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Constructive Enlistments: Alive and Well

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A. In that Private (E-2) John Doe, U.S. Army, Company A, 1st Battalion, 66th Infantry, did, at Action, Missouri, on or about 17 October 1977, wrongfully sell 1 gram, more or less, of a habit forming narcotic drug, to wit: heroin, to Private (E-2) Joseph Smith, U.S. Army, while said Private (E-2) John Doe was on official military business and in uniform.

B. In that Private (E-2) John Doe, U.S. Army, Company A, 1st Battalion, 66th Infantry, while on official military business, did, within Fort Blank, Missouri, an installation under exclusive military control, on or about 1230 hours, 17 October 1977, unlawfully kill Lisa Mason by driving a military sedan against the said Lisa Mason in a negligent manner.

C. In that Private (E-2) John Doe, U.S. Army, Company A, 1st Battalion, 66th Infantry, did, at Random, Missouri, on or about 18 October 1977, rape Private Jane Smith, while said Private Jane Smith was performing official military duties as a military recruiter.

5. Offenses occurring overseas usually fall within the "overseas exception" to *O'Callahan v. Parker*, 395 US 258 (1969), as explained in *US v. Black*, 51 CMR 381 (CMA 1976) and *US v. Lazzaro*, 54 CMR 272 (CMA 1976). In such cases the specification format contained in appendix 6, MCM, may be amended by adding language at the end stating "Said offense occurring outside the territorial limits of the

United States and not being cognizable in a US civilian court." Where the offense involves violation of a federal statute with extraterritorial application, the same type subject matter jurisdictional allegations may be used as if the offense had been committed in CONUS.

6. Although USCMA now requires that a specification allege facts demonstrating jurisdiction, where the jurisdictional facts are not related to the guilt or innocence of the accused the trial counsel should argue that these facts are directed to the military judge only and are not within the province of the court members to determine.

7. In cases where no arraignment has yet been held, the trial counsel should move to amend the specifications to include the additional jurisdictional language. As the amendment is in the nature of a bill of particulars, the DAJA-CL position is that it is not so substantial as to require reswearing of the charges.

8. The *Alef* decision demonstrates the difficulty of sustaining jurisdiction in off-post offenses. The staff judge advocate's analysis of the facts using *Relford* criteria should lead to a logical conclusion whether military jurisdiction lies in a case. If the staff judge advocate is unable to fashion a pleading using the *Relford* criteria, there probably exists no military jurisdiction under *Relford* or *O'Callahan* as presently interpreted by USCMA.

Constructive Enlistments: Alive and Well

Captain David A. Schleuter, Instructor, Criminal Law Division, TJAGSA.

Riding in the turbulent wake of recent Court of Military Appeals decisions, the concept of constructive enlistments appeared to be going down for the last time. Despite the predicted demise¹ of that concept, recent case law from the Courts of Military Review seems to have breathed some new life into it and, for the time being, extended its existence. Before examining those opinions and their impact on the law of enlistments, a brief review of the doctrine of constructive enlistments is appropriate.

The constructive enlistment has long been

recognized as a means of changing one's status from civilian to servicemember where some deficiencies existed in the formal enlistment process. The Army's Judge Advocate General recognized the concept as early as 1896.² The various Boards of Review addressed the issue on a number of occasions³ and in *United States v. King*⁴ the Court of Military Appeals elaborated on the theory, its practical effects, and its requisites.

The court noted that constructive enlistment contracts are creatures of the law and rest

solely on a "legal fiction and are not contract obligations" in the true sense.⁵ They are based upon the philosophy that a man is presumed to have promised to do what he ought to do to fulfill the contract. The court rejected the argument that a constructive enlistment had been formed where the accused had entered the Army with what was characterized by the court as *ex parte* criminal conduct.⁶ The requisite mutual intent of the parties to enter into a contractual relationship was lacking.⁷

The concept and its variations have also been relied upon by the Comptroller General in approving changes of status.⁸ And the federal judiciary has, in several instances, applied the same principles of equity upon which the constructive enlistment is grounded.⁹

The requisites for a constructive enlistment have been restated in a number of ways but the most commonly accepted criteria are usually stated as follows:

1. Voluntary submission to military authority;
2. Performance of military duties;
3. Receipt of pay and allowances; and
4. Acceptance of the services by the government.¹⁰

In condensed form the foregoing may be listed as (1) voluntarily performing military duties and (2) accepting military benefits.¹¹ Until a few years ago, if the servicemember entered into an enlistment fraudulently, erroneously, or in any other irregular manner, the government was free to establish that the foregoing criteria had been met and although the attempted formal entry was in some way defective, a valid constructive enlistment had taken place.¹²

That was the case of course prior to the application by the Court of Military Appeals of the equitable principle of estoppel to certain enlistment problems. In a trio of cases, *United States v. Brown*,¹³ *United States v. Catlow*,¹⁴ and *United States v. Russo*,¹⁵ the Court of Military Appeals laid a firm foundation for estopping the government from relying upon constructive enlistments in order to establish *in personam* court-martial jurisdiction. In *Brown*,

the court applied the estoppel theory to minority enlistments; in *Catlow* to coerced enlistments; and in *Russo* to fraudulent enlistments. In all three instances the enlistments were tainted to varying degrees by recruiter misconduct.

This trio of cases raised more questions than it answered—a result not atypical where a judicial forum forges new law. For instance, what degree of government misfeasance or malfeasance would cause invocation of the estoppel doctrine? What degree of persuasion or proof would satisfy a requirement of showing no government malfeasance or misfeasance? Although the Court of Military Appeals has not finally disposed of these and other questions, the Courts of Military Review have addressed the issues and seem to have resolved some of them.

Language in *Russo* indicated that recruiter misconduct would void an enlistment if such misconduct amounted to a violation of Article 84 of the Uniform Code of Military Justice.¹⁶

Russo's progeny seems to support the proposition that if, indeed, a recruiter actively and intentionally smoothes the enlistment path for an individual who is clearly not qualified, the resulting enlistment is defective and the recruiter's misconduct estops the government from relying upon a constructive enlistment.¹⁷

On the other hand, if the recruiter is simply negligent in processing an individual and for example fails to note a disqualifying factor, the government will probably not be estopped from showing a valid and binding constructive enlistment. That is assuming of course that the government can successfully show that the individual voluntarily performed military duties and accepted military benefits. Simple negligence was not deemed sufficient to estop the government in *United States v. Harrison*,¹⁸ *United States v. Valdez*,¹⁹ and *United States v. Eging*.²⁰

In *United States v. Harrison*, the recruiter failed to detect the individual's scheme to effect an underage enlistment. Because birth records were unavailable, the recruiter relied upon a family history in a "family Bible" presented by

the accused. He checked the authenticity of the entries and the accused's birthdate in a telephonic conversation with a woman who identified herself as the accused's grandmother. The court held that the accused's voluntary performance of duties and receipt of benefits after he reached the age of seventeen were untainted—because the recruiter did not actually know that the accused was ineligible, he did not violate Article 84. Hence a valid constructive enlistment could be shown.

The court in *Valdez* ruled similarly when a recruiter failed to recognize that a combination of factors (age, AFQT scores, and absence of a high school diploma) rendered the accused ineligible for enlistment. The accused's entry into the service was the result of simple negligence. And in *Ewing* the recruiter's negligence in not following up on the accused's joking references to a criminal record was not considered to be misconduct within the *Russo* rule.²¹

If the recruiter's actions or inactions amount to gross negligence, a different holding may result. For instance, in *United States v. Johnson*,²² the court held that gross negligence on the part of the recruiter in not detecting that the individual was blind in one eye, had the same effect of knowing misconduct. Because the government had a duty to discover nonwaivable defects, it was estopped from relying upon a constructive enlistment. That rationale unnecessarily expands the *Russo* holding which appeared to limit the misconduct in question to misconduct in violation of Article 84.²³ Negligence, simple or gross, does not constitute conduct punishable by that particular article.²⁴ Failure to detect deceit should not be equated with active and knowing assistance to an ineligible recruit.

To this point, the discussion has centered on malfeasance and misfeasance of the recruiter who enlists the individual. What effect will government malfeasance or misfeasance, occurring after the enlistment is effected, have on the enlistment? In *United States v. Brown*,²⁵ the failure of the military to discharge the underage recruit was coupled with the actions of the recruiter in arriving at the estoppel

theory. However, in *United States v. Marshall*²⁶ the court rendered an expansive interpretation of the holding in *Brown* to the extent that even assuming the ineligibility was not known to the recruiter, later disclosures by the individual to a clerk in a training unit placed an affirmative duty upon the government to take some action.²⁷ Failure to act estopped the government from showing a constructive enlistment. In language reminiscent of *Brown*, the court stated:

[S]hould this court apply the doctrine of constructive enlistment, recruits would be encouraged to conceal disqualifying information and superiors would be encouraged to ignore the information when it came to their attention one way or another, in the hope that with the passage of time the enlistment would mature. This we decline to do. . . .²⁸

Marshall strongly suggests that regardless of the amount of time actually served on the enlistment contract, the government is not relieved of the burden in detecting and ferreting out ineligible enlistees. Under the *Marshall* rationale, apparently little or no consideration will be given to the long-term equities which may exist. Because the individual in *Marshall* reported his deficiencies almost immediately upon completion of his enlistment process, that case should be narrowly construed. However, cases which do involve both pre-enlistment and post-enlistment malfeasance will no doubt continue to fall within the *Brown* mandate of estoppel.

There is yet another category of defective enlistments in which the government may nonetheless show constructive enlistments. Those situations arise when the enlistment is defective but the recruiter and other government personnel are blameless. A recent example of this appeared in *United States v. Wagner*.²⁹

Private Wagner enlisted to avoid the unpleasant prospect of civilian criminal prosecution for carrying a concealed weapon; he did so upon the advice and urgings of his appointed

attorney and his parents. Although he did take several preliminary tests, all processing of his enlistment was halted when the recruiter learned that criminal charges were pending. Processing did not continue until after an "Order Nolle Prosequi" had been entered in his case. The court assumed, for the purposes of review, that the enlistment was void at its inception,³⁰ but declined to accept the argument that either intentional circumvention of the regulations or negligence on the part of the recruiter estopped the government from relying upon a constructive enlistment. Reviewing the record, the court concluded that a "constructive enlistment was effectuated after the disqualification was removed and prior to the offense."³¹

A similar holding was made in *United States v. De La Puente*,³² where the accused alleged that he had been coerced into enlisting by a civilian judge. The court assumed, without deciding, that the improper civilian conduct rendered the enlistment defective but the absence of recruiter misconduct allowed a showing of constructive enlistment.

These cases are illustrative of the attempts by the Courts of Military Review to more closely define the term "recruiter misconduct." For now, they represent instances where, notwithstanding irregularities in the formal enlistment process, the government may establish a constructive enlistment.

The question remains as to what burden of proof must be met by the government in establishing jurisdiction based upon a constructive enlistment. There is a growing body of authority which indicates that if the accused is being tried for some offense other than AWOL or desertion, the government must show *in personam* jurisdiction over the accused by a preponderance of the evidence.³³ That position is grounded on the rationale that unless the accused's military status is an element of the offense, the question of jurisdiction is an interlocutory decision which requires only a showing by a preponderance of the evidence.

Under either standard, once the accused raises the issue of lack of jurisdiction because

of an irregular enlistment, the burden is on the government to show (1) the absence of recruiter misconduct, and (2) that a constructive enlistment was effected if in fact the enlistment was defective at its inception. In effect where specific recruiter misconduct is alleged, the prosecution is placed in the ironic position of proving the innocence of the recruiter.

Meeting the first prong normally requires, at a minimum, the live testimony of the recruiter who processed the accused; the outcome more often than not turns on the credibility of the recruiter and the accused.³⁴ The second prong, showing constructive enlistment, may be satisfied in any number of ways. The longer the accused has voluntarily performed his duties and received military benefits, the wider the range of possibilities of proof will be. Factors such as holding honored duty positions, performing special duties, accelerated promotions, and generally performing duties in a satisfactory manner will go a long way toward showing voluntary performance of military duties. Voluntarily accepting, and otherwise taking advantage of, military benefits in addition to the normal monthly pay entitlements will usually establish the second prong. For example, in *Wagner* the accused had taken advantage of the Army's alcohol and drug abuse program. As a practical matter, these factors may be established through the accused's superiors, personnel records, and in some cases during cross-examination of the accused on the motion to dismiss.

In approaching a case in which the enlistment may present a question of jurisdiction, counsel (both defense and prosecution) should address the following:

1. Was the accused ineligible for enlistment?³⁵
2. If so, did the recruiter violate Article 84, U.C.M.J.?
3. If the accused was ineligible for enlistment but no recruiter violated Article 84, did any subsequent misconduct by government representatives perpetuate the irregular enlistment?

4. If the government is not estopped from showing a constructive enlistment, what facts, if any, support or refute a showing of (1) voluntary performance of military duties, and (2) acceptance of military benefits?³⁶
5. If a constructive enlistment cannot be shown (because of the estoppel theory or due to the lack of evidence) are there any other bases for court-martial jurisdiction?³⁷

These questions present only a cursory analysis of the problem. Only through research of the appropriate statutes, regulations and case law will counsel be able to efficiently present his case for constructive enlistment and perfect the record for appeal.

The concept of constructive enlistments has taken an interesting turn but does appear to be alive and well. Whether the Court of Military Appeals will accept the holdings and rationale of the intermediate appellate courts is another question. It should. The concept of the constructive enlistment is a valuable tool and should not be lightly cast aside.

Notes

1. See, e.g., Grayson, *Recent Developments in Court-Martial Jurisdiction: The Demise of the Constructive Enlistment*, 72 MIL. L. REV. 117 (1976).
2. See Dig. Ops. JAG 1912 *Enlistments*, para. 1A-3c, at 603-04 (1896).
3. See, e.g., United States v. Reid, 15 C.M.R. 899 (A.F.B.R. 1954); United States v. Stevens, 7 C.M.R. 838 (A.F.B.R. 1953); United States v. Santiago, 1 C.M.R. 365 (A.B.R. 1951).
4. 11 C.M.A. 19, 28 C.M.R. 243 (1959).
5. 11 C.M.A. at 25, 28 C.M.R. at 249.
6. The accused, after receiving an undesirable discharge, forged overseas travel orders which in turn resulted in his being placed on military rolls. He subsequently performed his duties and drew pay for approximately four months before his conduct was discovered.
7. Judge Quinn dissented, noting that more than a mere "masquerade" had taken place. Although the accused had illegally gained association with the military, he had in fact procured "actual" entry into the service. Therefore, he was subject to court-martial jurisdiction.
8. See, e.g., 45 Comp. Gen. 218 (1965); 40 Comp. Gen. 428 (1961); 39 Comp. Gen. 860 (1960).
9. Barret v. Looney, 158 F. Supp. 224 (D. Kan. 1957), *aff'd* 252 F.2d 599 (10th Cir.), *cert. denied*, 357 U.S. 940 (1958); Mayborn v. Heflebower, 145 F.2d 864 (5th Cir. 1944), *cert. denied*, 325 U.S. 854 (1945); Hibbs v. Catovolo, 145 F.2d 866 (5th Cir. 1944), *cert. denied*, 325 U.S. 854 (1945). See generally, Coe v. United States, 44 Ct. Cl 419 (1909); *In re Agustin*, 62 F. Supp. 832 (N.D. Cal. 1945).
10. See U.S. DEP'T OF ARMY PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK 3-45 (1973).
11. See United States v. Harrison, NCM 77 0239 (N.C.M.R. 18 Aug. 1977).
12. See generally Goddard, *Constructive and Fraudulent Enlistment* (1962) (unpublished thesis in The Judge Advocate General's School, U.S. Army).
13. 23 C.M.A. 162, 48 C.M.R. 778 (1974).
14. 23 C.M.A. 142, 48 C.M.R. 758 (1974).
15. 23 C.M.A. 511, 50 C.M.R. 650 (1975).
16. To convict one accused of effecting an unlawful enlistment, the government must show:
 - (a) That the accused effected the enlistment, appointment, or separation of the person named, as alleged; (b) that this person was ineligible for the enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and (c) that the accused knew of these facts at the time of the enlistment, appointment, or separation.
17. See, e.g., United States v. Little, 24 C.M.A. 328, 52 C.M.R. 39 (1976); United States v. Burden, 23 C.M.A. 570, 50 C.M.R. 649 (1975); United States v. Muniz, 23 C.M.A. 530, 50 C.M.R. 669 (1975); United States v. Ruggerio, 54 C.M.R. Adv. Sh. 683 (N.C.M.R. 1977); United States v. Bobkoskie, 54 C.M.R. Adv. Sh. 672 (N.C.M.R. 1977); United States v. Robinson, 51 C.M.R. 838 (N.C.M.R. 1976); United States v. Huddleston, 50 C.M.R. 99 (A.C.M.R. 1975); United States v. Jones, 50 C.M.R. 92 (A.C.M.R. 1975); United States v. Bunnel, 49 C.M.R. 65 (A.C.M.R. 1974).
18. 3 M.J. 1020 (N.C.M.R. 1977).
19. NCM 77 0909 (N.C.M.R. 7 Jan. 1977).
20. CM 433414 (A.C.M.R. 27 May 1977) (unpublished).
21. During the enlistment process, the accused made an "unspecific" (in a joking manner) reference to a juvenile record involving a burglary conviction. On the Statements for Enlistment, DA Form 3286, he indicated that he had been fined \$45.00 for running a red light. He denied having been imprisoned, paroled or under suspended sentence.
22. NCM 76 0332 (N.C.M.R. 12 Aug. 1976).
23. But the court in United States v. Fialkowski, SPCM 11504 (A.C.M.R. 29 Apr. 1976), noted in dicta that the government could not acquire jurisdiction over a "willing" enlistee through criminal acts of its agents. When the recruit is "unwilling," mere negligence will preclude jurisdiction. In that case, no recruiter misconduct or negligence was present.
24. Negligence in any degree might constitute dereliction of duty under Article 92, U.C.M.J.
25. 23 C.M.A. 162, 48 C.M.R. 778 (1974).

26. 3 M.J. 612 (N.C.M.R. 1977).
27. The court pointed to the specific duty to report of "suspected or apparent misconduct" by a member in obtaining an irregular enlistment in the *Marine Corps Separation and Retirement Manual* MCO P1900.16, para. 6018. Cf. *United States v. Graham*, 3 M.J. 962 (N.C.M.R. 1977).
28. 3 M.J. at 615.
29. 3 M.J. at 898. See also *United States v. Graham*, 3 M.J. 962 (N.C.M.R. 1977). *United States v. Jennings*, CM 433629 (A.C.M.R. 9 Sept. 1977) (Memorandum Opinion).
30. 3 M.J. at 900. See footnote 2 to line S of Table 2-6, Army Regulation 601-210, Personnel Procurement, Regular Army Enlistment Program (C8, 24 June 1971).
31. 3 M.J. at 902.
32. CM 434626 (A.C.M.R. 20 June 1977) (Memorandum Opinion); police records check had disclosed no pending charges.
33. See, e.g., *United States v. Spicer*, 3 M.J. 689 (N.C.M.R. 1977); *United States v. Bobkowski*, 54 C.M.R. Adv. Sh. 672 (N.C.M.R. 1977); *United States v. Brede*, NCM 76 1946 (N.C.M.R. 23 Feb. 1977); *United States v. Barefield*, NCM 76 0435 (N.C.M.R. 21 June 1976).
34. See, e.g., *United States v. Jackson*, CM 434531 (A.C.M.R. 27 July 1976); *United States v. Johnson*, NCM 76 0332 (N.C.M.R. 12 Aug. 1976); *United States v. Holmes*, CM 433150 (A.C.M.R. 6 May 1976).
35. An argument can be made that if the irregularity in the enlistment goes to some factor other than competence to contract (i.e., insanity, age, duress, etc.), the enlistment is not affected by recruiter misconduct or negligence. The recruit is estopped from alleging the irregularity if the contract is voidable at the instance of the government. See generally, *United States v. Fialkowski*, SPCM 11504 (A.C.M.R. 29 Apr. 1976).
36. Confinement is not such service as would effect a constructive enlistment. See *United States v. Santiago*, 1 C.M.R. 365 (A.B.R. 1951); only five days service also held insufficient in *United States v. Williams*, 39 C.M.R. 471 (A.B.R. 1968) and continued protestations of military status may negate arguments of constructive enlistment. *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974).
37. For example, the individual may be subject to court-martial jurisdiction under other provisions of Articles 2 & 3, U.C.M.J. or Article 18, U.C.M.J. Additionally, jurisdiction may be based upon what might be characterized as de facto status—"actual" service in the military. See generally, *United States v. Julian*, 45 C.M.R. 876 (N.C.M.R. 1971); Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1 (1977) n.114-116, 227.

Professional Responsibility

Criminal Law Division, OTJAG

The OTJAG Professional Ethics Committee recently considered a case involving the propriety of a trial defense counsel's advice to his client to resist attempts by criminal investigators to obtain samples of his hair for comparison with hair found at the scene of the crime. Also considered were the counsel's statements to the CID agents regarding the law of seizure and the possibility of civil liability should they forcibly obtain hair samples from his client. The pertinent provisions of the ABA Code of Professional Responsibility considered by the Committee are Disciplinary Rule (DR) 7-102(A)(5) and (7), which state "(A) In his representation of a client, a lawyer shall not . . . (5) Knowingly make a false statement of law or fact . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

CPT A was detailed to represent PVT D, who was under investigation for rape, sodomy

and burglary. PVT D had been identified by the victim. In addition, hairs belonging to someone other than the victim were found on a couch in the victim's living room, where the alleged crimes occurred. Laboratory comparison of hairs found at the scene with hair samples of PVT D was sought. CPT A advised the trial counsel and the CID agents that PVT D would not consent to taking of the hair samples. Nevertheless, the samples were taken by agents while PVT D was in the post hospital for psychiatric evaluation. CPT A was present and assured himself that the agents did not have a warrant.

Subsequently, PVT D was sent to another post for further psychiatric evaluation. In response to a request, CID agents at the second post attempted to obtain additional hair samples from PVT D. Before proceeding to do so, they received legal advice that the hair samples could be obtained involuntarily. When the CID

agents informed PVT *D* of their purpose, he was allowed to call CPT *A*. CPT *A* advised PVT *D* not to cooperate, but not to hurt anyone. CPT *A* then spoke individually over the telephone with the three agents who intended to obtain the hair samples. To each agent he identified himself as PVT *D*'s defense counsel, informed them of his advice to PVT *D*, and stated that the law of involuntary seizure of hair samples was unsettled. He told them that violation of his client's constitutional rights could subject them to civil liability. CPT *A* stated to one agent: "I hope you have insurance for the actions you're going to take as I feel there's a strong possibility of civil liability, because PVT *D* wants it clear he's not consenting to your actions." CPT *A* stated he also informed the agents to seek legal advice before proceeding, and they did. Two days later the agents took hair samples from PVT *D*, who resisted by crawling under a bed and holding on to the springs. The charges were eventually dismissed upon recommendation of the Article 32 investigating officer.

Finding no ethical violations, the Committee stated that CPT *A*'s communications with the CID agents and advice to his client were based on his professional opinion that a search warrant was necessary for a forcible taking of hair samples, as obtaining this evidence did not fall within any of the recognized exceptions to the general warrant requirement, *e.g.*, search inci-

dent to arrest, protection of arresting officers from physical harm, or preservation of destructible evidence. As there is no case law squarely on point, the Committee concluded that CPT *A* maintained his position in good faith and did not make false statements of law when he told the agents that the law concerning this matter was not judicially settled. By instructing his client that he could nonviolently resist taking of the hair samples, counsel did nothing more than attempt to preserve the issue for judicial consideration. This attempt to preclude a claim of waiver was reasonable considering the distance separating counsel from his client. Likewise CPT *A*'s statement to the agents that they could subject themselves to a civil lawsuit was a conclusion which could follow from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In that case the United States Supreme Court recognized a cause of action against federal agents charged with violating citizens' fourth amendment rights. CPT *A*'s advice to the agents did not constitute a threat of criminal prosecution proscribed by DR 7-105. Finally, CPT *A*'s statement concerning the agents' need for insurance was determined to be inappropriate, but not unethical. His apparent lack of composure in this respect was considered tempered by the fact that his role as defense counsel was known to the agents, and he had advised them also to seek legal advice.

Judiciary Notes

U.S. Army Judiciary

NOTES FROM EXAMS & NEW TRIALS DIVISION

1. *Records of Trial.* Staff judge advocates should take corrective action to assure that general court-martial records of trial forwarded to the U.S. Army Judiciary (JALS-ED) for examination under Articles 61 and 69, including acquittals and other dispositions, contain original documents, such as Charge Sheet (DD Form 458), Article 32 Report of Investigation (DD Form 457) and exhibits, Pretrial Advice,

Request for Trial by Military Judge Alone, Request for Enlisted Court-Martial Members.

2. *Applications for Relief.* Whenever possible, the application for relief (DA Form 3499, signed personally by the applicant and properly notarized) should be submitted through the office of the staff judge advocate who was responsible for completion of the review under Article 65(c), U.C.M.J. That staff judge advocate should forward the application, together with the original record of trial, with appro-

appropriate comments and pertinent documents (such as certificates or affidavits) concerning the allegations set forth in the application. The documents should be sent to HQDA (JALS-ED), Nassif Building, Falls Church, Virginia 22041, by certified mail.

NOTE FROM DEFENSE APPELLATE DIVISION

The Advocate, A Journal For Military Defense Counsel, prepared by the attorneys at Defense

Appellate Division, is in the process of upgrading its mailing list. Any defense counsel office that is not receiving *The Advocate* or is receiving it at an improper address should send DA Form 3955 (Change of Address and Directory Record) to: Managing Editor, *The Advocate*, Defense Appellate Division, Nassif Building, Falls Church, Virginia 22041. Please note that *The Advocate* addressees must be offices—not individuals, and may receive only one copy each due to publishing costs.

Article 137 Training Aids

Criminal Law Division, TJAGSA

Article 137 of the Uniform Code of Military Justice requires that specified articles of the Code be carefully explained to each enlisted member of the service on three occasions: (1) upon the member's entrance on active duty or within six months; (2) after the member has completed six months of active duty; (3) and upon the member's reenlistment. To facilitate compliance with this statutory requirement, three training films have been produced:

TF 27-4863 "The Article 15";

TF 27-4821 "UCMJ Part I—Pretrial, Trial, and Post-Trial";

TF 27-4986 "UCMJ Part II—Offenses, Rights and Safeguards."

These films are in color, contemporary, and fast paced. They are designed to maintain a high audience interest level. Use of the three films satisfies Article 137 requirements. Note that TF 27-4986 has two brief instructional packages, one of which must be employed with this three-film series, in order to meet Article 137 standards. One instructional package may be used by an instructor to emphasize certain articles. If no instructor is present, the other package, covering the same material, may be read by a student after viewing the three films. These films should be available at installation level through the local audio-visual support center.

JAG School Note

On 22 September 1977, Mrs. Mary Salt, age 68, Claims Adjudicator in the US Army Claims Service, Europe, died while on vacation on the Isle of Wight in her native England. Mrs Salt was originally employed by the US Forces in October 1943 and served in Judge Advocate offices since 1944. After working in claims in

Versailles, Frankfurt, and Heidelberg, her last several years were with the Claims Service in Mannheim. Mrs Salt was well-known for her considerable expertise in the area of personnel claims. The Judge Advocate General's Corps has lost a loyal, dedicated employee, and a true friend.

CLE News

1. Virginia Rejects Mandatory CLE. The Supreme Court of Virginia rejected a proposed rule that would have required mandatory CLE for all practicing Virginia attorneys. In rejecting the order on September 9, 1977, the Court

said it "would not be in the best interest of the public and the legal profession to adopt such a rule at this time."

2. Available Video cassettes. Television Operations of The Judge Advocate General's School

announces that videocassettes of the 1977 Army Judge Advocate General's Conference, held 11 through 14 October 1977, are available, *in color*, to the field. Listed below are titles, running times and guest speakers. If you desire

any of these programs, please send a blank $\frac{3}{4}$ inch videocassette of the appropriate length to The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

TAPE #	TITLE	RUNNING TIME
1	OTJAG PERSONNEL REPORT, PART I Speakers: Colonel William K. Laray, Executive, Office of The Judge Advocate General, and Lieutenant Colonel William K. Suter, Chief, Personnel, Plans & Training Office, Office of The Judge Advocate General.	58:00
2	OTJAG PERSONNEL REPORT, PART II A Continuation of Tape 1	15:00
3	USAR REPORT Speaker: Lieutenant Colonel Jack H. Williams, Assistant Commandant for Reserve Affairs and Special Projects, TJAGSA.	23:00
4	ENLISTED PERSONNEL REPORT Speakers: Captain John F. DePue, JAGC Representative, MILPER-CEN and Master Sergeant Gunther M. Nothnagel, MILPERCEN.	29:00
5	ORGANIZATIONAL EFFECTIVENESS Speaker: Brigadier General John H. Johns, Director of Human Resources Development, Office of the Deputy Chief of Staff for Personnel, Department of the Army.	45:00
6	USALSA REPORT Speaker: Brigadier General Hugh J. Clausen, Chief, U.S. Army Legal Services Agency.	25:00
7	NEW DEVELOPMENTS IN CRIMINAL LAW (Including separate defense organization) Speaker: Colonel Wayne E. Alley, Criminal Law Division, Office of The Judge Advocate General.	42:00
8	GAD/DAD REPORTS Speakers: Colonel Thomas H. Davis, Chief, Government Appellate Division, U.S. Army Judiciary and Colonel Robert B. Clarke, Chief, Defense Appellate Division, U.S. Army Judiciary.	24:00
9	PROFESSIONAL RESPONSIBILITY, PART I Speakers: Colonel Thomas E. Murdock, Chief Trial Judge, U.S. Army Judiciary; Major Kenneth Gray, Criminal Law Division, TJAGSA; Major Michael Carmichael, Criminal Law Division, OTJAG; and Major Joseph Miller, Field Defense Services, Defense Appellate Division, USALSA.	59:00
10	PROFESSIONAL RESPONSIBILITY, PART II A continuation of Tape 9.	5:00
11	CONTRACTING OUT Speaker: Lieutenant Colonel Robert M. Nutt, Chief, Procurement Law Division, TJAGSA.	43:00

TAPE #	TITLE	RUNNING TIME
12	<i>AR 15-6 and AR 600-50</i> Speaker: Colonel Darrell L. Peck, Chief, Administrative Law Division, OTJAG	37:00
13	<i>EEO CASE PREPARATION</i> Speaker: Lieutenant Colonel Carroll J. Tichenor, Chief, Labor and Civilian Personnel Law Office.	30:00
14	<i>ADDRESS</i> Speaker: Lieutenant General DeWitt C. Smith, Deputy Chief of Staff for Personnel, Department of the Army.	44:00
15	<i>OPENING REMARKS; USAREUR REPORT</i> Speaker: Brigadier General Victor A. DeFiori, Judge Advocate, U.S. Army Europe and Seventh Army.	22:00
16	<i>INTERNATIONAL LAW UPDATE</i> Speaker: Mr. Waldemar A. Solf, International Affairs Division, OTJAG.	34:00
17	<i>ANTI-DEFICIENCY ACT</i> Speaker: Captain Gary L. Hopkins, Procurement Law Division, TJAGSA.	26:00
18	<i>KOREA UPDATE</i> Speaker: Colonel Richard J. Bednar, Judge Advocate, Eighth U.S. Army.	17:00
19	<i>TAJAG REMARKS</i> Speaker: Major General Lawrence H. Williams, The Assistant Judge Advocate General.	14:00
20	<i>GENERAL OFFICER PANEL</i> Major General Wilton B. Persons, Jr., Major General Lawrence H. Williams, Brigadier General Victor A. DeFiori, Brigadier General Hugh J. Clausen, Brigadier General Alton H. Harvey, Brigadier General Joseph N. Tenhet, Brigadier General Demetri M. Spiro, and Brigadier General Edward D. Clapp.	31:00
21	<i>CLOSING REMARKS</i> Speaker: Major General Wilton B. Persons, Jr., The Judge Advocate General.	15:00

3. 8th Advanced Procurement Attorneys' Course and 4th Allowability of Contract Costs Course. The theme for the 8th Advanced Procurement Attorneys' Course, scheduled for 9-13 January 1978, is "Construction Contracting." The tentative schedule of guest speakers includes:

Mr. Gilbert Cuneo, Executive Partner, Sellers, Conner & Cuneo, Washington, D.C.

Professor Ralph Nash, Professor of Law,

The George Washington National Law Center, Washington, D.C.

Mr. Al Joseph of Pettit, Evers and Martin, San Francisco, California.

Mr. Overton Currie of Smith, Currie & Hancock, Atlanta, Georgia.

Mr. Roy Mitchell, Partner, Lewis, Mitchell & Moore, Washington, D.C.

Mr. Eldon Crowell, Partner, Reavis, Pogue, Neal & Rose, Washington, D.C.

Judge Richard Solibakke, Chairman, Armed Services Board of Contract Appeals, Washington, D.C.

One day of the course will be dedicated to a presentation developed by Mr. E. M. Seltzer, Chief Counsel, Corps of Engineers, Washington, D.C.

The Advanced Procurement Attorneys' Course will be followed immediately by the 4th Allowability of Contract Costs Course on 16-18 January 1978. Mr. Roger Boyd, Partner, Reavis, Pogue, Neal & Rose, Washington, D.C., will be a guest speaker on the Cost Accounting Standards.

4. TJAGSA CLE Courses. Information on the prerequisites and content of TJAGSA courses is printed in CLE News, *The Army Lawyer*, September 1977, at 35.

November 14-18: 36th Senior Officer Legal Orientation Course (5F-F1).

November 28-December 1: 5th Fiscal Law Course (5F-F12).

December 5-8: 4th Military Administrative Law Developments Course (5F-F25).

December 12-15: 5th Military Administrative Law Developments Course (5F-F25).

January 3-6: 2d Claims Course (5F-F26).

January 9-13: 8th Procurement Attorneys' Advanced Course (5F-F11).

January 9-13: 6th Law of War Instructor Course (5F-F42).

January 16-18: 4th Allowability of Contract Costs Course (5F-F13).

January 16-19: 1st Litigation Course (5F-F29).

January 23-27: 37th Senior Officer Legal Orientation Course.

February 6-9: 6th Fiscal Law Course (5F-F12).

February 6-10: 38th Senior Officer Legal

Orientation Course (5F-F1).

February 13-17: 4th Criminal Trial Advocacy Course (5F-F32).

February 27-March 10: 74th Procurement Attorneys' Course (5F-F10).

March 7-10: 39th Senior Officer Legal Orientation Course (5F-F1).

March 13-17: 7th Law of War Instructor Course (5F-F42).

April 3-7: 17th Federal Labor Relations Course (5F-F22).

April 3-7: 4th Defense Trial Advocacy Course (5F-F34).

April 10-14: 40th Senior Officer Legal Orientation Course (5F-F1).

April 17-21: 8th Staff Judge Advocate Orientation Course (5F-F52).

April 17-28: 1st International Law I Course (5F-F40).

April 24-28: 5th Management for Military Lawyers Course (5F-F51).

May 1-12: 7th Procurement Attorneys' Course (5F-F10).

May 8-11: 7th Environmental Law Course (5F-F27).

May 15-17: 2d Negotiations Course (5F-F14).

May 15-19: 8th Law of War Instructor Course (5F-F42).

May 22-June 9: 17th Military Judge Course (5F-F33).

June 12-16: 41st Senior Officer Legal Orientation Course (5F-F1).

June 19-30: Noncommissioned Officers Advanced Course Phase II (71D50)

July 24-August 4: 76th Procurement Attorneys' Course (5F-F10).

August 7-11: 7th Law Office Management Course (7A-173A).

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

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

August 28-31: 75th Fiscal Law Course (5F-F12).

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

5. Civilian Sponsored CLE Courses.

December

1-2: PLI, Remedies for Breach of Contract, Los Angeles Hilton Hotel, Los Angeles, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

1-2: PLI, Practical Will Drafting, Barbizon Plaza Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

1-3: National Council of Juvenile Court Judges, The Unmet Challenge of the '70's—Juvenile Justice for Young Women, Hilton Gateway Inn, Kissimmee (Orlando), FL. Contact: Project Director, National Council of Juvenile Court Judges, Department MM, Univ. of Nevada, P.O. Box 8978, Reno, NV 89507. Phone (702) 784-6012.

4-9: NCDA, Advanced Organized Crime, Columbus, OH. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

4-9: NCSJ, Court Administration-Specialty, Judicial College Bldg., Univ. of Nevada, Reno NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$350.

4-16: NCSJ, The Judge and the Trial (Graduate), Judicial College Bldg., Univ. of Nevada, Reno, NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$540.

5-6: PLI, Foreign Trusts and Foreign Estates: Planning for United States and Foreign Persons, Barbizon Plaza Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$185.

5-7: George Washington Univ. National Law Center—Federal Publications, The Practice of Equal Employment, Miami, FL. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

5-7: Federal Publications, Practical Negotiation of Government Contracts, Williamsburg, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St.

NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

7-9: Federal Publications, Changes in Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

9-10: ALI-ABA, Practice under the Federal Rules of Evidence: Recent Developments, San Diego, CA. Contact: Donald M. Maclay, Director, Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone (215) 387-3000.

11-16: NCSJ, Alcohol and Drugs-Specialty, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$350.

12-13: Negotiation Institute, The Art of Negotiating, Hyatt Regency O'Hara, Chicago, IL. Contact: Negotiation Institute, Inc., 230 Park Ave., New York, NY 10017. Phone (212) 986-5558. Cost: \$450.

12-14: George Washington Univ. National Law Center—Federal Publications, Living with OSHA, Miami, FL. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000.

12-14: George Washington Univ. National Law Center, Patents and Technical Data [procurement aspects of patents and technical data in government contracting], Century Plaza Hotel, Los Angeles, CA. Contact: Government Contracts Program, George Washington Univ., 2000 H St. NW, Washington, DC 20052. Phone (202) 676-6815. Cost: \$400.

12-14: Federal Publications, Cost Estimating for Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-8200. Cost: \$425.

12-16: Federal Publications, The Masters Institute in Government Contracting, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$600.

13-15: LEI, Environmental Law Seminar, Berkeley, CA. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

14-16: Federal Publications, Contracting for Services, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

15-17: PLI, Advanced Criminal Trial Tactics for Prosecution and Defense, New York Hilton Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

19-21: Federal Publications, Renegotiation of Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$475.

19-21: Federal Publications, Changes in Government Contracts, San Diego, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

19-21: George Washington Univ. National Law Center—Federal Publications, Equal Employment Claims & Litigation, Las Vegas, NV. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000.

19-21: NYU School of Continuing Education, Government Project Management, Chicago, IL. Contact: SCENYU Registrations, New York Conference Management Center, 360 Lexington Ave., New York, NY 10017. Cost: \$355 for the first person and \$295 for each additional person.

12-13: PLI, Remedies for Breach of Contract, Americana Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

15-20: NCDA, Prosecutor's Office Administrator Course, Part III, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

19-21: ALI-ABA-State Bar of Arizona, Labor Law for the General Practitioner, Phoenix, AZ. Contact: Donald M. Maclay, Director, Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone (215) 387-3000.

29-1 Feb.: NCDA, Major Fraud, San Diego, CA. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

1. (Nonappropriated Fund Instrumentalities, Operational Principles) **The Risk Management Program Self-Insurance Coverage Does Not Extend To Private Property In The Possession Of A Nonappropriated Fund Instrumentality.** DAJA-AL 1977/3920, 7 Apr. 1977. The custodian of an Army hotel (transient billets), a nonappropriated fund instrumentality, asked if the fund could limit its liability for valuables left by guests with the hotel for safekeeping to \$15,000. The Judge Advocate General noted that the Risk Management Program of self-insurance covers only property acquired with nonappropriated funds or donated to a nonappropriated fund instrumentality (para. 7b, AR 230-16) and, therefore, its coverage does not extend to private property in the possession of a nonappropriated fund instrumentality and its limits of liability do not apply. Under the provisions of Chapter 12, AR 27-20, a claim could be made against a NAFI for bailed property which is tortiously damaged or lost by it (para. 17, AR 230-16 and para. 1-6, DA Pam 230-3). In the case of such a claim, the extent of the NAFI liability would depend on the facts of the case and could not be determined in advance.

The Judge Advocate General suggested that the surest method of limiting the potential liability of a nonappropriated fund instrumentality for tortious loss or damage of property bailed to it was not to accept property above a designated monetary value.

2. (Information and Records, Filing of Information) **Policy On Filing Aborted Elimination Action As Inclosure To Letter Of Reprimand UP AR 600-37.** DAJA-AL 1977/3951, 15 Apr. 1977. An officer was recommended for elimination UP AR 635-100 for moral and professional dereliction. This action was dropped and, in lieu thereof, he was given an administrative letter of reprimand (LOR) UP para. 2-4, AR 600-37, for permanent filing in his Official Military Personnel File (OMPF). The officer simply acknowledged receipt of the LOR when advised of the proposed action. The letter arrived at MILPERCEN with two inclosures relating to the aborted elimination action. MILPERCEN requested an opinion on the legality of filing these allied papers with the LOR.

TJAG advised that only material submitted by a member in response to a LOR and any listed inclosures thereto should be filed in the

OMPF UP (then) para. 2-4a(2), AR 600-37 (currently para. 2-4c(3)). TJAG expressed the view that only the officer's acknowledgement of receipt (1st Ind) met this condition. It was noted that para. 2-3h (now para. 2-3g), AR 600-37, authorizes the filing, without further referral to the member concerned, of unfavorable information of which the member has prior knowledge and has had an opportunity to refute. However, it was not clear from the correspondence in this case that the commander intended filing under authority of then para. 2-3h or that the officer had the opportunity to review and comment on all correspondence included in the elimination case file. TJAG also viewed as inconsistent with the underlying policies of AR 600-37, the filing of an aborted elimination action in the OMPF, as the action can hardly be considered "resolved." Individual documents (e.g., witness statements or case summaries without reference to the aborted action) may, however, be appropriate for filing if they meet all other requirements of the regulation. It was recommended that MILPERCEN query the commander as to the purported authority for forwarding the elimination package, as well as the extent of the officer's opportunity to rebut.

3. (Information and Records, Release and Access) Opinions of The Judge Advocate General Intended To Have Broad Application May Not Be Exempt From Release As Internal Memoranda. DAJA-AL 1977/4008, 15 Apr. 1977. A copy of a certain opinion of The Judge Advocate General was requested by a law firm. While opinions of The Judge Advocate General are generally exempt from release as internal memoranda (FOIA Exemption 5), it was decided to furnish a copy of the requested opinion to the law firm in question. The Judge Advocate General noted that opinions limited to the particular facts of specific cases which are not intended to have a broad application are generally exempt from release under Exemption 5. On the other hand, when the opinion is a statutory interpretation intended to be applied in all cases of a similar nature, it may be releasable.

4. (Civilian Employees) ABCMR Has Author-

ity To Correct Military Records Of Civilian Employees. DAJA-AL 1977/4188, 15 Apr. 1977. A question concerning the authority of the ABCMR to correct records of civilian employee grievance proceedings resulted in an opinion by the Administrative Law Division, OTJAG, concerning the extent of the ABCMR's authority to correct records pertaining to civilian employees in general. The opinion noted that the ABCMR has authority over "military records" relating to civilian employees and reiterated that it is the nature of the record, not the status of the individual which is the jurisdictional issue. Earlier opinions of The Judge Advocate General indicated that a record is considered a military record when it is issued, created or prepared by military authority for use by the military and is administered as a military record. The opinion then differentiates between official personnel folders of civilian employees and grievance records. The former are records of the Civil Service Commission, custody of which is granted to the Army as employing agency under paragraph 2-5a, Chapter 293, FPM. Because Civil Service Regulations control their creation and maintenance, they are not military records and accordingly not reviewable by the ABCMR. No allegation of failure to exhaust an administrative remedy before the ABCMR has been raised in any civilian employee litigation involving these records.

On the other hand, the opinion points out that grievance records are generated by the Army grievance system established pursuant to paragraph 3-6, Chapter 771, FPM. Because these records are entirely internal to the Army, filed locally, and not subject to review by the Civil Service Commission, the opinion states that they are within the jurisdiction of the ABCMR. Although paragraph 3-13c, CPR 771.3, provides that the MACOM's decision of a grievance is final and not reviewable further within DA, this provision appears not to be specific enough to limit the broad grant of jurisdiction by the Secretary of the Army to the ABCMR under AR 15-185. According to the opinion, a narrow reading of this provision would thwart the remedial purpose of 10 U.S.C. § 1552 in creating the ABCMR; and

therefore, it appears only to provide administrative finality for ripeness of any ABCMR review.

5. (Separation From Service, Grounds) Medical Opinion That EM Has Character/Behavior Disorder As Result Of Injury On Active Duty Does Not Preclude Discharge UP Expeditious Discharge Program and Recoupment Of Enlistment Bonus. DAJA-AL 1977/4296, 16 May 1977. EM enlisted in the Army for a four-year term under a cash bonus enlistment option. Two years later, he was discharged with an honorable discharge under the Expeditious Discharge Program (AR 635-200). Action was initiated to recoup the unearned portion of his reenlistment bonus (37 U.S.C. § 308a(b) and para. 9-2b, AR 600-200).

The EM applied to the ABCMR, requesting his discharge be changed to a medical discharge and that he not be required to repay any of the bonus. The stated justification was that he received a concussion when the deck lid of a tank fell on his head, bringing on headaches which contributed to actions leading to his separation under the EDP. He argued that because of his injury, his problems were not his own fault and the recoupment action was improper.

OTSG advised ABCMR that EM's post-concussion syndrome did not qualify him for a medical discharge although he had a character/behavior disorder sufficient to cause him to be administratively unfit. It was stated further that as EM had no recognition his behavior was unsatisfactory, it "should not be medically judged to be voluntary or due to his own fault." OTSG recommended ABCMR obtain a legal opinion on the matter.

TJAG advised ABCMR that the recoupment action was legally correct under applicable statutory and regulatory provisions. It was pointed out that EM voluntarily consented to the EDP discharge after proper notice. Medical evidence indicated EM had a character/behavior disorder; however, this disorder did not prevent him from agreeing to the EDP action.

6. (Information and Records, Release and Ac-

cess) Lateral Investigation Not Exempt From Release Under FOIA Exemption 5. DAJA-AL 1977/4379, 26 May 1977. A Freedom of Information Act request was received for the report of an investigation of an explosion in which civilian employees were injured. The investigation was not the safety investigation required by AR 385-40, but was a collateral investigation. The Judge Advocate General decided to release the report of investigation in its entirety. It was noted that the investigation was primarily factual in nature and that while factual portions of some safety investigations may be withheld under Exemption 5 of the Freedom of Information Act, the exemption is limited to the safety investigation and does not include collateral investigations required by regulation or conducted at the prerogative of a commander. It was also pointed out that the findings and recommendations of reports of investigation would normally be withholdable under FOIA Exemption 5. However, when recommendations are approved and in effect become the decision of the agency they are no longer exempt from release.

7. (Prohibited Activities and Standards of Conduct, Gifts) Appropriated Funds May Not Be Used To Purchase Plaques For Presentation To Departing Personnel As A Farewell Gesture. DAJA-AL 1977/4827, 1 July 1977. A staff judge advocate asked if it was legal to use appropriated funds to purchase service award plaques to present to departing personnel. It was noted that AR 672-1 implements section 1125, title 10, United States Code, subsection (1) of which authorizes limited discretion in the procurement of certain types of items with appropriated funds for presentation to "members, units, or agencies of an armed force" for "excellence in accomplishments or competitions related to that armed force." Subsection (2) authorizes the purchase of only "badges or buttons in recognition of special service, good conduct and discharge under conditions other than dishonorable." On this basis, it was opined that neither the statute nor the regulation constituted authority to use appropriated funds for the purchase of farewell plaques. It was also noted that para. 1-6j, AR 672-20, prohibits pre-

sentation of incentive awards as a farewell gesture.

Editorial Note: Due to the employment of a different indexing system, this opinion is indexed at OTJAG under the topic "Funds, Awards and Decorations." This case was not viewed or treated as a standards of conduct case. Neither AR 600-50 nor DoD Directive 5500.7 were considered.

8. (Separation From The Service, Discharge) Execution Of Approved AR 635-206 Discharge Will Be Withheld Pending Appeal Where EM Remains In Civil Confinement. DAJA-AL 1977/4866, 1 July 1977. A Texas court convicted an EM of a felony and sentenced him to an indeterminate sentence of 5 to 30 years confinement. His confinement began on 1 Jan. 1975. A board of officers convened UP AR 635-206 on 13 Apr. 1977 and recommended he be discharged under other than honorable conditions.

The convening authority recommended MILPERCEN that the EM be separated immediately, prior to completion of appellate review, because of the nature of the crime, the length of his absence from the Army, and the anticipated length of appellate action.

Citing paragraph 34, AR 635-206, which implements paragraph F, Inc. 5, DoD Directive 1332.14, TJAG advised that separation of a member with an approved discharge based on a civil conviction prior to final appellate action will be approved only in "very unusual" and "extenuating" circumstances. Immediate discharge normally will not arise where the member will remain in civil confinement pending action on the appeal. TJAG expressed the view there were no "very unusual" or "extenuating" circumstances in this case which allowed deviation from the general policy to withhold execution pending the outcome of the appeal.

1977 Judge Advocate General's Reserve Training Workshop

Reserve Affairs Department, TJAGSA

Over 100 Reserve Component judge advocate officers representing Military Law Centers, JAGSO Detachments, Army Reserve Commands, Training Divisions, Garrisons, Civil Affairs Units and Support Commands gathered at The Judge Advocate General's School from 7 to 9 September 1977 to attend the Judge Advocate General's Reserve Training Workshop (Conference). Command judge advocates of the active Army from FORSCOM, TRADOC and the CONUS armies joined the reserve judge advocates in discussing the Premobilization Legal Counseling Program, Troop Program Unit assignment policies, reserve training, OPMS-USAR, and other reserve matters. Following registration activities and a reception for conferees on Tuesday evening, the 6th, conference business began the following morning with welcoming remarks by TJAGSA Commandant, Colonel Barney L. Brannen, Jr., and a keynote address by Major General Lawrence H. Williams, The Assistant Judge Advocate General.

The first day activities included a report by Lieutenant Colonel Neil Roche, Commander, 3d Military Law Center, on the court reporter training program developed by that law center and insight into the recently developed OPMS-USAR program by Colonel Edward J. Van Horn, Director of Officer and Enlisted Personnel Management Directorate, RCPAC. Officer Personnel Management System (OPMS-USAR) is the career management system developed at RCPAC for the management of all USAR officers and is analogous on the active army side to MILPERCEN. The program offers members of the IRR up to 35 days of counterpart training, *i.e.*, training with, or in an active army SJA office. Colonel Van Horn pointed out that the initial testing in Readiness Region VI met with considerable success and the program is scheduled to expand into other Readiness Regions 1 October 1977. The morning activities concluded with an update in Criminal Law.

The afternoon session was highlighted by a question and answer period on OPMS-USAR and closed with workshops for the Military Law Center commanders and ARCOM and GOCOM staff judge advocates.

Brigadier General Demetri M. (Jim) Spiro, Chief, Judge, U.S. Army Legal Services Agency, MOB DES, chaired the second day's events, and after his opening remarks Colonel Charles A. Brant, Commander, 9th Military Law Center, discussed the IDT training program developed by his law center and how it could be applied to other law centers and JAGSO teams. Next, an update in Procurement and International Law was provided by members of TJAGSA faculty. An informative address by Brigadier Generals Clapp and Spiro on the recent attempt to eliminate JAG reserve pay slots followed these presentations. In their talk, Generals Spiro and Clapp outlined the background of the appropriation bill which was reported out by the House Defense Appropriation Subcommittee of the House Appropriation Committee in May and contained a rider recommending, among other things, that units performing legal functions be removed from Pay Group A (48 paid drills per year plus 15 days annual training) and be placed in Pay Group D (authorized only 15 days annual training) for fiscal year 1978. The House Bill 7983 containing this language was eventually passed by the House Committee and sent to the Senate. The Senate committee subsequently rejected the House position and reported out the bill without reference to eliminating the 48 paid drills for JAG detachments. The language in

the House version of the bill was subsequently deleted in a joint House-Senate conference. General Clapp indicated that the issue will undoubtedly surface again in the next fiscal year and that JAG reserve units must document all of their functions in order to be prepared for this issue when it arises again. The morning program concluded with a report on the U.S. Naval Reserve Program by Rear Admiral Penrose Albright, Director Naval Reserve Law Program. The afternoon session consisted of workshops headed by the CONUS army staff judge advocates.

The traditional conference banquet was held that evening in the TJAGSA consolidated club. Brigadier General Demetri M. Spiro, Chief Judge, U.S. Army Legal Services Agency, MOB DES, was the featured speaker at the conference banquet. In his address to the attendees, General Spiro stressed the importance of maintaining a well-trained reserve force as a means of aiding national security, and expressed his appreciation to the JAG reserve components and TJAGSA for their efforts in continually upgrading the JAG reserve program.

Brigadier General Edward D. Clapp, Assistant Judge Advocate General for Special Assignments, MOB DES, opened and chaired the Friday sessions of the conference and his remarks were followed by an update in the claims area. Recent developments in several areas of administrative law were then discussed. The agenda concluded with reports from First, Fifth and Sixth Army staff judge advocates.

JAGC Personnel Section

PP&TO, OTJAG

1. Assignments

LIEUTENANT COLONELS

NAME	FROM	TO	APPROX DATE
DE GIULIO, Anthony P.	USATC Ft Dix, NJ	TRADOC	Nov 77
THORNOCK, John R.	USALSA	Eng Ctr Ft Belvoir, VA	Oct 77

NAME	FROM	TO	APPROX DATE
MAJOR			
SKLAR, David A.	III Corps Ft Hood, TX	First Army Ft Meade, Md	Nov 77
CAPTAINS			
ALPHIN, Thomas H., Jr.	First Army Ft	USAG Ft Meade MD	Nov 77
BAUER, Bruce R.	3d Armd Div APO 09039	USALSA	Dec 77
BUSHNELL, William C.	USAG Ft Carson, CO	KOREA	Jan 78
CARTER, Rolan W.	1st Armd Div APO 09326	USALSA	Jan 78
DOLAN, Daniel A.	HQ Ft Huachuca, AZ	USALSA	Jan 78
DOUGLAS, William J.	Europe	USALSA	Nov 77
GALLIVAN, Richard A.	2d Inf Div APO 96224	USALSA	Mar 78
GREENHAUGH, John C.	Elect Cmd Ft Monmouth NJ	7th Sig Cmd Ft Ritchie, MD	Nov 77
HAINES, Lon C.	Europe	USATC Ft Dix, NJ	Mar 78
HEEKIN, Robert A.	FORSCOM	SE Regional Recruiting Cmd Ft Gillem, GA	Dec 77
HENDERSON, Stephen P.	USATC Ft Dix, NJ	USALSA	Jan 78
JACKSON, Robert H., Jr.	USACDE Ft Ord, CA	Pine Bluff Ars	Jan 78
LONG, Robert H., Jr.	7th Rgn Crim Inv APO 96301	27th Adv Crs TJAGSA	Aug 78
MEINHOLD, Don H.	USAG Ft Carson, CO	Korea	Jan 78
NEWELL, Robert D., Jr.	MAAG Taiwan	USACC Taiwan	Oct 77
NOLAN, Peter A.	MDW	USALSA	Dec 77
PARWULSKI, James J.	US Army Japan	USALSA	Dec 77
REICH, Timothy M.	USAG Ft Sheridan, IL	USAREC Ft Sheridan, IL	Oct 77
VOLZER, Harvey J.	Europe	USALSA	Dec 77
REVOCATIONS			
BEARDSLEY, Anthony W.	3d Armd Div APO 09039	USALSA	Oct 77
LEE, Verndal C.	Korea	9th Inf Div Ft Lewis, WA	Jan 78

2. AUS Promotions**COLONEL**

HANSEN, Donald W. 3 Sep 77
 TOCHER, Patrick A. 4 Sep 77

LIEUTENANT COLONEL

ECKHARDT, William G. 12 Aug 77

Current Materials of Interest

Articles

The DUKE LAW JOURNAL, Volume 1977, Number 2, May 1977, contains the eighth annual survey of major developments in federal administrative law. The notes included in the survey are:

Democratic Due Process: Administrative Procedure After Bishop v. Wood;

FTC v. Simeon Management Corp.: The First Amendment and the Need for Preliminary Injunctions of Commercial Speech;

Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification;

Developments Under the Freedom of Information Act—1976;

The Government in the Sunshine Act—An Overview;

Interim Rate Relief for Public Utilities Pending Judicial Appeal of Administrative Rate Orders;

OSHA: Employer Liability for Employee Violations.

Other Current articles of interest are:

Donald N. Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 MIL. L. REV. 1 (1977).

Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977).

Major Norman G. Cooper, *O'Callahan Revisited: Severing the Service Connection*, 76 MIL. L. REV. 165 (1977).

Captain David A. Schleuter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. (1977).

Major M. Scott Magers, *A Practical Guide to Federal Civilian Employee Disciplinary Action*, 77 MIL. L. REV. 65 (1977).

Captain William S. Ostan, *Unionization of the Military: Some Legal and Practical Considerations*, 77 MIL. L. REV. 109 (1977).

Capital John Robert Cotton, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143 (1977).

Major Delroy J. Gorecki, *Evidentiary Use of the Voice Spectrograph in Criminal Proceedings*, 77 MIL. L. REV. 167 (1977).

Frazier, *Labor Arbitration in the Federal Service*, 45 GEO. WASH. L. REV. 712 (1977).

Vance, *Human Rights and Foreign Policy*, 7 GA. J. INT'L & COMP. L. 223 (1977). [The author is Secretary of State Cyrus Vance.]

Cohn, *International Adjudication of Human Rights and the European Court of Human Rights: A Survey of its Procedural and Some of its Substantive Holdings*, 7 GA. J. INT'L & COMP. L. 315 (1977).

Note, *Progress Report on United Nations Human Rights Activities to Protect Prisoners*, 7 GA. J. INT'L & COMP. L. 467 (1977).

Dellapenna, *The Citizenship of Draft Evaders After the Pardon*, 22 VILL. L. REV. 531 (1976-1977).

Munnecke, *Mandatory CLE—Recertification*, 24 FED. B. NEWS 228 (1977).

Committee News, *Military Legal Assistance Resolution Adopted*, 24 FED. B. NEWS 236 (1977).

Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503 (1977).

Fryer, *Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors*, 11 INT'L LAW. 567 (1977).

Marino, *The Occupational Safety and Health Act and the Federal Workplace: Implementation of OSHA by the Departments of Defense and the Navy*, 29 JAG J. 125 (1977).

Swayze, *Traditional Principles of Blockade*

in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam, 29 JAG J. 143 (1977).

Mills, Procedural Requirements for Searches of Civilians by Military Officials on Overseas Installations, 29 JAG J. 175 (1977).

Case Notes

Legal Profession—Witnesses—Contingent Fees for Expert Witnesses—Person v. Association of the Bar of the City of New York, 414 F. Supp. 139 and 414 F. Supp. 144 (E.D.N.Y. 1976), reversed on appeal, 544 F.2d 534 (2d Cir. 1977), 1977 WIS L. REV. 603 (1977)

Gall, Maritime Law: Admiralty Jurisdiction: Damages Accidentally Caused to a Ship on Navigable Waters by a Missile Fired From a Navy Airplane Bears a "Significant Relationship to Traditional Maritime Activity." *Falgout Boats v. United States*, 508 F. 2d 855, 1975 A.M.C. 343 (9th Cir. 1974), 29 JAG J. 196 (1977).

Lewellyn, Constitutional Law: Search and Seizure: An Extension of the Exclusionary

Rule in the Area of Military Searches Conducted Overseas. United States v. Jordan, 24 C.M.A. 156, 51 C.M.R. 375 (1976), 29 JAG J. 207 (1977).

Book Reviews

Fleischman, Book Review, 45 GEO. WASH. L. REV. 879 (1977). [Review of MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE (1976).]

Campbell, Book Review, 29 JAG J. 216 (1977). [Review of ANGELA RODDEY HOLDER, MEDICAL MALPRACTICE LAW (1975).]

Major F. John Wagner, Book Review, 76 MIL. L. REV. 189 (1977). [REVIEW OF MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY (1975).]

DoD Instruction

Department of Defense Instruction Number 6015.18, 18 August 1977, establishes DoD procedures for control of smoking in DoD occupied buildings and facilities.

Errata

It has come to the attention of the editor that two paragraphs wandered away from their intended place in the Legal Assistance Items in the June 1977 issue of *The Army Lawyer*. The first two full paragraphs on page 31 (the paragraphs beginning "The ACA should be represented" and "The Agency's participa-

tion") should have appeared at the bottom of the right hand column on page 29, just below the paragraph beginning "The President expressed" All paragraphs have been instructed that in future issues wandering will not be authorized.

By Order of the Secretary of the Army:

Official:

JAMES C. PENNINGTON
Brigadier General, United States Army
The Adjutant General

BERNARD W. ROGERS
General, United States Army
Chief of Staff