You won't feel like General Halftrack; you will get a letter. So, to use a contemporary quote—Write on.

CURRENT MATERIALS OF INTEREST

Articles

Bond, "Protection of Non-Combatants in Guerilla Wars," 12 William and Mary 787 (1971), School of Law, College of William and Mary, Williamsburg, Virginia 23185 (Single Copy, \$2.00)

Custis, "Due Process and Military Discharges," 57 A.B.A.J. 875 (1971).

Comment, "Punishment for War Crimes: Duty or Discretion." 69 Mich. L. Rev. 1312 (1971). Michigan L. Rev., Hutchins Hall, Ann Arbor, Mich. 48104. Single Copy, \$2.75.

Books

D. Fox ed., *The Cambodian Incursion Legal Issues*, Oceana Publications, 89 pp. 1971.

J. Carey ed., *When Battle Rages, How Can Law Protect*, Oceana Publications, 115 pp. 1971.

C. William & M. Weinberg, *Homosexuals and the Military: A Study of Less Than Honorable Discharge*, Harper & Row, 221 pp. 1971.