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In 1972 the Commission on Government Procurement issued its report on the federal procurement system. The report included a series of recommendations. Many of those recommendations were implemented by changes to procurement regulations. However, other recommendations required statutory implementation. The following series of articles discusses proposed statutory implementation of Commission recommendations calling for a single procurement statute and recommendations related to alterations of legal and administrative remedies available to government contractors.

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**S. 1264, Federal Acquisition Act of 1977:
Changes in Contract Formation**

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Since 1948 procurement of goods and services by the military departments has been governed by the provisions of the Armed Services Procurement Act.¹ To those employed in the field of procurement, the Act and its implementing regulation,² if not easy to understand, are at least comfortable and familiar. Like old slippers or the favorite chair, they seem to fit the needs of those who use them. Changes come slowly, after great deliberation, and are easily assimilated without causing violent adjustments to long standing practices. However, looming on the horizon is a bill which, if

enacted, will cause many old and familiar procedures to simply pass away. The bill is S. 1264, the Federal Acquisition Act of 1977 [hereinafter referred to as FAA].

The FAA proposes many changes, one of which at first glance appears to be very significant. S. 1264 would make formal advertising and negotiation equally valid alternatives for acquiring property or services on behalf of the United States.⁴ Presently formal advertising is the preferred method for buying the needs of the government.⁵ Negotiation is authorized only if justified under one of 17 exceptions⁶ to the requirement for formal advertising. The thrust of the Federal Acquisition Act is to establish criteria that must be met when determining the purchasing method to be used. The criteria are designed to recognize that ". . . the nature of the product or service will dictate the Government's purchase considerations."⁷ These purchase considerations in turn will determine "what procurement method will most effectively generate competition."⁸

Title II, section 201, of the bill lists the criteria for use of competitive sealed bid method (formal advertising) of procurement. Section 201 provides:

"The competitive sealed bids method shall be used in the acquisition of property and

services when all of the following conditions are present—

(1) The anticipated total contract price exceeds the amount specified in title IV of this Act [\$10,000] for use of the simplified small purchase method;

(2) the agency need can be practically defined in terms not restricted by security or proprietary design;

(3) the private sector will provide a sufficient number of qualified suppliers willing to compete for and able to perform the contract;

(4) suitable products or services capable of meeting the agency need are available so as to warrant the award of a fixed price contract to a successful bidder selected primarily on the basis of price;

(5) the time available for acquisition is sufficient to prepare the purchase description and to carry out the requisite administrative procedures;

(6) the property or service is to be acquired within the limits of the United States and its possessions; and

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(7) the price for the property or service has not been established by or pursuant to law or regulation."⁹

Note that section 201 is written in the imperative. Acquisition "shall" be by competitive sealed bids if the seven conditions for use are present. This imperative language will require that every proposed purchase be examined initially to determine if the seven conditions are present. If so, competitive sealed bidding is the acquisition method that must be used. Thus, although the Act proposes to make formal advertising and competitive negotiation "equally valid alternatives," the mandatory nature of the language of section 201 appears to make formal advertising (competitive sealed bids) just a bit more equal than negotiation. Section 201, reinforced by legislative history of the bill,¹⁰ makes it clear, however, that the competitive sealed bids method of acquisition is preferred only if *all* seven conditions for use are present.

Section 203 of the FAA establishes requirements for award following formal advertising. The requirements are those presently found at 10 U.S.C. § 2305, namely:

- (1) bids are to be opened publicly at the time and place specified in the invitation for bids;
- (2) award is to be made to the responsible bidder whose bid conforms to the invitation and is most advantageous to the United States, price and other factors considered, and
- (3) notice of award is to be in writing.

The act adds to existing law by requiring all unsuccessful bidders to be notified of that fact.¹¹ The procuring activity is vested with the authority to determine responsibility of bidders and to make award to the proper bidder.¹²

Section 203(b) authorizes an agency head to reject all bids when "for cogent and compelling reasons, it is in the Government's best interest to do so." The drafters of the bill included this

language to tighten current statutes "which do not provide a clear standard."¹³ In fact, the FAA would merely codify a rule long recognized by the Comptroller General¹⁴ and in procurement regulations.¹⁵ For example, the Armed Services Procurement Regulation, Section 2-404, provides that "preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation." Thus, the Act breaks new ground by establishing a statutory standard for rejecting all bids, but the standard merely insures that current practices will continue.

Title III of the Federal Acquisition Act provides for acquisition of goods and services using competitive negotiation. The criteria for use of negotiation indicates that this acquisition method, as under current law, remains the method of last resort. Negotiation is to be used only if small purchase procedures are not applicable and the "acquisition does not meet the criteria. . . set forth in section 201. . . for use of competitive sealed bids."¹⁶ The only difference between the criteria for use of negotiation under the FAA and present statutes is one of emphasis. Title 10, United States Code, section 2304, prohibits negotiated procurements unless the circumstances surrounding the proposed acquisition fits one of 17 exceptions to formal advertising. Under the Federal Acquisition Act, negotiation is to be used if the criteria for formal advertising are not present. Instead of expressing the rules for negotiation in the negative, namely, negotiation is authorized if an exception to FAA is met, the Act merely states affirmately that competitive negotiation is to be used if the orders for use of CSB are not present. A matter of form, but little substance.

Section 304(a) deals with noncompetitive acquisitions. In the bill introduced in the Senate, such acquisitions were authorized only under a declaration of national emergency, in a public exigency situation or where only one source

was able to perform the work.¹⁷ However, during hearings by the Senate Committee on Governmental Affairs the original provisions were perceived as "too cumbersome." S. 1264 was amended to authorize noncompetitive procurements if award stems from an unsolicited proposal or the agency head¹⁸ determines that it is in the best interest of the government to enter into a noncompetitive contract. Any determination to award a noncompetitive contract must be made in writing and, except for contracts resulting from unsolicited proposals, notice of intent to award such a contract must be publicized in the Commerce Business Daily at least 30 days in advance of solicitation of a proposal from the prospective contractor, or at least 30 days in advance of award when earlier notice is impractical. If the notice results in other firms that demonstrate an ability to meet the requirements of the work requesting to compete, the acquisition must be awarded competitively.¹⁹ This approach will insure that maximum competition is obtained whenever possible and will prevent contracting activities from substituting subjective judgments on available competition for the marketplace's ability to generate competition.

Another section of the Act related to increasing competition is section 512 which requires publication of proposed acquisitions greater than \$10,000 in the Commerce Business Daily. There are six exceptions to the publication requirement. Publication is not necessary for acquisitions which:

1. are classified;
2. involve perishable subsistence supplies;
3. are of such unusual and compelling emergency that the government would be seriously injured if notice were required to be published 30 days in advance of the proposed contract award date;
4. are made by an order placed under an existing contract;
5. are made from another government department or agency or a mandatory source of supply;

6. it is determined in writing by the procuring agency with the concurrence of the Administrator, Small Business Administration, that advance publicity is not appropriate or reasonable.²⁰

Under the FAA, publication is to occur "immediately after the necessity for acquisition is established."²¹ This language is rather ambiguous. The necessity for acquisition is established long before a particular request for a contract is sent to a contracting activity. The need for a particular acquisition may come from one of numerous "customers" of the contracting office. Hence, the statute must be read to mean that publication is required immediately after the need for acquisition is made known to the contracting activity. Any other interpretation would result in a totally unworkable situation of the "customer" of the contracting office advertising an acquisition before the office charged with entering the contract was aware that a need existed.

Notwithstanding the rather poor use of language in section 512, it is apparent that Congress desires full publication of potential contract opportunities. Additionally, hearings on the FAA indicate that the publication requirements of section 512 are to be strictly followed. Publications of proposed acquisitions "which are not timely or which are not sufficiently descriptive do not fulfill the intent of [that section]."²² This seems to reverse the Comptroller General's position on current publication requirements²³—that failure to synopsize in the Commerce Business Daily is not fatal nor does it prevent an agency from executing a contract if competition is in fact obtained on the acquisition where the failure to synopsize occurred.²⁴

Yet another change that would result from passage of the FAA is to reduce the number of Determinations and Findings necessary under current statutes.²⁵ A Determination and Findings (D&F) is a written document required by statute to support certain contract actions. The largest reduction in the number of D&Fs required is in the area of the authority to negotiate contracts. Title 10, U.S.C., section

2310, requires that D&Fs be made under 12 or the 17 exceptions to formal advertising before negotiation of a contract is authorized. Each D&F must clearly illustrate why negotiation is proper under the exception to be used. Conversely, because the FAA requires that contracts be negotiated when competitive sealed bid criteria are not met, no D&F is necessary to justify negotiation. This eliminates the requirement for 12 D&Fs.

Determination and Findings are required also under 10 U.S.C. § 2306(c) when a cost-type contract is to be used; under 10 U.S.C. § 2306(g)(1) when contracts in excess of one year are to be executed outside the 48 states and the District of Columbia; under 10 U.S.C. § 2307(c) when advanced payments are to be made; and under 10 U.S.C. § 2313(b) if a foreign contractor is to be exempt from the Comptroller General review of records requirement. These D&F requirements would disappear with the FAA. That Act requires the D&Fs only if the government determines to enter into a non-competitive contract under section 304, if cost and pricing data requirements of section 305 are to be waived, if the authority under section 306(b) of the Comptroller General's Office to inspect a contractor's books and records is to be waived, or if detailed product specifications rather than functional specifications are to be used in a particular acquisition.

D&Fs are final under the language of 10 U.S.C. §2310. However, the General Accounting Office (GAO), apparently overlooking the plain language of the statute, takes the position that findings are final, but that any determination based upon such findings can be reviewed by GAO for abuse of administrative discretion. Section 507(a) of the FAA appears to overturn the GAO position. That section states that "[d]eterminations, findings, approvals, and decisions provided for by [the FAA] . . . shall be final."²⁶ However, the Senate report on the FAA, although quoting section 507(a), discusses conditions to finality: (1) good faith, (2) adequate facts to support the determination, and (3) a determination consonant with the law. The report states: "It is the considered view of

the committee that where the agency, acting in good faith, makes a determination or decision reasonably supported in fact and law, such determination should be final."²⁷ Thus, the Act, which appears to be conclusive, may allow room, in light of the Senate report, for review of agency determinations similar to that conducted by the GAO under current law.

Sections 202(c) and 302(c) require the use of functional specifications "to the maximum extent practicable and consistent with the needs of the agency." A functional specification means "a description of the intended use of a product required by the Government"²⁸—and "may include a statement of the qualitative nature of the product required and, when necessary, may set forth those minimum essential characteristics and standards to which such product must conform if it is to satisfy its intended use."²⁹ The use of functional specifications is required by the FAA primarily as a cure for the ills perceived by Congress to be associated with the use of design specifications. Congress spelled these perceived ills out in Senate Report 95-715.

Probably the worst thing [about design specifications] is the formidable bar to innovation erected by [such specifications] . . . Second, by being static, detailed specifications lag behind the advances continually emerging in other markets. . . . Third, product specifications which are stretched to cover as many applications as possible—the driving logic of standardization—may suit no one use well; users may be unable to get products really needed. Fourth, competition is sometimes illusory when exactly the same design is offered by the "competitors."

The Report also outlined the perceived advantages of using functional specifications. These are:

Significant cost saving opportunities . . . because a variety of product solutions may be considered.

More firms, especially small businesses, will be likely to compete. . . [because] functional specifications do not limit bidders only to those who can build one pre-specified design.

The use of commercially available products will be encouraged. . . .³¹

Undoubtedly, there are problems that are associated with the use of design specifications.³² Often these specifications are complex, costly to develop, contain errors and tend to lag behind technological advances. However, such specifications do allow various bidders to compete on an equal basis, generally insure that the government gets what it needs to perform its mission, and are readily usable in formal advertising.

Functional specifications are not free from problems. The potential for such problems was succinctly stated by the General Accounting Office:

Using functional specifications is not free from complex, and potentially costly, difficulties. Initially, the Government must expend considerable effort in drafting the specifications. Offerors must then translate the specifications into their own individual equipment and softwares approaches. This can involve a considerable amount of detail, may result in a variety of solutions to the Government's requirements, and may be quite costly. A substantial effort on the part of the Government is then required to evaluate the proposals.³³

The potential for problems with the use of functional specifications can be easily illustrated. For example, functional specifications are supposed to be less costly to use and are supposed to foster imaginative approaches to supplying government needs. The Senate report on S.1264 used the illustration of a mousetrap to demonstrate these supposed benefits. "[S]tat- ing a need as 'Rodent elimination' rather than

calling for a particular mousetrap design could foster some imaginative solution."³⁴

Not only would such a description foster imaginative solutions, it would require great wit and flexibility in selecting a bidder for award. "Rodent elimination" could result in bids on anything from a baseball bat to old Tom the alley cat. Evaluation of items offered in response to such specifications would be time-consuming. Each item would need to be examined individually to insure that it would, in fact, eliminate rodents. Something more than a requirement for "rodent elimination" is needed if potential suppliers are to compete on an equal basis for a contract and if the government is to get items that actually meet its needs.

The Federal Acquisition Act of 1977 will alter the federal contract landscape. Adjustments will be required by everyone involved in federal contracts, not only government personnel, but potential suppliers and contractors. Although passage of the FAA is not assured, it is evident that many members of Congress favor a single statute to govern federal acquisitions. The FAA does indicate areas where change in some form is imminent and, therefore, the bill should be studied so that the change, when it comes, will be easier to implement.

Notes

1. 10 U.S.C. §§2301-2314 (1976).
2. Armed Services Procurement Reg. [hereinafter cited as ASPR].
3. See *Federal Contract Reporter*, No. 700, D-1, Oct. 3, 1977, for a reprint of the bill.
4. *Id.* § 101(a).
5. 10 U.S.C. § 2304 (1976).
6. *Id.*
7. *S. Rep. No. 95-715*, 95th Cong., 2d Sess. 19 (1978) [hereinafter cited as S.R. 95-715].
8. *Id.*
9. *Id.*, at 132-33.
10. *Id.*, at 34.

11. Federal Acquisition Act of 1977, S. 1264, 95th Cong., 2d Sess., § 203(c) (1978) [hereinafter cited as S.1264].
12. S.R. 95-715, at 36.
13. *Id.* The current statute, 10 U.S.C. § 2305(c) (1976), provides that "... all bids may be rejected if the head of the agency determines that rejection is in the best public interest."
14. *See, e.g.*, Comp. Gen. Dec. B-186114, 19 July 1976, 1976-2 C.P.D. ¶ 55.
15. ASPR 2-404 (1976 ed.) and Federal Procurement Reg. 1-2.404-1.
16. S.1264 § 301.
17. S.R. 95-715, at 14.
18. Delegation of authority is authorized by S. 1264 § 601.
19. S.R. 95-715, at 15.
20. *Id.*, at 142-43.
21. S. 1264 § 501.
22. S.R. 95-715, at 57.
23. *See* ASPR § 1-1003.
24. *See* Comp. Gen. Dec. B-182858, 22 Apr. 1975, 1975-1 C.P.D. § 250.
25. S. 1264 § 507.
26. *Id.* § 507 (a).
27. S.R. 95-715, at 52.
28. S. 1264 § 3 (g).
29. *Id.*
30. S.R. 95-715, at 21.
31. *Id.*
32. Design specifications are detailed, step-by-step descriptions of the government's needs.
33. Comp. Gen. Dec. B-188990, 9 Sept. 1977, 1977-2 C.P.D. § 182.
34. S.R. 95-715, at 21.

Federal Acquisition Act and Truth in Negotiations

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The proposed Federal Acquisition Act includes section 305, Price and Cost Data and Analysis, the basis for which is the Truth in Negotiations Act.¹ Both section 305 and the Act are reproduced in footnote 1. However, not only does the proposal significantly modify existing law, it also incorporates regulatory material and case law. Following identification of the most important of these modifications and incorporations in the two succeeding paragraphs, each will be accorded specific attention, principally in the nature of a comparison with current requirements.

These *changes* to the Truth in Negotiations Act are proposed: the dollar threshold for *cost* data analysis with respect to negotiated prime contracts, price adjustments pursuant to contract modifications, or subcontract prices or price adjustments pursuant to a modification thereto, is increased from \$100,000 to \$500,000;

only *price* data analysis is required where "there has been a recent comparable competitive acquisition"; and, contractors are no longer required to certify that the data submitted were accurate, complete and current.

It is proposed that these Armed Services Procurement Regulations [hereinafter cited as ASPR] concepts be incorporated: the definitions of price data, cost data, price analysis and cost analysis; the requirement for at least price data analysis with regard to all negotiated prime contracts or price adjustments pursuant to modifications thereto; and, the requirement that:

Any prime contract or subcontract or modification thereto for which price data or cost data are required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to

exclude any significant sums by which it may be determined by the contracting officer that such price was increased because of reliance on data which were inaccurate, incomplete, or noncurrent. . . .²

1. \$500,000 Threshold.

It is explained in the Senate Report³ [hereinafter cited as Report] concerning the proposed act that the new dollar threshold "accounts for the current purchasing power of the dollar." Although inflation since the implementation of the Truth in Negotiations Act in 1962 has been significant, it does not approach 500 per cent (*i.e.*, \$100,000 to \$500,000). The proposal obviously is designed to exempt a greater portion of procurements from the analysis requirements. Once the dollar threshold is met, however, the proposed act closely parallels the Truth in Negotiations Act's requirements for submission of cost data. Specifically, except as otherwise provided,

cost data shall be obtained and cost analysis techniques shall be used to analyze and evaluate the reasonableness of prices-

(1) whenever the price of a negotiated prime contract or a price adjustment pursuant to a contract modification is expected to exceed \$500,000; or

(2) for any subcontract price or price adjustment pursuant to a modification thereto in excess of \$500,000, which forms part of a negotiated prime contract price or higher tier subcontract price.⁴

The language of subparagraph (2) is peculiar. It is not clear nor is it explained what, if any, effect the new language is intended to have. As Senator Metcalf notes, "this may be the same requirement as contained in the Truth in Negotiations Act, but it certainly is not as clear with regard to the circumstances in which subcontractors are required to furnish cost or pricing data."⁵

This language variation is unfortunate. The current law regarding subcontractor cost or

pricing data is clear; it has been accorded repeated and close scrutiny by Boards of Contract Appeals and the Court of Claims. The replacement language suffers from a lack of clarity.

2. Recent Comparable Competitive Acquisition.

Under the proposal an additional exception to the cost analysis requirement is created where "there has been a recent comparable competitive acquisition." Senator Metcalf attacks the exception as a "loophole" which "can be a significant weakening of the Government's ability to ascertain the reasonableness of prices for many non-price competitive procurements."⁶ The Report explains that "for purposes of this section, 'recent' means in the last 12 months and 'comparable' means for essentially the identical product or service."⁷ This rather loose (subjective) exception, when added to the higher dollar threshold, reduces substantially the number of DoD procurements for which cost data analysis will be required.

3. Certification.

Pursuant to the Truth in Negotiations Act, contractors are required to submit cost or pricing data and then, as a second step, to certify the accuracy, completeness, and currency of such data. The proposed act eliminates this second step; however, a price reduction clause (quoted, *supra*) is required. Senator Metcalf expresses grave concern about the absence of a certificate, stating, for example, that "without it there may not be a legal basis to recover for excess prices. . . ."⁸

But, under current law, it is not the certificate, per se, which triggers liability; it is the Price Reduction Clause *language* (see ASPR clause at § 7-104.29) which ties liability to defective *certified* data. (Note that the Justice Department asserts that the False Claims Act imposes liability for defective data even in the absence of a certificate.)

By eliminating the awkward and unnecessary certification step, the proposal simplifies and

improves the current liability assessment procedure. If nothing else, contracting officers will no longer be forced to contend with contractors reluctant to certify previously submitted data. As noted in the Report, "the committee felt that this certification [step] was an unnecessary paperwork requirement which did not enhance the Government's ability to adjust contracts found later to be based on faulty data. . . ."⁹

In addition to deleting the requirement for certification, the principal change embodied in the Proposed Act is the significant reduction in the number of contracts for which cost data analysis would be required (via new dollar threshold and the "recent comparable competitive acquisition" exception).

The proposal also *incorporates* certain definitions and procedures presently contained in Agency regulations, as well as an element of case law.

1. Definitions.

The Price and Cost Data and Analysis section of the Proposed Federal Acquisition Act begins by defining these terms: price data, cost data, price analysis and cost analysis. These definitions closely parallel those provided in ASPR §§ 3-807.2 and 3-807.3(h).

2. Price Analysis.

Although not required by the Truth in Negotiations Act, APR § 3-807.2 calls for "some form of price or cost analysis . . . in connection with every negotiated procurement action." The Proposal incorporates this approach except as to:

contracts or subcontracts where the price negotiated is based on adequate price competition, prices set by law or regulation, or, in exceptional cases, where the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.¹⁰

Of course, in order to make the determination that use of the competition or "set by law or regulation" exception is appropriate at least some price analysis is required.

3. Price Reduction Requirement.

Subparagraph (g) of the proposal, set forth earlier, directs incorporation of a price reduction provision in "any prime contract or subcontract or modification thereto for which price data or cost data are required. . . ." The subparagraph further provides, similar to the ASPR Price Reduction for Defective Cost or Pricing Data clause, that the price to the government "shall be adjusted to exclude any significant sums by which [it is determined] that such price was increased because of *reliance* on data which were inaccurate, incomplete, or noncurrent . . ." (emphasis supplied).

The "reliance test" flows from Boards of Contract Appeals and Court of Claims decisions involving the Truth in Negotiations Act.¹¹ However, the government's burden of proof on this issue is not particularly onerous because recent decisions have created a practical presumption in favor of the government.¹² In fact, the Court of Claims has suggested that it is the contractor's burden to show nonreliance on the part of the government.¹³ The consequence of inserting the reliance test into the Act may be to eliminate the favorable presumption. The Court of Claims and Boards of Contract Appeals may be tempted to reallocate the burden of proof under a statutory requirement!

The proposed revision to the Truth in Negotiations Act would undoubtedly bring about substantial changes in government contracting. Significantly fewer contractors would be required to submit cost data and none would be asked to certify such data. While some of the new provisions ought to improve current procedures, the proposal must be accorded close scrutiny to insure that more good than harm would be the result of replacing what Senator Metcalf describes as "good law" and one which is "needed as much or more today than it was 15 years ago."¹⁴

Notes

1. Truth in Negotiations Act, 10 U.S.C. § 2306(f) (1976).

(f) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—

(1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed \$100,000;

(2) Prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the head of the agency;

(3) Prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed \$100,000; or

(4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the head of the agency.

Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: *Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records,

documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

Section 305, S. 1264, *reprinted in S. Rep. No. 95-715, 95th Cong., 2nd Sess. 136-37 (1978).*

Price and Cost Data and Analysis

Sec. 305. (a) (1) The term "price data" means actual prices previously paid, contracted, quoted, or proposed, for materials or services identical or comparable to those being acquired, and the related dates, quantities, and item descriptions which prudent buyers and sellers would reasonably expect to have a significant effect on the negotiation of a contract price or payment provisions.

(2) The term "cost data" means all facts which prudent buyers and sellers would reasonably expect to have a significant effect on the negotiation of a contract price or payment provisions. Such data are of a type that can be verified as being factual, and are to be distinguished from judgmental factors. The term does, however, include the facts upon which a contractor's judgment is based.

(3) The term "price analysis" means the process of examining and evaluating a price without evaluation of the individual cost and profit elements of the price being evaluated.

(4) The term "cost analysis" means the element-by-element examination and evaluation of the estimated or actual costs of contract performance, and involves analysis of cost data furnished by an offeror or contractor and the judgmental factors applied in projecting from such data to the offered price.

(b) The contracting officer shall obtain price data and shall use price analysis techniques to analyze and evaluate the reasonableness of negotiated prime contract price or of a price adjustment pursuant to a modification thereto where—

(1) the price is expected to be \$500,000 or less;

(2) the price is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public; or

(3) there has been a recent comparable competitive acquisition.

(c) In the case of subcontracts, when any of the conditions in subsection (b) applies, price data shall be obtained and price analysis techniques shall be used to analyze and evaluate the reasonableness of—

(1) a subcontract price—where evaluation of a subcontract price is necessary to insure the reasonableness of the prime contract price, or

(2) a subcontract price adjustment pursuant to a prime contract modification.

(d) Except as provided in subsection (b)(2) and (3), cost data shall be obtained and cost analysis techniques shall be used to analyze and evaluate the reasonableness of prices—

(1) whenever the price of a negotiated prime contract or a price adjustment pursuant to a contract modification is expected to exceed \$500,000; or

(2) for any subcontract price or price adjustment pursuant to a modification thereto in excess of \$500,000 which forms part of a negotiated prime contract price or higher tier subcontract price.

(e) Notwithstanding subsection (b) hereof, the contracting officer may obtain cost data and use cost analysis techniques when authorized under circumstances set forth in regulations issued by the Administrator for Federal Procurement Policy pursuant to this Act.

(f) Contractors and subcontractors shall submit in writing such price data or cost data as are required to be obtained pursuant to this section. Regulations issued by the Administrator for Federal Procurement Policy may authorize identification in writing of price data and cost data, in lieu of actual submission, under specified circumstances.

(g) Any prime contract or subcontract or modification thereto for which price data or cost data are required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the contracting officer that such price was increased because of reliance on data which were inaccurate, incomplete, or noncurrent as of the date of submission or other date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price or payment provisions as is practicable).

(h) The requirements of this section do not apply to contracts or subcontracts where the price negotiated is based on adequate price competition, prices set by law or regulation, or, in exceptional cases, where the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.

2. S. 1264, 95th Cong., 2d Sess. § 305(g), *reprinted in Federal Acquisition Act of 1977, S. Rep. No. 95-715, 95th Cong., 2d Sess. 137 (1978).*

3. S. Rep. No. 95-715, 95th Cong., 2d Sess. 46 (1978).

4. S. 1264, 95th Cong., 2d Sess. § 305 (d), *reprinted in Federal Acquisition Act of 1977, S. Rep. No. 95-715, 95th Cong., 2d Sess. 137 (1978).*

5. Federal Acquisition Act of 1977, S. Rep. No. 95-715, 95th Cong., 2d Sess. 137 (1978).

6. *Id.* at 121.

7. *Id.* at 46.

8. *Id.* at 121.

9. *Id.* at 47.

10. S. 1264, 95th Cong., 2d Sess. § 305(h), *reprinted in Federal Acquisition Act of 1977, S. Rep. No. 95-715, 95th Cong., 2d Sess. (1978).*

11. *See, e.g., FMC Corp., ASBCA Nos. 10095 and 11113, 31 Mar. 1966, 66-1 B.C.A. para. 5483.*

12. *See, e.g., Cutler-Hammer, Inc., ASBCA No. 10900, 28 June 1967, 67-2 B.C.A. para. 6432.*

13. *Sylvania Elec. Prods., Inc. v. United States, 202 Ct. Cl. 16, 479 F.2d 1342 (1973).*

14. Federal Acquisition Act of 1977, S. Rep. No. 95-715, 95th Cong., 2d Sess. 121 (1978).

Protests Against Award According to the Federal Acquisition Act: A Paper Lion

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In reading Senate Bill 1264¹ (hereinafter referred to as S. 1264) one must be mindful to keep as his goal—watch the donut . . . not the hole. With this cautionary note in mind let us look at Title VII of this important piece of

legislation, pertaining to protests against awards of government contracts.

Senate Bill 1264, known as the Federal Acquisition Act of 1977 (hereinafter referred to as

the FAA) when, and if, passed by Congress, will undoubtedly leave its indelible mark, for better or worse, on the Federal contracting process. What impact, however, will Title VII have on Department of Defense contracting and protests arising therefrom?

Perhaps the most important provision in Title VII is Section 701, which sets forth the alleged existing authority of the Comptroller General, as head of the General Accounting Office, (hereinafter referred to as the GAO), to decide protests against award submitted to that office. The existing statutory basis for the Comptroller General to decide bid protests is set forth in the Budget and Accounting Act, 1921,² which provides in pertinent part that:

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted by the General Accounting Office.³

The Budget and Accounting Act, 1921, also states that:

Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled . . . may within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government.⁴

Notwithstanding these statutory provisions and the role portrayed by the GAO pursuant to them for the last 50 years, two recent Attorneys General, Mr. Mitchell and Mr. Bell, have challenged on Constitutional grounds the power of the Comptroller General to render decisions on protests against awards that would be binding on the executive branch of government.⁵ Instead, both men contend that such decisions are, at best, advisory only.⁶ The posi-

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tion of the Department of Justice is that the Comptroller General is a legislative position, an extension of Congress, and any construction of a statute which would bind an executive agency in a protest of award is a violation of the Constitutional doctrine of separation of powers because enforcement of the laws is entrusted to the executive branch of our government.⁷ To counter this argument, the GAO has adopted a bifurcated approach; that is that pursuant to the Budget and Accounting Act, 1921, the Comptroller General is vested with both legislative and executive powers. In performing audits of the government, the Comptroller General is acting in his legislative role.⁸ In settling accounts he is acting in his executive capacity,⁹ although separate and apart from any executive agency.

One may argue that the approach taken by the GAO is self-contradictory. The purpose of the doctrine of separation of powers is to insure that too much power does not become centered in one branch of the government. Accordingly, a system of checks and balances is provided to maintain equilibrium.¹⁰ By vesting both executive and legislative powers in one organization this basic Constitutional precept is circumvented. This anomaly notwithstanding, the "dual hat" scheme has been judicially recognized.¹¹ With that assurance it would seem that the logical approach to resolving this dichotomy would be for Congress, assuming it had the Constitutional authority to do so, to legislate the express power of the Comptroller General to act in these matters rather than rely on the interpretation and construction of the 1921 statute. This was perhaps the charted course for Section 703(b), Title VII of S.1264, as originally proposed, provided that all decisions of the Comptroller General would be binding on all interested parties, including executive agencies. Apparently because of the Constitutional issues raised by the Department of Justice this section was subsequently amended and the present version of Title VII simply maintains the status quo of the Comptroller General's power to decide such protests based upon the authority of the Budget and Accounting Act, 1921.¹²

Amendment of this section was a sage decision. First, it removed any potential conflict over the power of Congress to vest the bid protest function in the Comptroller General. Secondly, it not only maintained the current status of the Comptroller General to decide the protests, but also avoided a possible Constitutional confrontation with the executive in the courts, where an adverse decision would destroy the power, albeit tainted, currently relied on by the GAO in rendering bid protest decisions.

It is obvious that while Congress did not want to cross sabres with the executive on this issue, it also did not want to see the erosion of any of the GAO's existing power.¹³ The language adopted by the Committee¹⁴ in Section 703(b) reaffirms and makes explicit the GAO's 50-year reliance on the Budget and Accounting Act, 1921, for issuing protest decisions.¹⁵

It should be noted that this recurring problem of the authority of the GAO to bind by its decisions an executive agency, presents itself elsewhere in Title VII. Section 703(e) provides that:

Where the Comptroller General has declared that a solicitation, proposed award, or award of a contract does not comport with law or regulation, he may further declare the entitlement of an appropriate party to bid and proposal costs. In such cases the Comptroller General may remand the matter to the executive agency involved for an initial determination as to the amount of such costs. Declarations of entitlement to monetary awards *shall be paid promptly by the executive agency concerned* out of funds available for the purpose. Emphasis added.

This language appears to bind the respective executive agency involved and thrusts the Constitutional issue once again to the fore.

Section 702(a) of Title VII describes the Comptroller General's authority to entertain and decide protests submitted by "interested parties." This section defines "interested party" as, "any individual who would suffer a

direct economic effect as contractor or subcontractor, by the award or nonaward of the contract."

The current definition of an "interested party" eligible to file a protest with the GAO, expressed in a host of GAO opinions, includes not only contractors and subcontractors, but also such institutions as a Chamber of Commerce¹⁶ and a labor union representing such offerors.¹⁷

It is evident that this proposed definition, if strictly interpreted, would significantly limit the scope of those persons eligible to protest to the GAO an award of a contract. Conversely, such a literal reading could cause a party not now eligible to protest, such as a mere potential subcontractor not listed in the respective proposal¹⁸, to otherwise attain the status of an eligible party.

Although the language would appear to be limiting in scope, it may reasonably be argued that the intent of Congress in drafting Title VII was to maintain the status quo with regard to protests of award rather than create any sweeping amendments thereto.¹⁹

The remainder of Title VII merely attempts to codify existing rules and regulations. For example, Section 702(b) generally prohibits award of a contract pending protest before the Comptroller General unless the head of an executive agency determines upon a written finding that the interest of the United States will not permit waiting for the Comptroller General's decision and that the Comptroller General is so advised prior to award of the contract.²⁰

The current rule in the Armed Services Procurement Regulation is similar to that expressed above. The only difference is that the language "interest of the United States" used in the FAA is not as definitive as the language in the Armed Services Procurement Regulation which is couched in terms of urgently required items, undue delay of performance or delivery, or otherwise advantageous to the government.²¹ This difference is insignificant, how-

ever, and in practice will likely be blended with the current rule. Most certainly the codification by the FAA of these existing rules will cause no real impact.

There is one remaining exception to this attempted codification which bears mention. For years the various judicial circuits have been unable to unite on the standard to be applied regarding a protestor's standing to sue.²² The standard most often followed was that expressed in *Scanwell Laboratories v. Shaffer*.²³ There it was held that a person suffering a legal wrong because of adverse agency action had standing to sue in the federal courts by virtue of the Administrative Procedure Act,²⁴ (hereinafter referred to as the APA). Earlier this year, however, the Supreme Court in *Califano v. Sanders*²⁵ proclaimed the APA not to be an independent grant of subject-matter jurisdiction allowing federal courts to review agency action.

Now comes Section 705, in which the Senate committee decided to provide for judicial review by the federal district courts any adverse agency action or protest decision of the Comptroller General respecting solicitation or award.²⁶ Had they stopped there, Section 705 would, of course, not be inconsistent with current practices. The committee, however, would allow such aggrieved persons to have their plight judicially reviewed pursuant to the provisions of the APA.²⁷ This measure causes Section 705 to fly in the face of *Califano*,²⁸ and in fact legislatively reverses that decision. By so doing, not only will this provision reestablish the rationale of *Scanwell*²⁹ as the proper standard, but it will standardize the concept of standing, long an unplucked thorn in the side of both unsuccessful offerors and the courts.

Although it is clear that would-be contractors could then bring suit, and potentially increase the amount of litigation, federal contract practitioners should not begin leaping from buildings, for the wholesale interruption of the federal acquisition process may still be prevented by the imposition of the guidelines enumerated in *Steinthal and Co. v. Seamans*.³⁰

Except for the clarification relating to the standing issue in the judicial review process, which is peripheral to the majority of cases handled under the bid protest procedures, Title VII of the FAA does little more than create a few small ripples in an otherwise placid pond. It is fair to label it a paper lion, creating much sound and fury but signifying nothing.

Notes

1. S. 1264, 95th Cong., 2d Sess., reprinted in Federal Acquisition Act of 1977, S. REP. NO. 95-715, 95th Cong., 2d Sess. (1978). This bill should be read in conjunction with S. 3178, 95th Cong., 2d Sess. (1978), particularly § 4 dealing with claims against the United States. See Nutt, *A Funny Thing Happened on the Way to the Forum*, THE ARMY LAWYER, July 1978, at _____.

2. 31 U.S.C. (1970 & Supp. V 1975).

3. *Id.* § 71.

4. *Id.* § 74.

5. Letter from then Attorney General John Mitchell to Comptroller General Elmer Staats (June 14, 1971); letter from Attorney General Griffin Bell to Acting Administrator for Federal Procurement Policy (March 17, 1977).

6. *Id.*

7. Letter from Attorney General Griffin Bell to Acting Administrator for Federal Procurement Policy (March 17, 1977); statement of Irving Jaffe, Deputy Assistant Attorney General, Civil Division, filed with the Senate Government Operations subcommittee (July 27, 1977).

8. 31 U.S.C. § 67 (1970 & Supp. V. 1975).

9. 31 U.S.C. §§ 71 & 74 (1970 & Supp. V 1975).

10. U.S. Const. art. 1, § 1 & art. 2, § 1.

11. *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94 (D.D.C.), *aff'd*, 339 F. 2d 753 (D.C. Cir. 1964).

12. S. REP. NO. 95-751, 95th Cong., 2d Sess. 24 (1978).

13. *Id.*

14. Committee on Governmental Affairs, United States Senate.

15. S. REP. NO. 95-715, 95th Cong., 2d Sess. (1978).

16. 49 Comp. Gen. 9 (1969).

17. Comp. Gen. Dec. B-181265 (27 Nov. 1974), 74-2 C.P.D. § 298.
18. Comp. Gen. Dec. B-188959 (20 June 1977), 77-1 C.P.D. § 441.
19. S. REP. NO. 95-715, 95th Cong., 2d Sess. (1978).
20. S. 1264, 95th Cong., 2d Sess., reprinted in Federal Acquisition Act of 1977, S. REP. NO. 95-715, 95th Cong., 2d Sess. (1978).
21. Armed Services Procurement Reg. §§2-407.8 (b) (3) (i), (ii) and (iii).
22. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Scanwell Laboratories, Inc., v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).
23. Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).
24. Administrative Procedure Act, § 10, 5 U.S.C. §§ 701-706 (1976).
25. Califano v. Sanders, 430 U.S. 99 (1977).
26. S. REP. NO. 95-715, 95th Cong., 2d Sess. 146 (1978).
27. S. 1264, 95th Cong., 2d Sess., reprinted in Federal Acquisition Act of 1977, S. REP. NO. 95-715, 95th Cong., 2d Sess. 146 (1978).
28. Califano v. Sanders, 430 U.S. 99 (1977).
29. Scanwell Laboratories, Inc., v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).
30. Steinthall and Co. v. Seaman, 455 F.2d 1289 (D.C. Cir. 1971). The court held that:

Courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was not a rational basis for the agency's decision; and even in instances where such a determination is made, there is room for sound judicial discretion, in the presence of overriding public interest considerations to refuse to entertain declaratory or injunctive actions in a pre-procurement context.

There is a strong public interest in avoiding disruption of the Federal Acquisition Process.

A Funny Thing Happened on the Way to the Forum: The Contract Disputes Act of 1978

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When performance under a government contract goes awry and the parties cannot agree on a settlement, the contracting officer must assume the role of a judge. He must decide the facts and issue a final decision to the contractor. This triggers an appeal procedure, which, if the contractor decides to follow it, takes the parties to one of thirteen impartial Boards of Contract Appeals.¹ The decision of this Board becomes final as to all fact questions. Law questions, though they are regularly decided by these boards, are final only if not judicially reviewed. The court, if it disagrees with the board's conclusions, may construe the law differently—but never the facts unless they are found to be, in the words of the contract's disputes clause, "fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."²

This procedure was blessed by the United States Supreme Court in *Kihlberg v. United States* as early as 1878.³ The court apparently thought that this was desirable because the contractor could be expected to keep on working while administrative boards handed out quick decisions and avoided vexatious and perhaps ruinous litigation in numerous federal courts or the Court of Claims. Under *United States v. Holpuch Co.*⁴ the contractor was required to exhaust this administrative contract disputes procedure as a condition precedent to any judicial access or review.

Since 1972, only contractors have been permitted to obtain judicial review of an adverse agency board decision, a result of the United States Supreme Court's holding in *S.&E. Contractors v. United States*.⁵ This means that a disappointed contractor may appeal to the

Court of Claims if he brings suit for judicial review within six years.⁶ If he loses, he may seek a writ from the United States Supreme Court, alleging that the Board of Contract Appeals and the Court misapplied the facts and law under the standards expressed in the disputes clause mentioned above, which embodies the standards of the Wunderlich Act.⁷ On the other hand, if the government loses at the Board of Contract Appeals, administrative rules permit the government to seek reconsideration from the board, but no further relief is available.⁸

When the matter does not "arise under" the contract there is a breach of contract which gives contractors direct access to the Federal district courts or the Court of Claims under the Tucker Act.⁹ This statute expressly limits contractors to money damages for breaches of express or implied-in-fact contracts and limits access to the district courts to suits of \$10,000 or less. Of course, relief in the district courts is limited to that which can be granted by the Court of Claims on a properly identified suit for "breach" money.¹⁰

This procedure is one which has been regularized over time. It is understood by practitioners and judges. But there are some who believe that contractors need greater access to the courts and that broader remedies and increased jurisdictional amounts should be legislated. The answer to those who seek such changes may be found in a number of similar bills currently pending in the 95th Congress.¹¹ If any version should pass, a real likelihood this year, current practice in some respects will be codified. In others, radical changes will occur throughout the federal contract law community.

All of these bills respond in some way to 12 remedies of the Commission on Government Procurement.¹² They are:

1. Make clear to the contractor the identity and authority of the contracting officer, and other designated officials, to act in connection with each contract.

2. Provide for an informal conference to review contracting officer decisions adverse to the contractor.

3. Retain multiple agency boards; establish minimum standards for personnel and caseload; and grant the boards subpoena and discovery powers.

4. Establish a regional small claims boards system to resolve disputes involving \$25,000.

5. Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of, or in connection with, the administration or performance of contracts entered into by the United States.

6. Allow contractors direct access to the Court of Claims and district courts.

7. Grant both the government and contractors judicial review of adverse agency boards of contract appeals decisions.

8. Establish uniform and relatively short time periods within which parties may seek judicial review of adverse decisions of administrative forums.

9. Modify the present court remand practice to allow the reviewing court to take additional evidence to make a final disposition of the case.

10. Increase the monetary jurisdictional limit of the district courts to \$100,000 (dissent recommended \$25,000).

11. Pay interest on claims awarded by administrative and judicial forums.

12. Pay all court judgments on contract claims from agency appropriations if feasible.

The two most important bills are those which were introduced in the Second Session of the 95th Congress by Representative Harris on February 8, 1978, H.R. 11002, and by Senator Chiles, S.2787, reintroduced on June 7, 1978, as S.3178. Both of these bills respond to the Commission's findings and recommendations in

some respects. Recommendations 1, 2, 4, 5, and 11 will be codifications of existing law or regulation. The remaining recommendations will enact new law. The effect of these changes to existing practice will be evident from an analysis of some of the provisions of each bill.

The two versions are really very similar. Both provide statutory definitions, defining agency head, executive agency, contracting officer and contractor.¹³ But S. 3178 adds in section 2 (5) a new definition for "administrator," according statutory recognition to the Office of Federal Procurement Policy¹⁴ with great authority over the whole disputes process.

Both bills in section 3 apply the Act to express or implied contracts, making no distinction between the time-honored Court of Claims distinction over contracts implied-in-fact which the court has jurisdiction over, and contracts implied-in-law which the court, under the Tucker Act,¹⁵ has not. Additionally, it applies under either version to procurement of property, services, construction, alteration, repair, maintenance, and disposal, all traditional subjects falling under the ambit of "procurement" or in the sense of the Federal Acquisition Act, "acquisition."

Section 4 of each bill accords full authority in the agencies to settle *all* disputes or claims no matter when they arise. The significant new language vests subject matter jurisdiction in the agency boards as well as the courts over breach of contract, mistakes (presumably both unilateral and bilateral), misrepresentation OR OTHER CAUSE FOR CONTRACT MODIFICATION (emphasis added) which may include anything the drafters left out to avoid precluding adjustment in any forum of new causes of action not yet conceived. This is a radical departure from the exhaustion requirement under current disputes clause practice reversing *Holpuch*,¹⁶ and a radical addition of equitable remedies which are not conferred presently on the agency boards by contract clause or the courts under the Tucker Act.¹⁷

Section 5 changes little. Both versions of the Contract Disputes Act require contracting offi-

cers to decide both contractor and government claims in writing and send the decisions to the contractor in language much like that found in the Armed Services Procurement Regulation and the disputes clause.¹⁸ But for the first time, a 60-day decision-making period may be imposed on contracting officers triggered by a contractor request for a final decision. A presumption of adverse decision arises if no decision is furnished the contractor within this period and the contractor may appeal from the failure to decide.¹⁹ While the contractor could always appeal from a refusal or failure to decide, the proposed section's presumption shifts to the contracting officer a sense of urgency in the decision-making process. Any appeal or suit may be filed as provided in sections 8 and 10 of both bills. And, of course, these decisions, properly furnished to the contractor, signal the beginning of the "appeals" period.²⁰ Although the appeals period will begin in the same way as under current practice, the period is very soft as we shall see in sections 8 and 20 of both versions.

On the way to either forum, an agency board or the court, the contractor may take advantage of a new, mandatory informal conference with someone who outranks the contracting officer pursuant to section 6. This gives him a second chance at the contracting officer by a "second guesser," who shall not have participated significantly in the first decision. All the contractor need do is demand this informal conference and presto, within no more than 35 days under the Senate version, this conference follows. If the government leaves this step out and the agency board or the court becomes aware of it, the litigation may be stayed to afford the contractor this new, and now probably unwaivable right to interject a higher level review over the contracting officer with a view toward administrative settlement. H.R. 11002 imposes no such time limit, though it permits a stay if no conference "happens" before trial at whichever forum.

Section 7 requires the contractor to appeal within 90 days from the date of receipt of the contracting officer's decision. This adds 60 days to the traditional 30-day period.

Section 8 of both bills preserve agency boards of contract appeals with three-judge House version and five-judge Senate version minimums depending on the workload. The Senate version puts the Administrator of OFPP in a position of great power over agencies for creating boards. Board creation requires Administrator concurrence. Boards can be dissolved at his "determination" that there is not enough business to keep the board doors open. Of course there is provision in both bills for a redistribution of the cases to other boards if one should be dissolved.

Section 8 also adds a \$50,000 or less accelerated procedure for quick disputes resolution, available to either party—a codification of the current ASBCA Rule 12 at twice the amount. This is appealable just as any other agency board decision.

After decision by an agency board, section 8 provides that an appeal will lie with the district court or the Court of Claims provided it is within the jurisdictional limits as provided in § 14, provided appeal is taken within 12 months from the decision date, final delivery of supplies or completion of the contract work or acceptance, whichever is later. This differs from current practice which has a statute of limitations of six years²¹ from the time the cause of action accrues, meaning six years from the time a contract was breached²² or six years from an agency board's decision which exhausts the administrative contract remedy of the contractor.²³ On the other hand, government suit must be commenced within six years from the time a claim accrues,²⁴ or within one year from a court decision.²⁵

Both bills protect the contractor and permit appeals if he can prove, pursuant to Section 10 of the House bill, the current Wunderlich standards.²⁶ The Senate version's Section 10 permits appeal from adverse agency board decisions if the decision is fraudulent, or arbitrary, or capricious, or CLEARLY ERRONEOUS (emphasis added). This new test generally accepted in Court of Appeals reviews of district court findings departs from the time-honored

substantial evidence standard which the Court of Claims has relied upon since the passage of the Wunderlich Act in 1954.²⁷ This higher Wunderlich standard clearly protects the public purse by placing a more severe evidentiary burden on contractors aggrieved by denial of their claims at agency boards.

Under Section 8 the government will also get appeal rights, reversing *S.&E. Contractors, Inc.*²⁸ The House version will permit appeal if the agency award to the contractor exceeds \$1,000,000 or the Attorney General determines that there exists an issue of compelling government interest affecting federal procurement policy, provided, however, the appeal meets the § 10 standards and the appeal is perfected in 90 days from the adverse agency board decision. The Senate, on the other hand, proposes, a 120-day appeal period for the government. The basic procedural impediment is for the government to first obtain the Administrator's approval to appeal. Once over this hurdle, a veritable veto power over the Attorney General and the agency head, the Attorney General will be permitted to perfect the appeal under the § 10 standards. Under this authority the Administrator will be able to direct all manner of changes in the appeals rules, by setting up new grounds, as well as the kinds of specific cases or classes of cases that an agency board may otherwise get referred to it by the executive agencies. A potential danger here, perhaps, is the statutory grant of too much power over agency boards as well as over judicial review of their decisions.

Each bill also contains a small claims provision at section 9. The House version permits only the contractor to elect this procedure. If the appeal is docketed at an agency board, and the contractor elects this simplified procedure within 35 days after docketing, the board gets 120 days to resolve the dispute. This bill does not define "small claim." The Senate sets a \$10,000 small claims limit and allows either party to elect this one-judge procedure which must be resolved in 180 days. Only here, there is no appeal for either party. The contractor, however, is favored in the small claims area be-

cause he may, if he chooses, disavow the decision and sue in the district court if the case is below \$25,000, or in the Court of Claims if it exceeds \$25,000. He can do this by filing (as also provided in § 10) suit within 12 months, final delivery, performance or acceptance of the goods or services, whichever is later. And he gets a *de novo* hearing without regard to the findings below at the agency board. Under this version, the Administrator can raise this "small claims" limit every three years to adjust for inflation.

The really significant changes which both versions of the 1978 Contract Disputes Act contain are in section 10. Both provide for contractor suit directly in the district court or the Court of Claims rather than an agency board appeal as a matter of election—effectively nullifying the present contract disputes clause and overruling *Holpuch*.²⁹ If the contractor misses his 90-day appeal date under section 8, all is not lost for he has 12 months to sue from the receipt of a contracting officer's final decision, or from final delivery, or performance of the work, whichever is later. Also each claim under either version of this act is a separate cause of action. Any court of competent jurisdiction can consolidate these separate causes for decision, or delay pending action on another pending claim. The first court can order consolidation or it may transfer the case to another district court where it might have been brought, or it may transfer it to the Court of Claims. Of course, the latter may consolidate or transfer the cases between district courts. Judgments may be piecemeal or partial, deciding less than whole cases if deemed appropriate. The House bill in section 10 adds power to grant injunctions and declaratory judgments, a power which the Court of Claims has been denied under the Tucker Act.³⁰ In addition to its remand powers acquired in 1972, § 14(h) of S.3178 amends the Tucker Act by adding these same equitable powers to 28 U.S.C. § 1346(a) at subparagraphs (4) and (5). Additionally, it adds mandamus to compel agency action and a section to preclude waiver of a plaintiff's rights under the Tucker Act amendment.

To date only the Justice Department has analyzed this for impact.³¹ In his prepared statement for the Senate Subcommittees on Federal Spending Practices and Open Government and Citizens and Shareholders' Rights and Remedies, joint hearings, which began 14 June 1978, the Deputy Assistant Attorney General opposed *any* grant of mandamus, injunction or declaratory judgment citing *Larson v. Domestic and Foreign Commerce Corp.*³² as the overriding expression of public policy. This still valid expression opposes any exercise of the compulsive power to restrain government or to compel it to act. The Supreme Court said, "The Government as the representative of the community as a whole cannot be stopped in its tracks by any plaintiff who presents a disputes question of property or contract right."³³ Senator Chiles, in a letter to the Justice Department dated 8 May 1978, asked Mr. Jaffee to comment on this power saying that, "The intent of this section is to provide relief in a very narrow area, that of proprietary information (trade secrets) wherein monetary relief would not satisfy the needs of the contractor. It is not our intent to provide a loophole whereby the contractor is able to stop work on the contract and tie up the Government in court."³⁴ But notably, section 14 does not reflect this heretofore undisclosed intention. Left as it is, it creates a new cause of nonmonetary action that will enable contractors to interrupt performance any time the contracting officer gives the contractor any unfavorable interpretation or direction under the contract.

Section 11 of both bills deals with a grant of power to subpoena, depose and discover, a power which agency boards of contract appeals have not possessed. This is real clout! Under this power, boards will issue orders and, in the case of contumacy or refusal to obey, will seek enforcement against recalcitrants as a contempt. Enforcement, however, is through the district court having jurisdiction over the person who has refused, not really unlike the very cumbersome authority available in another statute.³⁵

What is the effect of all of this anyway? Today, if a contractor files a claim under a con-

tract, a final decision from the contracting officer should come within a reasonable time. This should start the process toward disputes resolution moving.

By way of illustration, let's trace a "typical" case through the time sequence as it is today and as it may be after passage of the Act. Then we should ask what, if anything, is gained by the changes wrought by the well-intentioned.

Assume that a claim is filed on 2 January 1978. Also assume that a reasonable time to decide the claim is two months and a final decision is rendered and delivered to the contractor on 1 March. If the contractor files his notice of appeal, as most contractors do, on the 30th day, it will be posted in the mail on 31 March 1978. Most agency board rules require that pleadings be exchanged. Appellants generally must file in 30 days. In our case, we can assume that the time limit is pushed to its extreme, as always, and it is now 10 May. The government trial attorney receives the complaint on 18 May and he takes a full 30 days to answer. It is now 19 June. He returns it to the board and it is served on appellant on 26 June 1978.

The case is now ready to try. Under most rules of agency boards, the parties can enter voluntary discovery procedures under rules providing for depositions, interrogatories or pre-hearing conferences where issues are identified and limited. If the parties have worked diligently and have pursued moderate discovery about 60 days may elapse before trial. The time is now 25 August 1978. Trial is set to begin on this simple \$40,000 case. It lasts a week and the time is 1 September 1978.

Transcripts arrive in 2 weeks. It's 15 September. The parties exchange briefs after two more weeks and it is 29 September. Each party asks for leave to exchange reply briefs and it is 13 October. Finally the board announces that the decision, after writing decisions in 12 pending cases, will be ready for the parties in about 4 months after 20 October. The decision finally comes on 20 February. Only 13 months have elapsed, the statistical average at the

ASBCA, for this trial and contractor wins. If contractor avails himself of the new statutory procedure for an agency appeal, he can add up to 95 days to the processing time (60 for the added appeal time and 35 for an informal conference).

If he forgets to appeal, he can still go to the court because he has a year or more to sue—which makes the period almost indeterminate. Thus, a minimum of 9 more months is added to the total processing time for the appeal. In all, the new statutory provisions could conceivably add a year or more, making a two-year case out of a 13-month case under current practice.

A number of events may further lengthen this processing time. Discovery under subpoena may last over a long period with its various exchanges and counter-exchanges. In the past and currently, voluntary procedures have worked well enough. But who knows what effect statutory machinery permitting legitimate delays will create.

Lawyers tend to use legal machinery when machinery is available. We know that legal machinery delays. Without this encumbrance, the parties generally cooperate and cooperation breeds! And lo! Settlements and speedy trials are born. But if injunctions, declaratory judgments, mandamus and other processes are made available, this new baby, bred in the cloakrooms of Congress, may be in for some hard labor before the contract law community is delivered of its new creation through judicial temperance and interpretation.

Notes

1. Agencies having Boards of Contract Appeals are: Armed Services, Energy, Corps of Engineers, Agriculture, Commerce, Interior, Transportation, General Services Administration, National Aeronautics, Space Administration, Postal Service, Veterans' Administration, Labor and Department of Housing and Urban Development Administration.

2. Armed Services Procurement Reg. § 7-103.12 [hereinafter cited as ASPR]; the clause incorporates the Wunderlich Act standards of judicial review, 41 U.S.C. § 321 (1970 & Supp. V 1975).

3. *Kihlberg v. United States*, 97 U.S. 398 (1878).
4. *United States v. Holpuch Co.*, 328 U.S. 424 (1946). Unless contractor showed the administrative remedy to be inadequate, *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).
5. *S. & E. Contractors, Inc. v. United States*, 406 U.S. 1 (1972).
6. 28 U.S.C. § 2501 (1970 & Supp. V 1975) and *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967), and *Nager Elec. Co. v. United States*, 368 F.2d 847 (1966).
7. ASPR § 7-103.12; 41 U.S.C. § 321 (1970 & Supp. V 1975).
8. ASPR App. A, Rule 29.
9. 28 U.S.C. § 1346 (a) (2), 1491 (1970 & Supp. V 1975).
10. *Warner v. Cox*, 487 F.2d 1301 (5th Cir. 1974).
11. Some of the bills pending in the 95th Congress by number and sponsor are:
 - 1st Session:
 - H.R. 664, Rodino
 - H.R. 4713, Fisher
 - H.R. 5855, Kindness
 - S.2292, Packwood
 - 2d Session:
 - H.R. 11002, Harris
 - H.R. 3745, Harris
 - H.R. 4793, Kindness
 - H.R. 9975, Fisher
 - S.2787, Chiles
 - S.3178, Chiles, Packwood
12. Report of the Commission on Government Procurement, Vol. 4, pp. 11-33 (Dec. 1972) [hereinafter cited as The Commission].
13. For example, S.3178 § 2, virtually copies ASPR 1-201.3 for its statutory definition by codifying the regulation.
14. Office of Federal Procurement Policy Act. P.L. 93-400; 88 Stat. 796, S-2510 (1974).
15. 28 U.S.C. § 1346 (a) (2), 1491 (1970 & Supp. V 1975); *Algonac Mfg. Co. v. United States*, 192 Ct. Cl. 649, 428 F.2d 1241 (1970), citing *Merritt v. United States*, 267 U.S. 338, 341 (1925).
16. *United States v. Holpuch Co.*, 328 U.S. 424 (1946).
17. *Computer Wholesale Corp. v. United States*, Ct. Cl. No. 476-76, 23 Gov't Cont. Rep. (CCH) Cont. Cas. Fed. 81,372, *reh'g denied* 6-24-77; 28 U.S.C. §§ 1346 (a) (2), 1491.
18. ASPR 1-314; ASPR 7-103.12.
19. This would codify existing case law. *Sheridan-Murray*, ASBCA No. 7615, 1962 B.C.A. § 2121.
20. *Pyramid Van & Storage*, ASBCA No. 14257, 69-2 B.C.A. § 7952.
21. 28 U.S.C. § 2501 (1970 & Supp. V 1975).
22. *Terteling v. United States*, 334 F.2d 250 (1964).
23. *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967); *Nager Elec. Co. v. United States*, 368 F.2d 847 (Ct. Cl. 1966).
24. 28 U.S.C. § 2415 (a) (1970 & Supp. V 1975).
25. *Id.*, *Aluminum Co. of America*, GSBICA No. 4728, 77-2 B.C.A. § 12830, holds this statute of limitations inapplicable to administrative boards.
26. ASPR § 7-103.12; 41 U.S.C. § 321 (1970 & Supp. V 1975).
27. *Id.*
28. *S.&E. Contractors, Inc. v. United States*, 406 U.S. 1 (1972).
29. ASPR § 7-103.12; 41 U.S.C. § 321 (1970 & Supp. V 1975); *United States v. Holpuch Co.*, 328 U.S. 424 (1946).
30. No injunctions, *Breed Corp.*, ASBCA Nos. 14074 and 14334, 76-1, B.C.A. 11904; no declaratory judgments, *Bethlehem Steel*, ASBCA No. 7353, 1963, B.C.A. § 3724.
31. Statement of Irving Jaffee, Deputy Assistant Attorney General, Civil Division, Department of Justice, on S.3178 and S.2292, Contract Disputes Act of 1978, scheduled for June 14, 1978.
32. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).
33. *Id.* at 704.
34. To Deputy Assistant Attorney General, Civil Div., Justice Department, Letter from Sen. Lawton Chiles, Committee on Governmental Affairs, Subcommittee on Federal Spending Practices and Open Government, Ct. Cl., 8 May 1978.
35. 5 U.S.C. § 304 (1976).

Professional Responsibility

Criminal Law Division, OTJAG

The Judge Advocate General's Professional Responsibility Advisory Committee recently reviewed allegations of improper conduct against two attorneys which originated in a purported practical joke that should not have been perpetrated in the first instance and which was carried too far.

The facts showed that charges were preferred against SP4 A and SP4 C for the attempted rape of a German national. CPT X was detailed as SP4 A's defense counsel. Before trial, CPT X sent SP6 Q and other members of his "staff" to a tavern where the prosecutrix was employed. CPT X's stated purpose in doing so was to determine whether, as he suspected, the alleged victim was a prostitute.

CPT Z, who was a trial counsel, learned of this activity and prepared, signed and dispatched, a letter purporting to convey various charges related to that activity against CPT X, the defense counsel, and SP6 Q, his assistant. The purported charges were conspiracy to commit solicitation, conspiracy to commit adultery, solicitation, attempted adultery, and conduct of a nature to bring discredit upon the armed forces. The letter was addressed through CPT X's Chief Defense Counsel to the Staff Judge Advocate. Charges were not in fact prepared or conveyed by the letter. A second letter accompanied the original of the joke letter and informed the Chief Defense Counsel that it was a joke. It also instructed that the joke letter was not to be forwarded to the Staff Judge Advocate. Prior to the joke letter, there existed between CPT Z and CPT X what appears to have been a severe personality conflict and an attendant inharmonious relationship.

At SP4 C's trial SP6 Q testified for the defense concerning the nature of the establishment where the victim worked. As trial counsel during the trial of SP4 C, CPT O conducted the following cross-examination of SP6 Q:

Q. Now, do you know what, if any, action she took because of you going to the bar on the 15th of February?

A. Only what I was told, sir.

Q. She called the cops didn't she?

A. From what I was informed, yes, sir.

Q. She complained that some Americans were at the bar trying to solicit sex for money, didn't she?

A. I don't know, sir.

Q. But she did call the police?

A. Yes, sir.

Q. In fact she made a formal complaint about your conduct, right?

A. I don't know, sir.

Q. What do you mean you don't know?

A. I only go by assumptions, sir. I've never seen a report filed against me.

Q. You never saw anything about you were going to be read charges or charges were going to be preferred against you?

A. Yes, sir, I saw that.

CPT O later acknowledged that the basis of his cross-examination was the joke letter and that he knew at the time of the questioning that the letter was a joke.

As to CPT Z, the preparer of the letter, the Committee found no Disciplinary Rule (DR) sufficiently applicable to his conduct to warrant considering whether it was violated. The Committee determined that his conduct did, however, raise issues regarding possible violations of the following Ethical Considerations (EC's).

(1) EC 7-37. . . Haranguing and *offensive tactics* by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. (Emphasis added.)

(2) EC 9-2. . . . When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

(3) EC 9-6. Every lawyer owes his solemn duty to uphold the integrity and honor of his profession; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

As to CPT O, the trial counsel who referred to "charges" during cross-examination, the Committee determined that his conduct raised issues under the following DR and EC.

(1) DR 7-106 (C). In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) EC 7-25. . . . A lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

After considering the material submitted to it, the Committee found that CPT Z did prepare, sign, and dispatch the letter in question and that it was subjectively intended by him as

a joke. In view of the strained personal relationship, the Committee found that objectively the letter should reasonably have been expected to be offensive to CPT X and SP6 Q. The letter was found to be disruptive and inimical to the efficient administration of the cases of SP4 A and SP4 C from both the government and defense points of view. While much of the disruption resulted from the subsequent actions of CPT X and CPT O, none of it would have occurred if the letter had not been written. No attempt was made by the Committee to determine whether the disruption prejudiced either accused. The conduct did not reflect credit on CPT Z or the Judge Advocate General's Corps as a part of the legal profession. In accordance with those findings, the Committee concluded that CPT Z's conduct in preparing and forwarding the joke charges was inconsistent with EC's 7-37, 9-2, and 9-6.

As to CPT O, the Committee found that at the trial of SP4 C he questioned SP6 Q in open court about non-existent charges against the latter. The basis of the question was the joke letter, and CPT O then knew there were no charges. It was found that non-existent charges against a testifying witness is a matter that should not be presented in court in any manner. However, the Committee determined that CPT O did not ask the question in an effort to gain improper advantage over the accused at trial. Instead, it was asked in an over zealous but good faith oral pursuit of an evasive witness. No effort was made to determine whether SP4 C was prejudiced by the question. In accordance with the above findings, the Committee concluded that CPT O's question did violate DR 7-106 (C) (1) and was inconsistent with EC 7-25.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

1. (Enlistment And Induction, Enlistment) EM's Erroneous Listing Of Civilian Offenses On His Application For Enlistment (DD Form 1966) Did Not Provide Basis For Dis-

charge UP Chapter 14, AR 635-200, For Fraudulent Enlistment. DAJA-AL 1977/6288, 11 Jan. 1978. EM enlisted at Columbus, Ohio, for 3 years in May 1977. On his application for enlistment (DD Form 1966) he listed three

juvenile offenses in Item 40g: school truancy, trespassing and simple assault. However, a records check with the Columbus County Court of Domestic Relations revealed that, although EM had been charged with three offenses, two of the charges listed by him (*i.e.*, trespassing and assault) did not coincide with the court's records. However, there was an entry which stated he had been found to be a delinquent minor on charges of menacing threats and breaking and entering for which he was given a suspended sentence. EM's Commander instituted separation action UP Chapter 14, AR 635-200, for fraudulent entry with recruiter connivance (based on EM's sworn statement that he told the recruiter about his court charges). GCMCA recommended EM be retained in the Army, despite the alleged recruiter connivance.

OTJAG expressed the opinion that the file did not contain sufficient evidence to support fraudulent entry based on recruiter connivance. The incorrect offenses and dates listed on the DD Form 1966 appeared to be inaccurate, but sincere, attempts to list all his prior offenses, rather than a deliberate attempt to conceal data or to deceive. EM's sworn statement and the Ohio Court report further supported that conclusion. OTJAG advised MILPERCEN EM could be retained in the Army.

2. (Military Installations, Law Enforcement) Gate Searches Are Within The Discretion Of The Installation Commander Under AR 210-10. DAJA-AL 1978/1701, 20 Jan. 1978. In response to an inquiry from the Inspector General concerning a finding that failure to conduct spot checks of vehicles entering and leaving Letterkenny Army Depot degraded depot security in control of government property, The Judge Advocate General advised that gate searches are a matter within the discretion of the local commander, assisted, as appropriate, by guidance from higher headquarters. No Army or DARCOM regulation requires installation commanders to conduct searches of vehicles entering or leaving military installations. Spot checks of vehicles in accordance with properly established procedures are appro-

priate when an installation commander concludes that military necessity dictates such measures. Through military necessity is not defined in Army regulations, the words have their ordinary meaning. A commander must be satisfied that the measures taken are necessary to carry out his military responsibilities, *e.g.* protection of government property.

3. (Military Installations, Law Enforcement) An Installation Commander May Establish Speed Limits In Implementation Of A State Statute And The Limits Are Enforceable Under The Assimilative Crimes Act, 18 U.S.C. § 13 (1976). DAJA-AL 1977/6340, 30 Jan. 1978. A staff judge advocate asked The Judge Advocate General whether the penal provisions of a new Texas state statute which permits installation commanders to implement the state traffic speed limits are capable of being assimilated into federal law through the Assimilative Crimes Act, 18 U.S.C. § 13 (1976). The State of Texas recently enacted the statute amending Section 169, Uniform Act Regulating Traffic on Highways, which is codified in Article 6701D, Vernon's Texas Civil Statutes. The new statute gives the commanding officer of a U.S. military reservation in Texas authority to alter the maximum speed limits of the state highway system found within the limits of the reservation. The Judge Advocate General advised that the state statute did not interfere with a federal activity, nor was it in conflict with federal law or regulation. Moreover, pursuant to AR 190-5, installation commanders are charged with the responsibility of establishing an effective traffic enforcement program and may implement the cited regulation by promulgating local traffic regulations. The installation commander, when establishing a speed limit, is acting pursuant to his inherent authority to prescribe rules for the protection and security of government property as well as the safety of members of his command. Even where a state law vests in my discretionary authority to alter the state speed limits prescribed by statute, the commander is still acting pursuant to federal law and regulation. Indeed, the installation commander need not comply with any of the provisions of the new Texas statute, but as a

matter of policy, he may elect to do so when establishing a speed limit on his installation.

4. (Article 138, U.C.M.J., Complaint Of Wrong) GCMCA Has Authority To Disapprove Relief For Cause Action By Subordinate In Response To An Article 138, U.C.M.J., Complaint, Despite Pending OER Appeal. DAJA-AL 1977/6342, 30 Jan. 1978.

A 1LT was relieved of his duties as unit PBO by his company commander in May 1977 based on unsatisfactory duty performance and conduct unbecoming an officer. He also received a relief OER UP para. 2-2f(2), AR 623-105. In response, he delivered to the CO a complaint, requesting (1) removal of his relief for cause OER (7 Apr.-14 May 1977) and that the period be listed as nonrated due to insufficient time; (2) the CO provide a letter of apology; and (3) the CO be counseled. The CO reacted by tearing the paperwork in half and threatening a lawsuit for defamation. Later, he pieced together the document, sought advice on his obligation to respond and replied through the regimental commander, declining relief. After receiving the denial, the complainant redrafted his complaint (he had already submitted a complaint after hearing nothing from his CO, but it had not been forwarded to the GCMCA) and forwarded it directly to the GCMCA, who responded that he should rewrite his complaint and clarify the matters in question.

Complainant's rewritten Article 138 was submitted directly to the GCMCA in November 1977. The GCMCA determined he lacked authority to grant the redress sought (reversal of the relief for cause) because of the pending OER appeal, but advised the complainant he considered the relief "precipitous" and that the OER should be removed from his files. The GCMCA's correspondence to OTJAG also indicated his belief that he lacked authority to grant the requested redress.

In its review, OTJAG queried the DCSPER Suitability Review Board and learned the OER appeal had been successful. Thus, that issue was mooted. In considering the matter, however, TJAG noted that, if the GCMCA considered the relief action improper, he could have

ordered it reversed and treated the period as nonrated. The fact an OER appeal is pending concurrently had no effect on the GCMCA's authority to reverse such relief (where he had the authority to make the assignment). TJAG went on to state that when the GCMCA lacks authority to grant the requested redress, but considers some relief warranted, he should forward the complaint with his recommendation to the authority possessing such power (para. 9b (3), AR 27-14). But, in this case, he had the power to disapprove the relief for cause and should have resolved that issue notwithstanding the pending OER appeal.

5. (Separation From The Service, Discharge) No Separation For Unfulfilled Enlistment Where EM's Academic Failure Prevented Completion of Substantially Equivalent Training For Which He Enlisted. DAJA-AL 1978/1750, 7 Feb. 1978. EM enlisted under the Delayed Entry Program (DEP) in November 1976 with training choice enlistment option—67H 10-OV-1 (airplane repairman). Pursuant to a new EPMS in March 1977, training for MOS 67H and three other related MOSs were incorporated into one training program—MOS 67G10—airplane repairer. EM entered on AD in June 1977. He was dropped for academic deficiency after five weeks training in airplane repair and reassigned to infantry training. EM requested separation, alleging the training he received was harder and longer than he was promised and the Army failed to afford him an opportunity to select alternate training.

OTJAG advised that the separation was not required, noting it was the *training* for the MOS, not the specific MOS course number, which was guaranteed. The training for which EM enlisted admittedly was only nine weeks in duration, but it was conducted during the latter part of the twenty-two weeks of training for the newly designated MOS. His own academic failure prevented him from completing this training. No breach of the enlistment guarantee occurred, as EM would have received the "substantial equivalent" of the training guaranteed in his enlistment agreement if he had completed the course successfully. His enlistment documents clearly advised him that his relief

from training for academic deficiency would result in his reassignment in accordance with the needs of the Army. Thus, there was no legal requirement to grant the request for separation action.

6. (Information and Records, Release And Access) FOIA Protects A Deceased Member's Records If Disclosure Would Constitute A Clearly Unwarranted Invasion Of The Member's Family's Privacy. DAJA-AL 1978/1797, 17 Feb. 1978. In response to an inquiry from the Office of the Surgeon General, The Judge Advocate General noted that, while the Privacy Act ordinarily does not protect the records of deceased personnel from disclosure, the courts have applied a balancing test in determining whether disclosure of records would constitute a clearly unwarranted invasion of personal privacy within the meaning of the Freedom of Information Act. The public interest in disclosure is balanced against the individual's, or in the case of a deceased member, the family's right to privacy. Information in medical records which would be embarrassing to the next of kin may be withheld if no public interest outweighs the privacy interest involved. Nevertheless, any reasonably segregable nonexempt portion of the record must be disclosed.

7. (Separation From The Service, Discharge) Dismissal Of Criminal Charge Against Officer Under Hawaiian Statute Was Not Equivalent To Acquittal And Did Not Bar Elimination Action, UP Chapter 5, AR 635-100. DAJA-AL 1978/1901, 21 Feb. 1978. An officer was arrested by Hawaiian police in August 1977 and charged with "open lewdness" (alleged homosexual advances to undercover police agent). He pleaded guilty to the charge in the Honolulu District Court in October 1977. However, during the sentencing phase in October 1977, his sentence was deferred until April 1978, UP Section 853-1, Hawaii Revised Statutes (1976). This statute provided pertinently: "Discharge of the defendant and dismissal of the charge against him . . . shall be without adjudication of guilt, shall eliminate any civil admission of guilt and is not a conviction."

The officer was discharged by the judge pursuant to this statute in December 1977.

The officer contended this action barred the Army from considering him for elimination (for moral and professional dereliction), UP para. 5-4a, AR 635-100. This paragraph states elimination action is precluded where conduct has been the subject of a judicial proceeding and has resulted "in an acquittal based on the merits or action having the effect thereof."

In its review, OTJAG observed that the double jeopardy provisions of paragraph 5-4a, AR 635-100, are intended to provide officers concerned an element of fundamental fairness, and that the provisions do not attach, except following acquittal based on the merits or an action equivalent thereto. The word "effect" in paragraph 5-4a of the regulation should not be read in the sense of "having the same result," but in the sense of being equivalent to a determination on the merits that the officer was not guilty. In the instant case, after reviewing the cited Hawaiian statute *in toto* and noting that it applied only when the defendant voluntarily pleaded guilty, OTJAG held that it did not preclude elimination action under AR 635-100. The purpose of the statute merely is to permit nonstigmatizing disposition of certain offenders so as not to foreclose educational and professional opportunities. Although charges are dismissed pursuant to this statute, it is not an action having the effect of "an acquittal based on the merits" as contemplated by paragraph 5-4a, AR 635-100; rather, the cited statute establishes a method for acknowledging culpability without acquiring a criminal record.

8. (Separation From The Service, Discharge) EM May Request Discharge For Unfulfilled Enlistment UP Paragraph 5-32, AR 635-200, Where Army Attempts To Reassign Him From Station Of Choice In Violation Of Enlistment Contract Clause Requiring Fault On His Part. DAJA-AL, 1978/1885, 23 Feb. 1978.

EM enlisted in the RA in February 1977 for training in MOS 11B10 and for assignment to the 3d Infantry. He received the training and was assigned to the Old Guard. Later, he developed back problems and was unable to per-

form his assigned duties (which required, *inter alia*, that he stand continuously for four hours). However, DASG advised EM could perform duties in MOS 11B within the limitation of the profile. When he received reassignment orders to Hawaii, EM submitted a request for separation UP para. 5-32, AR 635-200 (unfulfilled enlistment commitment).

In its review, OTJAG followed its general rule of looking to the enlistment documents themselves as the strongest evidence of the intentions of the parties in resolving a claim of unfulfilled enlistment commitment (DAJA-AL 1977/5765, 7 Nov. 1977 *et al*). This review indi-

cated EM was guaranteed assignment to the Old Guard until completion of his 3 year enlistment (or 3 years of his enlistment, if enlisted for a longer enlistment term), but, if through some fault of his own, he failed to maintain qualifications for service in the Old Guard, he could be trained and utilized in accordance with the needs of the Army.

OTJAG expressed the opinion that as there was neither evidence of misconduct nor concealment of the back condition prior to enlistment, the Army was obligated either to retain EM in the Old Guard or separate him UP para. 5-32, AR 635-200.

Legal Assistance Items

Major F. John Wagner, Jr., Developments, Doctrine and Literature Department, TJAGSA

1. ITEMS OF INTEREST.

Administration—Preventive Law. Capax, Inc., a New Jersey debt dunning agency, has been ordered by the Federal Trade Commission in a unanimous decision to cease from using unfair and deceptive tactics in letters sent to debtors to assist in the collection of alleged delinquent debts. Capax formerly was named Continental Credit Corp., Inc.

The firm sells to creditor-clients on a flat rate, non-commission basis a series of form letters that it mails at regular intervals to debtors. Its clients can choose between several different series of dunning letters. There are long and short versions of a "strong" series, a "diplomatic" series, a "bad check" series, and various Spanish language series.

In its opinion by Commissioner Elizabeth Hanford Dole, the FTC found that the firm's flat rate forms styled as "Letegrams" and "Telegrams" have simulated telegraphic communications, thus misleading recipients as to their nature, import, and urgency.

Capax argued that the "Letegram" is an "impact message" which is a legitimate business technique designed to obtain reader interest and attention, and that the communications are

in fact urgent because they concern a past due debt which is urgently in need of attention.

Rejecting these arguments, the Commission said: "There is no question that the collection of debts is a legitimate business activity. Many creditors understandably consider the collection of past due debts to be urgent. However, there may be many reasons for non-payment, including a valid defense to a claimed debt or inability to pay for reasons beyond the debtor's control, and payment may not be exacted by deception or other unfair practices."

The Commission also found that Capax has misrepresented that creditors' claims had been assigned to it for necessary collection action, and that it had the authority to take such action as initiating suit to collect debts.

"Contrary to the impression created," the FTC said, "Capax' service consisted of simply the preparation and mailing of form letters on behalf of creditors to alleged delinquent debtors. . . . There was no assignment of debts to Capax. Capax did not have authority to file suit in its own name or that of the creditor, and has never brought a suit against any debtor. Capax did not even have the authority to make any telephone calls to debtors or to make other per-

sonal contact with debtors demanding payment, and made no such calls or contacts, until the advent of 'Phase 2'.

"Thus, Capax misrepresented its true status and authority. There can be little doubt that this misrepresentation was a deceptive practice under the Federal Trade Commission Act."

The Commission further ruled Capax has misrepresented that unless payment was received, (1) legal action would be initiated and (2) it will take action to adversely affect the debtor's credit record. The Commission also found that Capax misrepresented that unless payment was received within the time specified, immediate action would be taken to collect the debt, such as the filing of suit.

In issuing its decision, the Commission reversed an initial decision by Administrative Law Judge Paul R. Teetor, which dismissed the complaint. (Final Order (D. 9058). [Ref: Ch. 2, DA PAM 27-12.]

Administration—Preventive Law; Consumer Affairs—Commercial Practices And Controls—Federal Statutory And Regulatory Consumer Protections—Door-To-Door Sales. The Federal Trade Commission announced on 26 May 1978 that it has unanimously accepted agreements containing consent orders against Capital Builders, Inc. and United Builders, Inc., door to door sellers of home improvements in West Virginia. The orders prohibit certain deceptive sales and credit practices and provide for limited refunds to certain consumers who purchased home improvements from these firms.

The respondents are:

- Capital Builders, Inc., 1105 Main St., Charleston, W. Va., and two officers, Jerome Finn and Richard Landman; and
- United Builders, Inc., 418 W. Washington St., Charleston, W. Va., and two officers, Marvin Bloom and Paul Denillo.

The complaints that led to the consent orders alleged among other things that respondents misrepresented that their products were offered at reduced prices and that purchasers

would receive discounts for allowing their homes to be used as models, in violation of the FTC Act.

The complaints also alleged that these firms failed to give credit customers whose homes were taken as security in the transactions proper notice that they have three days to cancel their contracts, a right provided by the Truth in Lending Act. Respondents also allegedly failed to make certain credit cost disclosures required by the Act.

The consent orders would prohibit the violations of law alleged in the complaints and would require the companies to establish escrow accounts from which pro-rata refunds will be made to certain customers. Consumers who purchased a home improvement from Capital Builders or United Builders between July 1, 1973 and October 1, 1975, and who meet certain other conditions outlined in the orders would be eligible for refunds. Those consumers will be notified of their eligibility by the companies or their escrow agents.

Relevant material will remain on the public record from May 26 through July 24, 1978. Comments from the public received during this period will become part of the public record. The Commission may withdraw its acceptance of the agreements after further consideration. An analysis of both consent orders may be obtained from the Public Reference Branch, Room 130, Federal Trade Commission, Washington, D.C. 20580 (Telephone No. (202) 523-3598). Consent Orders (Docket Nos. 9041 and 9043). [Ref.: Chs. 2 and 10, DA PAM 27-12.]

Consumer Affairs—Commercial Practices and Controls—Federal Statutory And Regulatory Consumer Protections—Truth-In-Lending Act. On 22 May 1978 the Board of Governors of the Federal Reserve System amended its Regulation Z—Truth in Lending—to require certain lenders to retain for more than two years all records of credit transactions in their possession.

The amendment is effective immediately. It applies to all creditors—and lessors—under the supervision of the Federal Reserve Board, the

Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board and the National Credit Union Administration.

These agencies jointly proposed, last October, a uniform statement of enforcement policy that, as proposed, calls for reimbursement to consumers for certain violations of Regulation Z. Such reimbursement may extend to violations that occurred more than two years before discovery. Before adoption of the new amendment, for which Consumer's Union petitioned the Board, Regulation Z called for retention of credit transaction records for no more than two years.

The Board's action is intended to avoid possible destruction, under the two-year record retention rule, of records that might show violations subject to reimbursement.

The amendment requires that creditors and lessors subject to the five Federal regulators retain credit transaction records until:

(1) The agencies have taken final action on the uniform statement of enforcement policy they have proposed, and

(2) Completed one examination under those guidelines.

Interested persons are invited to review this rule and submit relevant views by July 14, 1978. [Ref.: Ch. 10, DA PAM 27-12.]

Family Law—Adoption. In the case of *Reynolds v. Kimmons*, 569 P. 2d 799 (Alas. 1977), a case which was noted in the February 1978 issue of *The Army Lawyer*, the Alaska Supreme Court ruled that an indigent defendant in a suit to establish paternity has a due process right, under the Alaska Constitution, to appointment of counsel. In a related situation, determination of parental rights, the California Supreme Court recently held that an indigent mother has a right to appointment of appellate counsel in a parental rights termination proceeding. While the California Code does not specifically allow for such counsel, the holding was based on the statutory scheme adopted by the California legislature. *In re*

Jacqueline H., 4 FAM. L. REPT. (BNA) 2403 [1978]. [Ref.: Ch. 21, DA PAM 27-12.]

Family Law—Domestic Relations—Custody. (Our appreciation to Captain Richard C. Goodwin, Aberdeen Proving Ground, for bringing this case to our attention.) The Court of Special Appeals of Maryland recently held in the case of *McAndrew v. McAndrew* that since July 1, 1974 (the effective date of Maryland's Equal Rights Amendment), the maternal preference has been abolished in child custody cases. In so holding the court discussed its holdings in *Kirstukas v. Kirstukas*, 14 Md. App. 190, 286 A.2d 535 (1972) and in *Cooke v. Cooke*, 21 Md. App. 376, 319 A.2d 841 (1974). In those earlier cases the court had recognized the validity of the maternal preference as to children of tender years and females and had stated that the maternal preference was to be used only for the limited function of serving as a tie breaker and that the child's best interest was the measure by which the issue of custody was to be decided. The court's holding in *McAndrew* specifically overruled its decision in *Cooke*. The court stated that there should never be a tie. The judge has at his command not only the evidence offered by the parties but a full panoply of social service and other extrajudicial agency resources. From all of that the judge is required to make a decision. If, in a petition for modification, the judge is unable to conclude that custody should be changed, then it ought not be changed. *Vernon v. Vernon*, 30 Md. App. 564, 354 A.2d 222 (1976). [Ref.: Ch. 20, DA PAM 27-12.]

Property—Real, Personal And Community—Real Property—Leasing Real Property. In the case of *Kamarath v. Bennett*, the Texas Supreme Court held that there exists in Texas, in the rental of a dwelling unit, an implied warranty of habitability by the landlord. The warranty is imposed by law on the basis of public policy and arises by operation of law because of the relationship of the parties and the nature of the transaction. This case overruled both the trial court and the Texas Court of Civil Appeals. The landlord warrants that the resident is habitable and fit for living, that at the inception of the lease there are no latent defects in

facilities which are vital to the use of the premises for residential purposes, and that these essential facilities will remain in a condition that makes the property livable throughout the lease. In order for the landlord to breach the implied warranty of habitability, any defect alleged must be of the type of defect which will render the premises unsafe, unsanitary, or otherwise unfit for living therein. — S.W.2d — (Tex. 1978), *rev'g*, 549 S.W. 2d 784 (Tex. Civ. App. 1977). [Ref.: Ch. 34, DA PAM 27-12.]

2. PUBLICATIONS AND ARTICLES OF INTEREST.

Family Law—Domestic Relations.

Pattiz, Henry A., *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans* 5 PEPPERDINE L. REV. 191 (Spring 1978).

Klarman, Barbara, *Marital Agreements in Contemplation of Divorce*, 10 U. OF MICH. J. OF L. REFORM 397 (Spring 1977).

[Ref.: Ch. 20, DA PAM 27-12.]

Claims Items

U.S. Army Claims Service, OTJAG

1. Claims Settlement Costs. Relevant statistics for FY 1978 indicate that the Army claims program will show a large increase in both numbers of claims settled and amounts obligated for the year. During the first two quarters of FY 78, 68,794 claims had been settled. This sum represented an increase of about 13% in number of claims settled compared to like period in FY 77. An increase was also noted in the cost of settling claims under Chapter 11, AR 27-20. Based upon past experience, USARCS projected an increase of about \$17.00-\$20.00 per claim in the cost of settling Chapter 11 claims during FY 78. Statistics establish that the cost to settle a Chapter 11 claim has increased about \$68.00 per claim. The precise reason(s) for these rather substantial and unprecedented increases are not known. Concerning the increased cost to settle these claims, a certain amount is probably related to the declining purchasing power of the dollar in certain foreign areas. However, this factor alone does not account for the entire increase. In addition, worldwide inflationary factors would seem to be only partially related to the increase. USARCS will continue to examine the situation in an effort to determine the basis for the unexpected fiscal problems. Command judge advocates have been requested to examine their local claims programs to determine whether settlement procedures used by their offices are consistent with controlling policies and practices set forth in Chapter 11,

AR 27-20. USARCS concludes that an examination at the local claims office level is required to determine if the financial rights of claimants and the government are being protected adequately in the claims settlement process. The views and suggestions of judge advocates on this problem, or any other claims subject, were solicited by a USARCS letter.

2. Centralized Recovery Program. The centralized recovery program was implemented at the U.S. Army Claims Service (USARCS) on 1 May 1976. Eighteen personnel spaces had been authorized to perform the mission. This was considerably less than the 44 equivalent man years, which had been identified as performing the recovery function under the decentralized concept. Since that time, six additional spaces have been authorized. Actual manning has never reached authorized levels, due to personnel turbulence and delays encountered in hiring authorized personnel.

The first 12 months were marked by the training of new personnel and establishing necessary procedures to operate the program. During the last 12 months, emphasis and effort has been directed at revising administrative procedures, streamlining work flow and curing problem areas. Initially, the heavy caseload and collateral problems caused serious concern whether the program could be operated effectively. Current results indicate it can. During the last year, it has been observed that the re-

sponsiveness of carriers and warehousemen has improved. The average recovery has increased about 15%. Additionally, the adequacy of initial offers have improved markedly. There is reason to believe that these trends will continue.

The recovery caseload is very high and appears to be increasing yearly. Thus, even when all authorized personnel spaces are filled, the workload will still be formidable. Errors and irregularities, and failure to comply with requirements regarding preparation of files for

recovery processing, which must be cured at USARCS, create an exception to normal processing procedures, and as such consume an inordinate number of manhours sorely needed for normal operations. Strict compliance by local claims offices with published instructions is of the utmost importance to the Recovery Branch, this Service, if it is to successfully accomplish its fiscal mission of recovering the maximum amount of money at the least overall cost to the government.

1978 Law Day Observances

*Captain Robert W. Freer, Chief, Training Office,
Reserve Affairs Division, TJAGSA*

The 21st annual observance of Law Day U.S.A. was celebrated throughout the United States Army not only on Monday, 1 May 1978, but during the preceding and following weeks as well. Considerable planning and extensive effort on the part of Army judge advocate officers went into the Law Day programs which were held at 50 Army installations in 19 states, and 7 foreign countries.

Through the use of Law Day proclamations, various types of displays, extensive media coverage, elementary, junior high and high school class presentations, essay and poster contests, and a wide variety of social events, thousands of Army personnel and their families were made aware of Law Day 1978 and its meaning.

Highlights of some installation Law Day programs include the following: At Fort Campbell, Kentucky, Law Day slogans were used with the "time of day" phone spot from 23 April through 1 May; attorneys at Fort Polk, Louisiana, celebrated Law Day, USA, on Sunday, 30 April 1978, with a number of activities which focused on the law and its relationship to the family. Representatives of the Staff Judge Advocate's Office spoke at Catholic and Protestant Services in the Main Post Chapel, noting the legal services available to the military community and the coordination between the Army legal assistance program and other helping agencies on the installation. After the chapel services,

attorneys, their wives, and chaplains from the newly-activated Family Life Center met in the 5th Division and Fort Polk Courtroom for a seminar on child abuse. In a series of role-playing exercises, participants gained insights on a social problem of growing magnitude in military communities; at Vint Hill Farms Station, Warrenton, Virginia, a seminar was hosted by the Commander and Post Judge Advocate on 2 May for the members of the Fauquier and Price William County Bar Associations. The two hours seminar was presented as continuing legal education in the areas of Soldiers' and Sailors' Civil Relief Act and support of service dependents. Fourteen local civilian attorneys, including the presidents of the two county bar associations participated; on 27 April 1978, a joint Victory (24th Infantry Division) Bar Association and Atlantic Judicial Circuit Bar Association was held at the Fort Stewart, Georgia, Officers Club. The principal speaker was The Honorable Chief Justice H. E. Nichols of the Georgia Supreme Court. Chief Justice Nichols presented a speech highlighting recent developments in the law, recommendations for a one appeal criminal justice systems, and remarks concerning the judiciary needs to make the court more open to the public. Known throughout the state as the "Singing Chief Justice," he concluded the evening by singing two musical selections; as a prelude to Law Day, Headquarters, 1st Armored Division, Old Ironsides Law Center,

held a Legal Forum jointly sponsored by the Nuernberg Military Community, and the Office of the Staff Judge Advocate, 1st Armored Division, on 21 March. The Forum, held at the Monteith Barracks Recreation Center, was videotaped and excerpts from the program were broadcast the following weekend over AFN-TV Frankfurt; Headquarters V Corps produced several shows and spot announcements in cooperation with the Armed Forces Network, Europe including a four part series produced for the "Journal," a popular magazine format news show broadcast daily Europe-wide following the six o'clock evening news on AFN Television. The first two parts, shown on 1 and 2 May, consisted of an interview with a soldier who discussed his imprisonment in the USAREUR confinement facility and in German prison following his release after serving two-thirds of a four year term for sale of heroin. Film of the Frankfurt prison was shown in the second part. Major James Baker, Chief, International Affairs Division, V Corps, was interviewed during the third segment on 3 May. He discussed the impact of the NATO Status of

Forces Agreement on USAREUR personnel. The last segment, shown on 4 May, was an interview with Ernst Marenbach, Assistant Attorney General for the State of Hessen. Also within V Corps a mock trial was held for an assembly consisting of the student body of the Fulda High School on Law Day. A simple larceny case was the model for a 75 minute presentation in Frankfurt by nine members of the Frankfurt office for the 6th grade class at Elementary School 2 on Law Day. The following day a slightly modified presentation was held for the 1600 students of the local high school in two successive assemblies. The audience was the jury. Supplied with ballots, a vote on guilt or innocence was taken at the close of each performance.

In addition to the above, numerous installations presented religious ceremonies in support of the 1978 theme. These observances took the form of prayer breakfasts and Law Day messages delivered by U.S. Army Chaplains as well as participation by Judge Advocate officers.

International Affairs Note

International Affairs Division, OTJAG

The European Court of Human Rights in Strasbourg recently handed down its long awaited decision on Northern Ireland. The case arose after the Republic of Ireland had accused the United Kingdom of violating several articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the course of actions by British Security Forces to control terrorism in Northern Ireland during the early 1970s. Although all but one of the court's seventeen judges ruled that the United Kingdom had practiced "inhuman and degrading treatment" in interrogating Ulster detainees, the use of these interrogation techniques did not fulfill the court's definition of the more serious charge of torture. Moreover, the court rejected other Irish Republic charges that the United Kingdom had also violated other articles of the convention.

On 18 January 1978, after five years of deliberation, the European Court of Human Rights in Strasbourg rendered a final judgement in *Ireland v. United Kingdom*, the first interstate case to be decided by the court since its creation in 1959. In its December 1971 application to the European Commission of Human Rights, the court's investigative body, the Irish government alleged the United Kingdom had violated certain articles of the European Convention of Human Rights and Fundamental Freedoms. These incidents occurred during the 1971-1974 period in the course of British security operations during the emergency situation in Northern Ireland. Essentially, the Republic of Ireland claimed that many persons taken into custody by United Kingdom security forces under the emergency powers in effect during this period had been ill-treated in the course of

interrogation. According to the Irish complaint, the combined use of certain procedures, the so-called five techniques (wall-standing, hooding, subjection to noise, deprivation of sleep, and the deprivation of food and drink) during the interrogation of detainees amounted to a practice of inhuman treatment and torture in violation of article 3 of the European Convention.

The Irish also alleged the suspension of certain rights by the United Kingdom authorities in an emergency to combat terrorism in Northern Ireland exceeded the limits allowed under pertinent articles of the European Convention. Furthermore, it was claimed that the United Kingdom had violated article 14 of the Convention by discriminating against the Irish Republican Army (IRA) in the use of these emergency powers in contrast to more lenient treatment of pro-Ulster and so-called loyalist terrorists.

The case was brought before the Human Rights Court after four years of investigation by the Human Rights Commission, which concluded in 1976 that some of the allegations set forth in the original Irish suit were substantial enough to be considered by the court. Two public hearings last year extensively explored the facts of the case, the scope and the exercise of the court's jurisdiction, and allowed both sides to present arguments and rebuttals. Its ruling was publicly delivered on behalf of the court's seventeen judges by Court President Giorgio Balladore-Pallieri of Italy. Journalists from most European countries, including the Soviet Union, attended the open session.

It is final ruling, the court, by a vote of sixteen to one, agreed with the commission's ruling that the use of the five techniques against detainees in August and October 1971 constituted a practice of inhuman and degrading treatment in violation of article 3 of the convention, which prohibits the use of torture, inhuman or degrading treatment or punishment. The unqualified promise made in February 1977 before the court in public session by United Kingdom Attorney General Silkin, stating that the five techniques would not be reintroduced

under any circumstances as an aid to interrogation was noted. The many other measures taken subsequently by the United Kingdom to prevent a repetition of these actions, such as police and army instructions on arrest and interrogation procedures, prisoner complaint procedures, and payment of compensation to mistreated prisoners, were lauded. The court, however, refused to drop the complaint notwithstanding these United Kingdom initiatives since its judgments not only decide cases, but also clarify, develop, and safeguard the rules of the European Human Rights Convention so that they may be observed by all the member states.

In the only major deviation from the commission's recommendations, the judges decided, thirteen to four, that the use of the protested interrogation techniques, although condemned as a major breach of the convention, was not severe enough to be considered torture under the court's understanding of that word. A 1975 United Nations General Assembly resolution was cited, describing torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Thus, the court reasoned that although the five techniques undoubtedly amounted to inhuman and degrading treatment, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. The court also ruled that it did not have the power to compel the United Kingdom to institute criminal or disciplinary proceedings against members of the United Kingdom security police who had used the five techniques.

The court also denied the Irish charges that the United Kingdom, in its exercise of emergency powers, violated article 5 of the convention, which lists the circumstances under which a person may be deprived of his liberty or security, and that the United Kingdom had also gone beyond the limited suspension of these guarantees allowed under article 15 in time of war or other public emergency threatening the life of the nation. The court held that the Northern Ireland emergency clearly constituted a situation as envisaged under article 15

and, after reviewing the measures taken by the United Kingdom between August 1971 and March 1975 in light of the existing circumstances, ruled that British actions had not overstepped the limits on derogations allowed by the convention. Although these regulations may have been severely applied at the outset, the court concluded that the United Kingdom government and Parliament had lost little time in moderating their implementation so that there was a continual evolution in the direction of increasing respect for individual liberty. To the charge that these emergency measures were more severely applied towards the IRA than pro-Ulster terrorists, the court found that

there were profound differences between loyalist and the republican terrorism. During the period in question, the IRA, with its far more structured organization, constituted a significantly more serious menace to security than the loyalist groups. Loyalist actions were seen by authorities as the sporadic work of individuals or isolated factions. Furthermore, it was generally easier to institute criminal proceedings against loyalist terrorists than the IRA. Thus, the court believed that the British goal pursued at that time—the elimination of the most powerful organization (IRA) first—was legitimate, and the means used not disproportionate.

CLE News

1. Procurement Text Supply Exhausted. The supply of texts from the 8th Advanced Procurement Attorney's Course on Construction Contracting noted in the May issue of *The Army Lawyer* has been exhausted.

2. Contract Attorneys' Two Day Workshop. The second Contract Attorneys' Workshop will be held 4-5 December 1978. The course is designed to provide a forum where local problems can be shared with others similarly situated who may encounter similar difficulties. For this reason, staff judge advocates and command counsel are encouraged to begin thinking about problems they would want their contract attorneys to present at the workshop. A workshop format will accompany letters to the field during the summer to facilitate planning for this December event. The structure will attempt to address problems faced at all stages of the acquisition process from formation to contract close-out.

3. TJAGSA Course Prerequisites and Substantive Content. A complete listing of TJAGSA course prerequisites and substantive content is printed in CLE News, *The Army Lawyer*, June 1978, at 41-52.

4. TJAGSA CLE Courses.

August 7-11: 8th Law Office Management Course (7A-713A).

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

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

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

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

October 2-6: 9th Law of War Workshop (5F-F42).

October 10-13: Judge Advocate General's Conference and CLE Seminars.

October 16-December 15: 88th Judge Advocate Officer Basic (5-27-C20).

October 16-20: 5th Defense Trial Advocacy (5F-F34).

October 23-November 3: 78th Procurement Attorneys' Course (5F-F10).

November 6-8: 2d Criminal Law New Developments (5F-F35).

November 13-16: 8th Fiscal Law (5F-F12).

November 27-December 1: 43d Senior Office Legal Orientation (5F-F1).

December 4-5: 2d Procurement Law Workshop (5F-F15).

December 7-9: JAG Reserve Conference and Workshop.

December 11-14: 6th Military Administrative Law Developments (5F-F25).

January 8-12: 9th Procurement Attorneys' Advanced (5F-F11).

January 8-12: 10th Law of War Workshop (5F-F42).

January 15-17: 5th Allowability of Contract Costs (5F-F13).

January 15-19: 6th Defense Trial Advocacy (5F-F34).

January 22-26: 44th Senior Officer Legal Orientation (5F-F1).

January 29-March 30: 89th Judge Advocate Officer Basic (5-27-C20).

January 29-February 2: 18th Federal Labor Relations (5F-F22).

February 5-8: 8th Environmental Law (5F-F27).

February 12-16: 5th Criminal Trial Advocacy (5F-F32).

February 21-March 2: Military Lawyer's Assistant (512-71D20/50).

March 5-16: 79th Procurement Attorneys' (5F-F10).

March 5-8: 45th Senior Officer Legal Orientation (War College) (5F-F1).

March 19-23: 11th Law of War Workshop (5F-F42).

March 26-28: 3d Government Information Practices (5F-F28).

April 2-6: 46th Senior Officer Legal Orientation (5F-F1).

April 9-12: 9th Fiscal Law (5F-F12).

April 9-12: 2d Litigation (5F-F29).

April 17-19: 3d Claims (5F-F-26).

April 23-27: 9th Staff Judge Advocate Orientation (5F-F52).

April 23-May 4: 80th Procurement Attorneys' Course (5F-F10).

May 7-10: 6th Legal Assistance (5F-F23).

May 14-16: 3d Negotiations (5F-F14).

May 21-June 8: 18th Military Judge (5F-F33).

May 30-June 1: Legal Aspects of Terrorism.*

June 11-15: 47th Senior Officer Legal Orientation (5F-F1).

June 18-29: JAGSO (CM Trial).

June 21-23: Military Law Institute Seminar.

July 9-13 (Proc) and July 16-20 (Int. Law): JAOGC/CGSC (Phase VI Int. Law, Procurement).

July 9-20: 2d Military Administrative Law (5F-F20).

July 16-August 3: 19th Military Judge (5F-F33).

July 23-August 3: 81st Procurement Attorneys' Course (5F-F10).

August 6-October 5: 90th Judge Advocate Officer Basic (5-27-C20).

August 13-17: 48th Senior Officer Legal Orientation (5F-F1).

August 20-May 24, 1980: 28th Judge Advocate Officer Graduate (5-27-C22).

August 27-31: 9th Law Office Management (7A-713A).

September 17-21: 12th Law of War Workshop (5F-F42).

September 28-28: 49th Senior Officer Legal Orientation (5F-F1).

*Tentative.

5. Civilian Sponsored CLE Courses.

AUGUST

3-9: ABA, Centennial Meeting, New York, NY. Contact: Meetings Department, American Bar Association, 1155 E. 60th St., Chicago, IL 60637.

7: FBA, FBA Breakfast at the ABA Annual Meeting, New York Hilton, New York, NY.

7-18: American Academy of Judicial Education—Trial Judges Academy, Univ. of Virginia School of Law, Charlottesville, VA. Contact: American Academy of Judicial Education, 539 Woodward Building, 1425 H St. NW, Washington, DC 20005. Phone: (202) 783-5151.

9-11: PLI, Workshop for the Lawyer's Assistant: Paraprofessional and Secretary [Estate Planning and Administration or Litigation], Hyatt Regency Hotel, San Francisco, CA. Contact: Nancy Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: \$125.

12-15: Southern California Neuropsychiatric Institute, Symposium on Modern Neuropsychiatric Diagnosis and the Law, Mauna Kea Beach Hotel, Kamuela, HI. Contact: Gail Waldron, M.D., Program Director, Southern California Neuropsychiatric Institute, 6794 La Jolla Blvd., La Jolla, CA 92037.

12-19: CPI, Trial Advocacy Seminar, Ramada O'Hara Inn, Chicago, IL. Contact: Court Practice Institute, Inc., 4801 W. Peterson Ave., Chicago, IL 60646. Phone (312) 725-0166. Cost: \$700.

14-18: Univ. of Wisconsin Law School and Univ. Extension—Trial Advocacy, Univ. of Wisconsin Law School, Madison, WI. Contact: CLEW, 905 University Ave., Suite 309, Madison, WI 53706. Phone: (608) 262-3833. Cost: \$250.

14-18: George Washington Univ.—Federal Publications, Government Contract Claims, Berkeley, CA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: \$575.

20-23: Colby College, New England Seminar in the Forensic Sciences. Contact: Robert H. Kany, Special Programs, Colby College, Waterville, ME 04901.

21-22: PLI—9th Annual Estate Planning Institute, Stanford Court Hotel, San Francisco, CA. Contact: Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: \$185. Course Handbook Only: \$20.00.

21-23: American Academy of Judicial Education—Criminal Law I (intensive study for experienced judges; search and seizure), New England Center for Continuing Education, Durham, NH. Contact: American Academy of Judicial Education, 539 Woodward Bldg., 1425 H St. NW, Washington, DC 20005. Phone: (202) 783-5151.

23-24: LEI, Seminar for Attorneys on FOI/Privacy Acts, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (202) 254-3483.

23-25: PLI, Fundamental Concepts of Estate Administration, Little America Westgate Hotel, San Diego, CA. Contact: Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: \$250. Course handbook without course: \$20.

24-26: American Academy of Judicial Education, Evidence I (Intensive study for experienced judges; hearsay and judicial notice), New England Center for Continuing Education, Durham, NH. Contact: American Academy of Judicial Education, 539 Woodward Bldg., 1425 H St. NW, Washington, DC 20005. Phone: (202) 783-5151.

28-30: Federal Publications, Construction Contract Modifications, Seattle, WA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone: (202) 337-7000. cost: \$475.

SEPTEMBER

12-16: FBA, Annual Convention, The Mayflower Hotel, Washington, DC. Contact: Conference Secretary, Federal Bar Association, Suite 420, 1815 H St. NW, Washington, DC 20006. Phone: (202) 638-0252.

16-21: World Peace Through Law Center, Madrid, Spain—9th Conference on the Law of the World.

19-21: LEI, Institute for New Government Attorneys, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (202) 254-3483.

21-22: PLI—9th Annual Estate Planning Institute, Americana Hotel, New York, NY. Contact: Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: \$185.00. Course Handbook Only: \$20.00.

21-23: ALI-ABA—Environmental Litigation, Washington, DC. Contact: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

24-28: ABA Judicial Administration Division, Appellate Judges Conference—Appellate Judges Seminar, Boston, MA. Contact: ABA Judicial Administration Division, Appellate Judges Conference, ATTN: Howard S. Primer, 1155 E. 60th St., Chicago, IL 60637. Phone: (312) 947-3844.

26-28: LEI, Law of Federal Employment Seminar, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: (202) 254-3483.

28-30: FBA—Southern Regional Conference (seminar on Federal Trial Practice), Fairmont Hotel; New Orleans, LA.

JAGC Personnel Section

PPTO, OTJAG

1. Status of JAGC Regular Army Year Groups, Number of Applications and Number of Officers Selected by the Career Status Board which convened on 23 May 1978.

FY Group	PA Actual	Model	Officers	
			Appl	Selected
1961	18	25	0	0
1962	22	25	0	0
1963 (overstrength)	31	25	0	0
1964	22	25	1	1
1965 (overstrength)	31	25	0	0
1966 (overstrength)	33	25	0	0
1967 (overstrength)	38	25	1	1
1968 (overstrength)	46	25	5	0
1969 (overstrength)	43	25	3	1
1970 (overstrength)	56(13)*=69	25	5	1
1971 (overstrength)	40(22)*=62	25	11	1
1972 (overstrength)	30(21)*=51	25	27	0
1973 (overstrength)	24(25)*=49	25	19	0
			72	5

*Officers participating in the FLEP and Excess Leave Programs.

2. Status of JAGC AUS Year Groups (excluding officers with an ETS), Number of Applications and Number of Officers selected by the Career Status Board which convened on 23 May 1978.

FY	Actual				Officers		
	RA	VI	EX/Flep	Total	Model	Appl	Selected
FY 71	41	13	2	56	68	0	0
FY 72	21	26	0	47	68	0	0
FY 73	23	41	3	67	68	0	0
FY 74 (overstrength)	69	95	15	179	68	1	0
FY 75 (overstrength)	54	7	20	81	68	31	9
FY 76	18	1	26	45	68	23	6
					55	15	

3. RA Promotions.

COLONEL

MEYER, Harvey B. 16 Jun 78

LIEUTENANT COLONEL

COMEAU, Robert F. 4 Jun 78

FONTANELLA, David A. 23 Jun 78

QUATANNENS, Louis S. 4 Jun 78

TRACY, Curtis L. 10 Jun 78

MAJOR

WEBER, John P. 3 Jun 78

COOPER, Norman G. 15 Jun 78

HAESSIG, Arthur G. 13 Jun 78

JACUNSKI, George G. 3 Jun 78

MC Neill, David, Jr. 2 Jun 78

PLAUT, Peter K. 15 Jun 78

WEBER, John P. 3 Jun 78

CAPTAIN

ASHLEY, Richard W. 9 Jun 78

BOWE, Thomas G. 9 Jun 78

CARTER, William J. 9 Jun 78

FIERKE, Thomas G. 9 Jun 78

FLORSHEIM, Charles 9 Jun 78

FROTHINGHAM, Edward 9 Jun 78

GALLIGAN, John P. 9 Jun 78

HAHN, Alan K. 9 Jun 78

HUFFMAN, Lawrence M. 9 Jun 78

LUJAN, Thomas R. 9 Jun 78

MASENGALE, Roy L. 9 Jun 78

O'DOWD, John H., Jr. 9 Jun 78

O'NEILL, Patrick J. 9 Jun 78

WAMSTED, Michael L. 9 Jun 78

1ST LIEUTENANT

FEENEY, Thomas J. 4 Jun 78

4. AUS Promotions.

COLONEL

RUSSELL, George G. 2 May 78

LIEUTENANT COLONEL

NYDEGGER, Neil K. 6 May 78

MAJOR

ANDREWS, Douglas G.	7 May 78	PARK, Percival D.	10 May 78
BEHUNIAK, Thomas E	8 May 78	RANEY, Terry W.	8 May 78
BRODY, Sidney B.	8 May 78	RIVEST, Joseph R.	10 May 78
BROWN, Patrick P.	11 May 78	ROBERTS, Raymond L.	9 May 78
CLERVI, Ferdinand D.	8 May 78	ROBERSON, Gary F.	14 May 78
COOCH, Francis A.	13 May 78	SHIELDS, Buren R.	14 May 78
DAVIS, Louis R.	7 May 78	SMYSER, James O.	12 May 78
DOOLEY, Joseph M.	14 May 78	VALLECILLO, Carlos	2 May 78
FLANIGAN, Richard C.	13 May 78	VARO, Gregory O.	14 May 78
FOWLER, Joseph C.	13 May 78	WALSH, James F.	14 May 78
FULBRUGE, Charles R.	14 May 78	WARNER, Ronald A.	11 May 78
GALEHOUSE, Lawrence	12 May 78	WENTINK, Michael J.	10 May 78
GONZALES, Joseph A.	8 May 78	WILLIAMS Robert B.	11 May 78
GRAVELLE, Adrian J.	11 May 78	WILLIAMS Robert P.	11 May 78
HAAS, Michael A.	11 May 78	WILLIAMS, William E.	14 May 78
HAGGARD, Albert L.	12 May 78	WRIGHT, Richard W.	10 May 78
HARPER, Stephen J.	13 May 78	ZUCKER, David C.	12 May 78
HENDERSON, Robert H.	13 May 78	CAPTAIN	
HOSTLER, Dorsey D.	3 May 78	RIDDLE, David A.	21 Apr 78
HUFFMAN, Walter B.	9 May 78	CW3	
JACOBSEN, Craig C.	10 May 78	COLEMAN, Sidney L.	14 May 78
JEFFRESS, Walkton M.	12 May 78	HALL, William T.	14 May 78
KESLER, Dickson E.	12 May 78	TURNER, Larry	13 May 78
LAUBE, Garey L.	10 May 78	CW4	
LIMBAUGH, Daniel B.	14 May 78	RECA, James J.	3 Apr 78
MACKEY, Patrick J.	8 May 78	KNIGHT, Lawrence G.	4 May 78
NIX, John H.	7 May 78		

5. Assignments.

<i>NAME</i>	<i>FROM</i>	<i>TO</i>
	CAPTAINS	
Allen, Kenneth	Ft. Jackson, SC.	USALSA w/duty sta Ft. Jackson, SC
Anderson, Clarence	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
Andrews, Douglas	Ft. Bragg, NC	USALSA, w/duty sta Nurnberg, Germany
Baboian, Richard	S&F, TJAGSA	27th Advanced Course
Benjamin, Scott	Ft. Eustis, VA	USALSA w/duty sta Ft. Eustis, VA
Bernard, William	Ft. Sill, OK	USALSA, w/duty sta Ft. Sill, OK
Brodeur, Donald	Ft. Devens, MA	Korea
Burke, Robert J.	Ft. Lewis, WA	USALSA Bailey Cross Roads, Va.
Cantrell, Jimmy	Ft. Sill, OK	USALSA, w/duty sta Ft. Sill, OK

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NAME	FROM	TO
Clarke, Craig S.	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
Connolly, David	Ft. Belvoir, VA	USALSA w/duty sta Ft. Belvoir, VA
Cork, Timothy R.	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
Costello, Raymond	USAREUR	HQ USAFORSCOM. Ft. McPherson, GA.
Cotton, John R.	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
Dadds, Harry	Ft. McClellan, AL	USALSA w/duty sta Ft. McClellan, AL
Dale, Buris	Ft. Sill, OK	USALSA w/duty sta Ft. Sill, OK
Dumas, Arthur	Ft. Benning, GA	USALSA w/duty sta Ft. Benning, GA
Earl, James	USAREUR	Ft. Sheradon, IL
Felmet, Bryan	Ft. Gordon, GA	USALSA w/duty sta Ft. Gordon, GA
Ferm, Dennis	Ft. Bragg, NC	Korea
Fiatal, Robert	Ft. Bliss, TX	USALSA w/duty sta Ft. Bliss, TX
Fierke, Thomas	Ft. Devens, MA	Iran
Fogel, Robert	Ft. Sill, OK	USALSA w/duty sta Ft. Sill, OK
Forrester, Vance	Ft. Benning, GA	USALSA w/duty sta Ft. Benning, GA
Gibson, Kim	Ft. Monroe, VA	Korea
Goetzke, Joseph	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
Hann, James	Ft. Ben Harrison, IN	USALSA w/duty sta Ft. Ben Harrison, IN
Henderson, Robert	TJAGSA	Ft. Lewis, WA
Henningsen, John	Ft. Leavenworth, KS	USALSA w/duty sta Ft. Leavenworth, KS
Jones, Dwight	Ft. Lewis, WA	Korea
Kessie, Charles	Ft. Knox, KY	USALSA w/duty sta Ft. Knox, KY
Killian, Lewis	Ft. Eustis, VA	USALSA
Kinder, Larry E.	Ft. Leonard Wood, MO	USALSA w/duty sta Ft. Leonard Wood, MO
Leahy, Thomas M.	Ft. Benning, GA	USALSA w/duty sta Ft. Benning, GA

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<i>NAME</i>	<i>FROM</i>	<i>TO</i>
Lederer, Fredric	Ft. Ben Harrison, IN w/duty sta Germany	OTJAG, Washington, DC
Less, Geoffrey	Ft. Eustis, VA	USALSA w/duty sta Ft. Eustis, VA
Limbaugh, Daniel	Ft. Leonard Wood, MO	USALSA w/duty sta Ft. Leonard Wood, MO
Madsen, David	USAREUR	Homestead AFB, FL
Marth, Paul E.	Ft. Hamilton, NY	USALSA w/duty sta Ft. Hamilton, NY
Martin, Thomas	Ft. Bliss, TX	USALSA w/duty sta Ft. Bliss, TX
Martinez, Leo	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
McBride John P.	Ft. Leonard Wood, MO	USALSA w/duty sta Ft. Leonard Wood, MO
McElligott, Michael	Ft. Rucker, AL	USALSA w/duty sta Ft. Rucker, AL
Melton, Frank L.	USAAC, Ft. Huachuca, AZ	Ft. Greely, AK
Meyer, Carl	Korea	USALSA, Bailey Cross- roads, VA
Mirakian, Stephen	Ft. Leonard Wood, MO	USALSA w/duty sta Ft. Leonard Wood, MO
Mosier, Jerome	Ft. Leavenworth, KS	USALSA w/duty sta FT. Leavenworth, KS
Mura, Steven	Ft. Lewis, WA	Korea
Murrell, James	Ft. Dix, NJ	USALSA w/duty sta Ft. Dix, NJ
Myers, John	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
Osgard, James	USMA	Korea
Ostrander, Joel	Ft. Knox, KY	USALSA w/duty sta Ft. Knox, KY
Patrick, Jackie	Ft. Jackson, SC	USALSA w/duty sta Ft. Jackson, SC
Peluso, Ernest	Ft. Bragg, NC	Carlisle Barracks, PA
Piasta, Joseph	Ft. Belvoir, VA	USALSA w/duty sta Ft. Belvoir, VA
Reeder, Joe	OTJAG	Contract Appeals Division, USALSA
Reilly, Vincent	Ft. Knox, KY	USALSA w/duty sta Ft. Knox, KY
Roberts, David	Ft. Lee, VA	USALSA w/duty sta Ft. Lee, VA

NAME	FROM	TO
Rodriguez, Jorge	Ft. Dix, NJ	USALSA w/duty sta Ft. Dix, NJ
Roosa, Kenneth	Ft. Knox, KY	USALSA w/duty sta Ft. Knox, KY
Rose, George	USAREUR	87th Basic Class, TJAGSA
Rye, Kenneth	Ft. Dix, NJ	USALSA w/duty sta Ft. Dix, NJ
Schmidt, Lauren	Ft. Gordon, GA	USALSA w/duty sta Ft. Gordon, GA
Spencer, James	Ft. Dix, NJ	USALSA w/duty sta Ft. Dix, NJ
Sprinkles, Timothy	Ft. Bliss, TX	USALSA w/duty sta Ft. Bliss, TX
Tidwell, Gary L.	Ft. Jackson, SC	USALSA w/duty sta Ft. Jackson, SC
Urech, Everett	Ft. Benning, GA	USALSA w/duty sta Ft. Benning, GA
Young, Henry	Ft. Gordon, GA	USALSA w/duty sta Ft. Gordon, GA

Current Materials of Interest

Treaty

Environmental Modification-United States Signs Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, G.A. Res. 31/72, 31 U.N. GAOR, Supp. (No. 39) 37, U.N. Doc. A/31/39 (1977), 19 HARV. INT'L L. J. 384 (1978).

Articles

Tseng, *What Everyone Should Know About The Copyright Law in Wonderland*, 12 VAL. U. L. REV. 1 (1977).

Gallagher, *Renegotiation at the Court of Claims: The Government's Struggle With the Burden of Proof*, 46 GEO. WASH. L. REV. 376 (1978).

Comment, *Up to our Wastes in Wet Suits: The Federal Law on Water Pollution*, 8 CUM. L. REV. 731 (1978).

Hazard, *Myres S. McDougal Distinguished Lecture: Soviet Tactics in International Law-making*, 7 DENVER J. INT'L L. & POL'Y 9 (1977).

Lance, *A Criminal Punitive Discharge-An Effective Punishment?* 79 MIL. L. REV. 1 (1978).

Russell, *The Effect of the Privacy Act on Correction of Military Records*, 79 MIL. L. REV. 135 (1978).

Behuniak, *The Law of Unilateral Humanitarian Intervention by Armed Force: A Legal Survey*, 79 MIL. L. REV. 157 (1978).

Schafer, *The Military and the Six-Member Court-An Initial Look at Ballew*, 10 THE ADVOCATE 67 (1978).

Schmit, *Government Funding of Defense Investigations*, 10 THE ADVOCATE (1978).

Carroll, *Effectively Using "Offers of Proof"*, 10 THE ADVOCATE 87 (1978).

Special Findings Revisited, 10 THE ADVOCATE (1978).

Some Sample Instructions: Part 2, 10 THE ADVOCATE (1978).

Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F.L. REV. 343 (1978).

Palochak, *The Government Supply Warranty: Its Nature and Effect*, 19 A.F.L. REV. 383 (1978).

Case

Employment Discrimination—Equal Pay Act—Federal employees have right to jury trial in Equal Pay Act suits, Carter v. Marshall, 46 U.S.L.W. 2595 (D. Colo. April 20, 1978).

Carnahan, *United States v. Jordan: Foreign Searches, Military Courts, and the Act of State Doctrine*, 19 A.F.L. REV. 413 (1978).

Recent Opinions/Grants of Interest, 10 THE ADVOCATE 102 (1978).

Side-Bar, 10 THE ADVOCATE 110 (1978).

Book Reviews

Kos-Rabcewicz-Zubkowski, *Book Review*, 10 OTTAWA L. REV. 237 (1978). [Review of L. C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976).]

Donald P. Gilmore, *Book Review*, 8 GA. J. INT'L & COMP. L. 513 (1978). [Review of U.S. DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (1976) (AFP 110-31).]

John L. Costello, Jr., *Book Review*, 79 MIL. L. REV. 193 (1978). [Review of G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION (1976).]

Joseph A. Rehyansky, *Book Review*, 79 MIL. L. REV. 199 (1978). [Review of EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN (1977).]

Ronald E. Decker and CW3 Frederick Link, *Book Review*, 79 MIL. L. REV. 203 (1978). [Review of STANLEY ABRAMS, A POLYGRAPH HANDBOOK FOR ATTORNEYS (1977).]

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