



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

A SHIFT IN FOCUS

The following are excerpts from the opening remarks of Major General George S. Prugh at the 1972 Judge Advocate General's Conference.

We are now entering the 198th year of the Judge Advocate General's Corps. This is a different year than the last eight or ten. For one thing there were very few headlines. More importantly, there was a shift of focus. A shift from Vietnam to VOLAR and to all the problems that go along with that. There was a dramatic reduction in Army strength that we really didn't appreciate at first because so much of it was coming from out of Vietnam. A drop which took us down below the pre-Vietnam strength to a smaller Army than we have had in 10 or more years. The pressures of the draft disappeared almost altogether. We know we are going to have some difficulties in our own parochial JAG recruiting as a result of this development but it also presents for the Army itself a greatly different picture. There will be far less turbulence than we've had in the past. The motion we had in the constant transfer of personnel has disappeared. There seems to be a good deal more professionalism. There will be a revision to some of the earlier thinking with respect to discipline, some of the earlier thinking with respect to training. I think there is probably more at stake now in the particular job, because you don't have it for a short time and rush on to another place to punch another ticket. Now you are going to stay a little longer and your interest in it is going to be a little greater.

Distribution of *The Army Lawyer* is one to each active duty Army judge advocate and Department of the Army civilian attorney. If your office is not receiving sufficient copies of *The Army Lawyer* to make this distribution, please write the Editor, *The Army Lawyer* and an adjustment in the distribution to your installation will be made.

As far as the Army itself is concerned the focus has shifted to people and to people problems. Of course this isn't new to us. Substantially, that's the judge advocate's role. However, I think the implications for the Army are crucial to us. First of all there is no question we are in for some financial retrenchment. This means that there is very little money for other than the payrolls, and the actual people problems that the Army is struggling with.

There will be a reorganization, although I don't really think even in the Army staff they know for sure what direction it is going to take, and what all of its major ramifications will be. Clearly, I think, we will see the continued retrenchment of the overseas commitments. The Far East, generally, is shrinking, but it may not remain there.

To some extent we may not have the spotlight on us. However, I do think we can expect further pressure for civilianization in the Army. The question will be: Where can we put civilians into the system to make it work?

I think we can look forward to some efforts to make the Army a little more immediately and apparently useful to the country, in a role other than just national defense. For example, I think we can look for bigger rolls in the environmental area.

I think the country is going to expect of us a better job of training manpower. Whoever it is that we get into the Army and from whatever source, I think the country is going to expect that when we turn them out from us they will be better citizens than when we got them. When you turn out of the Army with undesirable discharges almost as many men as you had to draft, then you know that you have some problems and that you had better start looking very carefully at them. We cannot be ob-

TABLE OF CONTENTS

- 1 A Shift In Focus
- 4 General Parker Address
- 5 The Serviceman's Right to Legal Representation
- 9 Medical Care Recovery Act--Private Counsel
- 10 Claims Collections
- 10 SJA Spotlight--Japan
- 13 Report from the U. S. Army Judiciary
- 14 Military Justice Items
- 15 Claims Items
- 15 Procurement Legal Service
- 17 Administrative Law Opinions
- 19 JAG School Notes
- 20 Personnel Section
- 25 Military Lawyers Honored at Conference
- 26 Current Materials of Interest
- 26 Early Outs

The Judge Advocate General
Major General George S. Prugh

The Assistant Judge Advocate General
Major General Harold E. Parker

Commandant, Judge Advocate General's School
Colonel John Jay Douglass

Editorial Board
Colonel William S. Fulton, Jr.
Major James A. Endicott, Jr.

Editor
Captain Stephen L. Buescher

Administrative Assistants
Mrs. Helena Daidone
Miss Dorothy Gross

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.

livious to the man we send out of the service. The country is not going to allow us to be. They are going to be concerned with his medical situation, his moral situation, his legal situation, his discharge situation, his education and with regard to all of these they are going to expect the Army to provide a greater contribution. This is going to change our focus.

Now what do these things imply for the judge advocate and the military lawyer. I look to a greater effort toward preventive law. I think we can expect continued growth in the role of the military lawyer. Greater reliance upon him by command and the staff. They can't afford to make mistakes and they are going to want the help of the lawyer. I think there is going to be a greater emphasis on effective military justice training. Frankly I'm embarrassed to see the ignorance of our junior officers, our senior non-coms and our lower four grades in the area of military justice. We need to improve effective military justice training. I think there is going to be an expansion of our practice before the civilian courts on behalf of needy servicemen. Not exactly the Pilot Legal Assistance Program, that's a way we have been able to get the thing off the ground, but where we can get an attorney who is locally qualified we'll put him in and we'll carry the ball as far as we can for those servicemen who need it. I think we have continued opportunities in international affairs. The International Committee of the Red Cross Conference is continuing its efforts to up-date the Geneva Convention. In the Spring of '74 they expect to hold the diplomatic conference on it, so now is our chance to crank into it the lessons that we have learned since World War II. I think there are some opportunities in the procurement area. Some opportunities in the contract disputes area. Primarily because money is dear now, contractors find that contracts with the Department of Defense are dear, and there is just no margin for error. So now more than ever before we have got to be right, and be prepared to go in and fight all the way.

I think we can expect some reduction in total JAG manpower. But, while we may expect a little reduction, I think we will be in much better shape than we would have had reason two years ago to believe we would be in. Of course, our biggest problem is what it has always been, personnel. The

shortage of experienced officers. We have not had, up to now, trouble getting the young fellows to come in. We foresee some difficulties on the horizon there. More than ever you fellows in the field have to help. The grass roots support in recruiting and your role with the reservists, and in the law schools means more than it has ever before.

Without the draft, the major question is what kind of a soldier will we have in the Army, and what kind of problems will he give us. There has been an awful lot of speculation about this and very little consensus. We all know that our statistics have shown us over the years that the volunteer leads the pack in the commission of offenses. The draftee, has on the whole, been a pretty well conducted fellow. Are we likely to continue that sort of pattern with an all volunteer service.

I think we can expect very close continued observation of our discharge system. Our statistics in the area of discharges will not look good. We will have discharged, with undesirable discharges, last year, almost two divisions worth of troops. Those are sobering statistics. You all know the role that the Chapter 10 plays in this. Clearly our discharge system is going to be in for review. This is going to call for some readjustments in thinking. We are going to have to have effective counseling. We have got to do something about the delay business. This past year has not seen any great improvement except in the judiciary and the appellate work. Out in the trial area it is about as bad as it has been. I think that we have got to find a way to deal with cases before they get to the Article 15 level. I learned from the Air Force quite a little bit about this business and I think that in many ways they have moved ahead here. They give a young fellow about four bites at the apple for small type offenses before he really gets into trouble. They start with the old paragraph 128c material of the Manual to which we have paid very little attention. They formalize it, give him a letter of counseling, and if he finally gets to an Article 15 they suspend the Article 15 punishment. It isn't until he has made his fourth misstep that he will find himself in a court of record.

We have got to cut the court-martial cycle somehow, so that we can free some of our officers for something other than court-martial work. This is

a key problem, it seems to me. For an illustration of this again I harken back to the Air Force. They put their judge advocates out at special court level. This has a marked impact in reducing the number of cases. To the extent we can do this, I think we would save some manpower. We would reduce the number of cases and we will be able to use some of our legal talent in some of the other areas.

I think that Article 15 and the summary court are extraordinarily vulnerable. One of the odd things about this as I look back is that lawyer's work has been primarily focused on the higher levels of the court. Where the real problem is, is in the discretionary areas before the case gets to court. The Article 15, the summary court area. Here is where we lack credibility. Here is where the greatest resistance to the military justice system exists. This is also where the seeds are sown for the revisions of the entire system.

Article 134 is in for a slugging. There is just no doubt about it. Let's find a way in which we can get those offenses out of Article 134 and into some other Articles. Some we will need legislation for. Some others you can put into a regulation and then try as a violation of Article 92.

We need a probation system. The Marines have a very good system that's just beginning. It looks promising. We've tried it in different places and some of our posts have been successful. Now we need to expand it. We have got to find a way to reduce the impact of the court-martial as a federal conviction. We need to do something on the random selection of court members. We need to do something about separating our defense counsel.

Communication is important. Recently, I became aware that there were a few lower officers who felt that they could not talk through the chain or by-pass the chain to tell me that there was something wrong. I'd much rather know. I'm sure all of you feel the same way. So let's not discourage our fellows from sounding off. If they want to come to me they can come to me anytime. The door is open; they can come directly. I'll come back to you and I'll tell them that. But we must keep that sort of professional chain open, in order to really have a healthy proposition.

Actually I think the Corps is a very healthy proposition right now. I think the manpower is

healthy. We have been able to withstand our personnel losses, we have moved younger fellows on to positions of greater responsibilities, and they are proving themselves. We haven't had one who hasn't been able to carry his load, and most of them doing it quite well. I think our reputation has never been any higher. I think the type of work we are involved in, the reliance that the staff puts upon us, has never been any higher. I think

we have a lot of imagination, we have a lot of new ideas, and there is a healthy attitude about testing them out to see if we can't make it go better.

On this optimistic note I would like to end and say let's get on with this work. We have a good busy year ahead of us, now is the opportunity for a fellow with real ideas, some real drive. Let's get to it.

GENERAL PARKER ADDRESS

The following are excerpts from the remarks of Major General Harold E. Parker made at the 1972 Judge Advocate General's Conference.

The point I want to elaborate upon is what General Prugh said in his opening remarks about a shift in focus.

I think General Prugh's remarks about the trends he's observed in the Army really are an adequate explanation of why he went on to say that we needed a shift in focus in our judge advocate activities. As a matter of fact, don't we all know that the Army itself has shifted its focus. We have changed our objectives. We've got the war in Vietnam, but it's tapering off and the attention of the Army is directed elsewhere. We're coming to grips with the problem of the smaller Army, how to man it, how to train it, how to stay in existence as a really useful tool of national defense during this coming period. It looks to me like we will have a period of transition. The focus has shifted but we're going to have at least two years of instability, of sometimes conflict and indecisiveness, before we can begin to settle down.

Now, let me reassure you—when I say shift the focus I don't mean you're going to be able to shift gears and go off on a different course right away. We still have these problems of court-martial backlogs, court-martial processing times. But what you can do is to map out these things to which you want to begin devoting your energies as quickly as you can and look around for the resources to feed into these new directions.

But let me talk a minute about what I think The Judge Advocate General means when he says we need to shift our focus. I think there are two areas where we need to put our emphasis. One,

of course, is the continuing need to support the institution and the leadership of the Army. In this area, just for example, I think we've got to keep the emphasis on the education of all concerned in our military justice system. Are we getting the maximum out of the crisis in credibility materials that were turned out last year. How much time are you devoting from your judge advocate resources to continue to put across those messages? We've got to be able to sell the system. About the best way we have to sell the system is to educate people in it because if they really understand it they're much more likely to give it credibility.

We also need to protect the validity of our personnel and administrative decision-making. And here I'm thinking about lawyers input into the decisions of administrative discharges and Chapter 10's. I'm thinking about lawyers input into the civilian personnel area, into the union negotiations. We have to support an institutional leadership by helping to protect their resources.

Now in the second branch of this realigned focus I think we've got to emphasize, re-emphasize, and keep our eyes on ways to improve our legal support for the individuals in the Army. Now obviously one of the first things is the standard legal assistance program and any expansion of it that we can make. But are your clients getting the right kind of treatment. Do you have the lawyers to talk to them, do you have reasonable hours when they can have appointments, how quickly can they get appointments, what kind of surroundings will the interview take place in, are the lawyers

that they see sufficiently skilled in the subject matters, is there any way we can expand our services to the individuals in the legal assistance area? There are also spin-offs from the standard legal assistance programs. There is the question of debt counseling. I know that in one definition they're non-legal matters, but are very close to this matter of getting legal support to individuals. Such programs do not have to be run by the judge advocate. But you should have your lawyers in very close touch with those people to know ways in which the lawyer can assist the man who has debts. How about consumer protection? There are the opportunities in increased help from the Attorney General's Office in developing consumer protection. Within the Pentagon the point of contact if you need to ask questions about this program of the Association of State Attorneys General is in the Administrative Law Division. Claims is an important area. I usually find very dedicated workers in claims offices, but occasionally I find an old timer who just hasn't been able to bring himself to the idea that all claimants are not thieves. Claims are slow in payment because they have to be meticulously checked and there has to be duplication of estimates and all the rest. They would prefer not to use the abbreviated forms. However, a recent study showed that out of all the areas of judge advocate activities the one where there was the strongest indication of disapproval was the way we ran things in the claims area. The U. S. Army Claims Service is very, very conscious of the importance of payment of legitimate claims to the development of morale and sustaining individuals. You may note that they have now extended their rulings so that they will approve payment of claims by an individual soldier who is

mugged or robbed on post. Of course, it has always been regarded as permissible to pay for losses due to larceny from government quarters.

There are other points of individual support I want to mention. The whole area of counseling on the kinds of problems that soldiers have, whether they're in the disciplinary area, Article 15, administrative discharge areas, promotion, or personnel policies are areas where you can make an input.

This business of shifting focus means, in the first place, to set your sights on these areas. Where are you going to find your resources? Number one, watch out for unused lawyer time in your own offices. The caseload is dropping and it's not impossible unless you're watching it that your caseload may drop and you may have the same number of people putting the same amount of time on fewer cases. We've got an extra asset that we can tap. General Upp was very forceful about our use of the reserves. Now this is an area that again the CONUS JA's are beginning to become more ingenious about. Mobilization designees should be arranged for at installations in CONUS. Interns are an asset. Excess leavers are an asset. Use them skillfully; you might be able to get some of their efforts or divert some of the other officers' efforts into these newer areas. You've got to continue to fight this battle of the TAD's.

The important thing is to put the command emphasis in these areas, bringing in the resources as fast as you can. General Prugh has given us the lead in this shift in focus and I think we all recognize that he's right so let's get with it.

THE SERVICEMAN'S RIGHT TO LEGAL REPRESENTATION

By LTC Robert W. Dubeau, Mobilization Designee, Litigation Division, OTJAG

Recently, an advertisement appeared in several military service journals which offered a \$5,000 insurance policy to pay for the expense of civilian legal aid. In order that service members may make an informed decision concerning their need for such insurance, the following article has been prepared which outlines the circumstances under which a member is or may be entitled to free legal representation.

Army lawyers are well aware that military personnel have world-wide entitlement to military counsel in trials by court-martial, that the accused may request a particular officer to represent him, and that the officer requested will be so assigned if reasonably available.

There is, however, considerably less awareness that throughout the years since the first Judiciary Act the Attorney General and his representatives

have appeared on many occasions in actions between private persons where the interests of the United States were involved and on behalf of officers of the United States who were sued by others but where the United States was not a named party. This rule is so well recognized that it may properly be regarded as having been approved by Congress through the adoption of later statutes and it has been stated that where an action is against public officers on account of acts performed in the course of their official duty, there can be no doubt that the appearances of the Attorney General was made with statutory authority to protect the interests of the United States. (See 28 USC 518 and *Booth v. Fletcher*, 101 F. 2d 676 (1938)).

While most reported appellate cases do not deal directly with military personnel, they encompass a variety of situations; are clearly applicable to the military; and, as discussed below, constitute a well established policy to furnish representation to servicemen where the necessary prerequisites are met.

A brief review of some illustrative cases and opinions may be helpful before discussing present policies and procedures pertaining to such representation. Early in the 1830's customs collectors were represented by Government counsel when sued for illegally collected duties. *Elliott v. Swartwout*, 35 U.S. 137 (1836); *Bend v. Hoyt*, 38 U.S. 262 (1839); *Hardy v. Hoyt*, 38 U.S. 292 (1839). An early Attorney General's opinion expressed the view that it is the duty of Government attorneys to appear in Federal courts in all cases in which the United States shall be concerned, even though not as a party. 8 Op. Att. Gen 399 (1857). Where a Captain caused a man to be punished for disobedience and was later sued for his actions it was the opinion of the Attorney General that when an officer is sued for doing what he was required to do by law that he ought to be defended by the Government. 9 Op. Att. Gen. 51 (1857). In *United States v. Lee*, 106 U.S. 196 (1882), Government attorneys defended a suit regarding possession of land although the action was solely against its officers and agents. The United States Attorney will also seek removal of appropriate cases from State to Federal court. *Illinois v. Fletcher*, 22 F. 776 (1884); 28 USC 1441 and 1442. Suits regarding actions against

Judges, Marshals and other court personnel, jailer, etc., find the United States Attorney representing the judicial officers and personnel. In *Re Neagle*, 135 U.S. 1 (1889); *James v. McGill*, 46 F. 2d 334 (1931), *Bradford v. Harding*, 108 F. Supp. 338 (1952).

One contentious litigant went so far as to sue for damages the United States Attorney who had defended a Chief Judge, Courtcrier and Deputy Marshal. Another United States Attorney then defended the first United States Attorney. Predictably, he was held immune from civil liability. *Skolnick v. Hanrahan*, 398 F. 2d 27 (1968).

The general and well accepted principle that the United States, like other sovereigns, cannot be impleaded in a judicial tribunal except insofar as it has consented to be sued, is referred to in *Belknap v. Schild*, 161 U.S. 10 (1895), a case in which the United States Attorney appeared for appellants on a patent infringement concerning certain gates constructed at a dry dock in a navy yard. This case also clearly sets forth the rule that the exemption of the United States from judicial process does not protect their officers or agents, civil or military, from being liable to an action in tort even though acting under order of the United States. It should be noted that this case preceded the Federal Tort Claims Act, 28 USC 2671-2680.

In other actions, the Postmaster General (*Spaulding v. Vilas* 161 U.S. 483 (1895)), an employee of the Secretary of War (*DeArnaud v. Ainsworth*, 24 App. D.A. 167 (1904)), and, an employee of the Secretary of the Interior (*Farr v. Valentine*, 38 App. D.C. 413 (1912)), were represented by the Government.

In 1952 the Comptroller General indicated that, when Government employees and servicemen are sued in tort or charged with a violation of local or state criminal statutes as a result of performance of official duties, the Department of Justice may furnish counsel and incur expenses of suit in order to protect the interests of the United States, 31 Comp. Gen. 661.

In *Barr v. Matteo*, 360 U.S. 564 (1959), the acting Director of the Office of Rent Stabilization was defended in a suit for libel in connection with the dismissal of former employees.

The law appears to be well settled that the Attorney General individually, or through the United States Attorneys, and their assistants, is authorized to appear and defend civil and criminal actions, against Government officials, employees and *military personnel* (emphasis added) for acts done in the performance of their official duties; *Swanson v. Willis*, 114 F. Supp 438 (1953). The United States, through the Attorney General and other subordinate officials, has a right to appear for and conduct the defense of any of its officials sued by reason of official acts; *Meredith v. Van Oosterhout*, 286 F. 2d 216 (1960), *cert. den.* 81 S. Ct. 749.

Merely because the Government represents an employee the United States does not become a party to the action. *Payne v. McKee*, 153 F. Supp. 932 (1957), *Bland v. Britt*, 271 F. 2d 193 (1959).

These authorities indicate that there are a number of instances where representation by the Department of Justice is presently available in both criminal and civil suits arising from the performance of official duties. The premise for such representation lies in the obvious conclusion that the United States has either a potential pecuniary or policy interest in the outcome of such proceedings, or that the United States is under an obligation to furnish protection to those sued by reason of their official acts.

The latter approach is a definite benefit to morale and performance. A serviceman might be reluctant if he had to pay counsel fees and litigation expenses himself when sued or charged for acts or omissions committed in the performance of his duties.

Obviously, representation will be afforded in those tort cases filed pursuant to the Federal Tort Claims Act. In addition, 28 USC 2679(b) makes an action against the United States the exclusive remedy in case of injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment.

It is also the general policy of the Department of Justice to afford representation to Government officers and employees including servicemen when

suits are brought against them as a result of the performance of their official duties whether such suits are based on theories of injunction, mandamus, habeas corpus, etc. With regard to ordinary criminal and civil suits the policy applies only where property damage, personal injury or death has resulted, or where a substantial Federal interest is involved. Otherwise, except under unusual circumstances, the United States Attorney's policy is to decline to make court appearances on minor matters such as minor traffic violations except on specific request by their Civil Division. In practice such a request is generally instituted by the Federal agency submitting the request for representation to the Civil Division, Department of Justice. The final decision as to whether representation will be provided rests with the Department of Justice. Representation will probably be declined where the serviceman is adequately protected by his own liability insurance, in which case the United States Attorney would assist in getting the insurer to afford proper representation. If the insurance policy appears inadequate to meet the damages anticipated, the United States Attorney will monitor the preparation and defense of the action and participate to the extent he feels is necessary to see that adequate representation is afforded the employee.

While United States Attorneys are not required to remove to the Federal courts action or prosecutions brought against servicemen in state or local courts, they may do so if the circumstances warrant removal. Costs of removal (except as to minor traffic violations) may be defrayed from Department of Justice appropriations. It is also worthy of note that whenever representation is afforded pursuant to this policy the United States Attorney is authorized, on the same basis as in other cases, to incur litigation expenses which are necessary to protect the Government's interests.

One important limitation to representation exists where representation is provided solely because of the Government's potential liability in a subsequent suit under the Federal Tort Claims Act. Representation will probably not be afforded on appeal unless special circumstances, such as an important Federal question or the outcome of important litigation so indicate. If such representation is warranted, Civil Division, Department of Justice will seek the Solicitor General's approval.

Requests for representation should be submitted to the parent agency for their recommendation prior to the submission to the Civil Division of the Department of Justice. In the Army the proper authority is HQDA (DAJA-LT) WASH DC 20310. Local United States Attorneys may act to provide representation where time is limited if it appears that the serviceman was charged as a result of official duties within the scope of his employment; there is no serious doubt as to scope of employment; and, the matter does not concern a minor violation type offense or minor property damage.

In essence, the United States Attorney, in the limited time available, attempts to assess the case in light of the same criteria used by the Civil Division of the Department of Justice.

Army Regulation 27-40, Chapter 3, Defense of Legal Proceedings, in Paragraphs 3-1 and 3-2 briefly covers the responsibilities and policies of the Department of Justice and United States Attorneys, as well as setting forth the procedures to be followed in obtaining such representation. It should be followed closely in every case wherein a request for representation by the Department of Justice is to be submitted.

AR 27-40, para. 3-2b, further indicates the circumstances under which employment of private counsel may be authorized at Government expense. Subsection (1) of para. 3-2b provides that the expense of private counsel will be the responsibility of the person who employs such counsel in the absence of specific authorization from The Judge Advocate General. Subsection (2) relates to emergency authorization of employment of counsel in foreign countries under appropriate circumstances. Subsection (3) however, is of major importance and provides that "Counsel may be hired to represent persons subject to the Uniform Code of Military Justice before foreign courts and administrative agencies (10 USC 1037). Requests for the employment of such counsel will be processed under AR 27-50." The United States Code provides that the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to representation of persons subject to the Uniform Code of Military Justice before judicial and administrative agencies of any foreign nation. The section further provides for nonreimbursement of the Government for such

expenses unless there is a forfeiture of bail. AR 27-50, promulgated to implement 10 USC 1037, expresses compliance with a policy to protect, to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons. Section B thereof relates to counsel fees and other expenses. This regulation also sets forth the manner in which requests for representation are to be made, as well as the criteria procedures, funds chargeable, and other procedures. Paragraph 10 is of major interest as it spells out the criteria for providing counsel and paying expenses in Criminal court, where:

- a. The act complained of occurred in the performance of official duty; or
- b. The sentence normally imposed includes confinement, whether or not such sentence is suspended; or
- c. Capital punishment might be imposed; or
- d. An appeal is made from any proceeding in which there appears to have been a denial of the substantial rights of the accused; or,
- e. The case, although not within the criteria established in a, b, c, or d above, is considered to have significant impact upon the relations of U.S. forces with the host country or is considered to involve a particular U.S. interest.

Also of importance is Section 12, concerning trial and appellate proceedings in civil cases, which limits provision of counsel and payment of expenses in civil matters to cases where:

- a. The act complained of occurred in the performance of official duty; or
- b. The case is considered to have a significant impact upon the relations of U.S. forces with the host country or is considered to involve a particular U.S. interest.

Interestingly enough, the serviceman is entitled to a somewhat broader range of representation in foreign lands than in the United States. For instance, AR 27-50 provides broader representation not only at the appellate level but also in certain civilian type criminal cases outside the scope of official duty. Presumably these provisions reflect the suspicions of the American public at having U.S. servicemen tried or subjected to litigation in foreign courts.

Finally, in large areas of the world the United States and its allies have entered Status of Forces Agreements (SOFA) which affect suits against members of the military (as well as civilian employees) who are stationed in the host country. Art. 8, Para 5(g), of the NATO SOFA agreement is typical. It provides that a member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment entered against him in the receiving state in a matter arising from the performance of his official duties. The practical effect of these provisions is to give servicemen, regardless of rank, immunity from suit in large areas of the world against lawsuits stemming from acts performed in the course of official duties.

SOFA agreements also set forth claims procedures by which a person may be compensated for damage or injury resulting from the acts of a serviceman performed in the course of official duties.

Aside from refreshing the readers' recollection and perhaps supplementing his knowledge concerning representation, this discussion has another practical aspect. This is to serve as some basis for making comparisons and reaching decisions as to the desirability of service personnel securing private

insurance designed to cover expenses of legal representation.

As may be seen from this discussion, the probability of competent representation being furnished by the Government, covering acts done in the line of duty, is very substantial, and will almost invariably be furnished except in minor types of litigation such as minor traffic offenses. In the unlikely instance, however, that an officer prefers to obtain civilian counsel of his own, in addition or in preference to military, Government, or foreign civilian counsel which will be made available to him through the military service, such insurance could be helpful. While the Department of Justice has been extremely cooperative in affording representation when requested by the Army, it is the Department of Justice that makes the final determination as to whether legal services will be provided.

The decision as to whether private insurance is needed must be made on an individual basis by:

1. Determining the prospective assured's needs.
2. Deciding whether the protection which can reasonably be expected to be provided by the Government satisfies those needs, and
3. Purchasing insurance which will satisfy those needs which cannot reasonably be expected to be satisfied by the Government.

MEDICAL CARE RECOVERY ACT - PRIVATE COUNSEL

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

In the case of *Palmer v. Sterling Drugs Inc.*, 343 F. Supp. 692 (E.D. Pa. 1972), plaintiff sued for personal injuries sustained from using one of the drugs manufactured by defendant. In addition, plaintiff included as an element of special damages the claim of the United States for the reasonable value of medical care furnished by the Government. The incorporation of this allegation arose from an authorization contained in a letter from the Government, addressed to counsel for the plaintiff, requesting that this allegation be included within the complaint.

The defendant moved to strike and/or dismiss allegations in the complaint relating to such claim

on behalf of the United States. It was his contention that the statute, 42 U.S.C. §§2651-53, created a right to recover in only two ways: (1) Intervene or join in any action or proceeding brought by the injured party against the tortfeasor or (2) if such action is not commenced within six months after the first day care and treatment were furnished, institute its own legal proceeding against the tortfeasor.

The court, however, took issue with the restricted interpretation sought by the defendant. Initially it pointed out that the statutory construction of the Act was merely permissive or directory and thus did not make it mandatory for the United States

to pursue its claim in only two methods. Citing *Conley v. Maattala*, 303 F. Supp. 484 (D.C. N.H. 1969), where the allegations of defendant were identical to the present case, the court held that there was no valid reason why the United States should be made a party, either by separate action or by intervention. The amount to be recovered was *for the sole use and benefit of the United States* and the plaintiff was asserting this claim *with the express consent of the United States* (emphasis added). Thus the motion of defendant was denied.

This case represents the second time that the use of private counsel has been given judicial sanction by the federal courts. (The *Conley* case noted above was the first). There are some districts, notably the District of Columbia, where there is strong opposition to the utilization of private counsel. In those districts restraint should be exercised and the United States should probably seek recovery under the Federal Medical Care Recovery Act by the methods sought to be imposed by the defendant in the principle case.

ARMY AFFIRMATIVE CLAIMS COLLECTIONS

3rd QUARTER - CY 1972

	AR 27-38	AR 27-37
TOTAL	\$708,420.35	\$128,103.44
CONUS		
First U.S. Army	\$145,150.11	\$ 33,738.31
Third U.S. Army	153,667.55	14,971.80
Fifth U.S. Army	121,394.85	15,911.24
Sixth U.S. Army	109,211.78	13,831.12
MDW	37,079.25	4,050.94
DA	9,303.00	55.00
OVERSEAS		
USARAL	2,363.00	924.73
USAREUR	105,356.99	34,765.60
USARPAC	24,893.82	9,854.70
USARSO	XXXXXXXXXX	XXXXXXXXXX

SJA SPOTLIGHT - U. S. ARMY JAPAN

By: Major Gerald C. Coleman, Deputy Staff Judge Advocate

Similar to the legendary phoenix, United States Army Japan has recently risen from the obscurity of a remote headquarters primarily concerned with logistics and ordnance activities to its new role, reminiscent of the days of its former commander General of the Army Douglas MacArthur, as the major headquarters of all U.S. Army Forces in Japan including Okinawa. Situated at Camp Zama, Japan, Headquarters USARJ, as a consequence of the reversion of Okinawa to Japanese control on May 15, 1972, acquired control of all missions and functions previously assigned to U.S. Army Ryukyu Islands. This article however, will deal only with the activities of the legal office on the main islands

of Japan as the senior Army unit on Okinawa retained General Court-Martial jurisdiction in its new designation, United States Army Base Command, Okinawa.

Japan, with a population of over 105 million people, is an island nation consisting of four main islands, Honshu, Hokkaido, Kyushu, and Shikoku. It also includes the Ryukyu chain to the southwest and the Kuriles to the northeast, presently Russian-occupied. The Japanese people have developed a culture that is indicative of one of the world's strikingly individual societies. One who has lived in Japan will never forget the subtle beauty of Ike-

bana, the Japanese floral arrangements, the Haiku, short sensitive poems, the Nihon Teien or Japanese Garden and the numerous ceremonies and festivals which are conducted year-round.

The headquarters itself is located at Camp Zama, on the Kanto plains, 35 miles southwest of Tokyo. These plains were controlled during the middle ages by the family of Prince Yamato Takeru-no-Mikoto who designated the area as suitable for the training of samurai warriors and the area has been traditionally in military use since 1300 AD. The present camp dates back to 1935 when the Japanese Diet approved plans for the construction of a military academy on the site. In 1937 the completed academy was dedicated and became the Japanese counterpart of the United States Military Academy at West Point, New York. Visiting Japanese officials who formerly served as officers in the Imperial Army are quick to point out the fact that they received their training at Camp Zama.

Many of those stationed here who have waited patiently for the train at Sobudai-mae station outside Camp Zama will be interested to know that in December of 1937 the Emperor of Japan reviewed the cadet corps of the academy and at the ceremony officially decreed that the Zama area be known as SOBUDAI (So-to observe; Bu-military; Dai-eminence of land.) The headquarters building itself is designed after the famed Pentagon in Washington D. C. but with flared points, and is a product of the well-known American architect Antonin Raymond, who resided in Japan for many years.

HISTORY OF USARJ

The United States Army Japan can be traced back to the U.S. Armed Forces Far East, formed in July 1941 in Manila, and commanded by General of the Army Douglas MacArthur. The Japanese invasion of the Philippines forced the move of MacArthur's headquarters to Australia. After the war, the headquarters moved to Tokyo and in 1950, it moved again to Yokohama. In October 1953, the headquarters relocated to Camp Zama—its present station. U.S. Army Japan emerged July 1, 1957 from a U.S. Forces reorganization in the Pacific. USARJ was designated as one of the major subordinate commands of the U.S. Army Pacific, in Hawaii. The reversion of Okinawa to Japanese administration resulted in realignment of three Pa-

cific Army commands with USARJ, assuming its present role as senior Army Headquarters in Japan.

OFFICE OF THE STAFF JUDGE ADVOCATE

The Office of the Staff Judge Advocate is currently authorized twenty-nine personnel including eight officers of the Judge Advocate General's Corps, one warrant officer, and three civilian lawyers, one of whom is a Japanese lawyer retained on a contract basis. The position of Staff Judge Advocate, with a grade of full colonel authorized, is filled by Lieutenant Colonel Harold L. Miller who serves as legal advisor to the Commanding General and sits as the U.S. Army member of the Criminal and Civil Jurisdiction Subcommittee responsible for discussions with the Japanese Government on these matters. The administrative structure of the office has been revised recently and now conforms to the general pattern recognized in overseas commands. In addition to an administrative section the office is divided into six divisions including the following:

International Affairs: As might be expected in an overseas command, international affairs activities constitute the major workload of the office. This division is primarily responsible for interpreting the treaty of Mutual Cooperation and Security, the Status of Forces Agreement and other international agreements between the United States and Japan. Personnel of the office act as legal advisor to Army representatives in meetings of the United States component of the Joint Committee established under the U.S.-Japan SOFA and provide the designated USARJ member for the U.S.-Japan Master Labor Contract and Master Mariner Contract Disputes Boards which hear, consider and recommend decisions to the Joint Committee concerning inter-governmental policies involving labor disputes. These responsibilities are heavy and I recall how surprised I was when shortly after arriving in Japan I found myself in a conference at Headquarters, United States Forces Japan, representing the U.S. Army in an effort to reach agreement with the Navy and Air Force representatives on the applicability of a Japanese automobile tax to members of the U.S. forces, notwithstanding the provisions of the SOFA.

Perhaps the most important role of the inter-

national affairs division is that of Japanese Law and Liaison. This section monitors the exercise of criminal jurisdiction over members of the Army and DA civilians and their dependents by Japanese tribunals. This section also furnishes trial observers and interpreters for trials of U.S. military personnel and other citizens with the U.S. forces in Japanese courts. Each Judge Advocate officer, in addition to the U.S. civilian attorneys, is appointed as a trial observer by the U.S. Ambassador to Japan. It should be noted that in discharging the responsibility of the command for maintaining liaison with Japanese government officials on matters pertaining to criminal jurisdiction under SOFA, this office has been able to maintain close relations with leading Japanese legal authorities. Periodic visits are made by the SJA and members of the liaison office to the Chief Justice of the Supreme Court, the Minister of Justice and the Prosecutor General of Japan. The Staff Judge Advocate hosts a yearly reception for approximately 100 guests composed of Japanese Judges and prosecutors. In addition, Japanese officials are invited to a Law Day USA reception and members of this office attend the Japanese Law Day reception. The benefits of such contact are unlimited, as witness the recent reception held on 1 October 1972 at the official residence of the Minister of Justice when a close conversation between the minister and the Commanding General, USARJ, contributed to a break-through in the resolution of an impasse concerning the transport of U.S. combat vehicles in Japan.

Although this office receives approximately 75 command requests per month for opinion, comment or review on various policies or projects, the case of the combat vehicles requires special mention. In late July 1972 it became apparent that certain Japanese dissident groups, opposed to the war in Vietnam, would attempt to block the shipment of combat vehicles from the maintenance activity at Sagami, a short distance from Camp Zama, to the port of Yokohama. This office was tasked with drawing up a legal position for USARJ. On the basis of the recommended position the Commander, USARJ, ordered the movement of the vehicles only to have it frustrated by the activities of thousands of demonstrators on 5 August 1972. The demonstrations were initially successful and

were extended to the Sagami Facility itself. After considerable negotiation involving numerous legal memoranda, the problem was solved and the combat vehicles, including tanks, are now being transported with the protection of the Japanese Police. It should be noted that many other routine duties in the field of international affairs such as periodic visits to the U.S. Army prisoners confined at the Japanese prison at Otsu are performed by the JA's assigned to this office.

Military Justice: As in most SJA offices this division supervises and administers military justice throughout the command. Court-martial activity in this command, excluding USARBCO, which as noted above exercises its own GCM jurisdiction, is limited. A review of the court-martial docket thus far for 1972 indicates several GCM's and approximately 24 special courts-martial. The low incidence of such activity reflects the type of personnel assigned to the headquarters and the fact that the Japanese are not hesitant to exercise jurisdiction when they have primary right to do so. Personnel assigned to Military Justice are often cross-utilized in other areas such as international affairs and procurement activities. There is no military judge stationed on the main islands of Japan and military judges are provided by the Sixth Judicial Circuit located in Korea for GCM and BCD special courts-martial. At the present time, a part-time military judge disposes of non-BCD special courts-martial.

Administrative Law: The admin law division, under the direction of a U.S. civilian attorney renders opinions and advice concerning the interpretation, application and administration of laws, regulations, and directives relating to the operation of the Army in Japan. As is usual on most posts, a large number of nonappropriated fund activities and private associations require advice and assistance in the administration of their affairs. It is important to note, however, that when serving overseas all such advice must take into consideration the laws of the host country.

Procurement Law: The Staff Judge Advocate provides opinions and advice to the commander, staff and subordinate command on legal aspects of non-appropriated fund and some appropriated fund procurement, labor relations, taxation, excess property disposal and contractor claims in relation

thereto. Just recently, this office furnished an officer to act as the legal advisor to the Civilian Personnel Office at USARBCO to assist the activity in a representational hearing conducted by the U.S. Department of Labor to determine the proper composition of a proposed union local of the American Federation of Government Employees, on Okinawa. The hearing lasted four days and a brief was required for submission to the Assistant Secretary of Labor for Labor Management Relations. It is expected that the hearing will resolve a significant aspect of labor law in the public sector; i.e. whether civilian supervisors who exercise supervisory duties over only local national personnel are included within the definition of supervisors as set forth in Section 2(c) of Executive Order 11491 and therefore subject to exclusion from bargaining units which include employees. It is opined by this office that the answer will be affirmative.

This office also provides a three member Board of Contract Appeals to hear, consider and decide appeals by contractors in disputes under Army contracts entered into before 1 June 1968 in the Western Pacific area and under Army and Army-Air Force nonappropriated fund contracts in Japan and Korea.

Legal Assistance: The Legal Assistance Division provides legal assistance including advice concerning such matters as marriage, divorce, adoption, civil damage suits, insurance claims and analysis, Federal and State income tax, indebtedness, and contracts to all members of the command. In addition, the legal assistance officer prepares legal documents such as wills, powers of attorney and offers notary public services. Although a Japanese attorney is retained part-time on a contract basis to provide assistance in matters pertaining to Japanese law, the legal assistance officer must have an extensive knowledge of Japanese law in order to assist his clients with leases on the local economy, contracts with Japanese merchants and various Japanese family laws, including marriage. In this regard a knowledge of and interest in the Civil Law system is important as Japan has followed a Civil

Code patterned after the French and German Civil Codes since 1890.

Claims: Claims activities in the command, although limited in scope, are very important both in regard to the morale of the service member and the relationship of the Army with local civilians. The Claims Division reviews, adjudicates, approves, disapproves, and settles claim filed by United States Forces personnel against the United States for damage to their personal property; makes demands on behalf of and settles claims in favor of the United States Government; and prepares legal opinions covering litigation, personal injury, and property damage. The Air Force, under the provisions of DOD Directive 5518.8, operates foreign claims activities for all services in Japan. Two incidents will demonstrate the importance of timely, on the scene, claims investigation. At a recent fire fighting exhibition featuring the talents of a combined U.S.-Japanese fire fighting force, held in honor of fire prevention week, sparks from a demonstration fire spread to the Military Police barracks and the resultant fire demolished the building. Expeditious claims service helped avoid the consequences of an irate military police organization. Of a more serious nature, the property of a Japanese national was severely damaged during a recent transport of 26 tanks from Sagami to Yokohama. Immediate on the spot investigation and preparation of potential claims helped avoid undesirable publicity that may have resulted from this incident.

CONCLUSION

In attempting to synopsize the activities of the Judge Advocate in Japan many significant aspects of such service have been diminished or overlooked. However, it can be stated that the variety and challenge of the legal activity of each Judge Advocate officer is only limited by the desires and propensities of the individual himself. From a personal point of view the opportunity for interesting and fascinating experiences in discovering Japan and its culture are unlimited. In conclusion, assignment to the Office of the Staff Judge Advocate, USARJ, is certain to be a memorable experience.

REPORT FROM THE U. S. ARMY JUDICIARY

ADMINISTRATIVE NOTES

Military Judge MOS. A separate MOS (8102) was authorized for military judges effective 1 July

1971. The specifications of this MOS are contained in Section IV, AR 611-101. This MOS is awarded to all judges (General Court-Martial, Special Court-

Martial, and Appellate) who are certified for such duty by The Judge Advocate General. For judges assigned to the US Army Judiciary, 8102 is designated as their primary MOS; it is also their duty MOS. Military judges not assigned to the U.S. Army Judiciary should have MOS 8102 entered on their records, but it should not be designated as the primary MOS. All military judges are requested to insure that their officer qualification record (DA Form 66) contains the appropriate entry regarding MOS 8102.

RECURRING ERRORS AND IRREGULARITIES

a. October 1972 Corrections by ACOMR of Initial Promulgating Orders:

(1) Failure to show the correct number of previous court-martial convictions considered—three cases.

(2) Failure to show under "FINDINGS" that a specification of a Charge was dismissed on motion of the prosecution.

(3) Failure to show the date that the sentence was adjudged—two cases.

(4) Failure to show that the sentence was adjudged by a Military Judge.

b. *JAG-2 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 Oct - 31 Dec 72 should be forwarded, airmail, to HQDA (JAAJ-CC) not later than 11 January 1973. Many arithmetical errors in these reports are still occurring. Greater accuracy is urged.

c. *Service of ACOMR Decisions.* When a decision of the Army Court of Military Review is forwarded to another command for service upon the accused, the letter of transmittal should be addressed to a GCM authority. It should not be forwarded, for example, to a Personnel Control Facility, Special Processing Detachment, Transfer Station, Correctional Holding Detachment, or similar organization.

d. *CID Reports.* Since the publication of AR 195-2, dated 10 April 1972, many more records of trial are being received in the Judiciary containing documents, among the allied papers or exhibits, marked "FOR OFFICIAL USE ONLY." Necessary action should be taken, preferably before the charges are referred to a court-martial for trial, to have the protective markings cancelled in accordance with the provisions of AR 340-16.

MILITARY JUSTICE ITEMS

From: Military Justice Division, OTJAG

1. An accused is entitled to the convening authority's careful consideration of the appropriateness of the sentence adjudged. The character of the accused is a significant factor the convening authority should consider in determining what sentence, if any, he approves. A record of trial recently received in the US Army Judiciary shows that both the pretrial advice and the post-trial review listed the accused's character of service as being unsatisfactory, whereas his DA Form 20 showed a string of excellents. This latter fact was not mentioned in either the advice or the review. Such misadvice, more often due to oversight than not, usually requires corrective action at the appellate level. The sample review in DA Pam 27-5, *Staff Judge Advocate Handbook*, states that the "character of service" entry in the review should refer only to the

accused's character prior to the offenses of which he was convicted in the case being reviewed. This guidance should be followed by all staff judge advocates.

2. The following training films have been reviewed and determined to be obsolete:

- a. TF 15-1946, *The Investigating Officer.*
- b. TF 15-1961, *The Summary Court-Martial.*
- c. TF 15-2358, *The Special Court-Martial.*
- d. TF 15-3404, *Nonjudicial Punishment.*
- e. TF 15-3763, *The Uniform Code of Military Justice.*

Request that the above listed films be withdrawn from the active training list and disposed of through regular channels.

CLAIMS ITEMS

From: U.S. Army Claims Service, OTJAG

1. Safeguarding Property.

In a recent case before the U.S. Army Court of Military Appeals (U.S. v. Walker, SPCM 8081, 21 Aug 72) the court found an alleged inventory to safeguard an absent soldier's personal property to be a search and not an inventory. The facts of the case disclosed that a sergeant during the accused's absence opened the accused's locked locker and found a certain pair of suspected boots in the accused's locker. The sergeant stopped the inventory and took the boots to the first sergeant, leaving accused's now unsecured clothing in the locker. The court stated that this was "a strange way to safeguard the property of an absent serviceman."

This case again emphasizes the need to properly safeguard the property of a soldier when he is absent from his unit under normal circumstances, as required under paragraph 10-6 of DA Pamphlet No. 27-19. This paragraph states in part that under these circumstances the unit commander has a duty to insure that the personal property of the soldier is protected from theft, damage or loss. Failure to comply with these directives may result in claims against the Government.

2. Thefts From Quarters.

Receipt of claims by the U.S. Army Claims Service from various installations based on quarters

thefts of personal property indicates several disapprovals of claims under Chapter 11, AR 27-20, solely on the ground that no visible evidence of forced entry was found in the case. This fact, in and of itself, should not be accepted as an absolute rule to form the basis for the disapproval of a claim. Proper weight should be given to any other relevant evidence that may warrant a finding of theft as claimed.

3. On-Post Robberies.

Claims for losses due to theft from the person are cognizable and payable under Chapter 11, AR 27-20, subject to the following conditions:

- a. The victim is a proper party claimant.
- b. The theft occurred by the use of force, violence, or threat to do bodily harm.
- c. At the time of the theft the claimant was on a military installation and free from any negligence or misconduct which would contribute to the loss.
- d. The theft must have been immediately reported to appropriate police or command authorities, or as soon thereafter as is reasonable or practicable under the circumstances.
- e. It must have been reasonable under the attendant circumstances for the claimant to have had on his person the quality and quantity of the property allegedly stolen.

PROCUREMENT LEGAL SERVICE

By: The Procurement Law Division, TJAGSA

"Illegal Contracts. GAO clarifies its position on payments to contractors performing 'illegal' contracts." MS. Comp. Gen. B-176393, 13 October 1972, 52 Comp. Gen.....

Subsequent to the award of a formally advertised contract to Y, the apparent low bidder, X protested to the procuring activity concerning the freight rate utilized in evaluating its bid. The use in the evaluation of the bids of the corrected freight rate, as verified by the Contracting Officer, made X the low bidder. Relying upon 37 Comp. Gen. 330 (1957) and Ms. Comp. Gen. B-164826, 29 August 1968, the procuring activity's legal council advised that the original award contravened 10 U.S.C.

2305(c) and was a nullity. Based on this advice, the procuring activity canceled the award to Y.

Upon protest by Y to the GAO, it ruled that the contract should have been terminated for convenience rather than canceled. Expressing agreement with the United States Court of Claims' position that "the binding stamp of nullity" should be imposed only when the illegality is "plain" or "palpable," the GAO undertook to define such situations. The GAO stated that an award is plainly or

palpably illegal when it was made contrary to a statutory or regulatory requirement because of some action of the contractor or when the contractor was on direct notice that the procurement procedure utilized violated some requirement. In those instances the award could be canceled without liability to the Government except to the extent of a recovery by the contractor on a *quantum meruit* basis. If the contractor had no knowledge of the irregularity or was innocent of any participation in the irregular procurement procedure, the contract could not be considered plainly or palpably illegal. In those instances, the Government's only option was to terminate the contract for convenience, *John Reiner & Co. v. United States*, 325 F. 2d 438 (Ct. Cl. 1963); *Brown & Son Electric Co. v. United States*, 325 F. 2d 446 (Ct. Cl. 1963).

Upon review of the facts, the GAO found that this procurement fell into the latter category and that Y could easily maintain an action for damages computed under the termination for convenience clause. Thus the Comptroller General advised that the cancellation be converted to a termination for convenience.

To the extent that this decision conflicted with prior views, the GAO ruled that these prior decisions should not be followed.

COMMENT: The acceptance of the Court of Claims' position on "illegal" contracts by the General Accounting Office recognizes a practical reality in Government contracting. Even if the GAO had adhered to its prior standard of legality and had ruled that contract in this decision was a nullity, the contractor could have gone to the Court of Claims for recovery. The Court of Claims would have ruled on the question based on its own standards. *John Reiner Co. v. United States*, *supra*. Any recovery given to the contractor would have been paid out of Court of Claims judgment funds over which the GAO has no authority. This decision should be well received by both contractors and procuring activities for promoting much needed uniformity in government contract law and for eliminating unnecessary, time consuming litigation for all parties.

Procurement attorneys should also recognize in special circumstances the United States may cancel a contract without any liability absent a specific

statutory, regulatory or contract provisions. See *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) (cancellation for conflict of interest) and *United States v. Acme Process Equipment Co.*, 384 U.S. 917 (1966). In both cases the Supreme Court felt that the contract was unenforceable because the contract offended the essential purposes of the statute involved. The Court felt that the sanction of nonenforcement was consistent with the public policy embodied in the statute and that public policy required the United States to rid itself of contracts tainted by such wrong doing. Both the *Acme Processing Co.*, and the *Mississippi Valley* cases involved suspected moral turpitude. Contract cancellation without contractor recovery on any basis would probably be limited to similar fact situations.

TERMINATION FOR CONVENIENCE: Settlement Payments. Best Lumber Sales, ASBCA No. 16737, 31 August 1972.

Upon the termination for convenience of a fixed-price contract to deliver bomb pallet adapters produced from construction grade lumber, the contractor submitted its termination claim pursuant to the Termination for Convenience clause. The claim was based substantially on the lumber inventory purchased by the contractor for the termination portion of the contract. The inventory was composed of partially and fully completed pallets and bulk lumber to be used in constructing the pallets. Three months after the contractor submitted its settlement proposal, a Government official inspected the inventory to check the material for quality and quantity. The Government inspection found some variation in the quantity reported by the contractor. In addition, the bulk of the inventory was determined to be unacceptably defective in quality. Based upon the inspection report, the contracting officer rendered an unilateral determination that allowed the contractor less than 10% of the initial claim.

The contractor's appeal to the Board disputed both the quantity and quality determination by the Government. Ruling on the difference between the count of items, the Board determined that the probable explanation was theft of the lumber. By the appellant's own evidence the lumber had been left unprotected and on occasion lumber had been stolen.

Since paragraph (b)(ix) of the Termination clause made the contractor responsible for the protection of the lumber, the contractor was held to bear the consequences of its loss. Disputing the Government's evidence as to the quality of the lumber, the contractor presented substantial evidence that the lumber met the specified standard and was of the same grade as used in the pallets furnished for the unterminated portion of the contract. Based upon the fact that the rejection rate of the pallets previously delivered to the Government under this contract was extremely low, the Board accepted the evidence of the contractor as to the quality of the lumber and found that at least 85% of the lumber was acceptable.

The Board noted that in a termination for convenience, a contractor may recover its costs for raw materials, work in progress, and completed supplies even if they do not comply in all respects with the requirements of the specifications. The Board held that the portion (15%) of the inventory which did not conform to the specifications was allocable to the contract and did not exceed a reasonable amount of defective materials in a contract of this type.

COMMENT: The termination for convenience clause for fixed price contracts (ASPR 8-701) provides that the contractor would be paid for completed supplies accepted by the Government in accordance with the contract price, subject to any appropriate adjustment. This clause should be construed with the Inspection clause for fixed price supply contracts (ASPR 7-103.5) which gives the Government the right to accept nonconforming goods subject to an appropriate price adjustment. These clauses set forth the basic rules concerning acceptance and payment for completed items in the termination inventory. As to the remaining contractor inventory, the termination for Convenience clause has the effect of converting the fixed price

supply contract into a cost reimbursement contract subject to ASPR Section XV Cost Principles. Thus the basis of any settlement is governed by the factors of allowability, allocability and reasonableness. After a somewhat hesitant start, the Board held that costs of rejected items and nonspecification parts and supplies were reimbursable. See *Caskel Foege, Inc.*, ASBCA No. 7638, 1962 BCA 3318. In the *Caskel* decision, the Board overruled the principle set forth in *Chris Kaye Plastics Manufacturing Company*, ASBCA No. 3667, 56-2 BCA 1124, that the costs of accomplishing a nonspecified result could never be reimbursed. The Board's present position is predicated on the premise that a contractor performing a fixed price supply contract includes an amount in his price per item to recoup the costs of nonspecification items and supplies, and that reasonable costs of this type should be allowed in a T4 c settlement. This approach recognizes commercial reality and prevents the termination for convenience from working any excessive hardship on the contractor. The application of the cost principles to the settlement would prevent total recovery by an unreasonably inefficient contractor.

During performance of the contract in the principle decision, only 6 of 4106 bomb pallets adapters were rejected by the Government. The evidence strongly indicated that the lumber in the inventory was of the same grade and quality as was used throughout the performance of the contract. No evidence was presented that there had been any waiver of the specifications or that the inspection and acceptance was in any way improper. If the Board had based its findings on the Government inspection of the termination inventory, the regularity of all previous contract transactions would have been questioned by implication. Given this result, the reliance on the testimony presented by the contractor and its supplier to refute that of the Government inspector is understandable.

ADMINISTRATIVE LAW OPINIONS*

(Boards and Investigations—General) Scope of Para 7-26b, AR 600-200.

*The headnotes for these opinions conform to The Judge Advocate General's School Test, "Effective Research Aids For The Preparation of Military Affairs Opinions," February 1971.

The Adjutant General, the proponent of Army Regulation 600-200, has interpreted paragraph 7-26b as giving both the board and the convening authority the following options:

(a) Recommend or approve reduction of one or more grade. (The convening authority may ap-

prove a lesser number of reductions than recommended).

(b) Recommend or approve no reduction. No provision exists under the above-cited paragraph for suspension of a reduction in grade.

The Adjutant General also has opined that where a board had recommended suspension of the recommended reduction, the procedure employed by the board was incorrect and the fact that the board recommended a suspended reduction is clear evidence that the board members desired to afford the respondent a second "chance" to prove his worth. Thus, the convening authority should disapprove the board report because of improper procedures and then decide whether to drop the action or convene a new board.

(Pay—General) **Monthly Assessment For Recreation Purposes May Not Be Imposed On Army Personnel.** In an effort to improve the Army recreation program a proposal was made that a monthly recreation fee be assessed Army personnel at the installation where they are assigned. Funds produced from this fee would be used to support special services programs and activities of the installation. However, the use of the term "assessment" indicated a mandatory contribution. Such an assessment would constitute a deduction from the pay of personnel. Under 37 U.S.C. 1007, deductions from pay for recreation purposes are not authorized. No other statute authorizes such a deduction. Specific authorization for the deduction is required. Accordingly, it was stated that this proposal was legally objectionable. DAJA-AL 1972/4649, 17 Aug. 1972.

(Retired Members—General) **Officer May Not Voluntarily Retire On The Date Of His Scheduled Mandatory Retirement Date.** Pursuant to a request from TJAG, The Judge Advocate General examined paragraph 4-10a, AR 635-100, 19 Feb. 1969, as changed by C13, 13 Jun. 1972, to determine whether this provision is required by statute. The Officer Personnel Act of 1947 is the source statute for this paragraph and states that officers in a particular grade "who are not retired or separated at an earlier date under other provisions of law shall be eliminated from the active list and retired." This statutory language makes clear the Congressional intent that a retirement eligible offi-

cer may avoid the mandatory retirement provisions only by voluntarily retiring at an earlier date. Because the Uniform Retirement Date Act provides for the effective date of most retirements to be the first day of the month following the month in which retirement would otherwise be effective, any voluntary retirement must be effected one or more months prior to the mandatory retirement date to avoid a mandatory retirement. This same statutory limitation does not apply to regular warrant officers who face mandatory retirement under 10 U.S.C. 1035 or to regular commissioned officers recommended for retirement under 10 U.S.C. §3919. However, the provisions of paragraph 4-10a, AR 635-100, supra, currently apply to all officers. DAJA-AL 1972/4818, 7 Sep. 1972.

(Boards and Investigations — Eliminations Boards) **Commander May Make Recommendation As To Discharge To Elimination Board.** A staff judge advocate requested clarification of the general procedure of unit and intermediate commanders making recommendations as to the specific type of discharge in proceedings under the provisions of AR 635-206, 15 Jul. 1966 and AR 635-212, 15 Jul. 1966. It was stated that Section VI, AR 635-206 which contains the basic provisions for discharge for civil conviction is silent as to any action to be taken regarding recommendations for a specific type of discharge below the level of the convening authority. Similarly, neither paragraph 12 or 13, AR 635-212 contain a requirement or a prohibition that a recommendation on the character of discharge be made. Since there is no prohibition to making such a recommendation and since a board of officers has absolute discretion in examining the evidence and making its own recommendation, it was found there was no legal objection to continuing the practice currently in effect pending a change in the regulation. However, it was noted that a recent proposed change to AR 635-212 specifically prohibits any recommendation as to the type of discharge. It was also noted that there are situations which would render an indorsement as to the type of discharge inadmissible. These situations are generally those which violate para. 2, AR 15-6 as constituting improper influence. DAJA-AL 1972/4830, 18 Sep. 1972.

(Separation From The Service—General) **Excess Leave Pending Completion Of Appellate Review Is**

Creditable Against Time Lost. A staff judge advocate asked whether an individual placed on excess leave pending a BCD discharge until appellate review is completed was entitled to have the excess leave credited against time lost if the appellate court set the BCD aside. The individual in question in this case was convicted by court-martial on 22 Oct. 1970. He was released from confinement the same date and was returned to "full duty status." On 31 Mar. 1971, his request for excess leave pending completion of appellate review was granted, and he has been on excess leave since that date. The ultimate issue was whether this time ac-

cumulated on excess leave pending appellate review is tantamount to a return to full duty status within the meaning of 10 U.S.C. §972 and paragraph 2-3 AR 635-200. In this instance, the member was returned to "full duty status" for about five months before his request for excess leave was approved. Thus, his active duty status while on excess leave was similar to that of any other service member granted excess leave from a "full duty status" pending the outcome of litigation. Accordingly, the period the member has spent in excess leave is creditable toward his active duty obligation. DAJA/AL 1972/4846, 14 Sep. 1972.

JAG SCHOOL NOTES

1. Speakers. Thursday mornings at the JAG School are Commandant's time featuring guest speakers for the Advanced Class. Recent speakers included Colonel Zane E. Finkelstein and Captain Nicholas Sabalos who, both from the Joint Chiefs of Staff, addressed the Advanced Class in a classified presentation on "Joint Chiefs of Staff On-Going Agreements." Subsequent speakers through the end of the year will include Lieutenant General Joe Heiser, Jr., DCSLOG, Department of the Army; Mr. Michael Sonnenreich, Executive Director, National Commission on Marihuana and Drug Abuse; and Mr. Dolf Droge of the White House. Each of the speakers make a prepared presentation and then open themselves for questions from the students.

2. Paraprofessionals. The First Criminal Law Paraprofessional Course was completed in the month of November. This course emphasized training of enlisted men and civilians as investigative aides to assist trial and defense counsel in courts-martial. The course included a general background on military justice, a practical exercise in interviewing witnesses and a class on review of records of trial and charges.

3. Civil Rights Symposium. The School is very honored to have had its Director of Academics, Colonel William S. Fulton, Jr., selected to attend a symposium in Austin, Texas on Civil Rights sponsored by the University of Texas and the Lyndon Baines Johnson Library during the period 11-12 December.

4. USAR Conference. The Third Annual USAR Conference meets in Charlottesville at the School from 30 November through 2 December 1972. The keynote address will be given by Major General Prugh, The Judge Advocate General, and the closing remarks by The Assistant Judge Advocate General Harold Parker. Other speakers include Major General Milner Roberts, the Chief, U.S. Army Reserves and Dr. Theodore C. Marrs, Deputy Assistant Secretary of Defense for Reserve Affairs.

5. Iranian Judge Advocate General. The School was host in early November to Lieutenant General Fakhroddin Modarress, The Judge Advocate General of the Imperial Armed Forces, and Major General Siyovoush Behzadi, Assistant Judge Advocate General of the Imperial Iranian Armed Forces. During their visit they were briefed on activities of The Judge Advocate General's School. Their visit was occasion of the Annual Allied Officer's Gala in honor of all the foreign students attending the JAG School. This year the students included Squadron Leader (Major) Sheikh Muhammad Anwar, Pakistan Air Force; Lieutenant Colonel Leon O. Ridao, Philippines; Major Fereydoon Raji-Aboutaleb Tehrani, Iran; Major David H. D. Selwood, British Army and Captain Husni Salem Omari of the Jordanian Army. The Commandant of the School recently had the honor of taking part in a promotion ceremony for Major Tehrani.

6. Air Force General Counsel. In late November Mr. Jack Stempler, General Counsel, Depart-

ment of the Air Force, spent a day at The Judge Advocate General's School. He was briefed on School activities, including classes and publications. Mr. Stempler visited both the Basic and Advanced

Classes and had an opportunity to lunch with members of both classes. Mr. Stempler paid a courtesy call on Dean Paulsen of the University of Virginia during his visit at the JAG School.

PERSONNEL SECTION

From: PP&TO, OTJAG

1. **RETIREMENTS.** On behalf of the Corps, we offer our best wishes to the future to the following personnel who retired.

SGM Edward Montgomery, 16 October 1972.

2. All judge advocates are requested to advise Personnel, Plans and Training Office of the name and retirement date of civilian attorneys, legal clerks and court reporters at least 60 days prior to their retirement.

3. **ORDERS REQUESTED AS INDICATED:**

COLONELS

NAME	FROM	TO	APPROX DATE
BELTMAN, Laurence	USA Judiciary	OTJAG	Dec 72
HAMMACK, Ralph B	USA Judiciary w/sta Vn	USA Judiciary w/sta Okinawa	Oct 72

LIEUTENANT COLONELS

POYDASHEFF, Robert	OTJAG	OCLL, SA	Jan 73
--------------------	-------	----------	--------

MAJORS

ROGERS, Jack D	USARV	Hawaii	Nov 72
----------------	-------	--------	--------

CAPTAINS

ALEXANDER, John D	Korea	Ft Hamilton, NY	Feb 73
ANDERSON, Larry D	USARV	Hawaii	Nov 72
BELK, John W	Ft Gordon, Ga	Fort Hood, Texas	Jan 73
BOSILJEVAC, Mary	USAREUR	Beaumont GH, Tx	Dec 72
BRYSON, George P	USARV	Ft Carson, Colo	Mar 73
CHASET, Alan J	Ft Leavenworth, Kans	Hampton, Va	Jan 73
CHWALIBOG, Andrew	Korea	USAREUR	Mar 73
FEDYNSKY, George	Korea	USAREUR	Mar 73
FRANKLIN, Douglas	OTJAG	USAREUR	Feb 73
FRIEDBERG, Alan C	USARV	Fitzsimons GH	Mar 73
GODWIN, Fitzhugh	Korea	OTJAG	Mar 73
GRAVES, Paul K	Korea	USATC, Ft Lewis	Apr 73
HORNER, Peter J. J.	USA Judiciary	USARSUPTHAI	Jan 73
HUSKEY, Robert L	USARSUPTHAI	USAG Ft Campbell	Feb 73
KITTEL, Robert N	USARV	Seneca Army Depot	Mar 73
MATTINGLY, James	USARV	USA Engr Cen, Ft Belvoir, Va	Jan 73
MARRAH, Frederick	OTJAG	USA Engr Cen, Ft Belvoir, Va	Feb 73

CAPTAINS (Continued)

<i>NAME</i>	<i>FROM</i>	<i>TO</i>	<i>APPROX DATE</i>
MULLIN, Miles J	Korea	TJAGSA, S&F	Mar 73
PHILLIPS, Stephen	Beaumont GH, Texas	USAREUR	Feb 73
SZYMANSKI, James	USAREUR	S-F, USMA	May 73
WARD, James M	Ft Stewart, Ga	Ft Wolters, Tex	Nov 72
WILLIAMS, Mikel H	USATCE Ft L. Wood, Mo	USA Jud w/sta Ft L. Wood, Mo	Nov 72
WORTHING, Robert	USARV	OTJAG	Mar 73
WOOD, Darrell W	USATCE Ft L. Wood, Mo	HQ CONARC	Oct 72

WARRANT OFFICERS

BLACK, Carl E	1st COSCOM, Ft Bragg	82d Abn Div. Ft Bragg	Oct 72
HODGDON, Thomas T	USAG, White Sands MR	USAREUR	Jan 73
SHUN, Neil L	82d ABN Div. Ft Bragg	USAREUR	Nov 72

4. ASSIGNMENT—DIVERSION

BLONDEAU, Alex L. CPT	USAG Ft Campbell, Ky	WSMR, Wh Sands, NM	Jan 73
CAPALBO, Barry N	Okinawa	OTJAG	Jan 73
CAIRNS, Richard W	USA Systms Cmd, St Louis	USAG Ft Riley, Kan	Jan 73
DESLER, Peter M	Ft Huachuca, Ariz	OTJAG	Jan 73
HOUSE, George W	USAREUR	S-F, TJAGSA	Nov 72
TUCKER, Harry A	USATC, Ft Gordon, Ga	USAREUR	Jan 73
WHITEMAN, Steven	Atlanta Army Depot	3d Region, Ft McPherson, Ga	Jan 73

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

COL KENNEDY, Ried	Meritorious Svc Medal	Jul 67 - Jun 72
MAJ FRANKS, Mitchell D	Army Commendation Medal (2d OLC)	Apr 72 - Jun 72
MAJ MURRAY, Charles A	Meritorious Svc Medal	May 68 - Jul 72
CPT EGGERS, Howard C	Meritorious Svc Medal	Jun 68 - Aug 72
CPT KWIECIAK, Richard S	Army Commendation Medal	Jan 71 - Oct 71
CPT SMITH, Walter A	Meritorious Svc Medal	Dec 70 - May 72
CPT STAUBES, Christopher Jr.	Army Commendation Medal	Jan 70 - Jul 72
CPT GIANNELLI, Paul C	Army Commendation Medal (1st OLC)	Aug 71 - Aug 72

6. DA Circular 624-29, 10 October 1972 announces the convening of a selection board to convene on or about 9 January 1973 to consider eligible individuals for promotion to sergeant first class and specialist seven. The primary zone includes those in the grade of E-6 with a date of rank of 31 December 1967 or earlier. The secondary zone extends to 30 June 1968. Those eligible for promotion are listed in the circular.

7. GOVERNMENT CONTRACTOR CONFERENCE FOR 1973.

The 1973 Government Contractor conference sponsored by Federal Publications, Inc., will be

held at the Washington Hilton on 25-26 January 1973. The conference is an annual affair at which significant procurement developments of the past year are discussed by well known procurement experts. Federal Publications, Inc. will notify each subscriber to the Government Contractor of the conference, enclosing a registration application for those who expect to attend the conference. Each subscriber is entitled to one free admission. If a SJA subscriber is unable to attend the conference, he is requested to send the registration application, (including the address label of the subscriber) to HQDA(DAJA-PL) WASH DC 20210 in sufficient time so that free admission benefit may be used by other SJA personnel.

8. Attorney Vacancies under the jurisdiction of the Judge Advocate General:

<i>Position</i>	<i>Location</i>
Attorney-Adviser (Contracts) GS-905-13	Office of the Staff Judge Advocate HQ U.S. Army Aviation Center Fort Rucker, Alabama
Attorney-Adviser (Contracts) GS-905-12	USARV/MACV Sup Command U.S. Procurement Agency, Vietnam APO San Francisco 96309
Attorney-Adviser (General) GS-905-11	Office of the Staff Judge Advocate HQ Fort Hamilton Brooklyn, New York 11252
Attorney-Adviser GS-905-12	Office of the Staff Judge Advocate U.S. Army Procurement Agency, Europe Frankfort, Germany APO New York 09757
Attorney-Adviser (Contract) GS-905-13	HQ US Army Vietnam/MACV Sup Com APO San Francisco 96375

Anyone interested in the above positions please forward Standard Form 171 to The Personnel Plans and Training Office, (DAJA-PT) Office of the Judge Advocate General, U. S. Army, Washington, D. C. 20310

POSITION WANTED: Mr. William D. McAllister, a closed microphone reporter GS-6/7, is interested in a position anywhere in CONUS or overseas. He may be contacted at 3000 Woodhaven Road, Bldg. 26-4, Philadelphia, Pa. 19154.

<i>Grade</i>	<i>Req</i>	<i>MOS 71D</i>		<i>MOS 71E</i>	
		<i>OH 30 JUN 72</i>	<i>Req</i>	<i>OH 30 JUN 72</i>	<i>Req</i>
E-9	31	25	0	0	0
E-8	45	30	0	0	0
E-7	111	81	12	8	8
E-6	630	174	62	20	20
E-5	198	80	51	20	20
E-4	0	72	0	14	14
E-3	0	24	0	14	14
E-2	0	12	0	6	6
		1015	498	125	82
		PERCENT	49.06	65.60	

9. ENLISTED PERSONNEL NEWS

This column will appear periodically in THE ARMY LAWYER. The purpose of the column is to present information that is of interest to legal clerks and court reporters.

Fiscal year 1972 ended with a serious shortage of both legal clerks (MOS 71D) and court reporters (MOS 71E). At that time, 30 June 1972, we had a shortage of about 50% of our authorized legal clerks and approximately 35% of our authorized court reporters. The following chart shows our requirements and number on hand by grade as of 30 June 1972.

Since that time, our situation has improved vastly. As of 31 October 1972, we were authorized 1093 legal clerks and 705 were on active duty. This represents a shortage of only 35%. Our court reporter situation was even better. We were authorized 108 Army-wide, and 115 were on active duty. The increase in our number of legal clerks is attributable to the output from the Legal Clerks' Course at The Adjutant General's School. Likewise, we have gained a number of court reporters

from graduates of the Navy and Air Force Court Reporters Courses.

Fiscal year 1973 training calls for the schooling of approximately 900 legal clerks and 75 court reporters. In fiscal year 1974 we are programmed to gain approximately 770 legal clerks and 25 court reporters. Although we will lose a number of court reporters and legal clerks through retirement and ETS during fiscal year 1973, we should be in a good position, strength-wise, within the next six months.

Although we are obtaining numerous quality legal clerks from the course at The Adjutant General's School, there are still vacancies in each class. These vacancies can be filled by students attending the course on a TDY basis. Personnel desiring to attend the Legal Clerks' Course, especially those possessing MOS 71B, should report this matter to their chief legal clerk or legal administrative technician. Quotas to attend the course on TDY can be obtained from DA direct from the installation level. Details are contained in Chapter 11, AR 614-200. Starting dates for the course are set out in THE ARMY LAWYER, Vol. 2, No. 8, Aug. 72

During the first few months of the operation of the new Legal Clerks' Course at The Adjutant General's School, judge advocates of gaining installations were notified of the arrival of recent graduates by letter from the Office of The Judge Advocate General. These letters also recommend that new legal clerks be given a one-week orientation (on-the-job-training) in a judge advocate office prior to assuming their new positions. Notification of new arrivals is now made by sending copies of assignment orders from the AG School to judge advocates of gaining installations. It is recommended that new legal clerks spend some time in a JA office before taking a position such as a battalion legal clerk.

Since 1 April 1972, legal clerks and court re-

porters have been assigned as "special category" personnel by the Enlisted Personnel Directorate of the Office of Personnel Operations, DA. This means that they are handled individually, by name and assigned directly from one unit to another unit rather than to a major command for re-assignment. Special category personnel are assigned "unit to unit" to insure that they go where they are needed. In the eyes of the Pentagon, a man is needed at the unit which has a requisition on record. Requisitions may be submitted to obtain personnel to fill vacancies in organizations with approved manpower documents. Care must be taken to insure that the local command Adjutant General submits requisitions to obtain legal clerks and court reporters. In this regard, local judge advocate should obtain a list of all clerk and court reporter authorizations, including legal clerk positions at Battalion level, within their jurisdictions. In preparing such a list, the unit identification code (UIC) of each organization authorized legal clerks or court reporters should be obtained. A list of this nature is a valuable management tool. Routine questions concerning the assignment of legal clerks and court reporters should be directed to SFC Scheier, Special Category Branch, Enlisted Personnel Directorate, DA (Autovon 225-4420/7733). Questions may also be directed to PP&TO, OJJAG (MAJ Suter, Autovon 225-2832/9535). Just recently, an arrangement has been made whereby all legal clerk and court reporter assignments will be made only after coordination with OTJAG.

Although everyone has an interest in promotions, the promotion of enlisted personnel remains a mystery to many individuals. The enlisted promotion system is explained quite well in the Summer 1972 issue of THE ARMY PERSONNEL MAGAZINE (TIPS). That issue is recommended reading for all. The following chart shows how our legal clerks and court reporters did on three recent boards for promotion to E-7, E-8, and E-9, and promotion to E-6 in two recent months.

1. CENTRALIZED:	NUMBER IN ZONE CONSIDERED	SELECTED	SELECTION RATE
a. E-7 BOARD APRIL 1972			
TOTAL ARMY	34343	7092	20.6%
CMF AG	2066	412	19.9%
MOS 71E	4	1	25.0%
MOS 71D	52	7	13.5%
b. E-8 BOARD MAY 1972			
TOTAL ARMY	16765	2682	15.9%
CMF AG	1774	351	19.7%
MOS 71D	26	1	3.8%
c. E-9 BOARD APRIL 1972			
TOTAL ARMY	5308	1004	18.9%
CMF AG	645	212	32.8%
MOS 71D	10	5	50.0%
2. SEMI-CENTRALIZED:			
a. JULY 1972 E-6		b. SEP 1972 E-6	
TOTAL ELIGIBLE	15,000	TOTAL ELIGIBLE	14,954
TOTAL PROMOTED	205	TOTAL PROMOTED	611
71D ELIGIBLE	21	71D ELIGIBLE	24
71D PROMOTED	7	71D PROMOTED	13
71E ELIGIBLE	0	71E ELIGIBLE	5
		71E PROMOTED	2

As you can see, legal clerks did not fare too well on promotions to E-7 and E-8 but did well on the E-9 board. Additionally, we did extremely well on promotions to E-6 in the two months depicted. Affirmative steps are being taken to insure that personnel do better before the E-7 and E-8 promotion boards in the future. One of these is studying for and doing well on the MOS tests. All questions on the MOS tests are taken directly from the references set forth in the study guide which is sent to the field about four months prior to the test. If you want a promotion, the surest way is to score well on the MOS test.

The 1972 JAG Conference, held from 1 - 5 October in Charlottesville, Va., was attended, in addition to others, by fourteen legal administrative technicians and legal clerks. This was the first JAG Conference to be attended by warrant officers and legal clerks. These conferees attended all sessions of the Conference and assembled on two

occasions for interest group sessions. They contributed greatly to the Conference and it is planned that warrant officers and enlisted personnel will attend future conferences.

The following notes are for your information:

a. About 30% of our legal clerks and court reporters do not have a duplicate DA Form 20 on record in the Enlisted Personnel Directorate at DA. Also, many of you do not have enlisted assignment preference statements on file at EPD. Get these documents in. Chief clerks, make sure they comply!

b. A legal clerk and court reporter personnel roster was sent to the field in November for your information and use.

c. OTJAG has requested that the promotion range for court reporters be expanded to include E-8 and E-9.

d. The first legal clerk and court reporter non-commissioned education system (NCOES) Advanced Course will be taught in early 1973. The first 9 weeks of the course will be taught at The Adjutant General's School and the last two weeks will be taught at The Judge Advocate General's School. Ten persons (no women's Lib hangup here) in the grade of E-7 have been selected, but not notified, to attend this course. Details will soon be released.

e. OTJAG has requested approval to send 15 enlisted personnel to civilian stenotype school under the fully-funded civilian school program described in Chapter 5, AR 621-1. If approval is obtained, further details will be contained in THE ARMY LAWYER.

If you have suggestions or information that might be appropriate for the column, please submit them to HQDA(DAJA-PT) ATTN: MAJ Suter, Washington, D. C. 20310.

MILITARY LAWYERS HONORED AT CONFERENCE

Late in September The Judge Advocate General sent a message to staff judge advocates and commanders asking them to recommend military lawyers within their commands for recognition for outstanding work. At the conference General Prugh presented the list of those nominated for recognition. These people will also receive a letter and a certificate indicating their recognition. Those recognized were:

Judge Wongse Virapongse, Senior Thai Attorney and Legal Advisor, COMUS MACTHAI

Mr. Nguyen Thuy Lan, Attorney Advisor, Office of the Staff Judge Advocate, MACV

Mr. Gable C. M. Yu, Military National Attorney Advisor, Office of the Staff Judge Advocate, MAAG, Republic of China

Mr. Richard Wolf, Attorney-Advisor, Office of the Staff Judge Advocate, 1st Armored Division

Miss Etelka McCluer, Fifth Army, Claims Office of the Staff Judge Advocate

Mr. Edward Gluck, Procurement Office, USATASCOMEUR

Mr. Robert Gerwig, Attorney-Advisor, Office of the Staff Judge Advocate, Third Army

Mr. Joe Stenhouse, Attorney-Advisor, Office of the Staff Judge Advocate, Ninth Infantry Division and Fort Lewis

Mr. Oliver J. Sullivan, Attorney-Advisor, Office of the Staff Judge, USARJ

Mr. Arnold Feldman, Special Assistant Professor of Law, United States Military Academy

Mr. John Softcheck, Chief of the Procurement Law Division in the U. S. Army Munitions Command, Joliet, Illinois

CPT Kenneth D. Gray, Plans & Personnel, OTJAG

CPT Kenneth E. Grays, USATCI, Fort Dix

CPT Alexander L. Hendry, Jr., Assistant Staff Judge Advocate, Headquarters Third Army

CPT David McNeill, Jr., Officer in Charge, Karlsruhe Branch Office, TASCUM

CPT Larry Brisbee, Administrative Law Division, TASCUM

CPT Robert Sprague, Chief of Procurement, Tax and Labor Law Division, Headquarters XVIII Airborne Corps, Fort Bragg

CPT John Prosser, formerly assigned to USAREUR

CPT Marshall Criss, Procurement Law Division, USAREUR

CPT Paul Seibold, Chief, International Law, 1st Armored Division

CPT James D. Cowan, Assistant Staff Judge Advocate, 1st Armored Division

CPT Phillip Walker, SJA, 31st Air Defense Artillery Brigade

CPT Stephen Lenske, Chief, Legal Assistance Headquarters, U. S. Army Infantry Center, Fort Benning, Georgia

MAJ Steven Chucala, CID Agency

MAJ Thomas R. Cuthbert, Deputy Staff Judge Advocate, 1st Armored Division

LTC Frank J. Dorsey, Staff Judge Advocate, Sixth Army

LTC Barney Brannen, formerly the Staff Judge Advocate, Eighth Infantry Division

COL James E. Simon, Staff Judge Advocate, USATCI, Fort Dix

COL Gerald A. Davis, Staff Judge Advocate, Theater Army Support Command

COL Warren L. Taylor, Staff Judge Advocate, Fifth Army

CURRENT MATERIALS OF INTEREST

AR's

AR 600-37, 16 Oct. 1972, effective 1 Nov. 72 "Unfavorable Information." This regulation incorporates the provisions of AR 604-11 and 640-98 and updates the policies and procedures for resolution of unfavorable information.

AR 230-7, C7, 29 Sep. 72, effective 15 Nov. 72. This change implements DOD instructions which require an examination of records clause to be incorporated in all NAF contracts in excess of \$2,500.

AR 638-1, effective 1 Dec. 1972 "Disposition of Personal Effects of Deceased and Missing Persons." This regulation consolidates existing policies and procedures for handling the personal effects of deceased and missing persons.

DA Pam 608-2 Your Personal Affairs, Oct. 1972 is of interest to legal assistance officers.

Articles

Douglass, "High Command Case: A Study In Staff and Command Responsibility" 6 The International Lawyer 686 (1972).

Lane, "The Undesirable Discharge" Army, November 1972 at 19.

Note, "Judicial Review of Military Surveillance of Civilians: Big Brother Wears Modern Army Greens," 72 Colum. L. Rev. 1007 (1972).

Note, Judicial Review and Military Discipline—*Cortright v. Resor*: The Case of the Boys in the Band, 72 Colum. L. Rev. 1048 (1972).

McHugh, "Forcible Self-Help in International Law" Naval War College Review, November-December 1972 at 61.

Berry, "The Seabed Arms Control Issue, 1967-1971: A Superpower Symbiosis, Naval War College Review, November-December 1972 at 87.

Waranoff, Federal Judicial Control of the National Guard, 52 B U L Rev. 1 (1972).

Note, Military Retirement Benefits as Community Property, 24 Baylor L. Rev. 235 (1972).

Habeas Corpus Relief For the Military Prisoner: The Double Standard, 21 Drake L. Rev. 526 (1972).

Courses

Briefing Conference on Government Construction Contracts, Sponsored by the FBA, Dec. 5 & 6, 1972 in New Orleans. Cost \$125 for FBA members, \$150 for non members.

PLI Courses: For information write to PLI, 1133 Avenue of the Americas, New York, New York 10036.

Fifth Annual Criminal Advocacy Institute, Dec. 8-9 Detroit; Jan. 19-20 Las Vegas, \$100.

Defending A Narcotics Case; Dec. 8-9 San Francisco; Jan. 12-13 New York; \$100.

Federal Civil Practice; Jan. 11-12 Las Vegas; Jan. 26-27 Miami; Feb. 23-24 New York; \$125.

Consumer Credit 1973; Jan. 11-12 Chicago; Feb. 8-9 Las Vegas; Feb. 22-23 New York; \$100.

EARLY OUTS

From: PP&TO, OTJAG

1. A reduction of the obligated tour for judge advocates from 4 years to 3 years has been approved. Newly commissioned officers entering the

Judge Advocate General's Corps after 1 April 73 will have a minimum obligation of 3 years.

2. In accordance with this reduction, the obli-

gation of judge advocates on active duty on 1 April 73 will be reduced UPON THE APPLICATION OF THE OFFICER at the rate of 7½ days per month for each month of obligated service remaining on 1 April 73. For example, an OBV 4 officer currently with a 1 June 74 ETS will, UPON HIS APPLICATION, have his ETS adjusted to not earlier than 17 February 74, and adjustment of 105 days (14 months x 7½ days). No adjustment will reduce any present obligation of more than 3 years to a period of less than 3 years, nor reduce any obligation of less than 3 years (e.g., an officer with 4 years' prior Infantry service on a 2-year obligation would not have his obligated period of service reduced). ROTC scholarship students will be required to complete any obligation incurred under that program.

3. Also approved is the reduction of the minimum obligation under the excess leave program from 3 years plus 6 months for each year in the program to 3 years plus 4 months for each year in the program. This, in effect, reduces the obligation in the program from 4½ to 4 years in most cases (5 years for ROTC scholarship students). Excess leave officers on active duty may also receive a reduction of their obligation. These officers can receive a tour reduction of 2 months for each year and one-half (1 year and 10 months for ROTC scholarship students) remaining on their obligation to a maximum of 6 months' reduction. For example, an officer admitted to practice in his home state in 1 October 71 has a 4½ year obligation running from that date with an earliest release of 1 April 76. Thus, on 1 April 73, he has 3 years remaining on his obligation and can resign effective 1 December 75. As excess leave officers are Regular Army, they need not apply for the reduction. The reduction should be reflected in the application if and when the officer resigns his Regular Army commission.

4. An officer—OBV or Excess Leave—assigned to an overseas area will complete the normal overseas tour and will not receive a reduction in the period of obligated service which would advance his DEROS to a date earlier than the end of a normal tour; i.e., the officer will complete a normal overseas tour before being released from active duty. Likewise, an officer assigned to, or who has extended for, a specific position (e.g., TJAGSA,

West Point (2 academic years); Contract Appeals Division, Litigation Division (2 years)) will complete a normal tour prior to being released from active duty. Any officer who has extended for a specific assignment will serve the full period of that extension.

5. Officers with a currently scheduled ETS between 1 April and 1 January 74 may elect to have their tour reduced under the provisions of the present early release policy published in the June issue of THE ARMY LAWYER (accrued leave up to 60 days plus an additional 30 days in an unusual circumstance), or under this reduced tour concept. An officer may elect to apply for release under one policy or the other, but not both.

The following form letter may be used in applying for a reduction of obligated tour:

SUBJECT: Reduction of Obligated Tour of Active Duty

TO: The Judge Advocate General
Department of the Army
ATTN: Personnel, Plans and Training
Office
Washington, D. C. 20310

1. In accordance with the reduction of obligated tour for judge advocates, I request that my ETS be adjusted to
2. Date entered active duty with JAGC:
3. Present ETS:
4. I will have _____ months remaining on my active duty tour as of 1 April 1973. Thus I will be eligible for release on
(_____ months x 7 ½ days)

SIGNATURE

DAJA-PT

SUBJECT: Approval of Reduction of Current Obligated Service Commitment

1. Your request for reduction of your current obligated service commitment from _____ to _____ is approved.
2. This letter is the authority for amending your official records to show your status as OBV, with expiration date.

BY ORDER OF THE SECRETARY OF THE ARMY:

