STAFF JUDGE ADVOCATE
October 1974

THE ARMY LAWYER

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1974 JAG Conference

Nearly 200 senior judge advocates gathered at Charlottesville, Virginia, during the week of October 6–10, to attend the 1974 World-Wide JAG Conference. Following registration activities and the traditional icebreaker on Sunday the 6th, Conference business began the following morning with a "bedside" address to participants from Judge Advocate General George S. Prugh, delivered by Major General Harold E. Parker, Acting The Judge Advocate General. General Parker followed those remarks with the Conference Keynote Address and Report to the Corps. Both General Prugh's and General Parker's remarks are reproduced in this issue of *The Army Lawyer*.

Brigadier General Emory M. Sneeden chaired the events of the opening day, centering on a theme of "Personnel." Colonel William S. Fulton, Jr. gave the welcoming address to conferees. Afterward, a report from the Personnel, Plans and Training Office was given by Colonel Richard J. Bednar and Lieutenant Colonel Hugh R. Overhold—that "Personnel Picture" appears elsewhere in this issue. Next followed a presentation on Assignment and Promotion of Enlisted Personnel by Major James E. Clifton and Master Sergeant Patrick D. Worrall of Personnel Branch, Enlisted Personnel Directorate, MILPERCEN. The morning session ended with a panel presentation by General Sneeden, Colonel Bednar and Lieutenant Colonel Overholt, on "Officer Promotion and Career Development."

On Monday afternoon, conferees attended one of five available workshops: Developments and Procurement co-chaired by Colonel Joseph VanCleve and Colonel Cecil T. Lakes; Constitutional Considerations in Military Administrative Actions, chaired by Major Dennis M. Corrigan; Extraterritorial Jurisdiction of the Proposed Federal Criminal Code, co-chaired by Lieutenant Colonel George C. Russell, Jr., and Major James J. McGowan; the Army Environmental Program, chaired by Captain Thomas M. Strassburg; and the Military Judges Meeting, chaired by General Sneeden. Following the workshop sessions, interested participants were treated to the first of three guided afternoon tours of the new and nearly-completed JAG School complex. The Conference banquet was held that evening with the Honorable Martin R. Hoffmann, General Counsel, Department of Defense, as the keynote speaker.

Brigadier General Lawrence H. Williams opened and chaired the Tuesday session, on "Responsibilities Old and New." Major Robert H. McNeil II, reported on legal assistance. Colonel James E. Macklin, Jr., noted the status of criminal law activities and Mr. Waldemar Solf gave an update on international affairs. The Conference was then addressed by Mr. Ben B. Beeson, Director of Civilian Personnel, Department of the Army, on "Legal Support for the Civilian Personnel Officer." A two-part presentation on administrative eliminations also highlighted the day's activities: "The Training Discharge Program" by Major Carl E. Bacon, Personnel Staff Officer DCSPER, TRADOC; and a discussion of The Expeditious Discharge Program by Lieutenant Colonel John R. Thornock. The morning was closed with an address on "Quality in the Volunteer Army," by Brigadier General Alexander M. Weyand, Assistant Commander, US Army Recruiting Command. General Weyand's remarks are reproduced in this issue of *The Army Lawyer*. Other activities rounding out the program on October 8th, included reports to the Corps on: administrative law, delivered by Colonel Joseph N. Tenhet, Jr., the US Army Judiciary, by Colonel Victor A. DiFiori and Lieutenant Colonel Ronald M. Holdaway; litigation problem areas, noted by Colonel William H. Neinast; and The Captains' Conference, given by Captain David A. Schlueter. Tuesday's late afternoon activities were then highlighted by a gala picnic at one of Charlottesville's city parks.

With a theme of "Streamlining Support," the program for Wednesday, October 9th, was

The Army Lawyer

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chaired by Brigadier General Wilton B. Persons, Jr. After General Persons' own progress report from USAREUR, conferees heard from Captain Donald A. Deline on the Training and Use of Lawyers' Assistants; Captain Royal H. Daniel III gave a presentation on Automatic Date Processing Support for the Corps; and Lieutenant Colonel Rose L. Volino, Chief, LITE Division, Executive Services, OTJAG, USAF, spoke on "Legal Research Through Electronics." The morning session ended with a panal presentation on "Video and the Courtroom" conducted by: Lieutenant Colonel George G. Russell, Jr., Judge James L. McCrystal, Court of Common Pleas, Erie County, Ohio; and Mr. Lawrence B. Stone, General Manage, Video Records, Inc.

Wednesday afternoon workshops included: Overseas Staff Judge Advocate Problems, cochaired by General Persons and Colonel Gerald W. Davis; Labor-Management Relations, chaired by Lieutenant Colonel David A. Fontanella; Problems with Dependents, chaired by Major Dennis M. Corrigan; The Debt Management Program, chaired by Captain Mark E. Sullivan; and The President's Clemency Program, chaired by Colonel Arthur R. Slade. Wednesday evening found many of the conferees sporting 1920's attire at the annual Conference party—with this year's theme being "The Great Gatsby."

Brigadier General Bruce T. Coggins opened and chaired the final day's program. Dedicated to "Improving Organization and Training," the Thursday morning sessions featured a two-part discussion of SJA office organization: first, a report by Colonel Victor A. DiFiori on Defense Counsel; and a briefing on The Law Center Concept, by Lieutenant Colonel Robert S. Poydasheff. Colonel James E. Macklin, Jr., gave a progress report on the Military Magistrate's Program, and Colonel William S. Fulton, Jr., spoke on Continuing Legal Education for the Corps. A slide presentation on "Steadfast A Year Later" was also shown—Colonel Winchester Kelso, Jr., highlighting FORCOM and the CONUS Armies, and Colonel Arthur R. Slade presenting the Training and Doctrine Command. Major General Harold I. Hayward, Assistant Deputy Chief of Staff for Personnel, DA, was the final featured speaker of the Conference. Closing remarks were made by Major General Harold E. Parker.

JAG Conference Tapes

The following tapes of the 1974 JAG Conference are available from the School. Playing times in minutes are indicated. Listing is by tape number.

1. Keynote Address and Report to the Corps/ MG Harold E. Parker (32:10).
2. Personnel, Plans, and Training*/COL Richard J. Bednar, LTC Hugh R. Overhold (43:10).
3. Assignment and Promotion of Enlisted Personnel/MAJ James D. Clifton, MSG Patrick D. Worrall (33:00).
4. Officer Promotion and Career Development/ BG Emory M. Sneeden, COL Richard J. Bednar, LTC Hugh R. Overholt (50:30).
5. a. Remarks by BG Lawrence H. Williams.
   b. Legal Assistance/MAJ Robert H. McNeill II.
   c. Criminal Law*/COL James E. Macklin.
   d. International Affairs/Mr. Waldemar Solf.
   Total Running Time of Tape—61:50.
6. a. Legal Support for the Civilian Personnel Officer/Mr. Ben B. Beeson.
   b. Administrative Law/COL Joseph N. Tehnet, Jr.
   Total Running Time of Tape—58:00.
7. Administrative Eliminations
   a. The Training Discharge Program*/MAJ Carl E. Bacon.
   b. The Expeditious Discharge Program*/LTC John Thornock.
   Total Running Time of Tape—38:00.
8. Quality in the Volunteer Army*/BG Alexander M. Weyand (33:00).
9. The US Army Judiciary/COL Victor A. DeFiori (38:30).
10. a. Litigation Problem Areas/COL William A. Neinast.
    b. The Captains' Conference/CPT David A. Schleuter.
    Total Running Time of Tape—45:25.
11. a. Progress Report from USAREUR*/BG Wilton B. Persons, Jr.
    b. Training and Use of Lawyers' Assistants/ CPT Donald A. Deline.
    Total Running Time of Tape—60:00.
12. a. ADP Support for the Corps*/CPT Royal Daniel III.
    b. Legal Research Through Electronics/COL Rose L. Volino.
    Total Running Time of Tape—59:00.
13. Video in the Courtroom, Part I/LTC George G. Russell, Jr., Judge James L. McCrystal, Mr. Lawrence B. Stone (62:10).
14. Video in the Courtroom, Part II (27:00).
17. a. Remarks by BG Edmund Montgomery.
    b. SJA Office Organization.
    Defense Counsel/COL Victor A. DeFiori.
    Law Centers*/LTC Robert S. Poydasheff.
    c. Military Magistrates/COL James D. Macklin.
    Total Running Time of Tape—60:00.
18. Steadfast A Year Later
    FORSCOM and the CONUS Armies*/COL Winchester Kelso.
    Training and Doctrine Command*/COL Arthur R. Slade.
    Total Running Time of Tape—55:00.
19. a. Continuing Legal Education/COL William S. Fulton, Jr.
    b. Address/MG Harold I. Hayward.
    Total Running Time of Tapes—55:00.
20. Closing Remarks/MG Harold E. Parker (27:00).

*Contains some video material in presentation.

Format. The aforenoted presentations are available in three modes of presentation: ¾ inch video cassette, ¼ inch audio-tape reel and standard audio cassettes. Requesters should note, however, that certain presentations did contain accompanying video (see footnote above).

Address for Requesting: Audio Visual Division, Academic Department, The Judge Advocate General's School, US Army, Charlottesville, Virginia 22901.

Loan Period. These tapes, when available, may be borrowed for a maximum period of 14 days. However, if blank tape stock is forwarded to this office with a request for material, dubs will be provided. In this manner, the requesting office will have the tape on hand for future use.

TJAG's "Bedside" Conference Address

Due to his convalescence from extensive hip surgery, Major General George S. Prugh, The Judge Advocate General, United States Army, was regrettably unable to appear at the 1974 JAG Conference. However, those in attendance signed a massive "get well poster" for our bedridden TJAG and heard the following message from General Prugh delivered by Major General Harold E. Parker, Acting TJAG. (As of this writing, General Prugh is back "on his feet" and feeling fine.)

GREETINGS FROM MAJOR GENERAL PRUGH
to
THE JUDGE ADVOCATE GENERAL'S
CONFERENCE
6-10 October 1974

One of the most difficult decisions of my life was the one which I knew would result in my missing this Worldwide SJA Conference with you. The agenda is certainly one of the most interesting we've ever had. And I know that the enthusiasm and professional skill you bring to the Conference will set it apart as simply a superb affair, not to be missed by any serious military lawyer.

But even beyond all that, I am particularly disturbed because I miss this Conference. *The* Conference has always meant to me an emotional experience, warmed by long years of fraternal association and enlivened by the personalities and convivialities of comrades who have walked the same paths of Army service.

It is probably for the best that this last Conference during my term should find me away, for otherwise you might be subjected to the sight of a general overwhelmed by the emotions of the occasion and presenting a quite unmanly, although sincere, spectacle of an old gaffer whose heart bursts with pride and affection for all of his Judge Advocate colleagues and the chance to have spent his years of service in their company. So, from the sanctuary of Walter Reed Army Medical Center I send my warmest good wishes, not only for this Conference, an assured success, but for the year to come and your service to our great client, the United States Army.

Acting TJAG's Address

These remarks were excerpted from the opening and closing remarks of Major General Harold E. Parker, Acting The Judge Advocate General, at the 1974 World-Wide Judge Advocate General's Conference.

Our conference theme this year is "Improving the Delivery of Legal Services in a Period of Constrained Resources." It is a long way around to say, "Do the Same or More With Less." And that is certainly a fitting theme for this time in our country and this world. Since our last conference there have been some traumatic changes in this country and our political scene. We have experienced a real downturn in the economy. We have seen the size of the Army diminished somewhat, although not dramatically. And we all know that we are in for a period of belt-tightening both in our personal and public affairs. But it is the public affairs which we will address today and through this Conference. We designed this theme to talk about ways to do a better job and still not use up more of our precious resources. Now the commander needs his lawyer more than he ever has, because the operations of the Army get more and more complex all the time. As I said to a recent group of newly-nominated brigadier generals: the commander should not let his judge advocate run his command—but neither should he try to run his command *without* his judge advocate. The commander *needs* his lawyer.

In spite of its restricted resources, the Army has set itself a course of reaching a 16-division force as rapidly as possible without increasing its total manpower levels. This means the JAG Corps will have to also plan to provide the legal services for that kind of a force. To keep a step ahead in the delivery of legal services it is important that we look to improve management techniques, seek developments in electronics, and any other useful innovation.

In addition to the political and economic changes in the past year, within our own arena there have been a number of very interesting developments. The *Levy v. Parker* case has, to a considerable extent, settled the substantive law in an area that had been of great concern to us—Articles 133 and 134. We should now be able to go forward for a considerable period of time without a serious outside challenge to that substantive law. This does not mean that we should necessarily stand pat—that we should

not consider legislation making individual offenses out of the conglomerate which is now Article 134. But it does mean that we do not have to move in those directions on a crash basis. We have been concerned—and still are—about the attitude that Congress might take toward the UCMJ were we to seek new legislation. We have been concerned that if we were to seek legislation of the kind that would be considered useful by the military lawyers, we might find that other people had other ideas. And as you know, we have some constant critics—and friends—both in Congress and the general public who have ideas for innovations which are not exactly the ones we would like. So while the *Levy* case has settled the dust for a while in one area of our substantive law, it has not, I am sure, put the question finally to rest.

Our own Court of Military Appeals has decided some cases of significance: the *Ruiz* case, which has resulted in the suspension of the mandatory urinalysis program, was one such case. There have been some others, particularly *Dunlap v. Convening Authority*, which have put some problems before us in the area of procedures—again, putting a great premium on being able to do our work efficiently and within a reasonable period of time.

Also during the year we have at least initiated a couple of programs which will potentially bear fruit for the future. We have seen the beginning of the Senior Defense Counsel Program—although it is still on a rather informal basis and not a highly structured thing. But we have the beginnings of a setup for the delivery of our defense services in a way which is somewhat separated from the SJA and the prosecutor. Of course, the alternative might have been to go full-bore into the separate defense corps. We discussed that last year. I think you know where we stand on that issue as far as the Judge Advocate General's office is concerned—and that is, we are simply not staffed to handle a complete new defense structure. However, the Senior Defense Counsel Program is, at least, a gesture in that direction.

In CONUS we have also quite recently seen the first introduction—outside of a pilot study—of a magistrate's program. This is one in which General Prugh is very interested. He is much impressed with the value of the program as it has been used in Europe. He sees it not only as a plus for public relations, but a program truly of benefit to persons who are incarcerated in pretrial confinement. General Prugh also sees our program as a beginning of a larger plan involving a group of judges or junior judges who would serve as magistrates and perform not just the oversight of pretrial confinement matters, but many other functions such as Article 32 investigations, the issuance of search warrants and other vital functions. General Prugh has a great deal of interest in this program and he is very desirous of seeing it well received in CONUS.

Turning to what we have in front of us, first we have to consider on equality with our other problems—and some of us would feel a little greater—the matter of legal assistance. As we all know, about 95 percent of the personnel in the Army never get into any kind of trouble. We owe these individuals the kind of personal legal support and services that we can say is truly professional. I know that there is a lot of frustration still in this area. I have talked to judge advocates in the field. One major at a large installation recently said he was disillusioned. He was the only judge advocate at that installation who was doing legal assistance. And he told me, "You know, I get all those clients every day and I can't do a proper job for any of them—I'm just not able to carry out the Extended Legal Assistance Program." I am afraid this has happened in some other places. I talked about this at the end of last year's Conference, trying to impress upon the leadership of the Corps the importance of providing legal service for "the good guys," even at the expense of cutting down on some of our courts-martial. I am sorry to report to you that that message, if received, has not been implemented. As I look at the statistics of courts-martial received per month in the Judiciary, I see that the average number of cases (GCM and BCD-Specials) in FY 1974 came out to be about 270 per month. When I look at the cases tried, based on the judges' reports, I find that they continue to try this same large number of cases in the field. Now, as I mentioned, this is an era where we are not going to have unlimited resources. The only way in which we can deal with this—and the way which is traditional in a period of restricted resources—is through the establishment of priorities. If we cannot persuade the responsible commanders that their good soldiers deserve the amount of legal resources necessary to provide that legal assistance, I do not think there is anyone else who is going to try. You are the only ones who can make the commanders see

what I think is the obvious in the appropriate allocation of resources—even if it means restraining yourself on the trial of some cases. And believe me, not every case that has been tried in the field needed to be tried. Not every specification that has been charged needed to be charged. When I hear about cases in which 113 specifications of bad checks are referred to trial, I get heartburn. Can you imagine? Think about your jurisdiction. Think about your own clerks and their capabilities—and typists and their capabilities—and counsel and their capabilities. How would you handle 113 specifications of bad checks in one case? In another case I know of, we were unable to show adequate cause for the delay in the preparation of the record. So we received an order from the Court of Military Appeals directing completion of the record and of convening authority action by a certain time. The order was justified, because the case was unconscionably slow in production—when I checked on it to see what was wrong, I found it was a case with 79 specifications.

If you gentlemen cannot convince your convening authorities that: (1) there has to be an allocation of resources that will take care of "the good guys," and (2) only those cases which you have the capability of trying and producing the record within a reasonable length of time can be tried, we are in for a lot more trouble. We do not possess an unlimited capacity to try soldiers by court-martial. We do not need it, and we certainly do not have it. And I hold us collectively responsible for making that crystal-clear to our commanders.

So when it comes to setting priorities, every one of you, to the extent you can, should start with those affirmative programs for "the good guy." You should slice the resources off the top for those personnel. That would be the best way to go about it. What is left should go toward those other things such as trials by courts-martial. This is a tough nut to handle because it is not in our hands. I freely admit that the staff judge advocates cannot achieve this by themselves. We have been told by some SJA's that "until you get something in command channels, we have gone about as far as we can." That problem has now been confronted. By now, your commanding generals should have received the following communication from Department of the Army:

> Subject: Review of Court-Martial Cases
>
> The Army's ability to provide free legal services is an important benefit to service members. Prompt assistance with personal legal problems and handling of claims boost morale and help prevent disciplinary problems or loss of soldier effectiveness. Action should be taken to avoid reducing the availability of these morale-building legal services. In this regard, cases being considered for court-martial trial should be screened so that those which can be, are disposed of by other means, thus avoiding the unnecessary expenditure of legal resources.
>
> Screening court-martial cases is a responsibility of every commander who is authorized to refer cases to trial. Summary and special courts-martial convening authorities who do not have organic legal staff support should identify a point of contact for legal advice and seek that advice prior to referring cases to trial."

That is the strongest statement we could get from DA. I hope it will give you a little bit more leverage if, in fact, you agree with me as to the direction in which we should go.

We have received our marching orders from the Court of Military Appeals in the *Dunlap* case. We have got to get those records of trials completed and get the convening authority's action in the appropriate time, or what happens? You have wasted a very substantial slice of resources available to the command. You might just as well have never started the case.

We have had another interesting development come along recently—the President's Clemency Program. I do not believe that any of us in Army JAG or on the Army Staff can properly take credit for this program as it finally developed because, as you know, it was somewhat of a political creation. But it is a program which we hope works, and one which, as it finally developed, probably did as little violence to the ideas and concernsof the military leaders as any within the realm of possibility. We presently have one JAGC captain detailed to the President's Clemency Board, and expect that four additional lawyers may be requested from the Corps by mid-October. It is a fascinating operation, and one which we hope will eventually work to the benefit of the country and the Army. One thing, at least: it ought to do away with some of the cases I have been crying about, because we have emptied some of the Personnel

Control Facilities and there are a lot fewer people there now to go through the court-martial mill.

Another one of our affirmative programs is the claims work done in all the office supervised by the US Army Claims Service. The Corps went through a difficult period this year with a shortage of funds. We hope it will not be that way next year. We think—and the indications so far are—that, with your good management and perhaps a slight downturn in the number and value of claims, we are going to get through this year's claims work without having to suspend payment to individuals. This is certainly a prime objective. But I want to commend all who participated in this work for the great job you did during that trying period when we had to allocate funds to the various claims processing and approving authorities, and had to defer payment of some claims. I feel that this was done with a great deal of understanding and skill, and I was very pleased to see that we had no more than two or three Congressional inquiries at OTJAG level. They were answered promptly and there was no further discussion from those channels. I think you did a tremendous job in handling those matters, reflecting just another part of our service to "the good guys."

Along with claims we have had the concurrent problem of collecting money through our recovery program. When you look at our progress last year, although we went up somewhat in total amount recovered, our percentage of recoveries dropped slightly. This is obviously something we need to pursue with vigor at all of our installations, and everywhere possible. Because, as you know, the money we receive through the recovery program goes back into the claims fund for use again in the payment of claims.

I do not want to conclude these remarks without saying something a little on the positive side. A part of the trauma which this country has been through this past year has reflected badly on the legal profession. I suppose lawyers have always been somewhat subject to suspicion in our society—that which has happened recently has probably heightened some of this suspicion. I have thought about this, and the performance of some of the lawyers in the Watergate affair. It seems to me that most of the individuals involved did not *act* like lawyers. They forgot they were lawyers, and tried to apply some other standard.

We in the Judge Advocate General's Corps, above all, must stand for something—and we must know for what we stand. We must stand for professionalism, which means having our legal skills and using them both effectively and efficiently. We must stand for integrity. We must be ready to stand up and be counted. Our commanders will appreciate it—if they do not, it is *still* our responsibility. We must *not* be a rubber stamp for a convening authority, a client, or "the system." This is one of the great problems we see in reading the Watergate transcripts, where people forgot they had a profession and professional obligations. On this same theme, we must remember that we are *not* ombudsmen, because that goes too far in the other direction. There are other agencies in the military where this function is better performed. We can assist—and we always have assisted—people who have complaints or concerns, by trying to put their feet on the proper path. But we would do the Army and our Corps a disservice were we to cast ourselves in the role of correcting every mistake that occurs. We are *not* policy makers—except in our limited legal sphere and in the administration of criminal justice. At most in this area, we could call ourselves policy shapers. And we are only able to shape policy if our views are well-thought out and well-presented in a professional manner.

One thing of which George Prugh and I are very proud is the integrity which has been displayed by the Judge Advocate officers of the Army. I think our standards of professional excellence are very high—and I am certain they will continue to be so. Let us recognize our limitations—not try to be everything for everybody—and concentrate on doing our proper jobs with pride, with professionalism, with integrity.

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As I was thinking about this Conference, I remembered that in previous closing remarks made here in past years I have usually come up saying this has been "the best Conference ever." I have always meant it, and have actually thought each Conference was "the best." I tried to think how that could be true. We put a lot of intelligent effort into each of these productions, and they are always attended by alert and cooperative officers. This is so in all our Conferences. So why is it that each Conference seems

to get a little bit better? My conclusion is that this is probably because the affairs of the Army JAG Corps get more and more interesting and important. The role of the lawyer in the Army is, without doubt, increasing in importance every year. And it is my conclusion that this is reflected in the vitality of each of our annual JAG Conferences. This is why I feel that this Conference has been "the best" of the ones I have been privileged to attend in the last eight successive years.

The affairs of the JAG Corps run from Conference to Conference. General Prugh has aptly said that the annual world-wide JAG Conference really marks the end of a year with the JAG Corps, and the beginning of a new one. And this year's meeting will probably end a couple of decades, because next year's Conference will be on a whole new plane in our new TJAGSA facilities. And I hope that each of you, and many more, return to make next year's meeting even "better again" than all previous ones.

Quality in the Volunteer Army

Taken from a presentation by Brigadier General Alexander M. Weyand, Assistant Commander, US Army Recruiting Command, to the 1974 JAG Conference.

I am pleased to have the opportunity to speak to you about the US Army Recruiting Command (USAREC) and some of the things we are doing.

Mission.

USAREC has a three-fold mission—

1) Recruit for the Army.

2) Examine medically and mentally all applicants for enlistment in all the armed services.

3) Process and enlist qualified applicants into the armed services.

The last two missions are accomplished by Armed Forces Examining and Entrance Stations—called AFEES. The Army, through USAREC, operates the AFEES as executive agent for the Department of Defense.

Organization.

USAREC is almost world-wide. Our Command includes all of CONUS, Alaska, Hawaii, Guam, and Puerto Rico. The Command is divided geographically into five regions: Northeastern, Southeastern, Southwestern, Midwestern, and Western (Western includes Hawaii, Guam and Alaska. Southeastern includes Puerto Rico). The regions are commanded by full colonels, assisted by two full colonels as Deputies and a full colonel as Chief of Staff. There is a Judge Advocate at each Regional Headquarters. Each region has 11–12 Armed Forces Examining and Entrance Stations and 11–12 District Recruiting Commands (DRC) under it. The AFEES are commanded by majors and lieutenant colonels.

The DRC's are commanded by lieutenant colonels. Each DRC has several areas, each headed by a captain. Each area has a number of recruiting stations (RS), normally headed by an E-7. A RS may consist of one to 10 recruiters. The DRC commanders must have successfully commanded a battalion and graduated from C&GSC or the Armed Forces Staff College. The captain area commanders must have successfully commanded a company and completed their Advanced Course.

Enlistment Standards.

DA establishes the enlistment standards—mental, moral, medical, administrative. USAREC implements the standards. The mental standards are based on the Army Classification Battery administered to enlistment applicants. Moral standards concern the civil offense record of enlistment applicants. Medical standards are self-explanatory. Administrative standards concern such matters as minimum and maximum age, number of dependents, citizenship status, educational level.

When the term "quality" is used by Congress and DA, it usually means high school graduate (HSG) and mental categories I through III. These are the mental categories:

CAT I	93–100
CAT II	65–92
CAT III	31–64
	III A 50–60
	III B 31–49
CAT IV	10–30
	IV A 21–30
	IV B 16–20
	IV C 10–15

The figures opposite each category represent the scores derived from the Army Classification Battery administered by the AFEES to enlistment applicants.

During the period 1 Jan–30 Jun 74, USAREC was assigned quality goals based on the Congressional constraint of Mental Category IV and nonhigh school graduate enlistments. During this time, the Army's recruiting policy in terms of quality was directed towards attaining a minimum HSG rate for total nonprior service enlistments of 55 percent HSG and a maximum Mental Category IV rate of 18 percent. By the end of FY 74, the HSG rate was 55.6 percent against a minimum requirement of 55 percent, and the CAT IV rate was 17.9 percent against a maximum of 18 percent. We met the Congressional constraints.

DA developed a FY 75 and FY 76 quality plan aimed at increasing the quality of the enlisted force. At the outset of FY 75, the FY 75 quality goals were established at 58 percent HSG and 18 percent CAT IV. During the first quarter the HSG actual enlistment rate was 60.6 percent and the CAT IV actual enlistment rate was 17.2 percent. The Secretary of the Army desired to increase the quality even more when it appeared that USAREC was meeting or exceeding the quantity goals under the 1st Qtr, FY 75 quality criteria. As a result, effective 1 October 1974, more stringent controls were imposed aimed at lowering the CAT IV rate to 12 percent, increasing the intake in the higher mental categories, and barring from enlistment those individuals who have the highest dropout rate or disciplinary problems—that is, the bottom portion of CAT IV individuals and all CAT IV 17-year-old NHSG. The minimum HSG enlistment goal remained at 58 percent.

Quality Control in the Enlistment Process.

I am sure you are interested in our effort to insure only qualified applicants are enlisted. I will take you through the major processing steps.

Applicant Interview. Applicants are interviewed by the recruiter. A preliminary determination of eligibility can be made as a result of this interview. The interview includes such matters as:

a. Completion of a short questionnaire concerning medical history.

b. Questions concerning the applicant's civil offense record and disposition of all civil charges ever filed against the applicant.

c. Completion by the applicant of a written statement concerning his civil offense record.

d. Signature of the applicant on a certificate in which he states he has been advised that a check will be made with the FBI immediately after his enlistment to see if he has any previous record of arrests, convictions or juvenile court adjudications. The form also states that he understands that if he intentionally conceals or misrepresents any information regarding his record he may be subjected to disciplinary action under the Uniform Code of Military Justice or to discharge under other than honorable conditions. The recruiter must sign as a witness to the applicant's signature.

Data Verification. The recruiter verifies the applicant's age, educational qualifications and citizenship status.

Police Record Checks. The recruiter makes a check with local law enforcement agencies when the applicant alleges he has a record which appears to bar enlistment or require waiver. Also, he makes police record checks whenever he suspects the applicant has a record.

NAC on DEP Personnel. The DEP is the Army's Delayed Entry Program. Applicants can be enlisted into the Army Reserve with an active duty date up to 270 days in the future. On that AD date he is scheduled for enlistment in the RA. It is, in effect, a stash program. It is a means to "lock in" applicants who want to enter AD at a later date or who cannot obtain a school quota until some future date. The DEP permits us to "bank" future RA enlistments. If an applicant is to remain in the DEP for 60 days or more, a National Agency Check (NAC) will be initiated by the recruiter. The results may reveal a concealed record which requires waiver or is an absolute bar to enlistment.

Mental Testing. The AFEES administers the Army Classification Battery to applicants. There are several scrambled versions of the test which can be used to test a group and which minimize the successful use of a crib sheet. Every effort is made to preclude cheating. Proctors observe the applicants during testing. If the AFEES commander has reason to suspect a particular applicant did cheat during a mental test, the AFEES commander has authority to immediately administer a completely different

version of the test—the results of the first test are invalidated and the scores on the second test become the official scores. Currently, the reception stations are administering the mental test again to a selected number of enlistees to determine if the mental test scores obtained at the AFEES were valid. So far, about 95 percent are valid.

Physical Examination. The required physical examination is administered at the AFEES. Applicants must complete a detailed medical history report. During the orientation on completion of it, the applicant is warned of the penalties prescribed by federal statute for giving dishonest answers to questions on the form. He is also told that if he conceals information which might have resulted in rejection for military service and he is enlisted, then he will be subject to administrative discharge and could receive an undesirable discharge.

Determine Enlistment Eligibility. The Guidance Counselor carries a recruiter MOS. He is physically located at the AFEES although he is assigned to a District Recruiting Command. It is he who reviews the enlistment documents forwarded by the recruiter with the applicant to the AFEES and the results of the mental tests and medical examination given by the AFEES. He ascertains the options available to each applicant based on the applicant's desires and his qualifications. He is required to conduct a private interview with each applicant to insure that the applicant understands the consequence of false statements and concealed information. The Guidance Counselor must sign the form which was first reviewed and signed by the applicant at the RS, which advises the applicant about the check which will be made, after enlistment, with the FBI and of the possible consequence of false statements and concealed information concerning civil offense records.

One-on-One Interview. When the Guidance Counselor completes his processing of the applicant and the applicant is ready for enlistment, then the Guidance Counselor turns him over to the AFEES for completion of enlistment processing and actual enlistment. An AFEES officer or an NCO in the grade of E-7 or above must conduct a private interview with the applicant, called the "one-on-one" interview. The AFEES officer or NCO must go over the enlistment agreements with the applicant to insure he understands them and that no promises have been made which are not authorized by enlistment regulations. The applicant must be given an opportunity to reveal any information hitherto concealed or falsified concerning his eligibility to enlist—such as the number of dependents, his age, his civil offense record, his physical condition. He must be warned of the consequences of concealment and falsification of information concerning his eligibility. The one-on-one interviewer must sign the form which the applicant signed at the RS, which verifies that the applicant has been advised that an FBI check will be made after enlistment and has been advised he may be punished under the UCMJ or discharged with an undesirable discharge.

Understanding of Enlistment Agreement. In addition to the one-on-one interview, there must be another counselling session by the AFEES officer who is going to enlist the applicant. In this session, the enlisting officer must insure that the applicant has no misunderstanding of the enlistment documents he must sign and make sure that no improper promises have been made to the applicant.

Group Warning of Article 83, UCMJ. The enlisting officer must brief applicants just before he administers the oath of enlistment on Article 83, UCMJ, the article concerning an individual who procures his enlistment by false representation or concealment as to his enlistment qualifications.

Moral Standards for Enlistment.

Certain civil offense records disqualify applicants from enlistment but the records can be waived. Records of conviction or juvenile court adjudication can be waived. Applicants who are currently under a charge are not eligible and such record cannot be waived. Also, applicants who are released from a charge on condition that they enlist are not eligible and *this* record cannot be waived. The practice of some judges and prosecutors offering to offenders the option of joining the Army or being tried on the charge filed against them is called "go to jail or join the Army." Considerable efforts have been made by The Judge Advocate General, Secretary of the Army and our Command to stop this practice. A description of these efforts appears as an appendix to this presentation.

Moral waiver approval authorities are:

Minor Traffic Offenses	AREA CDR (CPT)
Minor Nontraffic	DRC CDR (LTC)

Misdemeanors	RRC CDR (COL)
Juvenile Felony	GENERAL OFFICER, HQ USAREC
Adult Felony	MILPERCEN

Following is a breakdown of the number and type of male moral waivers granted in FY 74:

Adult Fel	Juv Fel	Misdem. & Minor Non Traffic	Traffic	Total	Tot Enls	% of Enls
55	170	2911	778	3914	175,523	2.2

As you can see, the number of moral waivers granted, in comparison with the total enlistments, was small.

The documentation submitted in support of the moral waiver must reflect information indicating whether the applicant will be a good risk. The documentation must reflect the following information:

a. Employment record

b. School performance, if in school the previous year

c. Report of the probation/parole officer, if any

d. Nature of offense

e. Age at the time of offense

f. Mental category

g. Physical profile

Trainee Discharge Program.

Background. The Trainee Discharge Program was instituted in September 1973 to facilitate eliminating recruits lacking the aptitude, motivation, or self-discipline to become successful soldiers. Under the program, a trainee may be given an honorable discharge by his brigade-level commander at any time during his initial 179 days of service. The Army benefits in that potential problem soldiers are eliminated before leaving the training base, and the individual affected, who may be making conscientious efforts to improve but lacks the ability, is discharged without prejudice. This program recognizes that the enlistment standards set for applicants to meet do not guarantee successful soldiers. It supplements the enlistment criteria and further screens out those who would be problems to unit commanders after BCT/AIT.

The 179-day Discharge Program loss rates are:

	SEP–JAN 74 AVG	FEB–JUN 74 AVG	JUL 74
BCT	4.66	7.96	8.22
AIT	2.29	4.39	3.41
TOTAL	6.95	12.35	11.63

The loss rates by discharge for *all* causes—179-day program, unsuitable, unfit, etc. are:

	SEPT–JAN 74 AVG	FEB–JUN 74 AVG	JUL 74
BCT	9.60	13.89	13.03
AIT	5.94	8.68	7.20
TOTAL	15.54	22.57	20.23

It can be observed that about two-thirds of the discharges under the program occur in BCT, and that the discharge rate from the Trainee Discharge Program is roughly about half that of all causes.

Discharge by Category. Data relating to discharges by category of the individual supports the Army's emphasis on quality accessions. We get our data from DCSPER DA. The program average to date indicates that:

a. The non-high school graduate fall out rate is 2.2 times that of high school graduates.

b. The GED high school graduate fall out rate is 2.22 times that of the high school diploma graduate rate.

c. The mental Category IV rate is 1.67 times that of the Category I-IIIA rate.

d. The 17-year-old rate was 1.21 times that of the 18-year-old rate.

e. There is negligible difference in loss rates by race.

f. The loss rate by sex is significant. Women, across the board, fall out at a rate of 1.20 times the male rate. When restricting the comparison to like mental categories and education status (since all women enlistees are Mental Category I-III, high school graduates), the women fall out at a rate 1.60 times the male rate. DA has just noticed this difference and at present does not know the causes for a higher fall out rate.

Impact of All Administrative Discharges on Recruiting.

Administrative discharges prior to ETS do impact on recruiting. The size of the recruiting objectives assigned to USAREC by DA is, of course, affected by actual and estimated loss

rates. Data on the causes of discharge prior to termination of the enlistment period is used to identify those recruiters whose enlistees fail in significant numbers and he may be the subject of extra supervision and training to improve the quality of his prospects and enlistees.

Recruiter Malpractice.

What is it? A problem we are dealing with is one called recruiter malpractice. In USAREC, in general, this means that a recruiter deliberately effected, or attempted to effect, the enlistment of an applicant who was disqualified by:

a. Concealing information

b. Or permitting, or telling, the applicant to conceal and lie

c. Or creation of false documents

d. Or helping the applicant to achieve a qualifying score on the mental test.

Some of the common malpractices are:

Conviction/Adjudication Record—Concealed

Pending Charge—Concealed

Under Age—Forged Birth Document

Too Many Dependents—Concealed

No Parental Consent—Forged Consent

Medical Defect—Concealed

Crib Sheet for Mental Test Used by Applicant

With the emphasis on enlistment of high school graduates, there has also been some creation of false high school diplomas and GED certificates.

Response to Recruiter Malpractice Allegations. Every allegation is investigated by either a USAREC officer or the CID. There is a JA review of reports of investigation. Commanders concerned initiate UCMJ action if the legal review indicates an offense was committed, there is sufficient evidence to support UCMJ action, and the circumstances warrant UCMJ action. When there is substantial evidence of a recruiter malpractice, the recruiter is suspended from production pending disciplinary and administrative action. Regardless of whether UCMJ action is taken or not, if there is substantial evidence of a recruiter malpractice, the recruiter is reassigned from USAREC and a reclassification request is submitted to HQDA. Here is our malpractice experience from 1 January–13 September of this year:

Allegations Founded	198
Allegations Unfounded	703
Allegations Pending	438
Total Allegs. Invest.	1,339
Total Enls (1 Jan–13 Sep 74)	157,678
% of Total Allegations vs Enls	.0084
% of Founded Allegations vs Enls	.0013
Total Recruiters Involved in Founded Allegs.	133
Total Recruiters on Production	4,668
% of Total Recruiter Force Involved in Founded Allegations	2.84%

Although only about 2.8 percent of the total number of recruiters on production have been involved in substantiated recruiter malpractices, we view recruiter malpractice as very serious—so does the Secretary of the Army and the DCSPER. We expect every JA who supports USAREC units to view recruiter malpractice cases with equal seriousness. Your problem at your post and in your command may be drugs, larceny, assault and battery—our problem is mission related and affects the entire Army. Trials of our cases are accomplished by TRADOC/FORSCOM installations per support agreements with TRADOC and FORSCOM. Hence, our problems are your problems from several aspects—your office may be advising members of our Command who are facing Article 15 proceedings or a court-martial; your office may be reviewing reports of investigation and advising our commanders on the sufficiency of evidence and the nature of offenses committed; your office may be helping the commander to draft specifications for court-martial charges or language for Article 15 actions; your office may be involved in the trial of our recruiters who are charged with violations of the Code. We would like for you to communicate to your JA's in your military justice sections the seriousness of our cases and give as much priority to them as possible.

I want to assure all of you that USAREC is trying hard to enlist the quality and quantity required by Department of the Army. We want to minimize your workload in connection with military justice and administrative discharges of disciplinary problems. We want to enlist qualified, effective men and women. Recruiting is the number one mission in the Army today. If you do not believe this, ask Secretary Callaway.

APPENDIX

The "Go to Jail or Join the Army" Alternative

1. *References:*

a. Line S and accompanying note, table 2–6, AR 601–210.

b. Paragraph 4–11.1, AR 601–210.

2. *Background.* Many instances have been brought to the attention of the U.S. Army Recruiting Command (USAREC) of judges/prosecuters agreeing to dismiss or drop criminal or juvenile court charges if the offender enlists in the Army. This practice is referred to as "go to jail or join the Army." Many such instances have been publicized in local newspapers. Such publicity has generated adverse comments from members of the general public and is deemed to have an adverse effect on the Army's image. Additionally, such individuals are not motivated to be good soldiers and have a high potential to be disciplinary problems.

3. *Factual Information.* Line S, table 2–6, AR 601–210, and the accompanying note to table 2–6, preclude the enlistment of individuals who are subject to a pending criminal or juvenile court charge or who are released from such charge on the condition they enlist.

4. *Summary.* The following efforts have been made by Department of the Army and USAREC to terminate the practice of judges/prosecutors offering offenders the option of "go to jail or join the Army" and to terminate recruiters from participating in such practices.

a. Beginning in October 1971, the USAREC Legal Counsel began writing letters to individual judges, prosecutors, probation officers, and police chiefs advising them of the Army's policies covering enlistment and induction of persons who are or have been the subject of criminal or juvenile court charges. These individuals normally are brought to the attention of HQ USAREC by investigations into alleged recruiter malpractices, communications from USAREC commanders and other DA personnel, and newspaper articles.

b. The Judge Advocate General, DA, wrote a letter on or about 14 March 1972 to the Chief Justices and Attorneys General of the fifty states and to heads of selected legal organizations soliciting their assistance in terminating the practice. TJAG has written additional letters to some of the Chief Justices and Attorneys.

c. On 5 April 1972, the DCG, USAREC wrote a letter to the regional recruiting command (RRC) commanders (then called recruiting district commanders) apprising them of the problem, the efforts being made to terminate the practice, and the fact that recruiters must reject proposals that an offender be enlisted as an alternative to prosecution.

d. On 16 May 1972, the DCG/CofS, USAREC wrote a letter to the RRC commanders in which he (1) informed them of additional efforts being made by TJAG and replies TJAG had received from judges and attorneys general, and (2) directed them to remind recruiting personnel of the prohibition against enlisting persons who are the subject of criminal or juvenile court charges or who were released therefrom on the condition they enlist.

e. In August 1972, an article on the Army's moral waiver program written by the USAREC Legal Counsel was published in *Juvenile Justice*, Journal of the National Council of Juvenile Court Judges. A copy of this article was furnished to all RRC commanders on 7 September 1972. Distribution of the journal includes 1500 juvenile court judges and 1100 other persons involved in the Nation's juvenile justice system. Included in the article was a brief discussion of the Army's policy against enlisting or inducting persons who are pending criminal or juvenile court charges or who are released from such charges on condition of enlistment or induction.

f. On 28 September 1972, the DCG/CofS wrote a letter to the RRC commanders directing them to remind the recruiting force of current policy regarding processing enlistment applicants who possess a police record or who are under civil constraint.

g. On 28 November 1972, a USAREC Command Information Bulletin titled "Go to Jail or Join the Army—It's a No-No." was issued to all units in the Command. Copies were mailed direct to all of the recruiting stations.

h. On 5 December 1972, TJAG forwarded to the *Judges Journal* an article, "Go to the Army or Go to Jail—Double or Nothing," by CPT Richard K. Connor of the Administrative Law Division, OTJAG. The *Judges Journal* is a professional publication distributed to judges throughout the country. The article was published in the July 1973 issue.

i. On 5 December 1972, Mr. Froehlke, Secretary of the Army, learned that HQ USAREC had recently written to a judge in Virginia about the "Go to Jail or Join the Army" practice. Mr. Froehlke queried OCINFO, DA about this matter and indicated his interest in writing to the Virginia judge to reinforce USAREC's position. On 11 December 1972, OCINFO replied that (1) Headquarters USAREC has written to several judges in the past year about this matter; (2) USAREC Legal Counsel believes local prosecutors and defense attorneys frequently make pre-trial agreements to recommend "the Army or Jail" choice to judges; and, (3) OTJAG is convinced Army recruiters are also sometimes culpable as parties to such pre-trial agreements. OCINFO recommended that (1) TJAG's March 1972 letter (see subparagraph b above) and CPT Connor's article (see subparagraph h above) should be released to the press if the *Judges Journal* decided to publish CPT Connor's article; (2) the Secretary of the Army not write any specific judge; and (3) the subject be mentioned, where appropriate, in speeches by the Secretary of the Army and other members of the Army leadership. OCINFO advised the USAREC Legal Counsel on 15 December 1972 that the Secretary approved all the recommendations of OCINFO.

j. On 12 December 1972, HQ USAREC recommended to DA that Chapter 4, AR 601-210 be revised to include a new paragraph 4-11.1 which would clearly reflect that (1) recruiting personnel are not authorized to participate in the release of an individual from pending charges, probation, parole or other form of civil restraint in order for him to enlist in the Army, and (2) individuals subject to a pending charge or released from it to enlist or who are on conditional supervised probation/parole or conditional suspended sentence are not eligible for enlistment and therefore are not eligible for preenlistment processing to determine their mental and medical eligibility for enlistment. This recommended revision was published in Change 18 to AR 601-210, effective 1 October 1973.

k. On 27 December 1972, the CG wrote a letter to the RRC commanders concerning recent instances of the processing or enlistment of individuals who had concealed criminal records. Many of these recent erroneous or fraudulent enlistments were due to inadequate police record checks. The letter directed accomplishment of all required police record checks. Additionally, the letter again called attention to line S and the accompanying note, table 2-6, AR 601-210, which preclude the enlistment of individuals who are under juvenile or criminal charges or who are released from such charges on the condition they enlist in the Army.

l. On 12 March 1973, Cdr of USAREC apprised DCSPER, DA of (1) the possibility that a decision might be made that there would be no inductions of any registrants after 1 July 1973, even though some residual induction authority remains when general induction authority expires; and, (2) in such event, the Department of Justice and the Selective Service System might exert pressure on DA to permit the enlistment of Selective Service violators pending trial or sentence as an exception to reference 1a. Thus, the Army would be asked to enlist a specific category of law violators who have been offered the option of "go to jail or join the Army." USAREC recommended against making such exception. In May 1973, the Selective Service System issued instructions prohibiting all inductions, including violators, after 1 July 1973. As a result, the Department of Justice requested Department of Defense to authorize the enlistment of indicted draft law violators. All services advised DOD that no exception would be made to the prohibition against enlistment of individuals who are subject to a pending charge.

m. In the April 1973 issue of the *US Army Recruiting and Career Counseling Journal*, an article by the USAREC Legal Counsel was published concerning the "Go to Jail or Join the Army" option. The article pointed out that Army regulations prohibit the enlistment of persons offered this option and that recruiters who participate in the offering of such option are subject to such actions as punishment under the Uniform Code of Military Justice, adverse EER's, relief and reassignment from recruiting duty. The *Journal* is distributed by the printer direct to RRC headquarters, district recruiting commands (DRC), Armed Forces Examining and Entrance Stations and recruiting stations.

n. On 17 September 1973, the CG, USAREC wrote a letter to the RRC commanders directing them to remind all recruiting personnel that individuals who are subject to a pending charge or who are released from a pending charge are ineligible for enlistment and that they must not participate in any way with the release of an individual from a pending charge in order that he

may enlist in the Army as an alternative to further prosecution or juvenile court proceedings. Additionally, the letter required the RRC commanders to bring to the attention of all recruiting personnel the approved revision of AR 601–210 described in subparagraph j above.

o. On 1 August 1974, the Secretary of the Army sent a letter to the Attorneys General of the fifty states informing them of the success of the volunteer Army in meeting the authorized strength for FY 74, and that the Army now intends to move more forcibly into the quality personnel market to insure maximum trainability, job satisfaction, motivation and even better discipline. The Secretary noted that it is the practice of some courts to sometimes encourage their local troublemakers to "enlist in the Army or else." He solicited the help of the Attorneys General in discouraging this practice and spreading the word to all the judges in their states to make them aware of the Army's need for men and women who are true volunteers.

p. On 6 August 1974, the CG, USAREC wrote a letter to the RRC commanders (1) apprising them of the continuing problem experienced by the Army with the enlistment of individuals who have been offered the "go to jail or join the Army" alternative; (2) reiterating the provisions of AR 601–210 which preclude enlistment or processing of individuals who are under charges or have been released from charges on condition that they enlist; (3) advising them of the decision of the U.S. Court of Military Appeals on 21 June 1974 in *U.S. v Catlow*, which ruled that the enlistment of Catlow was void at its inception as it was not the product of his own volition because it was "forced" by the alternative offered him by a judge of "five years indefinite in jail" or a 3-year enlistment in the Army. The commanders were directed to (1) remind the recruiter force again and frequently of the enlistment rules in tables 2–5 and 2–6 and in paragraph 4–11.1, AR 601–210 which are applicable to individuals who are or have been the subjects of criminal and juvenile court charges, and (2) to conscientiously investigate allegations that the rules were violated, review reports of investigations, and take appropriate disciplinary action where circumstances and evidence warrant action under the Uniform Code of Military justice.

The Personnel Picture

Taken from a presentation by Lieutenant Colonel Hugh Overholt, Chief, PP&TO, OTJAG, before the 1974 Judge Advocate General's Conference.

Corps Strength. As was noted in last year's report, our O-6 strength continues to decrease. We are down some 15 from where we were then and, should we continue this trend, we could have even less on board next year. We have had many retirements in the O-6 grades since last year. Our accounting period is measured from personnel directory to personnel directory, and we find that there are 25 names missing out of that group which was in our directory last year. Hopefully, for next year, we do not predict such a loss. As for the O-5 and O-4 grades, we are up a little bit from last year—so we have made some progress there, a total of some 10 officers. Regarding our warrant officers there are some really significant improvements; we now have 61 such officers in the Corps. The number is up from 52 last year, and Dave Watts up in OTJAG certainly deserves a lot of credit for being able to convice the personnel people that we do need warrant officers. I am sure these warrant officers are much appreciated in the field. Our minority recruiting figures also indicate we are doing quite well in that area.

Our end strength given to us for FY 1975 is 1,665 officers. That sounds like a lot of officers, but our accountability procedures now include in that figure the hundred or so excess leave and fully funded personnel we have on board. So, our basic end strength for people working in the field, excluding our transient/patient/student personnel, is right around 1,530. Our tentative end strength given to us for FY 1976 is 1,608, which would be a cut of around 55 officers. As noted, this is tentative, and is based on a much larger cut in the officer population in the Army. We are talking about 102,000 officers in the Army now, but are destined over a period leading up to 1980 to drop to around 94,000. As this is programmed through, there are systematic cuts. We will reclama that, and hopefully be

JAG CORPS STRENGTH
(As of 30 September 1974)

Officers:	MG	BG	COL	LTC	MAJ	CPT	TOTAL
RA	2	4	81	90	150	214	541
Vol-Indef			1	5	14	70	90
OBV					2	883	885
Ret recal			1				1
Females			1		2	17	20
Total	2	4	84	95	168	1184	1537*
Authorized spaces	2	4	123	177	420	935	

Warrant Officers:	W4	W3	W2	W1	TOTAL
RA	2	6	5	0	13
OTRA	2	8	25	13	48
Total	4	14	30	13	61**
Authorized spaces					49
Authorized end strength FY 75					61

*MINORITIES: 31 Black - 8 Mexican-American - 5 Puerto Rican - 2 Oriental
**MINORITIES: 7 Black - 1 Puerto Rican - 2 Oriental

able to buffer the cut. We are very proud that we have been able to hold just about with our field strength where it has been.

Noncommissioned Strength. Regarding enlisted personnel, our authorizations have been going up for 71D's. As of 30 September 1974, we are authorized 1,305 71D's in the field, with an on-board status of 1,436. So we are doing good here—and the School out at Fort Benjamin Harrison is at full strength right now, turning out 71D's regularly. With this present status, I am very optimistic about our enlisted picture. As for court reporters—71E's—we are in much the same position. We are authorized 97, and have 122 on board. Also this year, the Naval Justice School is going to permit us to train 70 more court reporters, which is just about the total we are authorized to train this year. We also have five other 71E's that are in the fully funded stenotype program which starts in May 1975. They will be attending school for one year, coming out with a stenotype degree. And as we get more and more authorization for these personnel we will be able to increase our input into this program. Major Paul Ray is our PP&TO contact for any questions on enlisted personnel, and he will be happy to work with you and get you in touch with other appropriate people.

JAGC Recruiting. On the subject of recruiting, things have gone well. We were authorized to bring in 262 officers this year, that is, direct commissioned personnel. Those people were selected and "in the bank" some nine months ago. In fact, in order to make sure that we covered bar failures and other contingencies, we recruited 310 people to fill the 262 vacancies we had. Again, the desire of people to come into the Corps has been tremendous. I might add that we are getting fine people: the officers who sit on the selection boards continue to be impressed at the caliber of these personnel. Many of our new officers have also had prior service, and upon graduation from law school have returned to the military life they once enjoyed.

JAGC RECRUITING
(Less Excess Leave & Branch Transfer)
(As of 30 September 1974)

Fiscal Year	Applications	Appointments
1967	1140	532
1968	1180	206
1969	1275	333
1970	1212	360
1971	670	200
1972	409	198
1973	379	180*
1974	593	330**
1975	515	262***

*225 Appointments were required.
**350 Appointments were required.
***Procurement Authority.

A much awaited basic class has graduated this month, which will deliver some 90 people to the field. We have 109 presently scheduled for the basic class that will finish in December; 105 for

STRENGTH COMPARIOSN
(As of 30 September 1974)

Officers:	MG		BG		COL		LTC		MAJ		CPT		TOTAL	
	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974
On duty	3	2	3	4	98	84	92	95	162	$68	1068	1184	1426	1537
Authorized	3	2	3	4	125	123	209	177	434	420	742	935		
Females	0	0	0	0	1	1	0	0	2	2	7	17	10	20
Minorities	0	0	0	0	2	2	3	5	4	2	42	43	51	52

the class ending in April; and we hope to have 50 in the one graduating next June. We have had some recent problems awaiting results from the new multi-state bar exam—and this may affect enrollment in the class ending this December—but we are working on this problem and will get those captains to you as soon as possible.

Minority recruiting has always been important to us. Certainly Ken Gray and his successor, Bill Greene, deserve appreciation for their efforts in this area. In the schedule we have coming into the Corps this year 12 black lawyers and one Oriental. The picture for our total minority structure including, if you will, our women lawyers (as the DCSPER statistics often do) includes around 31 females and close to 45 black officers in the Corps this year. We are very proud of that achievement as a matter of fact.

Another strong input for us is our excess leave program. In the pure excess leave program we have 128 officers. Within the school year 1975 we will be putting 40 into the field. And into our newest program which was implemented last summer, the Fully Funded Legal Education Program, we currently have 48 officers enrolled in school. I might add that we will have two more enrolled this semester which will give us 50 officers in this program. Twenty-five of those officers were picked so we could get them in last fiscal year. Because they were already in law school we were able to pick 25 of our excess leave officers and convert them over to the fully funded program—then we had 25 new officers who were started originally.

Regarding the Fully Funded Program, the board will meet again in January of 1975 to select our people for next year. The competition for these scholarships has been tremendous: we had 300 applicants last year for the 25 positions, and that was when we got to the field somewhat late with our regulations and guidance. I predict that this year we will have double that many applicants for the program. Another thing that has been encouraging is the quality of those who have applied: we had one officer with an 800 LSAT score and several more in the 790 range.

Promotions. Probably one thing that has made us the proudest this year concerns the fact that the promotion picture has taken a definite turn toward the best. The current policy at DCSPER is to convene *a* promotion board *a* year for each grade. This should be a great help to many of our captains who waited so long for

EXCESS LEAVE OFFICERS
AND
FUNDED LEGAL EDUCATION PROGRAM

Excess Leave	MAJ	CPT	1LT	2LT	TOTAL
SY 75	1	24	7	8	40
SY 76	2	24	14	17	57
SY 77	1	8	19	3	31
TOTAL	4	56	40	28	128*

*Minorities

12 - Black - 2 - Mexican American - 1 - Oriental - 2 - Females

Funded Legal Education Program	CPT	1LT	2LT	TOTAL
SY 75	10	1		11
SY 76	10	4		14
SY 77	16	6	1	23
TOTAL	36	11	1	48*

*Minorities
3 - Black - 1 - Female

AUS PROMOTION SELECTIONS
(As of 30 September 1974)

	MAJ		LTC		COL	
	CONS	SEL	CONS	SEL	CONS	SEL
Previously	1	0	7	2	8	0
First time	30	22	17	15	6	3
Secondary	42	4	61	4	26	3
JA first time:	73%		90%		50%	
APL first time:	58%		60%		37%	
Standby Board			2	2	1	1

boards. We went all the way from 1969 up to 1973 without having a promotion board from 0–3 to 0–4. This was because of a tremendous hump in the number of captains in the Army vis-a-vis the given end strength. Now, once the number of officers per grade are determined for a year, tentative promotion rate is arrived at; a zone of consideration is set out; and they start promoting into it. Of course you have always had to have vacancies in order to promote, and for so many years there were just too many majors on board. Now they have been able to work through that (by a RIF and other things) to get some needed vacancies. So we are finally moving up through the system, and it looks like we will have a promotion board in each grade within the forseeable future. Of course, should Congress cut our money—and we have to cut back on our officer force more severely than anticipated—our promotions would be limited. This is because you have got to have the vacancies and you must stay within your force structure. Right now, however, we do plan to have a promotion board from 0–3 to 0–4 in February of 1975; from 0–4 to 0–5 in late spring or summer; and, possibly by late summer, we will have a promotion board from 0–5 to 0–6. The warrant officer promotion boards to W–3 and W–4 are scheduled for the spring of 1975.

We have also a concerned effort to participate more in the promotion process. This had been done by liaison with DCSPER and by their allowing us to have officers on promotion boards. This year we have been able to place members on five promotion boards.

As far as how we have done on promotions this year, our rate for majors as opposed to the Army Promotion Test rate is 73 percent to the APL's 58 percent; for lieutenant colonel we did fantastically well, 90 percent to 60 percent; for colonel, 50 percent to 37 percent (and the JAGC figure should really be higher because we have the standy board selections where we have done quite well).

WO AUS PROMOTION SELECTIONS
(As of 30 September 1974)

	W4		W3	
	CONS	SEL	CONS	SEL
Primary	0	0	4	4
Secondary	2	0	11	0

While there is not a lot of action in the area of warrant officer promotions, we have done quite well in the primary zone when we have gone up for consideration. We also hope to have a group of people in the Primary zone next time.

RA PROMOTION SELECTIONS
(As of 30 September 1974)

	MAJ		LTC		COL	
	CONS	SEL	CONS	SEL	CONS	SEL
Previously	3	3	0	0	17	3
First time	17	16	10	7	6	4
JA first time	94%		70%		67%	
APL first time	85%		76%		57%	

Our promotion rates from captain to major, RA, have been very good. We are a little under the Army line regarding lieutenant colonel selections, but we did not have that many in the zone. As far as the colonel selections represented, those rates reflect the "old" board action. Results from a new colonel board are expected any day now, and we are hopeful that they will equal our year's performance before other boards.

Assignments. This has been a year of concern over assignments. And this is the time of year when we are gathering up our information and facts to ascertain the wishes of everyone in the Corps to see where we are going to be next year as far as replacements and the like. The big story on future assignments will concern money. We have a lot of indications that our PCS money is going back to the same tight

APL PROMOTIONS

To	Total No.		Time in Grade			Time in Service		
	FY 73	FY 74	FY 72	FY 73	FY 74	FY 73	FY 74	FY 75 (Projected)
Col, AUS	768	524	5.5 yrs	6.1 yrs	6.6 yrs.	21.0 yrs	20.9 yrs	21.0 yrs
LTC, AUS	1671	852	5.5 yrs	6.3 yrs	7.1 yrs	14.8 yrs	15.1 yrs	15.1 yrs
Maj, AUS	962	1106	5.6 yrs	6.5 yrs	7.0 yrs	9.3 yrs	10.0 yrs	10.0 yrs

status we had a few years back. Each PCS will be scrutinized: that is, our guidance will be "make the most economical move." If there are two people equally qualified for a job, move the man who is closest to it. Fill your in-country bases with overseas returnees. Assign out of your TJAGSA training base rather than making lateral assignments.

It is fair to say that we still have some non-voluntary tours in Korea. Our policy on these assignments is well set out in our pamphlet on *Your JAG Career*. We do not have that many such tours at the field grades. In fact, the two we have that are "unaccompanied" (with the 2d Infantry Division) have always had plenty of volunteers. In the captain grades we do still find it necessary to occasionally "levy"—but not more than eight to 12 a year so far.

Service Schools. On the matter of service schools in the assignment area, selection for Command and General Staff College and the Armed Forces Staff College continues to be difficult. We have been able to hold onto our quotas for these schools (nine for C&GSC, one to AFSC), however, there are more and more deserving people desiring to go than can be chosen. In order to be as equitable as we can, our current practice is to establish zones of consideration and to make our decisions based on the files, the jobs, and the potential of the officers in view of the needs of the Corps and the Army. Our basic criteria is to select that person who is going to go to the highest level of leadership in the Judge Advocate General's Corps based on all the factors available. It is true that, occasionally due to recent assignments and the need for stability in a given job, we defer people going to C&GSC. Personnel in this category will generally be selected to go in the following year.

Graduate School. Concerning graduate schooling, the 10 available positions for graduate school are full this year. We have a variety of disciplines available for this schooling: criminal law, procurement law, international affairs, international law. Next year we are looking for an officer to go to school in labor law. We encourage all personnel to let us know if they want to go to graduate school so we can put them on our list. We will conduct a board on this matter later on in the year.

Specialty Identifiers. With encouragement from General Prugh, our Plans Office came up with a Specialty Identifier Program. The message went to the field in August, and since then we have been gathering data on these specialty identifiers. We are refining the program at this time and our hope is to be able to award these designators shortly. They will appear on the Officer Record Brief and will go into the branch file. We presently intend to suppress the skill-identifier on your Officer Record Brief, so in your official ORB (the one used before a promotion board or selection board) those identifiers will not be noted. We have high hopes for this program, and I have already seen many instances where it would be especially helpful to us in the planning for future personnel management.

Paralegals. Our Paralegal Plan, for the present, has run into a great deal of problems. For every paralegal that we would like to put in the field, DCSPER (or what amounts to DCSOPS) now wants us to give up a lawyer space in trade. The Corps does not presently consider this an equitable arrangement.

Separate Promotion List. I do want to point out that there is no change in the provision for a

GRADUATE SCHOOLING (MASTERS IN LAW)
School Year 1975

Discipline	No
Criminal Law	5
International Law	1
Procurement Law	2
Business Administration	1
Patent Law	1

School	No
George Washington	6
University of California	1
University of Michigan	1
University of Texas	1
University of Virginia	1

School Year 1976

Discipline	No
Criminal Law	5
International Law	2
Procurement Law	1
Labor Law	1
Environmental Law	1

separate promotion list in the Defense Officer Personnel Management Act. Hearings are presently being held on the DOPMS, but I do not look for them to come to any fruition within the near future. Should anything develop, the Corps will be notified.

Entry Grade of Captain. Concerning the entry grade of captain, we have been assured that until the Defense Officer Personnel Management Act does pass, we will be able to keep our 0–3 entry grade.

New Filing Equipment. I want to finally note the new equipment we have been able to put into our PP&TO office. I referred to it briefly last year, and it is now in. We have the new electronic retriever files with super magnetic recording devices on them, enabling us to rapidly retrieve files and giving us a readout on Corps manpower at any given time for any command or installation. It has been a great help to us in the assignment process, and if you ever want to know how your office stands, just give PP&TO a call.

Legal Assistance Items

From: Administrative and Civil Law Division, TJAGSA

1. Advice for Referrals.

It is frequently necessary for the Legal Assistance Officer to refer a client to civilian counsel. The Legal Assistance Officer is only required to give the client the names of at least three attorneys, para. 4(c), AR 608–50 (22 Feb 1974). However, it may be appropriate and very useful to give the clients some further advice regarding the hiring of an attorney. The client may not know what questions to ask, what type of attorney or firm to hire, the importance of preliminary fee discussions, etc.

Although this advice may be given individually by the Legal Assistance Officer each time a referral is made, the Legal Assistance Officer can save considerable time—and the client will retain the information in more accurate form—if it is prepared as a pamphlet or memo. Such a pamphlet has been prepared by Mr. Herbert S. Denenberg, Pennsylvania Insurance Commissioner, Harrisburg, Pennsylvania. The publication, though brief, succinctly covers when to get an attorney, how to select an attorney, the relevant questions to ask in hiring an attorney, and the types and meaning of different fees. The pamphlet may serve as a useful model upon which to prepare a local pamphlet designed for use in conjunction with whatever information the Legal Assistance Officer renders.

2. Articles and Publications of Interest.

Note, "The Nature and Organization of the New York Small Claims Court," 38 ALB. L. REV. 196 (1974).

National Criminal Justice Information and Statistics Service, *National Survey of Court Organization*, 1973, Pp. 261. $2.40. This report describes the existing organization of courts in the 50 states and the District of Columbia. It describes the organization, jurisdiction, judges, other judicial personnel, and other pertinent information relevant in each type of court within each state. Available from the Sup't of Documents, US Govt. Printing Office, Washington, DC 20402. (Stock No. 2700–00228) This report may be extremely valuable for a Legal Assistance Officer rendering advice regarding matters which have been instituted or shall be instituted in jurisdictions other than their home state or where stationed. Furthermore, it may be very useful to any JAG officer rendering legal assistance in a state other than that where he is admitted to practice.

National Employment Law Project, *Discrimination Claims Under Title VII of the Civil Rights Act of 1964: Procedural Chart and Guidelines for Preparation of EEOC Charges*, 1974. Free. This is a guide to the preparation of employment discrimination charges, and includes a chart outlining the relevant procedures and three copies of the EEOC form for discrimination charges. Write to the National Employment Law Project, 423 W. 118th St., New York, NY 10027.

Stanislaus County Legal Assistance, Inc., *Protecting Your Home from Creditors: The Filing of a Declaration of Homestead*, Pp. 4. Free. Available from Stanislaus County Legal Assis-

tance, Inc., P.O. Box 3291, 925 J Street, Modesto, California 95353.

The Washington Legal Services has recently developed a statewise "clearinghouse" for information about cases and other items of interest for Legas Assistance Attorneys in that state. For further information write Mr. L. Davis, Northwest Washington Legal Services, 1712½ Hewitt Avenue, Everett, Washington 98201.

3. Cases of Interest.

Steele v. Latimer, 521 P.2d 304 (1974). The Supreme Court of Kansas has adopted the doctrine of implied warranty of habitability. Municipal code provisions which proscribe minimum standards of habitability are by implication made a part of any lease of urban residential property. The implied warranty is that the premises are habitable and safe for human occupancy, in compliance with the pertinent code provisions, and will so remain during the duration of the lease. If a breach of the implied warranty occurs, the traditional remedies are available to the tenant.

Hechavarria v. United States, 374 F. Supp. 128 (S.D.Ga. 1974). The presumption of nonresidence of an alien may be rebutted by acts and statements showing an intention to acquire residence or by proof of declaration of intent to become a naturalized citizen.

Conway v. Dana, 316 A. 2d 324 (1974). Rejecting any presumption that the father by reason of his sex without regard to the relative economic positions of the spouses is primarily responsible for support of minor children, the Pennsylvania Supreme Court held that child support rests equally upon both parties. Both parents must discharge their obligation in accordance with their respective capacities and abilities.

Kahn v. Shevin, _____U.S._____, 40 L.Ed.2d (1974). Weakly distinguishing *Frontiero v. Richardson*, 411 U.S. 677 (1973), the court found constitutional a Florida statute which grants widows, but not widowers, an annual $500 property tax exemption. The majority further refused to apply the "compelling state interest" test. Instead, quoting *Reed v. Reed*, 404 U.S. 71 (1971), the court found that the classification was not inconsistent with the Equal Protection Clause since it had a "fair and substantial relation to the object of the legislation." The object putatively was to reduce the disparity between the economic capabilities of a man and a woman.

Padilla v. Allison, _____Cal.3d_____ (1974) (California's Constitutional provision denying aliens right to vote upheld.)

Pernell v. Southall Realty, 42 U.S. 4295 (1974) (In a 9–0 decision the Court finds that the Seventh Amendment to the US Constitution guarantees both parties to an action to recover possession of rental property the right to trial by jury).

TJAGSA Announces Changes in Advanced Class Curriculum

Several changes have been made in the curriculum of the Judge Advocate Officer Advanced Course with a view to better preparing the students who attend for their future duties in the Corps. The curriculum is still arranged in the two semester format of a typical civilian university, and the course is still measured in credit hours the same way. (A credit hour is earned for each 14 hours of classroom instruction or the equivalent.)

The Advanced Course is a 34-credit hour course consisting of four curriculum elements.

1. *Core subjects.* This is classroom instruction in which all students participate. The subjects are designed to enhance their knowledge and understanding in major areas of contemporary military law. There are now 20 credit hours of core subjects, a reduction of two from last year. The reduction results from a decrease in the number of hours devoted to international law and procurement law, which was only partially offset by an increase in the hours of administrative and civil law subjects. These are the core subjects:

(a) Fall semester

Subject	Credit Hours
Criminal Law I: Constitutional Problems of Criminal Law	2
Administrative and Civil Law —Judicial Review of Military Activities	2

Subject	Credit Hours
—Law of Federal Employment	
International Law	3
Government Contract Law	3
Military Command and Staff	2
	12

(b) Spring semester

Subject	Credit Hours
Criminal Law II: Procedure	3
Legal Basis of Command	3
—Military Installations	
—NAF's	
—Environmental Law	
—Military Assistance to Civil Authorities	
Management for Military Lawyers	2
	8

2. *Elective subjects.* The elective program is intended to provide students some measure of flexibility in adjusting the Advanced Course curriculum to their own professional needs and desires. Each student is required to take a minimum of eight credit hours of electives this year, an increase of two over last year. The number of electives offered by TJAGSA has also been increased, from 14 last year to 20 this year. Students also have the option of taking electives at the University of Virginia School of Law or Department of Government and Foreign Affairs. This broad range of electives enables students to familiarize themselves with areas in which they lack experience, increase their knowledge in specialized fields in which they are interested, and broaden their horizons in completely new areas of law. The following TJAGSA electives are offered this year.

(a) Fall Semester

Subject	Credit Hours
Legal Assistance I: The Military Legal Assistance Program and Frequent Legal Problems of Military Personnel	1
Analysis of the Military Criminal Legal System I	1
International Law of Human Rights	1
Procurement: State and Local Taxation and Control of Federal Contractors	1
Legal Assistance II: Estate Planning for Military Personnel	1
Scientific Evidence	1
Total	6

(b) Spring Semester

Subject	Credit Hours
Advanced Procurement Attorneys' Course	2
Law of the Sea	1
International Law of Military Operations	1
Claims I: Military Claims Practice	1
Civil Rights	1
Analysis of the Military Criminal Legal System II	1
Legislative Drafting	1
Procurement: Disputes and Remedies	1
Claims II: Selected Problems in Tort Litigation	1
Military Justice: The Every-Day Problems	1
Judge Advocate Operations Overseas	1
Negotiations: Concepts and Techniques	1
Procurement: Socio-Economic Policies	1
Privacy and the Control of Information	1
Total	15

3. *Legal Writing Program.* The remaining six credit hours of the course are awarded for successful completion of the Legal Writing Program. This is a modification of the thesis program offered in previous years. The principle difference is that the students now have a choice of whether to write a single thesis or two shorter research papers with a combined length equivalent to that of a thesis. In addition, the students now attend a formal legal writing class in the first quarter of the academic year to assist them in selecting a topic, planning their research and approach to the problem, and improving their writing skills.

4. *Other Activities.* In addition to these requirements, the students continue to participate in a variety of other activities intended to enrich the course without placing an undue bur-

den on the students. These include the annual JAG Conference, field trips, a guest speaker program, and visits by invited general officers and staff judge advocates.

TJAGSA is constantly striving to improve the curriculum of its courses and the quality of instruction. Your suggestions are always welcome.

Judiciary Notes

From: U.S. Army Judiciary

1. Administrative Note.

Applications for Relief. Counsel assisting an individual with an application for relief from a conviction by court-martial pursuant to Article 69, UCMJ, should submit a memorandum presenting a carefully considered argument in support thereof, citing relevant points and authorities applicable to dispositive facts. Of course, submission of a memorandum is not a requirement to obtain full consideration of an application for relief.

2. Recurring Errors and Irregularities.

August 1974 Corrections by ACOMR of Initial Promulgating Orders:

a. Failing to show that the sentence was adjudged by a military judge—five cases.

b. Failing to show the correct number of previous convictions—one case.

c. Failing to show the accused's name correctly—one case.

d. Failing to show correct date that sentence was adjudged—one case.

e. Failing to show correct date that court-martial convening order was promulgated—one case.

f. Failing to show amendment of court-martial convening order—one case.

g. Failing to show General Court-Martial Order"—one case.

h. Failing to correctly show pleas—one case.

i. Failing to correctly show the findings—four cases.

j. Failing to correctly show the charges and specifications upon which the accused was arraigned—seven cases.

3. Note from Defense Appellate Division.

Post-Trial Duties of Defense Counsel

By: Captain David A. Shaw, Defense Appellate Division, USALSA

It has been noted during appellate review that some trial defense counsel are not representing their clients during the post-trial stages as thoroughly as possible. The following is intended to highlight post-trial avenues of relief available to an accused. It is not meant as an exhaustive or definitive work in the area.

1. Upon announcement of the findings or sentence, be prepared to move immediately for a mistrial in the event of an improper, inconsistent, or self-impeaching verdict or sentence.

2. Seek deferment of a sentence to confinement pending appeal, and seek appropriate review from an unlawful denial thereof. Stress appellate issues in the case, as well as financial, medical, or other reasons against confinement. *See* paragraphs 88*f*, and *g*, *Manual for Courts-Martial, United States, 1969 (Revised edition)*, and paragraph 2-30, AR 27-10.

3. Where possible, seek clemency recommendations from the trial counsel, military judge, or court members. Where appropriate, request a personal hearing, or at least an interview, before the convening authority. *See* paragraphs 48*b* (1) and 77*a*, *Manual for Courts-Martial, United States, 1969 (Revised edition)*.

4. Consider preparing a brief pursuant to article 38(c), Uniform Code of Military Justice. Use it to argue the factual and legal theories of the defense and to introduce into the record evidence discovered after trial or not used at trial.

Counsel should also consider using the Article 38(c) brief to enter formal objections which were not articulated at trial. The Article 38(c) brief may also be used to submit additional matters in extenuation and mitigation, post-trial psychiatric reports, etc., for consideration during appellate review. *See United States v. Fagnan*, 12 USCMA 192, 30 CMR 192, 195 (1961). In short, because the Article 38(c) brief allows such material to become part of "the entire record," it may be used to raise matters which had not been raised elsewhere.

5. Prepare the client for the post-trial interview. Explain its nature, scope and purpose. Explain the extreme importance of his conduct, attitude, and appearance during the interview. Insure that he has been advised that admissions regarding present charges on other crimes, or about the appropriateness of the adjudged sentence, can be damaging to him. Unless the client can be trusted to answer questions on his own, a post-trial interview should not be undertaken in the absence of counsel.

6. Exercise the accused's right to rebut adverse matters first appearing in the post-trial review. Seek access to the post-trial review prior to the time it is forwarded for the convening authority's action and make appropriate written comments regarding it.

7. Advise the accused of the meaning and effect of the findings and sentence in his case. Include an explanation of the consequences of a punitive discharge, his appellate rights, and assist accused in securing the appointment of appellate defense counsel if appropriate. Also familiarize the accused with the Army Clemency and parole system. *See The Advocate*, Volume 6, No. 1, July 1974 at page 10, regarding post-trial sentence relief apart from the judicial process.

8. Monitor the post-trial delay between findings and sentence and action of the convening authority for compliance with the standards announced in *Dunlap v. Convening Authority*, 23 USCMA 135, 48 CMR 751 (1974). The *Dunlap* issue may be raised directly with the convening authority in an Article 38(c) brief and, if appropriate, a petition for extraordinary relief may be filed with the United States Court of Military Appeals. A sample extraordinary relief petition is printed in Volume 5, No. 3, *The Advocate* (July–October 1973).

9. Maintain a continuing interest in the case. Members of the Defense Appellate Division, USALSA, Autovon 289–1807, are available to provide information and assistance to trial defense counsel.

10. *See, generally*, paragraph 48*b*, *Manual for Courts-Martial, United States, 1969 (Revised edition)* and Section IV, Chapter 4, DA Pamphlet 27–10, regarding the post-trial duties of trial defense counsel.

4. Note from Government Appellate Division.

Trial Counsel Authentication

By: Captain Gay E. McGuire, Government Appellate Division USALSA

The Court of Military Review has received numerous cases in recent months involving trial records that are not properly authenticated by the trial counsel. Trial counsel sign the record for the military judge, but merely state: Captain _____, Trial Counsel, in lieu of military judge; or Captain _____, Trial Counsel, for military judge. One of the more quixotic authentications was: Captain _____, Trial Counsel in lieu of military. Appellate defense counsel cite these as erroneous authentications relying on Article 54, Uniform Code of Military Justice, and Paragraph 82*f*, *Manual for Courts-Martial United States, 1969* (Revised), as well as several cases decided by the court.

Article 54 requires that records of trial by general courts-martial be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a court member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Paragraph 82*f*, *Manual for Courts-Martial, United States, 1969* (Revised), further amplifies the requirement of authentication and references Appendix 9(b) of the *Manual* for the standard form which should be used if the military judge himself cannot authenticate the record.

The Court of Military Review held in two unreported cases that when authentication is accomplished by trial counsel, the reasons therefor must be expressed in terms of the death, disability, or absence of the military judge. (*United States v. Mockler*, SPCM 7370 (ACMR 14 January 1972); *United States v. Asbury*, CM 426410 (ACMR 28 April 1972)). In each case the court had the record sent back for proper authentication, and required that a new post-trial review be written and a new action by the convening authority be taken, because the staff judge advocate may not review an unauthenticated record and a convening authority may not act on an unauthenticated record.

In order to reply to this assignment of error, government appellate counsel attempt to discern the reason for the failure of the military judge to authenticate in the absence of some affirmative indication on the record explaining trial counsel's signature. The reasons usually involve the retirement of the military judge prior to the date of the completion of the record of trial or the substitution of one judge for the one scheduled to hear the particular case involved and his leaving the judicial circuit before the record is prepared for authentication. Counsel then has to request leave to file documents, such as retirement papers, travel vouchers to explain the omission of the judge's signature. A certificate of correction has even been requested by the Court of Military Appeal to explain the trial counsel's signature where no explanation for it appeared on the record itself. Varying degrees of success have been achieved by these efforts, but all have delayed the final disposition of the appeal.

All of these efforts necessary to explain the absence of the military judge's signature could be avoided if the "Format" as shown in Appendix 9(b) of the *Manual* were followed, provided, of course, that the reason for trial counsel's signature (or that of any other acceptable party) is because of the death, disability, or absence of the required signer. It is requested that staff judge advocates take cognizance of the authentication requirement and insure that when substitute authentication is utilized the reasons for the substitution are expressed in the language required by the *Manual* and appear on the face of the record.

Criminal Law Items

From: Criminal Law Division, OTJAG

Oversights in Convening Orders. The recent COMA decision, *United States v. Febus-Santini*, ___ USCMA ___, ___ CMR ___ (4 October 1974) highlights a jurisdictional error which could have been avoided. Febus-Santini was convicted by general court-martial of two specifications of robbery. COMA reversed the conviction because the court which tried him was improperly constituted. At trial, before Judge *A*, the trial counsel announced that the court was convened by CMCO number 79, which appointed Judge *A*. No mention was made of CMCO number 97, dated 10 days later than number 79 and prior to the trial, which relieved Judge *A* and substituted Judge *B*. CMCO number 97 was intended to contain limiting language specifically noting that Judge *B* was substituted for Judge *A* in only one trial, not that of Febus-Santini. Through administrative error, that limiting language was omitted. COMA reversed Febus-Santini's conviction on the basis that Judge *A* had been relieved. Staff Judge Advocates and trial counsel once again are urged to review their convening orders carefully to prevent errors of this type.

Litigation Notes

From: Litigation Division, OTJAG

Removal of State Actions to Federal Courts. Federal officials frequently become the subjects of, or defendants in, proceedings in state courts involving the performance of their governmental duties. While it is generally appreciated that such suits may be removed to the federal judicial system, neither the rationale for the practice nor the fact that the removal action

is almost an absolute right is so well recognized. These aspects of removal are developed in the following "Memorandum in Opposition to Respondent's Motion for Remand" prepared by Captain Fitzhugh L. Godwin, Jr., Military Personnel Branch, Litigation Division, OTJAG, for proceedings in Colorado. Abbreviations have been substituted for the original parties named therein.

* * *

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR REMAND

Statement of the Case

Petitioner, Captain *C*, an officer in the United States Army, seeks removal of a complaint filed in the District Court within and for the County of El Paso and State of Colorado by Respondent *P*, an enlisted man in the United States Army. The complaint is an action in replevin of an automobile alleged to have been wrongfully detained by two co-defendants, *B*, doing business as El Paso Garage, and *M*, an employee of *B*. On 22 July 1974 the state court gave respondent possession of the car without prejudice to the rights of the co-defendants. Respondent *P* also seeks money damages to be determined by the Court for the detention and loss of the use of the automobile and $10,000 in exemplary damages from defendants *C* and *M*. Respondent alleges that petitioner compelled him to turn over his keys to *M*. Petitioner at the time of the alleged incident on 2 July 1974, was an officer in the United States Army serving as the Commanding Officer, Company *X*. Respondent was at that time a member of petitioner's command. Petitioner in Exhibit 1 has set forth the facts of the incident on 2 July 1974 at which time the co-defendants *B* and *M* received possession of respondent's automobile and from which incident respondent seeks damages against petitioner. Petitioner has had no contact with respondent except in his role as respondent's commanding officer.

Issue

Whether the complaint filed in the state court may be removed to this court under 28 U.S.C. 1442a.

Argument

I

Petitioner Is A Person For Whom Removal Of A Civil Action In A State Court Is Provided Under 28 U.S.C. 1442a.

Under the pertinent portion of 28 U.S.C. 1442a, Congress has provided for the removal of "civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an Act done under color of his office or status". Such person "may at any time before trial or final hearing thereof" petition the district court of the United States for the district where the civil action is pending for removal. Petitioner *C* is an officer in the United States Army with the rank of Captain. He was on 2 July 1974 and is at the present performing duties as Commanding Officer, Company *X*. He is a member of the armed forces of the United States within 28 U.S.C. 1442a and his petition is otherwise timely filed.

II.

The Right Of Removal Is Absolute Whenever A Suit In A State Court Is For Any Act Done Under Color of Office or Status

In *Willingham* v. *Morgan*, 395 U.S. 402 (1969) the Supreme Court of the United States reviewed the power of federal officials to have actions brought against them in state courts removed to federal courts under 28 U.S.C. 1442(a)(1) which provides for removal of any civil action against "[a]ny officer of the United States—for any act under color of such office—". In *Willingham*, a federal prisoner brought a tort action in a state court against the warden and chief medical officer for inoculating him with "a deleterious foreign substance, serum or drug" which caused permanent injury and for assault, battery, clubbing, choking and torturing plaintiff. *Morgan V. Willingham*, 383 F. 2d 139 (10th Cir., 1967).

The Tenth Circuit Court of Appeals had before it evidence that the only contact the warden and chief medical examiner had had with the prisoner was within the walls of the penitentiary. *Morgan* v. *Willingham, supra*, at 142. The Circuit Court is denying the right to remove held that this evidence may have adequately supported the finding of official im-

munity but it was insufficient to support that the acts were performed under "color of title", which was a narrower test than for official immunity. *Id.* The Supreme Court in *Willingham* v. *Morgan, supra,* reviewed the history of removal statutes, concluded that the purpose of all these enactments was not hard to discern and, quoting itself from *Tennessee* v. *Davis,* 100 U.S. 257, 263 (1880), said the Federal Government

> "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State Court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection.—if their protection must be left to the action of the State Court,—the operations of the general government may at any time be arrested at the will of one of its members." *Willingham* v. *Morgan,* 395 U.S. at 406.

The Supreme Court held that the right to removal under 28 U.S.C. 1442 (a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal office. *Id.* "The Federal jurisdiction rested on a 'federal interest in the matter' [citation omitted], the very basic interest in the enforcement of federal law through federal officials." *Id.* The removal statute was not narrow or limited but is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. *Id.* In its strongest statement, the removal statute as a matter of public policy grants the rights to a federal officer who certifies under oath that he was acting "under color of office or in the performance of his duties. *O'Bryan* v. *Chandler,* 356 F. Supp 714, 719 (W.D. Ok., 1973).

Petitioner contends that the removal statute under 28 U.S.C. 1442a must be construed the same as 28 U.S.C. 1442(a)(1). It is not narrow and limited. It is broad and available to members of the armed forces with even a colorable defense arising out of the performance of their official duties. There are three bases for this position. First, the policy reason behind the absolute right to removal under 28 U.S.C. 1442(a)(1) quoted from *Willingham* v. *Morgan* 395 U.S. at 406, is just as true for the members of the armed forces of the United States who are performing their duty. It has been held that official immunity is just as applicable to lower federal officers as it is to higher federal officers. *Barr* v. *Matteo,* 360 U.S. 564 (1959); *S and S Logging Co.* v. *Baker* 366 F. 2d 617, 620 (9th Cir., 1966); *Sulger* v. *Pocbyla* 397 F. 2d 173, 177 (9th Cir., 1968). The policy reasons should be just as true for Captain *C* in performing his duties as a Commanding Officer of an infantry company. Secondly, the language of the statues are similar and the pertinent parts are almost exact:

> "Any officer of the United States—for any act under color of such office—" 28 U.S.C. 1442(a)(1)
>
> "a member of the armed forces of the United States on account of an act done under color of his office or status—" 28 U.S.C. 1442a.

Thirdly, it has been held that an Air Force Captain was a federal officer under 28 U.S.C. 1442(a)(1) (even after Congress passed 28 U.S.C. 1442a). See *People of the State of Colorado* v. *Maxwell,* 125F. Supp. 18, 22 (D. Colo. 1954) where the judge held that a captain in the United States Air Force "is in my view an 'officer of the United States' within the meaning of §1442(a)(1), *supra*". See also *United States* v. *Canella,* 63 F. Supp. 377 (S.D. Colo., 1945). Certainly, the military officer should receive no less protection simply because he seeks removal under 28 U.S.C. 1442a.

In *Green* v. *James,* 333 F. Supp. 1226 (D. Hawaii, 1971) an Army officer against whom a complaint in a state court was filed for wrongful and malicious use of his rank in order to secure issuance of a traffic ticket was entitled to removal. The Court held that in 28 U.S.C. 1442 and 1442a Congress had expressly provided for the removal of this type action into the federal judicial system in reliance upon federal supremacy in such matters, thereby eliminating all risks of challenge to the sovereign immunity of the United States. The court also held at 333 F. Supp 1228 that the test for removal under 28 U.S.C. 1442a, as was held with respect to 28 U.S.C. 1442a(1) in *Willingham* v. *Morgan, supra,* was broader, not narrower than the test for immunity.

III

The Suit In A State Court Must Therefore, Be Removed Where A Member of the Armed

Forces Raises A Colorable Defense Arising Out Of The Performance Of His Duties.

In *Willingham* v. *Morgan, supra,* at 407 the Supreme Court pointed out that the officer seeking removal does not have to have a clearly sustainable defense to remove. The purpose of the statute is to allow him to litigate his defense of official immunity in the federal courts. *Id.* His claim need only be a colorable defense as he need not win his case before he can have it removed. Though to prevail on the merits, petitioner must show he acted under color of title to establish the defense of official immunity, it need only be shown that his relationship to the respondent is derived solely from his official duties. *Id.*, at 409; *Hazen* v. *Southern Hills National Bank of Tulsa,* 414 F. 2d 778, 779 (10th Cir. 1969).

Respondent has cited as authority *Nass* v. *Mitchell,* 233 Fed. Supp. 414 (D. Md., 1964); *Goldfarb* v. *Miller,* 181 F. Supp 41 (D.N.J., 1959) and *State of Oklahoma* v. *Willingham,* 143 F. Supp. 445 (E.D.Ok., 1956). Two of these cases involve a member of the armed forces and the third case involves an employee of the United States Post Office Department. All three cases involve negligent operation of vehicles on the state highway while driving a government vehicle. These cases are of questionable authority in this case for two reasons. First, all three of these cases were relied upon in *Morgan* v. *Willingham, supra,* at 141 which the Supreme Court reversed in *Willingham* v. *Morgan, supra.* These three cases and *Morgan* v. *Willingham, supra,* stood for the narrow construction of 28 U.S.C. 1442(a)(1) which the Supreme Court rejected in *Willingham.* These cases stood for the proposition that removal could not be obtained where the sole evidence of record to show officiality was that the only contact the petitioners had with the respondent was "within the walls of the penitentiary" (*Morgan* v. *Willingham, supra,* at 141) or in the other three cases "in the course and scope of employment." *Id.* These cases instead required a factual determination that the alleged acts of the federal officer were committed under color of office. This the Supreme Court rejected in *Willingham* v. *Morgan,* 395 U.S. at 409, where it said "it was sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties." This was a sufficient "casual connection" and "the connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times." *Id.*

The second reason that these cases cited by respondent are of questionable authority in this suit is because the area of public safety on the highways is one where the public policy behind official immunity was balanced against state enforcement of highway laws and the responsibility of federal employees to obey state highway safety laws.

IV

The Incident Giving Rise To This Suit Arose Solely Out Of Defendent's Performance Of Duty Which Is Sufficient To Establish A Casual Connection For Removal.

Exhibit 1 is an affidavit in which Petitioner *C* relates that he is the Commanding Officer of Company *X* and that while acting in this capacity on 2 July 1974 the incident occurred which gave rise to this civil action. Petitioner *C* also states that all his relations with respondent have been in his role as Company Commander.

Exhibit 2 is an affidavit in which Colonel *L* petitioner's superior officer, states that petitioner was acting under color of his office as Commanding Officer of Company *X* at the time of the alleged incident. Petitioner has submitted a similar statement under oath which was filed with the Petition For Removal.

Conclusion

Petitioner has placed before this court affidavits which, in addition to the complaint filed in the civil action, show that the incident giving rise to the civil action filed in the State court arose while Petitioner was performing his duties as commanding officer of respondent. He has established a colorable defense of official immunity which he is entitled to present to this court after removal of the civil suit under 28 U.S.C. 1442a.

TJAGSA—Schedule of Resident Continuing Legal Education Courses Through 30 August 1975

Number	*Title*	*Dates*	*Length*
5F-F8	17th Senior Officer Legal Orientation	4 Nov–7 Nov 74	3½ days
5F-F11	60th Procurement Attorneys	11 Nov–22 Nov 74	2 wks
CONF	U.S. Army Reserve Judge Advocate Conference	4 Dec–6 Dec 74	3 days
5F-F10	11th Law of Federal Employment	9 Dec–12 Dec 74	3½ days
5F-F12	5th Procurement Attorney, Advanced	6 Jan–17 Jan 75	2 wks
5F-F17	1st Military Administrative Law and the Federal Courts	13 Jan–16 Jan 75	3½ days
5F-F8	18th Senior Officer Legal Orientation	27 Jan–30 Jan 75	3½ days
7A-713A	5th Law Office Management	3 Feb–7 Feb 75	1 wk
5F-F15	2d Management for Military Lawyers	10 Feb–14 Feb 75	1 wk
CONF	National Guard Judge Advocate Conference	2 Mar–5 Mar 75	4 days
5F-F11	61st Procurement Attorneys	24 Mar–4 Apr 75	2 wks
5F-F13	2d Environmental Law	7 Apr–10 Apr 75	3½ days
5F-F8	20th Senior Officer Legal Orientation	14 Apr–17 Apr 75	3½ days
5F-F8	**19th Senior Officer Legal Orientation	28 Apr–1 May 75	4 days
(None)	3d NCO Advanced	28 Apr–9 May 75	2 wks
5F-F6	5th Staff Judge Advocate Orientation	5 May–9 May 75	1 wk
5-27-C8	22d JA New Developments Course (Reserve Component)	12 May–23 May 75	2 wks
5F-F1	17th Military Justice	16 Jun–27 Jun 75	2 wks
5F-F1	Administration Phase	16 Jun–20 Jun 75	1 wk
5F-F1	Trial Advocacy Phase	23 Jun–27 Jun 75	1 wk
5F-F8	21st Senior Officer Legal Orientation	30 Jun–3 Jul 75	3½ days
5F-F9	14th Military Judge	14 Jul–1 Aug 75	3 wks
5F-F3	19th International Law	21 Jul–1 Aug 75	2 wks
5F-F11	62d Procurement Attorneys	28 Jul–8 Aug 75	2 wks

*Army War College Only
**Reflects Schedule Change since previous listing in *The Army Lawyer*.

Personnel Section

Reminder On Utility Rate Increases Affecting The Military. It is imperative that every effort be made to find out about rate increase filings by local utility companies by whatever means possible where the local installation is affected. You are encouraged to develop necessary contracts with facilities engineers and other personnel so that you will be able to report such matters to the Regulatory Law Office, OTJAG, initially by telephone (22–56570, 55994), with necessary written follow-up.

2. Regular Army Commissions. Effective 1 November 1974 all requests to be considered for a Regular Army commission must be sent to PP&TO through the individual's staff Judge Advocate for comment.

Current Materials of Interest

Articles.

Note on *United States v. Marshall*, 22 U.S.C.M.A. 431 (1973), "The Military Court System Takes the Initiative with the Issue of Speedy Trial," 3 CAPITAL U.L. REV. 292 (1974). A former legal clerk at Fort Gordon, Robert L. Ratchford, Jr., notes that "the military which

defends and protects the United States in a military fashion also defends and protects the individual in the military in a legal fashion."

Kintisch, "Discretion: Should Boards of Contract Appeals Resist?" 33 FED. B. J. 229 (Summer 1974). The former chief of AMC's Procurement Management Review Division proposes an amendment to the standard disputes clause regarding waiver of the contractual time limit for late appeals from final contracting officer decisions.

Wellen, "Armed Forces Disability Benefits—A Lawyer's View" 27 JAG J. 485 (Spring 1974). Lieutenant Robert H. Wellen, JAGC, USNR, examines the services' complex system of disability benefits noting certain inequities and inefficiencies, and recommending some curative legislation of the subject.

N.J. Dilloff, "Federal Court Litigation Over the Regulation of Adult Grooming," 38 ALBANY L. REV. 387-406 (1974. A Navy JAG author deals with the constitutional right to control one's appearance in four social contexts—one being the military sector—concluding that regular active duty personnel have few rights with regard to hair and grooming, while Reservists possess more substantial rights in view of recent federal court decisions.

Tobin, "The Foreign Subpoena: A Proposal for Improvement," 62 GEO. L.J. 1531 (July 1974). A proposition that Rule 45(d)(1) of the Federal Rules of Civil Procedure be amended to provide a uniform standard for determining adequate proof of service of notice to take a deposition, especially when seeking a foreign subpoena of a nonparty witness; also includes a tabulation of requirements for obtaining a foreign subpoena under most current district court practices.

Comment, 'The Homosexual's Legal Dilemma," 27 ARKANSAS L. REV. 687 (Winter 1973). Contains a 12-page discussion of alleged employment discrimination against homosexuals by the military and government employers.

Manual.

The Central Committee for Conscientious Objectors has recently published a *Military Counsellor's Manual*, a 400-page text for military counselors and attorneys concerned with applying for discharge, conscientious objection, filing complaints, upgrading bad discharges, Reservists' rights an AWOL counselling. Included with the manual is another 170-page book, *Advice for Conscientious Objectors in the Armed Forces*. Cost of the *Manual* with *Advice* is $9.00; the *Manual* alone sells for $8.00. Contact: CCCO, 2016 Walnut Street, Philadelphia, Pennsylvania 19103 or telephone (215) 568-7971.

Seminar.

The University of Pennsylvania's Center for Studies in Socio-Legal Psychiatry will present "Psychiatry for Lawyers," featuring five seminars dealing with psychiatric concepts available in legal situations. Britannia Beach Hotel, Paradise Island, Nassau, Bahamas, January 31–February 7, 1975, $100 registration, $497 complete travel package. For more information contact: Robert M. Sadoff, M.D., Room 201C, Piersol Pavillion, Hospital of University of Pennsylvania, Philadelphia, Pennsylvania 19104.

By Order of the Secretary of the Army:

FRED C. WEYAND
General, United States Army
Chief of Staff

Official:
VERNE L. BOWERS
Major General, United States Army
The Adjutant General