VOLUME 1 — NUMBER 2 — SEPTEMBER 1971

THE ARMY LAWYER

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

MILITARY AFFAIRS NOW ADMINISTRATIVE LAW DIVISION

Effective 16 August 1971, Major General George S. Prugh directed that the Military Affairs Division, Office of The Judge Advocate General, be redesignated as the Administrative Law Division. Opinions from the Administrative Law Division will continue to bear the symbol JAGA. General Prugh expressed the view that non-JAGC members of administrative staff elements could more readily understand the type of legal duties performed by the Division if the name were changed.

GENERAL PRUGH SPEAKS TO MILITARY JUDGES

On 30 July 1971 Major General George S. Prugh spoke at the graduation of the 10th Military Judge Course of The Judge Advocate General's School. The following is the substance of his remarks:

THE LAWYER BECOMES A JUDGE

Just making this statement raises several interesting thoughts. It suggests a transformation from one state of being to another and quite a different one. It suggests some special qualifications required in the judge but not found in every lawyer. It suggests a question as to what these special qualifications might be, and simultaneously it suggests there may be some common characteristics which need defining. It raises the further question whether the new status as a judge has any permanence or is only transitory and can be changed with the assignment of new and different duties.

In the military service our problem takes on additional complexity as we change the statement to read, "the military lawyer becomes a military judge." It is upon the military aspects that I would like to focus.

Neither the UCMJ nor the MCM gives us much help in looking at the makeup, either desired or required, of a military judge. Superficially, the military judge's requirements are to be a commissioned officer, a member of an appropriate bar, and certified as qualified to be a military judge by his JAG.

But obviously this is only the beginning point, because it tells us nothing of what the desired personal qualifications are. We can get a hint of these by looking at the judge's duties. Many qualifications are quite well known because they are typical of all judges, military or otherwise. Technical knowledge, good judgment, sound reasoning, patience, understanding, intellectual strength, psychological comprehension, clarity of expression —all are important. Some duties are peculiar to the military, however, and point to additional qualifications. For instance, not only must he preside, but the Manual prescribes he must insure that the proceedings are conducted in a dignified, *military* manner. I take this "military" to mean in an orderly way, not at all the heel-clicking, square-cornered style, but a business-like, solemn, carefully

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

and professionally operated forum. The judge must not only try the case "faithfully and impartially according to his conscience" but also according to the "laws applicable to trials by court-martial." This he swears to do.

At the outset, then, it is apparent that the military judge must have some particular knowledge of military matters in order to sit in a court-martial. But even this leaves us dissatisfied in our search for the military judiciary's criteria of membership. In any case, we can note that the military judge should be familiar with the general conditions of the military community, just as a civilian judge is expected to know the general conditions of his community, and the military judge must know military law and manners in addition to that required of civilian judges.

Clearly the judge must be knowledgeable in the law, the rules of his craft. He must have unimpeachable integrity, morality, and honesty—characteristics in a judge which are at best relative matters but at worst are destructive of any judicial system. He must be knowledgeable of human nature and wise in the ways of men and women, knowledge difficult enough for any of us to master. He must have the moral courage to act and decide as his conscience and intellect dictate.

But there are other criteria, some quite negative. For example, the military judge can no longer be an advocate. He must shift gears from the lawyer's role where he argues for adoption of a particular point of view. Here, obviously, we have room to inquire into the special characteristics of each party, the lawyer and the judge. The one must have the insight to seize upon the most favorable supporting fact and legal point; the other, to be able to see through the oral haze to the truth of the matter. But what about truth? Is there a place for truth in the procedure at all? Twenty years ago I unhesitatingly and probably naively said, "yes," but today I'm challenged and seem to be in the minority when I expect judges to search for truth. To the counsel, truth often is what his client says it is. To the judge, truth seems frequently to be

forgotten altogether, victim of his search for measurement of whether a reasonable doubt exists based upon the evidence presented. Of course, he is forbidden by his own act to hinder the ascertainment of truth by counsel, but if he conceives his role merely as an umpire between the two sides, the prosecution and the defense, then is truth even a consideration for the judge.

I personally do not agree with this restricted role of the military judge. I believe he has an obligation to apply the code where and when it is legally proper to do so, regardless of his personal approval or disapproval of particular procedures, provisions, or even offenses. While he cannot be the prosecutor, neither may he be the defender; while he must avoid even a controversial manner and tone, he need not sit passively by while opportunity to clear up an obscurity slips by, ignored by counsel. Especially if he is to make findings and sentence, the military judge is not only free but obliged to inquire of witnesses, and to call new witnesses, to assist him in discovering the truth pertinent to the charges, and responsibility rests heavily upon the military judge to cure the creeping rot of delay by doing all proper to expediate our processes.

Another significant element in the military judiciary, it seeems to me, is the unique role of military authority, distributed as it is through officers generally, commanders and noncommissioned officers specifically. That it is a necessity is not doubted by anyone contemplating the government and deployment of hundreds of thousands of young men trained and equipped to fight, furnished with individual weapons, and having ready access to other dangerous weapons and material without civilian counterpart. The authors of the Constitution and the first Congress itself where acutely aware of the need for authoritative control over the armed forces so that they will be well disciplined. From America's very beginnings, the military law as enacted by Congress struggled to support discipline and at the same time to provide an orderly and fair system capable of adjudicating criminal matters as well. As General Westmoreland has said, "an unfair or unjust correction never promotes the development of discipline." Balancing discipline and justice is a mistake — the two are inseparable. To sit in judgment in criminal cases, however, poses few unfamiliar problems for the military judge. It is in the disciplinary area where he quickly runs into difficulty unless he has an understanding of leadership, military authority, and discipline. This would be unfamiliar to the civilian transplanted to a military bench.

I take it as an essential that the military judge know and understand the roles of discipline, leadership, and military authority, in the same manner as he must know the law, possess good judgment, and be familiar with the circumstances of his community. This knowledge of discipline, leadership, and military authority does not come easily or quickly. It requires diligent study of the who's, what's, and why's. He will thereby recognize proper and improper application of leadership principles, use of discipline as an effective device in furthering a command's mission, and appropriate divisions of military authority.

The summary of the few points we've been able to examine causes me to consider at least these three criteria as additional for becoming a military judge, beyond what would be found in a lawyer or civilian judge.

1. The military judge must have considerable knowledge of the military life and military law.

2. He must also have considerable experience in or study of the principles and problems of leadership for nco's and officers.

3. Finally, he must consider himself not merely as an umpire but as a responsible participant in the process of governing and regulating the land and naval forces.

These three characteristics are not welcomed, I'm sure, by those who see military justice as something simple and uncomplicated, like a military march. Neither will they be welcomed by those who see an easy transition from civilian to military legal processes. On the other extreme, some may suggest that the military judge is a mere extension of command. I reject that out of hand. Knowledge by the judge of the Army's need for and methods of achieving discipline, leadership, and military authority does not mean that the judge should or would forsake his independent role, reliance upon his own judgment, and the unfettered application of his own authority in dealing with those matters properly charged to him. In this I'll remain steadfastly at the side of the military judge.

The military judge is an evolving figure, one whose part in the whole scheme of military law is still not perfectly understood. I pledge my support to the military judges in achieving a better understanding of their work; I ask only a full recognition by the military judges of the special and unique features of being a judge within a large body of fully armed and frequently transplanted young men. In the atmosphere of mutual understanding and cooperation we can together gain public and military confidence in our enlightened military system of law and justice.

THE MILITARY CLAIMS ACT: APPLICATION OF COMPARATIVE NEGLIGENCE IN GERMANY

By Lieutenant Colonel William R. Mullins, Chief, Foreign Claims Division, U.S. Army Claims Service.

Public Law 90-522, 26 September 1968, amended the Military Claims Act (10 U.S.C. 2733) to provide that local law should be applied in determining the effect of a claimant's negligence on his right to recover damages. The amendment has been implemented by paragraph 11b, AR 27-21. The effect of this change in the law is to make the doctrine of comparative negligence applicable to all cases under the Military Claims Act arising in Germany.

Under comparative negligence principles, contributory negligence does not bar recovery but merely affects the amount recoverable. As applied in Germany comparative negligence means that in the case of an incident or accident, where both parties are negligent, the responsibility assigned to each party for causing the accident or incident is determined and apportioned in fractions or a percentage; and each party is entitled to recover from the other that proportion of the damages equal to the fraction or percentage assigned to him.

Though the general principles of negligence law are applied in the adjudication of cases where comparative negligence is involved, the process is essentially subjective. The German courts base their findings upon the particular facts of each case, and in consequence different courts arrive at different results in cases where the facts are essentially the same.

In adjudicating cases under the Military Claims Act, claims approving authorities should first analyze all the facts, including any violations of traffic law, safety regulations or other rules and regulations. Most cases fall into one of three major categories: In the first, one party is entirely responsible for the accident, whereupon a claim should be paid in full or denied completely depending upon whether the government agent or the claimant is at fault. In the second, both parties are at fault, in which case the claimant is entitled to 50% or ½ of the proven damages. In the third, one party is primarily liable, but the other party is guilty of some negligence which contributed to the incident. In these cases the usual division of liability is on a ⅔-⅓, ¾-¼, or ⅘-⅕ basis, depending upon the seriousness of the contributory

negligence. If, however, the degree of negligence of one party, is slight as compared with that of the other, it may be ignored in adjudicating the claim, in which case the other party is held entirely responsible.

A complicating factor in traffic accident cases is that, under the German Road Traffic Law, an injured person has the election of proceeding under ordinary tort law, where negligence on the part of the person causing the damage must be proved, subject to a percentage decrease in the award for any contributory negligence, or under the "holder's liability" theory. This latter theory makes the holder of a motor vehicle liable for damages he causes, on the premise that the owner assumes the operational risk when he places a vehicle on the road. The "holder" may or may not be the owner. A person who has control, (pays for a vehicle's maintenance, insurance, repairs, etc.) though legal title is invested in someone else, may be the "holder."

To avoid liability under this theory, the burden of proof is on the holder to show that, as to him, the accident was unavoidable and that he or his agent exercised the "highest degree of care" as opposed to "ordinary care."

In any event, under either method of proceeding (ordinary tort law or the holder's liability theory), the contributory negligence of the claimant reduces his claim in proportion to the damages he causes. Thus, as a practical matter, in adjudicating cases under the Military Claims Act, holder's liability is relevant in two respects: (1) when placing liability upon the Government in cases where evidence of negligence on the part of its driver is weak or non-existent, and (2) when the "operational risk" theory is used to determine the degree of comparative negligence. As an example, should a case arise involving a collision between an Army truck and a passenger car, where it has been established that both drivers were equally at fault, the percentage of liability chargeable to the Government would not be ½-½, as would normally be the case, but ⅔-⅓ or ⅗-⅖, because the "operational risk" of the truck is greater than the passenger car. On the other hand if the passenger vehicle was being operated at a grossly excessive speed the "operational risk" attached to it would equal the "operational risk" of a slow-moving truck.

CONSCIENTIOUS OBJECTORS AND COURTS-MARTIAL: SOME RECENT DEVELOPMENTS

By Captain Stephen L. Buescher, Editor, The Army Lawyer

Following denial of an application for discharge as a conscientious objector, the next step for the militant objector-service member may well be to disobey orders rather than to return to duty. At trial, his claim of conscientious objection will undoubtedly be raised in defense of his disobedience. The treatment of conscientious objection and denial of an application for discharge as a defense in courts-martial continues to be troublesome.

The starting point for any discussion of conscientious objection and courts-martial is *United States v. Noyd,* 40 C.M.R. 195 (1969). This was the famous case of the Air Force officer who refused an order to train a pilot in a plane used in Vietnam, following denial of his application for discharge or assignment to non-combatant duties. Noyd contended that the denial of his conscientious objector application by the Secretary of the Air Force was unlawful and that the law officer and board of review had mistakenly ruled that the court-martial lacked jurisdiction to consider the issue. In deciding that the law officer had, in fact, considered the legality of the Secretary's decision and that his decision was correct due to Noyd's selective objection, the Court of Military Appeals set forth guidelines for treatment of this subject. They stated that since relief for in-service conscientious objectors is a privilege rather than

a matter of right, "the obligation to obey a lawful order cannot be, and is not, as a matter of law, terminated on the mere occurrence of a condition or circumstance that might justify separation from the service," i. e., conscientious objection. Rather, the obligation to obey continues until the individual is discharged. Thus, conscientious objection alone is not a defense to disobedience of orders, no matter how sincere or well founded.

At the same time, DoD Directive 1300.6, 21 Aug. 1962, revised 10 May 1968, and the implementing regulations set forth standards and procedures for relief for conscientious objectors in the form of discharge or assignment to non-combatant duties. When a conscientious objector has filed an application for relief under these regulations, it is provided that, pending consideration, the applicant will be assigned to duties providing minimum conflict with the professed beliefs. Upon denial of relief by the Secretary, orders to perform duties in conflict with conscientious objection can again be given. Thus, the denial may "generate" orders that could not be given during the pendency of the application. As to these "generated" orders, if the Secretary's decision was unlawful, they are also unlawful. Thus, wrongful denial of an application for relief as a conscientious objector may be asserted as a defense of disobedience of some orders. The conditions precedent to the defense are a denied application: an allegation that the application was wrongfully denied; and an order generated by the denial (i.e., an order that could not be given under the regulations to one who had a C. O. application pending because of a conflict with the professed beliefs).

These principles were adhered to and reiterated in: *U.S. v. Wilson,* 41 C.M.R. 100 (1969) (conscientious objection no defense to disobedience of lawful order); *U.S. v. Avila,* 41 C.M.R. 654 (ACMR 1969) (no conscientious objector application pending, claim of C. O. status not a defense to disobedience of order); *U.S. v. May,* 41 C.M.R. 664 (ACMR 1969) (application filed, regulations not followed, claim was a defense to disobedience); *Mueller v. Brown,* 40 C.M.R. 246 (1969) (no court-martial pending, court would not review legality of denial of application); *Lee v. Pearson,* 40 C.M.R. 257 (1969) (once application denied, have duty to obey lawful order); *U.S. v. Kent,* 40 C.M.R. 404 (ACMR 1969) (no application pending, must obey orders).

The Army Court of Military Review, in *U.S. v. Goguen,* —— C.M.R. —— (ACMR 1970)[1], discussed those factors to be considered in determining whether or not the decision of the Secretary of the Army was a legal one. The court stated that the standard to be used is the standard applied by Federal Courts in deciding pre-service conscientious objector claims. The crucial question is whether the decision of the Secretary had a "basis in fact." If so, his decision must stand. If not, the denial, and any generated order is unlawful. It was stated that an order of the Secretary of the Army is unlawful when it (1) erroneously construes the standard provided in the regulations; (2) applies a standard inconsistent with standards provided by the Secretary of Defense or the President; or (3) acts in a matter the Secretary is not authorized to decide. Further, procedural errors amounting to a denial of due process will also render the Secretary's decision illegal.[2] In reviewing the decision of the Secretary, the military judge is limited to those matters contained in the application file. The military judge may not determine the merits of the claim *de novo,* nor consider new evidence.[3] The question of the legality of the Secretary's decision is a question of law for the military judge,[4] although questions of fact essential to the determination will be submitted to the triers of fact.

These rules seem clear, and the matter might have been laid to rest, but for two more recent decisions by the Court of Military Appeals, *United States v. Stewart,* 43 C.M.R. 112 (1971), and *United States v. Larson,* 43 C.M.R. 405 (1971). Stewart had been trained as a noncombatant for nonprofessional medi-

cal service. He came to believe that even this activity would violate his religious principles. His application for discharge was denied and he was ordered to "put on your uniform to continue your movement to your overseas destination in compliance with your written overseas movement orders." He refused to obey and, at trial, he made an offer of proof at an out-of-court hearing that at the time of the offense he was a conscientious objector and that his application for discharge was unlawfully denied. The law officer refused to hear any evidence on either part of the offer of proof. Stewart then pleaded guilty.

Larson also had his application for discharge as a conscientious objector denied. However, his allegation of unlawfulness was based on procedural irregularities. He asserted that the chaplain's interview came before his application form had been submitted rather than after, as required by the regulations. In an out-of-court hearing, Larson sought to have the charge of disobeying an order dismissed because of denial of due process in processing his application, based on the asserted error. The military judge refused to hear the motion or receive evidence, erroneously holding it to be a factual issue for the court members. However, when the defense called two officers within the command charged with making the administrative determination, the military judge restricted the scope of counsel's inquiry, ruling that the witnesses' assertion that they had complied with the regulation closed the matter. Accused's application was not admitted into evidence. Finally, in reply to a request for instructions on the defense of denial of administrative due process, the military judge ruled the matter was not in issue. The Court of Military Review would have returned the case for a hearing on the legality of the order, permitting presentation of witnesses on the issue.

In both cases then Judge, now Chief Judge, Darden repudiated the Court's decision in *Noyd*. He is now of the opinion that conscientious objection can never be a defense to disobedience of orders. He rejects the "generated by the illegal decision of the Secretary" rational, stating that "no statute makes conscientious objection or the Secretary's improper denial of conscientious objector applications a defense in military trials." Thus, Chief Judge Darden sees no authority for litigation of the issue at courts-martial. He also states that "if a court-marital could declare on order illegal because, under discretionary regulations, the Secretary has denied the application, the Secretary would have to grant a discharge." Chief Judge Darden feels this result conflicts with the grant of authority for administering the armed forces.

At the other end of the spectrum is Senior Judge Ferguson, now serving until appointment of his replacement. In *Larson* he would not have overturned the Court of Military Review's decision that a rehearing on the legality of the Secretary's decision and resultant order was necessary. He further made known his feeling that the chaplain used an improper standard in determining that Larson was insincere in his claim of conscientious objection. If true, this error might be the basis for a defense to the disobedience of orders charge. The fact that Judge Ferguson found an error not alleged by the defense, which was apparently relying strictly on the asserted procedural irregularity, and his insistence on hearing on the merits of accused's claim of illegal denial, is indicative of his more liberal stance. In *Stewart*, Judge Ferguson would again require a rehearing, holding that the law officer's ruling was to the substantial prejudice of accused.

Judge Quinn stands in the middle. In *Stewart* he concurred with Darden in the result, but would not repudiate *Noyd*. Rather he held that Stewart's guilty plea and testimony during sentencing demonstrated no abuse of discretion or denial of due process in the Secretary's disapproval. Judge Quinn also cited the Army Court of Military Review's decision in *Goguen*, which affirmed the conviction based on the fact that the order was

legal in any event,[5] thus not making clear his exact basis for affirming Stewart's conviction. In *Larson* Judge Quinn, writing for the majority, looked to the record and Larson's C. O. application, which while not in evidence was an appellate exhibit, and found sufficient undisputed factual material to determine that the denial of the application was not improper. He held that the procedural error alleged was a mere "technicality" not amounting to a denial of procedural due process.

Thus, Chief Judge Darden would not allow the defense, Senior Judge Ferguson would require a full and complete hearing on the issue of the legality of the denial at the trial level in all cases, and Chief Judge Quinn is inclined to decide the legality of the denial at the appellate level on those facts available and with an apparently more favorable view to the Government than Judge Ferguson. These trifurcated opinions have placed the outcome of the conscientious objector discharge in courts-martial in doubt, especially in view of Senior Judge Ferguson's expected departure from the bench. However, if the military courts do not review the legality of the Secretary's decision, the district courts will. It would seem preferable for both an accused and the Government to litigate all issues, including the legality of the Secretary's decision, at a single trial.

1. The decision in *Goguen* was subsequently reversed and the charges dismissed by the Court of Military Appeals which found that a Federal Court's grant of a writ of habeas corpus to Goguen terminated military jurisdiction. United States v. Goguen, 43 C.M.R. 367 (1971).

2. United States v. Larson, 43 C.M.R. 405 (1971).

3. United States v. Goguen, 43 C.M.R. —— (ACMR 1970).

4. United States v. Avila, 41 C.M.R. 654 (ACMR 1969).

5. The order in *Goguen* was to wear a uniform, found not to be in conflict with conscientious objector beliefs, and thus an order that could have been given during the pendency of the C. O. application.

CODE COMMITTEE REPORTS ON UCMJ CHANGES UNDER CONSIDERATION

Each year the committee created by Article 67(g), UCMJ, and consisting of the Judges of the U.S. Court of Military Appeals, The Judge Advocates General of the Armed Forces, and the General Counsel of the Department of Transportation, reports to the Committees on Armed Services of the Senate and House and the Secretaries of the Military Departments. This year's report, covering 1 January 1970 to 31 December 1970, states that the Code Committee now has under study and consideration the following subjects:

(1) Legislation which would expand the power of the military trial judge in contempt matters.

(2) Legislation which would specify the powers of the Court of Military Appeals, the Courts of Military Review, and military judges to issue writs and orders in aid of their jurisdiction.

(3) Legislation to permit an appeal to the U. S. Supreme Court from decisions of the Court of Military Appeals in cases involving constitutional questions.

(4) Legislation to permit the execution of a sentence to confinement at the time the convening authority approves the sentence. Such legislation not only would reduce the pointless and costly segregation of various classes of prisoners, but would permit this class of prisoner to benefit from rehabilitation training.

(5) Legislation to amend article 69, Uniform Code of Military Justice, to permit limited delegation of the authority of the Judge Advocate General of an Armed Force to correct errors in certain court-martial cases and to give the Judge Advocate General of an Armed Force the authority to correct errors in certain records of trial by general court-martial without the necessity of

referring such records to a Court of Military Review.

(6) Legislation to amend article 62 (*a*), Uniform Code of Military Justice, to permit an appeal of an interlocutory ruling by the prosecution in certain limited categories of cases, such as a ruling that a confession, or evidence obtained as the result of a search, is not admissible, or a determination that a specification failed to allege an offense. Such a provision would conform military practice to civilian practice (see, for example, the American Bar Association Standards on Criminal Appeals, section 1.4; see also, 18 U.S.C. 3731). Such an appeal would be made to a senior trial judge in the area or to a Court of Military Review. Under current law, such appeals may be made only to the convening authority and only in the limited situation where a specification before a court-martial has been dismissed.

(7) Legislation to relieve the convening authority of responsibility for making a post-trial review of the findings of a court-martial.

(8) Legislation to provide for a system of random selection of court members in general courts-martial and possibly in special courts-martial.

(9) Legislation which would transfer sentencing power to the military judge in all cases, except those involving the death penalty.

The Code Committee also recommended increased use of para-professional personnel to save money and improve career retention.

REPORT FROM THE U.S. ARMY JUDICIARY

The following items were prepared by the U.S. Army Judiciary

Statistics

The following court-martial statistics are compiled from monthly reports filed by military judges. These statistics represent cases *tried* in the field during the periods in question. They will differ from the number of cases *received* in the U.S. Army Judiciary for review during the same period. The figures on SPCMs include cases tried before a military judge alone and cases tried with a judge and court members. Special court-martial cases tried before a court without a judge presiding are not included.

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total
FY 1970					
General Court-Martial Cases Tried	695	628	659	797	2779
Special Court-Martial Cases Tried by:					
Judge from Judiciary	3406	6289	6438	5963	22096
Part-time Judge	1056	2920	2626	2517	9119
FY 1971					
General Court-Martial Cases Tried	709	668	697	669	2743
Special Court-Martial Cases Tried by:					
Judge from Judiciary	5521	5774	5893	5095	22283
Part-time Judge	2065	1336	1099	972	5472

Recurring Errors and Irregularities

(a) Since the purpose of the post-trial review by the Staff Judge Advocate is to provide accurate information to the convening authority in order that he may make an informed and intelligent decision in a case, inaccurate post-trial reviews prevent such a decision by the convening authority. These inaccuracies result from a failure to make a minimal check of the record before the record is forwarded to this headquarters for review. For example, an accused was originally charged with eight (8) specifications of unauthorized absence. Specification one (1) was dismissed before trial and the other seven (7) specifications were renumbered. The SJA review states that the accused pleaded guilty to *eight* (8) specifications of unauthorized absence. No indication was given in the post-trial review that one specification was dismissed and the others renumbered. A second example: The accused was originally charged with wrongful introduction, wrongful possession and wrongful sale of marihuana. The sale specification was dismissed on recommendation of the SJA. The accused was tried on the other two specifications and found guilty. The military judge held that the two specifications were multiplicious for sentencing and stated that the maximum punishment was confinement at hard labor for 5 years. The SJA post-trial review advised the convening authority that the maximum punishment was confinement at hard labor for *15* years. This was 5 years in excess of the maximum for the offense of which the accused was convicted even had the two specifications not been held multiplicious by the military judge.

(b) When a case is to be forwarded for review under Article 69, Uniform Code of Military Justice, the proper transmittal language in such a case is "The record of trial is forwarded to The Judge Advocate General of the Army for examination under the provisions of Article 69, Uniform Code of Military Justice." Some actions and general court-martial orders have used the phrase "is forwarded for review by the Court of Military Review." This is inappropriate since such a case may not be referred to the Court of Military Review.

Administrative Processing of Records of Trial

(a) Staff Judge Advocates should take affirmative action to implement the provisions of paragraph 96, MCM, 1969 (Rev.), which require a report to The Judge Advocate General [by electric means or airmail, ATTN: Clerk of Court, U.S. Army Judiciary] whenever an accused is transferred before he has been notified of the decision of the Army Court of Military Review. This is especially important when an accused, whose record of trial is being reviewed under the provisions of Article 66, UCMJ, is reassigned and subsequently granted excess leave pending completion of appellate review. Staff Judge Advocates are urged to maintain close contact with commanding officers and personnel officers involved in the issuance of transfer and/or excess leave orders to assure that the U. S. Army Judiciary is advised promptly of the whereabouts of the accused. This can be done by placing the Clerk of Court, U. S. Army Judiciary, on the distribution list of the transfer and/or excess leave orders.

(b) In a number of instances staff judge advocates have failed to process correctly special court-martial records of trial that have been returned to their commands for a new review and action pursuant to a decision of the Army Court of Military Review.

When, as a result of the new review, the convening authority approves the findings of guilty but disapproves the bad-conduct discharge or does not approve any sentence at all, further review of the record by the Court of Military Review pursuant to Article 66, UCMJ, is not authorized. Also, examination pursuant to Article 69, UCMJ, is precluded. Therefore, the new action should *not* contain any of the following statements: "The record of trial is forwarded to The Judge Advocate General of the Army for review by a Court of Military Review;" "The record of

trial is forwarded to the Judge Advocate General of the Army pursuant to Article 69, Uniform Code of Military Justice." If the sentence has been disapproved in its entirety, the action should state that disapproval of the sentence does not affect the approved findings of guilty. It should also include, a statement that all rights, privileges, and property of which the accused has been deprived by virtue of the disapproved sentence will be restored.

Review of the record must then be accomplished in accordance with Article 65 (c), UCMJ, paragraph 94*a* (2), MCM, 1969 (Rev.), and paragraph 2-24*b* (4), AR-27-10. Two copies of the new special court-martial order should be stamped to show that review has been completed pursuant to Article 65 (c), UCMJ, and returned to the Clerk of Court, U.S. Army Judiciary, with the original record of trial, including the new Action.

(c) Delay in the prompt service of Army Court of Military Review decisions and delay in forwarding these decisions to the appropriate general court-martial jurisdiction to which an accused has been transferred, has created numerous administrative problems and has resulted in excessive delay in completion of appellate review. Numerous certificates of attempted service which do not contain sufficient documentation of attempted service, have also been received by the Clerk of Court, U.S. Army Judiciary, resulting in delay of appellate review. Staff Judge Advocates are urged to insure that Army Court of Military Review decisions are served upon an accused as expeditiously as possible or are forwarded to the appropriate general court-martial jurisdiction with a copy of the transmittal letter or indorsement forwarded to the Clerk of Court, U. S. Army Judiciary. A receipt from the accused for a Court of Review decision and any request for final action should include the date that the accused signed the receipt or the request. If an accused cannot be served, a certificate of attempted service, including date, place of attempted service and reason for non-service, should be forwarded to the Clerk of Court, U. S. Army Judiciary. All Army Court of Military Review decisions served upon accused by mail should be sent by certified mail, return receipt requested. The certified mail receipt showing non-delivery of a decision should be attached to the certificate of attempted service when it is forwarded to the Clerk of Court, U.S. Army Judiciary.

MEDICAL CARE RECOVERY ACT ITEMS

The following statistics were prepared by the Litigation Division, OTJAG.

Collection pursuant to AR 27-38
(Medical Care Recovery Program)
2d Quarter CY 1971
1 Apr - 30 Jun 1971

All Activities	$588,878.55
CONUS	
First United States Army	$120,042.12
Third United States Army	140,463.65
Fifth United States Army	136,209.16
Sixth United States Army	58,314.59
MDW	15,513.00
DA	681.78
OVERSEAS	
U. S. Army Alaska	1,545.77
U. S. Army Forces Southern Command	xxxxxxxxx
U. S. Army Europe	102,989.48
U. S. Army Pacific	13,119.00

DETERMINATION OF BAD TIME

The following article was prepared by the Litigation Division, OTJAG.

The recently published revision of Army Regulation 630-10 now provides among other things, that in most cases commanders will finally decide whether absences, including absences in excess of thirty days, will be excused or must be made up (para. 4-24). Since decisions against members are often litigated, staff judge advocates should be aware of the applicable Federal decisions and insure that adverse bad time determinations are reached in accordance with applicable regulations and can be defended in court.

The basic authority for retaining enlisted men on active duty to make up time lost due to unauthorized absences is set forth in title 10, United States Code, section 972. Paragraphs 4-22 through 4-24, AR 630-10, implement that statute and provide a procedure for determining whether an absence is excused or must be made up. It should be noted that there is no authority for retention of officers to make up unauthorized absences.

The criteria in the regulation for excusing an absence is whether an absence is unavoidable insofar as both the member and the Government is concerned (para. 4-23c.) This reflects a standard established by the Comptroller General in 40 Comp Gen 366 (1961). The administrative test utilized by The Judge Advocate General has been to inquire whether the member acted in good faith and made reasonable efforts to determine his status. Similarly, the Federal courts have recognized that a member has a continuing duty to attempt in good faith to ascertain his status (Beaty v. Kenan, 420 F. 2d 55 (9th Cir, 1969); Roberts v. Commanding General, 314 F. Supp. 998 (Md. 1970)).

Military personnel have consistently challenged their retention based on administrative decisions not to excuse absences. However, the body of reported cases is modest. The validity of section 972 seems clear (See Beaty v. Kenan, supra; Gaston v. Cassidy, 296 F. Supp. 986 (E. D. NY, 1970); Parsley v. Moses, 138 F. Supp. 799 (N. D., 1956)). Unfortunately, the criteria to be utilized by the military agencies, and the standard for judicial review is not so well settled. The test seems to be whether there is some basis in fact for the decision of the military agency, *Roberts* v. *Commanding General,* supra.

The cases which have been litigated generally have dealt with soldiers who have reported to a post and been told to go home and await further orders because their records have been lost. The members have done so and then not returned to military control for six months to several years. In the interim, some have not attempted to contact military authorities, while others have had fleeting or substantial contacts with a military or civilian agency.

As has been indicated, the Federal courts have had no difficulty in concluding that a soldier has an obligation to determine his status, *Beaty* v. *Kenan,* supra; *Roberts* v. *Commanding General,* supra. Thus a soldier who remains away for a substantial period of time (perhaps in excess of 60-90 days) in such circumstances and makes no further attempt to ascertain his status probably will receive no relief from a Federal court.

The more difficult problem is the disposition of the soldier who contacts a military agency during his absence and is told to continue to await orders. Can some of the time prior to his contact be bad time, assuming sufficient time has elapsed? Moreover, is the member under an obligation to do something more if he receives no orders? The Judge Advocate General would answer in the affirmative. Courts apparently would also answer in the affirmative (Roberts v. Commanding General, supra; Gardner v. Resor, No. 1243, USDC, Md., Pa., decided 8 August 1970)). However, the Ninth Circuit appears to have adopted a mechanical test and to have

taken the position that once a soldier contacts an agency and has been told to wait, he need do nothing further (Beaty v. Kenan, supra; McFarlne v. DeYoung, 311 F. Supp. 521 (E. D. Calif, 1970) rev. 431 F. 2d 1197 (9th Cir., 1970)). This approach has a certain superficial attraction because it is so simple. It has been cited in several unreported decisions. However, the Ninth Circuit has not had the opportunity to consider all of the ramifications of *Beaty*. It seems likely that in the proper circumstances, it will modify its test.

Several procedural problems raised by AR 630-10 have not yet been litigated. Paragraph 4-24 authorizes certain commanders to excuse absences. The regulation does not indicate whether the authority can be delegated. The only safe course is to insure that the appropriate commander personally approves the decision not to excuse an absence, even though the determination is published over a command line. Similarly, the procedure to be used in the informal investigation is not clear. The Federal courts have always insisted on some basic due process. See *Goldberg* v. *Kelly*, 397 U.S. 254 (1969). Thus, assuming that the language of paragraphs 4-22 and 4-23b takes this investigation out of the ambit of AR 15-6 (See para. 1 AR 15-6), it is still essential that the basic rudiments of due process be followed. Accordingly, the investigating officer must give the member fair notice, permit him to retain counsel, show him the available evidence, and permit him to present his version of events and evidence in his behalf. Unless there is some compelling reason to the contrary, the member should be permitted to appear in person with counsel and present his evidence. Staff judge advocates should furnish continuing advice on this point.

Additionally, there is the question of evidence. Staff judge advocates have the choice of insuring that an adequate written record of the investigation and decision are maintained or, in the event of litigation, presenting at the hearing all the officers who participated in the administrative decision not to excuse the absence in question, including, perhaps, the Commanding General. The former alternative is the only practical course and should be followed. Past experience has indicated that, if it is adequate, the Government can successfully argue that the judicial hearing must be limited to the administrative records.

Finally, the new regulation contains no appeal procedures. However, the provisions of Article 138, Uniform Code of Military Justice are available as a substitute. This avoids the constitutional problem. *Parsley v. Moses*, supra; *Smith* v. *Resor*, 406 F. 2d 141 (2d Cir., 1969).

SOME FUNDAMENTALS OF A MARINE CASUALTY INVESTIGATION

The following article was prepared by the U.S. Army Claims Service.

1. Introduction. a. The Army Maritime Claims Settlement Act (AMCSA) (10 U.S.C. 4801-04, 4806) is an alternative remedy, and an exclusive Army administrative remedy, to the Suits in Admiralty Act (46 U.S.C. 741-743) and Public Vessels Act (46 U.S.C. 781-790) for damage caused by an Army vessel. A claimant may bring his action initially in a district court, with one exception as provided in 46 U.S.C. 740 where an administrative action is mandatory at the outset, or file his claim with the Department of the Army. For this reason a marine casualty investigation (MCI) must be made in a professional manner and in accordance with commercial practice as set out in AR 55-19. Claims officers should not, without checking for adequacy for a determination under AMCSA, submit a report of a marine casualty investigation by the Military Sealift Command (MSC), intended primarily for other purposes, i.e., charter coverage, in lieu of an Army report of a marine casualty investigation (ARMCI).

b. The AMCSA is an established remedy, well known to the major steamship companies. Hence, almost all claims for collision damage allegedly caused by Army vessels are forwarded direct to the U. S. Army Claims Service (USACS). This procedure, as shipowners know, normally obviates the delay and expense incident to litigation and affords the opportunity for prompt settlement of just claims. Infrequently, a claim will not be settled by the USACS, usually because there is no liability or because a claimant will not settle for a sum considered to constitute reasonable damages. In such cases litigation usually follows.

c. It is seen, therefore, that a workmanlike MCI report should be prepared either for guidance of the USACS or for a court in the event of litigation. Some of the basic steps in preparing an ARMCI are set out below.

2. Basic Procedures: Although six fundamental steps in the investigation of a marine casualty are discussed here, the first two constitute the indisputable parts of such investigation. Of these, the first concerns liability; the second, the amount of damages.

a. Notice of Damage:

(1) The marine casualty investigating officer will first ascertain whether prompt notice of damage has been given by the aggrieved party to the offending vessel, or to her owners or agents. Such notice should be given as soon as practicable after the incident of damage and at the latest before the vessel leaves the port of the alleged casualty. This affords opposing interests the opportunity to inspect for "fresh" damage or to ascertain that the damage is "old" and not caused when, where, and how alleged. The difficulty in establishing any damage after the vessel sails is frequently pointed out by the courts. There is the opportunity for damage by subsequent similar incidents, as well as the fact that the damage may have been preexisting.

(2) Further, the coincident physical factors tending to prove or disapprove liability may be present only at about the time of a casualty. For example, the draft of the two vessels involved may show the location with respect to their freeboard, which, of course, would not be the same after one or both ships had partially loaded or discharged cargo. Similarly, concerning pier damage, the height of tide, constantly varying, may prove or disprove the vertical point of impact.

(3) If an error in navigation, i.e., failure to exercise the care of a competent seaman, is alleged, the set and drift of the tide, as well as the direction and velocity of the wind existing at the time are highly relevant circumstances. The impact of these two forces should be considered. They may never again precisely coincide to generate the same effect. A competent master or other conning officer will explain his maneuvering orders with respect to these factors.

b. Joint Survey:

(1) While the foregoing are essential with respect to liability, the prompt joint damage survey is equally fundamental to any agreement as to the physical items of damage and consequent repair costs. The courts "frown" upon *ex parte* surveys and some courts do not allow fees for such surveys as an item of damages. Incidentally, classification survey fees are routinely allowable as an item of damages. Such surveys determine the seaworthiness of a vessel after casualty, important information for vessel owners, underwriters and shippers or consignees of cargo.

(2) A delayed joint survey may be as futile as an *ex parte* survey. Old damage becomes obscure and may be confused with other damage. All parties having a possible interest in the casualty should be invited to the joint survey. In addition to the various owners or agents of the property involved, i.e., vessels, cargo when damaged, and shore structures, third parties such as vessels which may have embarrassed the maneuvers of the vessels directly involved should be invited to attend joint surveys. At the outset of an investigation, it may be difficult to ascertain who will ultimately pay for a loss.

c. Statements by Witnesses. Although not of the preeminence of the first two above "musts", the interrogation of witnesses and the obtaining of signed statements when possible rank as a close third requirement in conducting a marine casualty investigation. A general description of the incident by the marine casualty investigating officer constitutes a useful summary but should not be in lieu of the statement of witnesses except in cases of necessity. The absence of witnesses or their refusal to be interrogated or to give a signed statement, a privilege which they may exercise, may constitute such necessity. Such fact should be in the record. In these cases heresay evidence, together with the investigating officer's opinion and conclusion, may afford the basis for a determination by the settling authority.

d. Drawings or Sketches. A fourth essential in completing a report of a marine casualty investigation is an oriented drawing or sketch, not necessarily to scale, of the area. An oriented sketch, showing as a minimum north as the upper or top of the page, may readily depict the heading of vessels, the longitudinal axis of shore structures, the location of buoys or other aids to navigation, position of third party vessels, the set, drift, and stage of the tide, and the direction and velocity of the wind. All of these factors assist the authority having settlement responsibility to determine whether a collision could have prevented and, in fact, which vessel or vessels were at fault.

e. Rules and Regulations. A fifth essential in reporting a marine casualty, particularly in foreign waters, is the furnishing of pertinent statutory law, rules of navigation, including any local regulations and established customs which may be contrary to, or appear to be in conflict with, the general rules. A violation of a written rule resulting in an incident of damage is evidence of *prima facie* fault and is difficult to rebut. Any such violation, however insignificant it may appear, should be noted. The rules of the road routinely state which vessel is "burdened", the other being "privileged"; or the rare case when both are under a duty to take affirmative action as when vessels are meeting end-on, or nearly so, thus involving risk of collision. A competent lookout is so necessary that a defective one is a major fault resulting in *prima facie* liability.

f. Physical Facts. A sixth and final factor to be considered in investigating and reporting a marine casualty in ascertaining indisputable physical facts, alluded to above. These facts are frequently overlooked in reliance upon testimony which, at best, is circumscribed by memory, ability to estimate, to perceive and to describe what has been seen; and which, at worst, is subject to prejudice and falsification. Established physical facts are irrefutable and may show error or accuracy in written or oral evidence. As an extreme example, an indent in the side of a vessel 15 feet above the waterline could not have been caused by the corner of a barge having a freeboard of only 6 feet, in the absence of some explanatory circumstance. The speed of a vessel may be conclusively established by the time and distance of her run. The damaged condition of a vessel may be good evidence of the force and angle of collision. Physical facts may show the impossibility of an alleged maneuver, as well as the impossibility of damage.

3. Conclusion: This resume is not intended to exhaust the subject of investigating and reporting marine casualties. Indeed, where a minor claim, reasonably estimated as less than $500.00 is involved, much of the detail suggested above may be omitted. On the other hand, investigating and reporting a potentially large claim would require all of the above and no doubt more as the facts of the case unravel.

PROCUREMENT LEGAL SERVICE

The following items were prepared by the Procurement Law Division, TJAGSA

Formal Advertised Procurements — District Court rejects GAO opinion; enjoins award. Northeast Construction Co., v. Romney, DCDC, No. 1163-71, June 21, 1971.

The plaintiff in this case was a bidder on a HUD contract. The IFB required that bidders indicate on the bid form what percentage of his work force would be filled by members of designated minority groups. Also included in the IFB were designated minimum percentages of minority employment in order for a bidder to be eligible for award. The plaintiff failed to designate what percentage of his work force would be from minority groups but signed the bid and the appendix which asked for the percentage designations.

The Government's contracting officer rejected the plaintiff's bid as being nonresponsive and awarded the contract to the second low bidder. Plaintiff protested to the Comptroller General who concurred in the decision of the contracting officer (B-172581, 50 Comp. Gen. —— [1971]). The plaintiff then brought this action in the District Court for the District of Columbia.

The Court disagreed with the GAO and the contracting officer and found that the irregularity (failing to specify percentages of minority employment) was minor. The Court felt that the contractor was legally bound to employ the stated minimum and that no competitive advantage could accrue by allowing him to so state after opening of his bid. The Court then issued a preliminary injunction enjoining award to the second low bidder as work had not commenced under the contract.

COMMENT: The decision of the District Court is of great importance to the procurement attorney especially since it results in an injunction against award. The GAO, in its opinion, felt that it could find no basis by which the plaintiff could be legally bound to the stated minimums and that the failure to submit goals for minority employment was a material deviation from the IFB requirements and thereby precluded award to the plaintiff. The GAO opinion was apparently rendered after a careful review of the facts in the case. The District Court opinion is therefore questionable in view of the revised opinion of the US Circuit Court of Appeals in the *Schoonmaker* case. (*Schoonmaker v. Resor,* USCA, DC, 23 June 1971). In *Schoonmaker* the Army had acquiesced in a GAO opinion and had denied award on the contractor. The District Court for D.C. found the denial of the award to be arbitrary and capricious and overturned the Army's decision. The Circuit Court originally ruled against *Schoonmaker* in that the GAO opinion was not arbitrary or capricious (USCA, DC, 5 March 1971). In its rehearing the Court further finds that the Army's section in acceding to the GAO view was not arbitrary or capricious either even though the Army may disagree with the GAO. It is therefore arguable that, applying the *Schoonmaker* standard to the *Northeast Construction Co.* case, the injunction should not have been issued. It would be difficult to say that both the GAO and HUD were arbitrary and capricious in denying award to the plaintiff in view of the long standing rules on responsiveness of bids.

Bid Protests — Comp. Gen. review of District Court decision.
Comp. Gen., Ms. B-171782, July 19, 1971.

In this case the Comptroller General was asked to rule on a protest filed by National Cash Register (NCR) regarding a Department of Education contract. NCR had, simultaneously with filing the protest, requested an injunction in the District Court of the District of Columbia.

The protest and the action in the District Court asserted that the Office of Education

should not have awarded a contract to Leasco Corp. in that improper evaluation criteria were used; the procurement should have been conducted by formal advertising; and the Office of Education violated its own procurement regulations in several instances. The Judge for the district court found that NCR had not shown a "flagrant disregard" of the procurement rules by the Office of Education and denied NCR's request for an injunction and since injunction relief was NCR's sole prayer, the Judge dismissed the complaint *sua sponte.*

In an appearance before the GAO, Leasco's attorneys asserted that the Judge's actions were *res judicata* on the merits of NCR's claim. GAO concurs with Leasco and states that the dismissal of the complaint operates as a full adjudication upon the merits which is conclusive not only as to the matters which were decided, but also as to all matters which might have been decided in the original action.

COMMENT: The decision by the GAO emphasizes that the Court had made a determination on the merits of NCR's claim. This will not always be the case since a hearing on a preliminary injunction normally will not preclude further evaluation of the merits. However, here the Judge dismissed stating that, "as a matter of law this case is not an appropriate case for an injunction, even if all of plaintiff's allegations are accepted as true."

The instant GAO decision to treat the District Court ruling as *res judicata* on the merits further indicates that the GAO role in the procurement process is significantly reduced once a proposed award reaches the courts. Although in at least one case, *Page Communications v. Resor,* DC DC, 4 Dec 70, an injunction was issued pending a GAO ruling on the merits. In *ITT v. Seamans,* DC DC, June 25, 1971, the GAO sought to intervene in a case contesting an Air Force award of a contract in accordance with a GAO opinion. The Court there found that the GAO had no legal interest in the proceedings and denied their motion to intervene. The denial was supported by the Justice Department which asserted that GAO decisions are advisory only and cannot directly interfere in an executive agency's contracting function.

Formal advertising — Responsiveness — failure to return all pages of IFB. Comp. Gen., Ms B-172183, 6/29/71.

The bidder in this case had failed to return all pages of the IFB with his bid. The pages deleted covered most of the terms and conditions of the proposed award. The bidder had returned the first page of the IFB which provided that "subject to the terms and conditions herein, the undersigned offers to lease." The bid was rejected as nonresponsive even though the bidder asserted that the "subject to" language incorporated the terms and conditions by reference.

The GAO agreed with the contracting officer that the bid was nonresponsive. It pointed out that the key issue was the meaning of the words quoted above. The GAO stated, "We believe there is a substantial question as to whether 'herein' refers to the provisions of the solicitation as issued or to the provisions returned with the bid. Thus, we find no clear indication in the language of the bid that [the bidder] intended to be bound by all of the material provisions of the solicitation. When a bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, we have consistently followed the rule that the bidder is not permitted to explain his intended meaning after bid opening."

COMMENT: The above decision depends upon the language of the IFB. Other GAO opinions have found the failure to return pages of an IFB not be fatal to the bid where the language of the IFB clearly indicates an intention to be bound. Thus language where the bidder states he agrees to be bound by all substantive terms and conditions of the solicitation in any resultant contract would enable a bidder to be found responsive even though he had not returned certain IFB pages. B-170044, October 15, 1970; 49 Comp. Gen. 289 (1969).

A bid may also be found responsive if the portions of the IFB which are not returned are insignificant portions of the proposed award.

Responsibility — Referral to SBA
Comp. Gen. Ms. B-171622 (13 May 1971).

ASPR 1.705-3 (b) requires that whenever a contracting officer has determined a bidding concern to be nonresponsible as to capacity or credit, the matter shall be referred to the SBA where the proposed award is more than $10,000. In the subject case, the contract was a requirements contract for oil tanks. The Government guaranteed that it would buy a minimum of 14 such tanks and it was estimated that 48 would be purchased. The protesting firm's bid for the minimum quantity was $9996.00. The contracting officer found him to be nonresponsible and did not refer the matter to the SBA. The bidder protested on the basis that the matter should have been referred to the SBA as the price of the estimated quantity would be well in excess of the $10,000 threshold set forth in the ASPR.

The Comp. Gen. agreed with the contractor emphasizing that bids were to be evaluated on the estimated quantities; the pre-award survey was conducted with the estimated quantities as a base; and ASPR requires estimated quantities to be as realistic and accurate as possible. The Comptroller notes that evaluation of the SBA threshold at the minimum level is inconsistent with the Government's obligation to purchase all of its needs from the contractor even if they exceed the minimum.

COMMENT: This case illustrates another of the difficulties encountered in the use of requirements contracts. (See cases of interest — Procurement Law in last month's issue of the Army Lawyer.) The procurement legal advisor must not only review minimum requirements but should be wary of actions which have the *appearance* of attempting to circumvent the requirements of the regulations as in this case.

Socio-Economic Policies — executive order issued pursuant to Clean Air Act.
Executive Order 11602, 29 June 1971, 36 Fed. Reg. 12475.

The President has issued an executive order pursuant to Sec. 306 of the Clean Air Act (42 USC 1857 et seq.) requiring all Government contracting agencies to adhere to the Act's policy and purpose. The order authorizes the Environmental Protection Agency (EPA) Administrator to list facilities which have given rise to a conviction under the act. Government agencies are precluded from entering into any contract for the procurement of goods, materials or services at such a facility and further requires that all Government contracts contain a clause directing compliance with the Act and standards issued pursuant thereto.

COMMENT: The original draft of the Executive Order was vigorously protested by the ABA Public Contract Law Section as imposing an unreasonable burden on Government Contracting. The final order deleted some of the more objectionable provisions as seen by the ABA.

The Labor Department has also recently issued guidelines affecting Government contractors in the implementation of the Department's equal employment opportunity compliance program in the construction industry. The memorandum of John L. Wilks, Director of the Office of Federal Contract Compliance, dated 7 June 1971, sets forth a two step program where a compliance officer will first analyze personnel policies of prime and sub-contractors to isolate possible problems and will then conduct on-site visits to ascertain whether there has been compliance with the standards of the agency. The existence of continued uncorrected deficiencies will result in a hearing and may lead to contract cancellation and debarment.

TAXES — Price increase allowed for increase in subcontract costs.
HEGEMAN-HARRIS & COMPANY, INC. v. U.S. Ct. Cl. (April 16, 1971)

The contractor in this case had contracted to build a Federal Office Building in Albuquerque, New Mexico. The contract was fixed price and contained the standard "Federal, State and Local Taxes" clause.

Subsequent to the award of the contract, New Mexico increased its gross receipts tax and its sales and use taxes. The result of the tax increase was to increase costs for the contractor and his substantial number of subcontractors. The contractor sought adjustment of price under the taxes clause. The contracting officer authorized increased price resulting from taxes imposed directly on the prime but disallowed those resulting from increase taxes on subcontractors. In so doing the contracting officer relied on the phrase "levied on or measured by the contract or the sales price of the services or completed supplies furnished under this contract." The Contracting Officer, with the backing of the Comptroller General opinion in B-156701, 44 Comp. Gen. 816 (1965) claimed that the tax clause applied only to taxes on the completed project and not to materials incorporated into the project.

The Court held that the Contractor was entitled to price adjustments resulting from increases in price of subcontracts, provided the subcontract was entered into after the effective date of the tax increase. The Court looked to the words "bear the burden" found in the clause and concluded that if they are to have any meaning at all they must include, the tax increases involved here. The Court rejected the above cited Comp. Gen. opinion as not binding upon them and stated that the Comptroller had not analyzed the clause.

The Court also discussed the problems created by use of the taxes clause in a construction contract since it was designed for use in supply contracts. The Court reasoned that you must interpret the clause as a reasonable and prudent construction contractor would interpret. In this case a construction contractor would place a different meaning on completed supplies than would a supply contractor. In construction contracts the court found, contractors treated the finished building as a "completed supply" and also such items as fixtures, glass, cements, etc. To hold otherwise, the Court states, " . . . [T]he clause would have little meaning and would simply be a trap for the unwary contractor, luring him to depend on escalation rather than making suitable provisions in the bid price."

PERSONNEL ACTIONS

Personnel actions are provided by The Personnel, Plans and Training Office, OTJAG.

1. Commendations

Often officers of the Corps and civilian attorneys are awarded decorations or receive letters of appreciation or commendation for work well done. Copies of such orders and/or letters should be sent to the Chief, Personnel, Plans and Training Office, OTJAG, so that a copy of the orders or letters may be placed in the branch and TAG 201 files.

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

RETIRED 31 July 1971

COL FREEMAN, Wilson

RETIRED 1 August 1971

LTC MURRAY, Ralph E.

RETIRING 31 August 1971

LTC STOKER, James D.

3. PROMOTIONS. Congratulations to the following officers and warrant officers who will be promoted on the dates indicated.

COL HALL, Rupert P.	13 August 1971	CW3 BASTILE, Wilfred N.	13 August 1971
CW3 YOUNG, Seburn V.	12 August 1971	CW3 KANE, Roger C.	16 August 1971
CW3 JUST, Dale F.	13 August 1971	CW3 JOHNSON, Ole M.	27 August 1971

4. ORDERS REQUESTED AS INDICATED.

NAME	*FROM*	*TO*	*APPROX. DATE*
	COLONELS		
AMMERMAN, Edwin F.	Hq, 5th USA	Med Cen, BAMC	Jul 71
CARNEY, Clement E.	Hq USARYIS	USA Sch Tng Cn Ft Gordon	Nov 71
CLAUSEN, Hugh J.	SAOSA	OTJAG	Aug 71
DORT, Dean R.	Hq, 6th USA	Hq, USARPAC, Hawaii	Sep 71
REESE, Thomas H.	OTJAG	Hq, 6th USA	Sep 71
	LIEUTENANT COLONELS		
CLAUSE, James D.	CDC, Ft Belvoir	USA Jud	Sep 71
PASSAMENECK, David C.	USA CID Agy	DCSPER	Aug 71
MITTELSTAEDT, Robert N.	Vietnam	Hq, USARYIS	Aug 71
MOUNTS, James A., Jr.	DCSPER	OTJAG	Aug 71
RYKER, George C.	OTJAG	OCLL	Aug 71
	MAJORS		
CHUCALA, Steven	Ft Belvoir-EN Cen	USA CID Agy	Aug 71
KILE, Daniel A.	Hq, MDW	Stu Det, MDW	Sep 71
NAUGHTON, John F.	Stu Det 5th Army	Dir Mil Supt, Pentagon	Aug 71
PLATT, Edgar C.	OTJAG	Aberdeen, PG	Aug 71
ROGERS, Jack D.	Stu Det, MDW	S-F TJAGSA	Jul 71
WILLIAMS, Jack H.	OTJAG	USARV	Aug 71
	CAPTAINS		
ARONICA, Joseph J.	USARSUPTHAI	USA Jud	Oct 71
BERMAN, Fred J.	XVIII Abn Cps, Ft Bragg	OTJAG	Aug 71
FITZMORRIS, John D.	OTJAG	USATCI Ft Polk	Sep 71
FOLAWN, John S.	Ft Belvoir-EN Cen	USATCI Ft Lewis	Aug 71
GARDNER, Benjamin	USA Berlin	USA Jud w/sta Germany	Aug 71
GOCKE, James W.	USAG Ft Riley	Inst Path, WRAMC	Aug 71
LAZARUS, Paul D.	USA Jud	USA Jud w/sta Ft Devens	Aug 71
MADRID, Jay J.	Europe	1st Cav Div Ft Hood	Sep 71
MARON, Andrew W.	Europe	Stu Det, 6th USA	Aug 71
MASSEY, John M.	1st Amd Div, Ft Hood	OTJAG	Sep 71
OLEINEWSKI, Walter	USATC Ft Campbell	Inst Path, WRAMC	Aug 71
SPROULL, John F.	Vietnam	USAG Ft Carson	Nov 71
WAGNER, Lawrence I.	USATC Ft Campbell	USA Jud	Nov 71
WATTS, Theodore H.	ADC Ft Bliss	XVIII Abn Cps Ft Bragg	Sep 71
	WARRANT OFFICERS		
TRAVIS, Harry B.	USATC Ft Campbell	Stu Det, 3rd USA	Sep 71

5. We are happy to welcome Colonel Virgil McElroy back to the Corps, after the absence of three years. He is assigned as a member of the U.S. Court of Military Review.

6. Voluntary recall to active duty:

CPT DEVINE, Frank E.
Hq, USA Eng Cen, Ft Belvoir
CPT O'BRIEN, Maurice J.
Hq, USAIC, Ft Benning, GA

7. NEWLY COMMISSIONED JAGC OFFICERS. The following officers recently commissioned in JAGC are assigned as indicated.

CPT FEDYNSKY, George
Hq, USATC, Ft Benning, GA

CPT KARJALA, John G.
Hq, 1st Cav Div, Ft Hood, TX

CURRENT MATERIALS OF INTEREST

Army Regulations

AR 27-4, 20 July 1971, effective 1 January 1972, Legal Services; Judge Advocate General Service Organizations, Organization, Training, Employment, and Administration. This revision supersedes AR 27-4, 9 May 1969, and reflects organizational and administrative changes within judge advocate reserve structure.

AR 37-41, 22 July 1971, effective 15 September 1971 (supersedes AR 37-41, 1 February 1971), entitled Regulations Governing the Use of Project Orders. This revision requires ordering and performing components to be separately managed and financed; allows use of project orders to finance minor construction and maintenance of real property; requires reimbursement for unfunded costs by the performing activity when ordering component is acting as an agent for a non-Government customer, or user and deletes requirement that project orders be performed when the period of availability of the appropriations for expenditure since this period was extended indefinitely under "M" accounts.

Articles

Paust, "Legal Aspects of the My Lai Incident: A Response to Professor Rubin, 50 Ore L. Rev. 138 (1971). (School of Law, University of Oregon, Eugene, Oregon 97403, $3.00)

"Collateral Investigations of Army Aircraft Accidents, U. S. Army Aviation Digest, July 1971.

Books

R. Hammer, The Court-Martial of Lieutenant Calley, Coward, McCann & Geoghegan, Inc., N.Y., 398 pp. 1971.

S. Brodsky & N. Eggleston, The Military Prison, Southern Illinois Press, Carbondale, Illinois, 197 pp., 1970.

E. Byrne, Military Law: A Handbook for the Navy and Marine Corps, U.S. Naval Institute, Annapolis, Maryland, 396 pp., 1970.