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A Court Reporter Speaks . . .

By: SP7 Art Gunderman, Fort Leonard Wood, Missouri

Court reporting is an old and much honored profession; an endeavor of which its practitioners are justly proud. Wherever statesmen speak, a reporter is close by, recording their words for dissemination to the public and for posterity. Whenever a bad conduct discharge special or general court-martial is convened, anywhere in the world, a court reporter is recording those proceedings to preserve forever an accurate account of what transpired that day. By his finished product, the court reporter paints a complete picture of the trial upon which the reviewers, including the staff judge advocate, the convening authority, the Army Court of Military Review, and the Court of Military Appeals, rely in making their decisions. The reporter's responsibility is an awesome one.

The role of the Army court reporter has remained remarkably unchanged for the past 45 or 50 years. Article of War 115, found in Appendix 1, *A Manual for Courts-Martial, U. S. Army, 1928*, is nearly identical in language to Article 28, Uniform Code of Military Justice, found in Appendix 2, *Manual for Courts-Martial, United States, 1969 (Revised Edition)*. Similarly, duties of the court reporter (Para 46b, *MCM, 1928*; and Para 49b[1], *MCM, 1969 [Rev]*) remain essentially unchanged.

One difference worthy of mention is the fact that in years gone by, the enlisted court reporter was given extra pay for his transcripts. This pay, pursuant to Act of Congress dated 25 August 1937, was at the rate of 25 cents for each 100 words transcribed and 10 cents for each 100 words of the first and each

additional carbon copy. This reimbursement policy, abandoned during the early 50's, was again reinstated with the award of proficiency pay (P-2) to court reporters. Our modern system of compensation is probably much more equitable, as income no longer fluctuates with case load, but remains constant regardless of the instability of the docket.

With 17 years military service, ten of which have been in court reporting and legal clerk positions, I appreciate this opportunity to speak to such a large and distinguished audience of judge advocates, military judges, court reporters and legal clerks as is provided by the medium of *The Army Lawyer*. I propose to address myself to specific persons and positions within the Corps and hope that my comments and observations reflect the thoughts of the majority of court reporters now on active duty.

. . . to The Judge Advocate General.

Much improvement in the lot of the court reporter has occurred in recent years. Mentioned earlier, award of proficiency pay has enhanced court reporting as a career field. Exemption from additional duties in overseas areas is also a big morale boost. However, there is, at all levels within the Corps, agreement that much remains to be done if reporters are to attain a status in the military anywhere near their counterparts in the civilian community.

In 1970, the Judge Advocate Agency, Combat Developments Command, prepared an extensive report on court reporting systems in the Army, concluding that the Army court reporter should be a Warrant Officer Steno-

STAFF JUDGE ADVOCATE

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typist. Every reporter and nearly every staff judge advocate I have discussed this report with, has agreed with its conclusions and recommendations. Although once disapproved, I trust that this program has not been abandoned. It is the best overall solution to the problems facing the career court reporter today. In the alternative, continued effort must be made to improve the career potential of court reporters. I find it impossible to encourage a soldier to become a career court reporter, when in the same breath I must tell him he will be able to attain a grade no higher than E-7 and, with so few E-7 positions Army-wide, chances of that are slim. At a minimum, a program allowing normal progression to E-9 is essential if we are to attract and retain a viable force of career court reporters. Recent announcement of plans for implementation of a stenotype court reporting training program at civilian schools (*The Army Lawyer*, August 1973, p. 27) is a tremendous breakthrough and careful selection of qualified applicants will ensure the success of this program. However, under the present grade structure, the Corps will face even greater retention problems when one considers the demand for and earning potential of a civilian stenotypist.

Ideally, the court reporter should be assigned to the Judiciary. Regardless of the Manual provision that saddles the trial counsel with responsibility for preparation of the record of trial, it is the military judge who is most concerned with the transcript. In nearly all cases, he is the only officer who authenticates the record of trial and, this being the case, the person preparing that record should function under the control and supervision of the military judge.

The comments set out above are not made with any claim to originality. They are merely a restatement of longstanding problems, made with the knowledge that everything possible is being done to find solutions to them.

. . . to Staff Judge Advocates.

The biggest problem the court reporter faces is malassignment and misuse of his

talents. The staff judge advocate knows his court reporters are valuable assets; he is tempted and too often uses them in positions other than court reporting. As an example, one major command is authorized 21 court reporters in the staff judge advocate offices within that command. All of these positions are filled with qualified 71E personnel; in fact, some overage exists. Yet only one-third of those reporters are engaged in court reporting duties. Another example: there is an office which is fortunate enough to have a full complement of both civilian and military reporters. The civilians do 100% of the verbatim reporting, while the military reporters are engaged in preparation of summarized (regular, special) records of trial and in military justice administrative work. This misuse of reporter talent is a waste. I personally know one dedicated reporter who fought long and hard to obtain the coveted 71E MOS and has not reported a verbatim case in nearly a year because the civilian reporters in that office take all of the verbatim cases. This reporter is so disillusioned that he will be giving up nine years service and his E-6 stripes upon ETS next year and moving on to greener civilian fields. We cannot afford to allow this to happen if we are to attain our goal of a court reporting career force.

What do I suggest? Do your best to keep your court reporters reporting courts. Share the wealth. Chances are that at a nearby post, the staff judge advocate is struggling to keep up with his case load because of a lack of reporters. We court reporters are not afraid of a pile of work and, for the most part, are not averse to an occasional TDY trip. If it is at all possible, give operational control of your court reporters to the military judge hearing cases in your command. In compensation, you will gain return of that good legal clerk or secretary-steno who now supports the judiciary at your station.

... to the Military Judge.

Two problems occur in court which the military judge can readily correct if he is aware of them. Both arises in cases tried before a

court with members. First and worst, to coin a phrase, is that area when the jurors are questioned by counsel and the court concerning their competency—the voir dire. In the beginning stages of the trial, when the jury is being examined for the first time, counsel fire questions rapidly at court members, both collectively and individually. The reporter, who must not only record questions and answers but must identify each speaker for the record, is faced with an almost insurmountable task. Relief is easily obtained if the military judge will ask counsel to proceed slowly and instruct the court members to identify themselves by name before speaking. I fear that many records of trial have been authenticated and forwarded with the record attributing a comment to one member that was actually made by another, simply because the reporter could not correctly identify court members whose names and faces he was not yet familiar with.

The other area of concern in court is the side bar conference. Too many times, the parties to the trial speak so softly that the reporter is unable to hear what is said. That happened to me just recently—I missed one word: "Denied," that if omitted from the record would have caused substantial error and may even have caused reversal of the case. In that side bar situation, where parties to the trial are all close together, try to direct your remarks toward the court reporter. Speak softly, but be extra careful to speak clearly and distinctly so that the reporter can accurately record your words.

... to Counsel.

The biggest problem the court reporter has in court is counsel's inherent ability to talk in unison. Regardless of the method of court reporting used, it is extremely difficult to record the words of two people speaking at the same time. This occurs when objections are voiced, when witnesses are interrupted, during voir dire examinations, and at numerous other points during trial. Remember that the court reporter must not only record your

spoken word; he must also identify speakers, insert gestures and so forth.

Another problem often encountered arises in the marking of exhibits for identification. When an exhibit is handed to the reporter for marking, silence must be the rule. It is impossible to mark an exhibit and annotate the exhibit log while counsel is extolling to the court the virtues of the proposed exhibit and what is to be proved by its presentation. If at all possible, have the reporter mark and log your exhibits before the court convenes or during a recess. If exhibits are marked in open court, be sure the reporter is allowed sufficient time to do so properly.

The final area I wish to address myself to is gestures, motions, and indications made by witnesses on the stand. Such expressions as "over to about here", "about that long", "he had a bruise right here as big as that, and another over here but not quite so large" become entirely meaningless when read in the typed record. The reporter is not permitted to draw a conclusion from a gesture—it must be clarified by counsel. If a witness nods his head or lifts an eyebrow in answer to a question, the notation "witness nods" or "no audible response" may appear in the record in the absence of insistence upon a spoken answer.

The participants in the trial should never lose sight of the fact that their utterances are being recorded. Consciousness of the record and its importance will impel clarity of thought and speech and promote accuracy and readability of the transcript.

... to Court Reporters.

The duties of court reporters are too many and diversified to discuss here. Our job is not the easiest one, but in the majority of cases, is performed in an outstanding manner. I take great pride in being one of the approximately 100 court reporters on active duty today.

The courts and counsel rely with confidence upon the ability of the court reporter—the one who is called upon to report verbatim the

words of the court, counsel and witnesses. Upon this "Silent Man" rests a grave responsibility: the protection of life, liberty and property, through the sanctity of the record of trial. Were it not for the trained ability of the reporter, courts would not function with the speed demanded by the present day volume of cases.

The responsibility for preferring the record devolves on trial counsel. The responsibility and duty of keeping the record rests upon the court reporter. It is made through him for the convenience of the court, counsel, and reviewing bodies. Were the reporter an automatic recording device, unendowed with human intellect, the record in many instances would be unintelligible. The nods or shakes of a witness' head in response to a question; the accent of a foreign witness; the unintentional mispronunciation of material words; the garbling of names and technical terms; extraneous sounds such as coughs and sneezes, sirens and airplanes, or other noises outside the courtroom—all these necessitate a distinct and independent mental operation on the part of the reporter in the process of transmuting the sounds heard into a typewritten transcript which conveys the intelligibility of the printed word. Through the exercise of intelligence, supplemented by skill and experience, the reporter is able to translate the verbal jumbles and slurs of all types of speakers into an accurate record.

Let us remember, as we continue our production of high quality work, that the motto of court reports is:

THE RECORD NEVER FORGETS

In conclusion, the time-honored story of the tired reporter is, perhaps, appropriate. After extended argument of a case, lasting through the supper hour and into the evening hours, the court reporter turned appealingly to the judge, stating that he was tired. The military judge, in a spirit of helpfulness, turned to counsel with this request: "Won't you please speed up? The reporter says he is tired."

Training in the Geneva and Hague Conventions: A Dead Issue?

By: Major James J. McGowan, Jr., JAGC, Chief, International and Comparative Law Division, TJAGSA

The units involved in the My Lai operation had minimal training with respect to the handling of civilians under the . . . Geneva Conventions.¹

Convention Requirements

Both the 1907 Hague and 1949 Geneva Conventions require that the military provide instruction to its members in the law of war.² The requirements of the articles of these Conventions, although they state "issue instructions" and "disseminate the text of the present Convention,"³ mean more than giving merely lip service or photo copies of the Conventions to officers and soldiers. Dissemination of the Conventions is to be supplemented by programs of study or, as is more commonly called, periods of instruction on the Conventions.⁴ As the Geneva Conventions' Commentator states "the Convention should be known to those who will be called upon to apply it; the latter may have to render an account of their deeds or shortcomings before the courts, and in some cases they may even benefit by the provisions of the Convention."⁵ Historically, it should be noted that the United States was the first nation to issue written instructions for her forces concerning, *inter alia*, the humane treatment of prisoners of war and other noncombatants in time of armed conflict.⁶ Starting in 1951,⁷ various regulations were promulgated which required training in the Conventions. The Army made a full cycle in the training area from a required three hour course being given one time to troops in 1951,⁸ to insuring continued training in 1956,⁹ to an annual mandatory two-hour block of instruction in 1970.¹⁰

The Status of Current Army Directives

Where is the status of Army requirements now? It can be summed up in different ways depending upon the reader's viewpoint. The

latest regulation does away with any mandatory training requirements except at branch basic, career officer, warrant officer courses, C&GS and officer-producing programs plus enlisted basic combat training.¹¹ In place of annual mandatory training being provided by commanders, it requires that Army field commanders insure that each member of their commands "[h]as a practical working knowledge of the Conventions and their impact on his future responsibilities."¹² This is a peacetime requirement, as a separate provision of the regulations deals with instruction in time of armed conflict.¹³ What does this peacetime requirement entail? What does the commander do to fulfill it and, then, how does he check to insure it has been adequate and meets the criteria of the regulation?

In the first place, the requirement is plain on its face; it requires that the combat arms commander insure his men are familiar with the law of the Conventions so that they can apply it to their actions in combat whether it deals with employment of a weapons system or treatment of noncombatants. As far as the other branches are concerned, the same basic requirement is there; but there may be an additional one due to the technical duty of a specific branch, *e.g.*, military police personnel may require more instruction in the Geneva Prisoners of War Convention; medical corps, medical service personnel and chaplains may require additional, in-depth training in the Geneva Wounded and Sick Conventions.¹⁴ Simply because the illustrative examples of who might need additional training have been limited to these four separate branches does not mean these are the only personnel involved. Medical evacuation pilots, military intelligence interrogators and other personnel have responsibilities and duties which may be definitely affected by the provisions of the Conventions.

In order that the commander may fulfill his responsibilities with respect to this training, many methods of instruction and training aids are available to him.¹⁵ Instruction may be of the formal type provided by judge advocate and command-experienced officers team teaching the subject, or it may consist of practical exercises inserted in a FTX, ATT or other unit training such as range firing where a pop-up target depicts an unarmed individual with his arms raised. The range of such practical training methods is limited only by the ingenuity of the officers or commander providing them.

As The Judge Advocate General has been given the responsibility for the preparation of training literature to support this training, the commander can look to the SJA to provide him with the necessary materials in this area.¹⁶ Appendix A to AR 350-216 lists those references for this use. In addition, newer publications than those listed in the appendix have been and are being prepared by The Judge Advocate General's School to further enhance the quality of this instruction. These new publications are DA Pamphlet 27-200, "The Law of Land Warfare: A Self-Instructional Text"¹⁷ and a proposed illustrated handbook, "Your Conduct in Combat Under the Law of War," Training Circular 27-12, Test Edition, which has been prepared in a test edition and field tested.¹⁸ A training manager's guide for use with the illustrated handbook is also being prepared at The Judge Advocate General's School which will consist of three sections: one covering a narrative of the basic law of war; the second containing scenarios for use in training exercises and; the third, dealing with methods of instruction.¹⁹ In addition to the new materials, the films listed in Appendix A to AR 350-216 are particularly useful supplements to instruction. A new film on the Geneva Civilian Convention will be made early next year and, hopefully, will be available late next year. It must be emphasized that films should not be used in place of formal or practical training but only to supplement that training. A lesson plan demonstrating this supplementary procedure

type training is available for Department of the Army Training Film 21-4228, "The Geneva Conventions and the Soldier," from the International and Comparative Law Division, TJAGSA, Charlottesville, Virginia 22901.

With the requirements and methods of training addressed, there only remains to be discussed the method by which the success of training in the Conventions may be evaluated. In the absence of annual mandatory training and a notation being entered in personnel records (except for basic enlisted and officers' schools), there is no record to which the Inspector General or a G-3 or S-3 can look for inspection purposes. Nevertheless, the commander is responsible for insuring that his men have a practical working knowledge of the Conventions and their impact on their duties, present and future.²⁰ How does a commander conduct an inspection to insure he fulfills this requirement? At the Appendix to this article is a proposed law of war checklist keyed to Army Regulation 350-216 which will assist commanders in determining whether: (1) personnel are receiving initial formal training in the Conventions on entering the service; (2) personnel are receiving sufficient refresher training to insure they retain a practical working knowledge of the Conventions; and (3) unit commanders are aware of their responsibilities under AR 350-216. The assistance of the staff judge advocates should be available to aid in any inspection conducted by a commander or his staff. Since the SJA has specialized knowledge in this field concerning the law, he would be able to pinpoint any critical areas and suggest remedial action to correct any deficiencies.

Conclusion

The military has come a long way since 1863 in providing instruction in the law of war to its members. Such a great tradition of education in this field should not be broken at this time simply on the basis that the military is not involved in armed conflict. The commander and the staff judge advocate particularly may feel that they have more important

jobs than training in the law of war requiring a higher priority such as courts-martial, environmental problems or race relations. Nevertheless, the primary function of the peacetime Army is to train to be ready for use in time of hostilities. And the United States by the Conventions has committed itself to conduct hostilities in a lawful manner. In order to do this commanders and their men must know what the law is; how it will affect their combat activities, and that it *will* aid them in mission accomplishment. Who is the most appropriate individual to provide this information but the lawyer and his staff.

As the old saying goes—an ounce of prevention is worth a pound of cure—the training in the Conventions given today may prevent prosecution of the war crime of tomorrow. The importance of the judge advocate in this area is emphasized by the inclusion of an article in the Draft Protocols to the Geneva Conventions. Article 71 of the Photocols reads:

The High Contracting Parties shall employ in their armed forces, in time of peace as in time of armed conflict, qualified legal advisers who shall advise military commanders on the application of the Conventions and the present Protocol *and who shall ensure that appropriate instruction be given to the armed forces.*²¹

The provision of Article 71 should leave no doubt in the mind of the military lawyer that education in the Conventions is highly regarded and desired. In the final analysis, education in this field is an extension of the preventive law program for the commander and his SJA, which, if presented correctly and timely, may give manifold protection to everyone concerned.

Appendix—Law of War Checklist

1. Each service member received initial formal training in the Conventions. (Paragraphs 5 and 6(b), Section II, AR 350-216).
2. A permanent entry has been made on individual qualification records indicating the date initial formal training was completed. (Paragraph 9, Section III, AR 350-216).
3. The service member has a practical working knowledge of the Conventions and their impact on his future responsibilities. (Paragraph 6(a), AR 350-216).
4. Each unit commander is aware that training in the Conventions is "essential personal knowledge training." (Paragraphs 2-3(c) (3), Chapter 2, AR 350-1).
5. The unit commander has determined the adequacy of individual understanding of the Conventions. (Paragraphs 2-4(b), Chapter 2, AR 350-1). If so, what method has he used?
 - a. Testing
 - b. Sampling
 - c. Informal Discussion
 - d. Other
6. Unit commanders and training personnel are aware of the availability of training publications and films on the Conventions, including:
 - a. Army Subject Schedule 27-1, "The Geneva Conventions of 1949 and Hague Convention No. IV of 1907, (8 Oct. 1970).
 - b. DA Pamphlet 27-200, "The Law of Land Warfare: A Self-Instructional Text," (28 April 1972).
 - c. DA Training Films:
 - (1) TF 21-4228, "The Geneva Conventions and the Soldier"
 - (2) TF 21-4229, "When the Enemy is My Prisoner"
 - (3) TF 21-4249, "The Geneva Conventions and the Military Policeman"

Footnotes

1. Report of the House Armed Services Investigation Subcommittee Investigation of the My Lai Incident, 91st Cong., 2d Sess. 6 (1970).

2. Hague Convention No. IV with Respect to the Laws and Customs of War on Land, with Annex of Regulation, 18 October 1907; 36 Stat. 2277; T.S. No. 539 at Article 1 of the Regulations; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (GWS), [1955] 3 U.S.T. 3114; T.I.A.S. No. 3362, 75 U.N.T.S. 31 at Article 47; Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (GPS Sea), [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 at Article 48; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1959 (GPW), [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 at Article 127; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GC), [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 at Article 144.
3. *Id.*
4. *Id.*
5. Pictet, III Commentary, Geneva Convention Relative to the Treatment of Prisoners of War, ICRC at 614 (1960).
6. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, War Department, Washington, 24 April 1863.
7. Training Circular 22, "Training in the Geneva Conventions of 1949" (1951).
8. *Id.*
9. DA Training Circular 21-2, "Training for Individual Combat Effectiveness" (1955).
10. AR 350-216, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907 (1970).
11. AR 350-216, "The Geneva Conventions of 1949 and Hague Convention No. IV of 1907," at paragraph 5 (1973).
12. *Id.* at paragraph 6a.
13. *Ibid* at paragraph 6b.
14. In regard to military police personnel, see Article 127, GPW, set forth in DA Pamphlet 27-1, "Treaties Governing Land Warfare," at 115 (1956); for medical personnel and chaplains, see Article 47, GWS, DA Pamphlet 27-1 at 40.
15. The current regulation states only that formal instruction is a command responsibility, *supra* note 11 at paragraph 8, but it does set forth other command responsibilities with respect to practical training, *supra* note 11 at paragraphs 6 and 8c.
16. AR 350-216, *supra* note 11 at paragraph 4c.
17. April 1972, available through local publications distribution.
18. This publication is currently being prepared for Army-wide distribution as a TRADOC training circular and should be available to the field in the near future.
19. Publication of this pamphlet will take place after publication of the illustrated handbook.
20. *Supra* note 11 at paragraph 6a.
21. International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Geneva, June 1973 (emphasis added). Recently, government experts from all nations—parties to the Conventions—have met to revise the Conventions to make them more relevant to modern conflict. A diplomatic conference is scheduled next year for final approval of the drafts for submission to the different governments.

Off-Post Use and Possession of Marijuana

By: Captain Thomas G. Tracy, JAGC, Army Air Defense Command, Ent AFB, Colorado

There has been considerable controversy since the advent of *O'Callahan v. Parker*¹ as to whether the off-post use and possession of marijuana is "service connected" for purposes of military courts-martial jurisdiction. *O'Callahan*, decided on 2 June 1969, is the landmark U.S. Supreme Court case which held that military courts-martial had no jurisdiction unless the offense was "service connected" (i.e. the nature, time, and place of the offense must be related in some way to the military).² *O'Callahan* was accused of attempted sexual assault on a civilian female while on evening pass

from his post at Fort Shaftner, Hawaii. He was dressed in civilian clothes and broke into the girl's room in an attempt to rape her. The Court found his offenses to be without "service connection" and accordingly set aside his conviction by court-martial of attempted rape, housebreaking, and assault with intent to rape.

Shortly after the *O'Callahan* decision, the U.S. Court of Military Appeals considered the issue in *United States v. Beeker*,³ decided on 12 September 1969, and held that off-post use

and possession of marijuana was "service connected." In that case, Beeker was charged with wrongful *use* of marijuana while en route from Laredo, Texas, to San Antonio, Texas. In his opinion, Chief Judge Quinn stated:

"In *United States v. Williams*, we noted that the use of these substances has disastrous effects on the health, morale, and fitness for duty of persons in the armed forces . . . like wrongful use, wrongful possession of marijuana and narcotics on or off base has singular military significance which carries the act outside the limitation on military jurisdiction set out in the *O'Callahan* case."⁴

In a case decided the day before *Beeker* was announced, the U.S. District Court for Rhode Island in *Moylan v. Laird*⁵ held that "off base possession of marijuana within the peripheries of the civilian United States is not a matter over which military jurisdiction extends." In his decision, Judge Pettine noted the *Beeker* decision, but partially disagreed with it:

"The court is frank to acknowledge that use of marijuana by servicemen, whether on or off base, might well have special military significance. Accordingly, the court accepts the reasoning of the *Beeker* decision in so far as it deals with *use* of marijuana. However, *possession* is an entirely different matter."⁶

Thus, a division of opinion began to appear between military and civilian courts. The military courts continued to hold that an offense arising out of the off-base possession or use of a controlled substance is "service connected" per se. The civilian courts began to take the position that something more than mere off-base possession and use must be shown to vest jurisdiction in military court.

Shortly after the *Moylan* decision, several military cases appeared which followed *Beeker's* holding and dicta. In *United States v. Rose*⁷ and *United States v. Johnson*,⁸ the courts held that off-post delivery or wrongful sales of drugs (including marijuana) to another serviceman was "service connected" because of the effect on over-all morale and fitness of military forces. In *United States v.*

Morley,⁹ the Court of Military Review cited *Moylan*, but adhered to the position presented in *Beeker* regarding the issue of off-post possession of marijuana.¹⁰

In the following years (1972 and 1973) several other civilian courts took issue with the rationale of *Beeker*. A federal district court in Florida¹¹ held that mere possession of marijuana while off base was insufficient to permit military jurisdiction. But perhaps the most significant decision at that time was made in *Cole v. Laird*¹² where the U.S. Court of Appeals for the Fifth Circuit¹³ held that the alleged *use* by Cole of marijuana when he was off-post, off-duty, and in civilian clothes did not satisfy the constitutional requirement for "service connection." In its holding, the court implied that the rationale taken by the military court in *Beeker* was faulty:

"*Beeker* rested on dicta in *Williams* to the effect that habitual narcotics use impairs the readiness of troops for action. It is clear that marijuana does not rise to the level of heroin or other physically addictive 'hard drugs'".

On 20 February 1973, the United States District Court for Hawaii, in *Redmond v. Warner*,¹⁴ followed the trend, and held that off-post possession and *sale* of marijuana was not "service connected". The decision is significant, because it also considered the sale of marijuana—an aspect of the problem not considered in previous federal cases. In a second decision,¹⁵ the same court expanded its ruling by holding that off-base possession of marijuana and other controlled substances, and off-base transfer of marijuana to a military undercover agent while the accused was off-duty and in civilian clothes was not "service connected".

In spite of federal court attack on the *Beeker* theory that off-post possession and use of marijuana is "service connected" the U.S. Court of Military Appeals reaffirmed their position in *United States v. Teasley*.¹⁶ In that case, Teasley was charged with wrongful possession of narcotic paraphernalia while in the civilian community. The court held that possession of such paraphernalia was *not*

"service connected" but distinguished such possession from possession or use of marijuana or narcotics. In the latter situation, the court continued to adhere to the *Beeker* doctrine.¹⁷

The second federal appellate court to consider the issue was the U.S. Court of Appeals for the Tenth Circuit.¹⁸ On 19 July 1973, in a case involving the off-base transfer of marijuana by an Army Captain to an Army enlisted man who was acting as an undercover agent for the CID. The court held that the off-base transfer of marijuana between servicemen while off-duty is not "service connected" for purposes of court-martial jurisdiction within the meaning of *O'Callahan v. Parker*.¹⁹

A third federal appellate court arrived at a different decision. The U. S. District Court for New Jersey²⁰ held that off-base possession of marijuana was not "service connected". On appeal, the U.S. Court of Appeals for the Third Circuit²¹ dismissed the action for the failure of the appellee to exhaust his military remedies.²²

Aside from the jurisdictional question, this collateral issue has also generated much controversy in the courts. Traditionally, the federal courts have usually required the military petitioner to exhaust all his military remedies before considering his case.²³ However, some of the federal cases have granted injunctive relief to servicemen where jurisdiction is the issue. This is a relatively new development, and allows the serviceman to obtain a federal injunction against the military taking any action in the case. The court in *Redmon v. Warner*²⁴ cited *Moylan v. Laird*²⁵ and *Schrouth v. Warner*²⁶ in holding that relief pursuant to 28 U.S.C. § 1331 would also lie without prior exhaustion of military remedies to enjoin court-martial proceedings for an offense which cannot constitutionally be made subject to military jurisdiction.²⁷

However, there is considerable authority to the contrary, and it appears that a majority of the courts would still require a military petitioner to exhaust his military remedies be-

fore seeking federal relief. The "exhaustion doctrine" is followed by the U.S. District Court for the District of Columbia,²⁸ and several U.S. District Courts in the Fifth Judicial Circuit.²⁹ The strongest opinion, to date, comes from the U.S. Court of Appeals for the Third Circuit in *Sedivy v. Richardson* wherein the court expressly rejected the reasoning of the *Moyer* court, and distinguished another U.S. Court of Appeals case, *Councilman v. Laird*, because the "exhaustion doctrine" was not argued by the Government.³⁰

In summary, two distinct issues have appeared in cases involving the off-post use and possession of marijuana and other "controlled substances". The first and probably most important issue is the jurisdictional question of whether such offenses are "service connected" for purposes of military court-martial jurisdiction. The military courts continue to maintain that such offenses are "service connected" within the meaning of the *O'Callahan* case, whereas most civilian courts seem to take the opposite approach. However, even here the federal courts are not uniform in their decisions. For example, the U.S. District Court for Rhode Island would allow the military jurisdiction in all drug offenses occurring off-post except for the possession of marijuana, but the most liberal court to date, the U.S. District Court for Hawaii, would deny the military jurisdiction in most off-post drug cases, including the use and possession of "hard drugs". So there is no agreement between the various federal courts as to where the line should be drawn.

The other issue is also procedural in nature, and involves the doctrine of "exhaustion of remedies". Here, a majority of federal courts seem to follow the traditional argument that the military petitioner must exhaust his military remedies before seeking relief from an Article III Court. But a number of federal district courts have allowed equitable relief, and there is a viable argument for this type of relief. The Government has appealed the decision in *Councilman v. Laird*, and the U. S. Supreme Court may resolve these controversies in the near future.

In the meantime, this line of cases appears to indicate that U.S. Court of Appeals will continue to rule that mere possession and use of marijuana off-post is not "service connected", and that additional courts-martial may be enjoined from proceeding with military trials by federal courts. Nevertheless, military courts continue to consider these offenses "service connected" and commanders should not be reluctant to go to trial because of speculation as to what a federal court might do if the accused decided to restrain the court-martial from proceeding. It is also significant to note that these decisions have had no direct effect on disposition of such cases by Article 15 or by considering these offenses as a basis for administrative elimination proceedings.

Footnotes

1. 395 U.S. 258 (1969).
2. The Court speaks of this on page 267 of their opinion when they stated: "Status is necessary for jurisdiction; but it does not follow that ascertainment of status completes the inquiry, regardless of the nature, time, and place of the offense."
3. 18 USCMA 563, 40 C.M.R. 275 (1969).
4. 40 C.M.R. at page 277. Beeker was not charged with off-base possession of marijuana. To that extent, Beeker announced more than it held. But the same military court settled this technicality one week after Beeker was announced in United States v. DeRonde, 18 USCMA 575, 40 C.M.R. 287 (1969) where a serviceman's guilty plea to one specification of off-base possession of marijuana was allowed to stand.
5. 305 F. Supp. 551 (R.I. 1969).
6. *Supra* at page 556.
7. 19 USCMA 3, 41 C.M.R. 3 (1969).
8. CM 420600, 41 C.M.R. 461 (1969).
9. CM 420762, 41 C.M.R. 410 (1970).
10. In that opinion, the court stated: "This court accords the *Moylan* decision of the United States District Court great deference. However, we have exhaustively considered the very issue of the military significance of off-post possession of marijuana."
11. *Lytle v. Kincaid*, 344 F.Supp. 223 (M.D. Fla. 1972).
12. 468 F.2d 829 (5th Cir. 1972).
13. The Fifth Circuit consists of Alabama, Canal Zone, Florida, Georgia, Louisiana, Mississippi, and Texas.
14. 12 Civ. No. 73-3741 (USDC Hawaii 1973).
15. *Schroth v. Warner*, 12 Civ. No. 73-3726 (USDC Hawaii 1973).
16. 22 USCMA 131, 46 C.M.R. 131 (Feb. 2, 1973).
17. The court, in their opinion, stated: "In United States v. Beeker, 18 USCMA 563, 40 C.M.R. 275 (1969) we held that while the possession and use of marijuana and narcotics are civilian type offenses, they have 'special military significance' so that possession and use of these substances by military personnel are offenses triable by court-martial, as violations of military law, even though the possession or use occur off-base. Our view of the circumstances justifying that decision has not gone unchallenged in other courts. *Cole v. Laird*, 468 F.2d 829 (5th Cir 1972); *Moylan v. Laird*, 305 F.Supp. 551 (DRI 1969). The contrary arguments have not persuaded us that we were wrong." *Supra* at page 132. Subsequent to this case, the U.S. Court of Military Appeals again considered the issue in *United States v. Rainville*, decided on 12 September 1973, and again applied the Beeker doctrine to off-post use and possession of marijuana.
18. The Tenth Circuit consists of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.
19. *Councilman v. Laird*, — F.2d — (10th Cir., No. 72-1812, July 19th 1973). It should be noted that since the outcome of the opinion by the U. S. Court of Appeals, the Government has appealed the decision to the U.S. Supreme Court. At the present time, the Solicitor General has certified the case for appeal.
20. *Sedivy v. Laird*, — F. Supp. — (USDA N. J., July 7, 1972).
21. The Third Circuit consists of Delaware, Pennsylvania, New Jersey, and the Virgin Islands.
22. *Sedivy v. Richardson*, — F.2d — (3rd Cir., No. 72-2065, September 26th, 1973).
23. General support for this proposition can be found in *Noyd v. Bond*, 395 U.S. 683, 693-694 (1969).
24. *Supra*.
25. *Supra*.
26. *Supra*.
27. In justifying their position, the court stated: "In either case, whether a petitioner claims that military jurisdiction cannot constitutionally extend to him or his offense, there is no principle of justice that requires him to go through experiences, expenses, and delays of being arrested, subjected to pre-trial confinement, investigated, tried, denied relief on appeals and incarcerated, before being permitted to invoke protections before an Article III Court." (Article III of the Constitution. This refers to a federal as opposed to a military court.)
28. *Mascavage v. Richardson*, unreported, (Civ. No. 402-703, April 25th, 1973, District of Columbia).

29. See generally *Diorie v. McBride*, 306 F. Supp. 528 (Alabama), *Torres v. O'Conner*, 329 F. Supp. 1025 (Georgia), and *Hamlin v. Laird*, unreported, (Civ. No. 176-1, Dec. 14th, 1972, Georgia-S). The most recent case to be reported from the Fifth Circuit was *Scott v. Schlesinger*, — F. Supp. — (Civ. No. CA 4-2371, October 7th, 1973) where the U.S. District Court for the Northern District of Texas also held that the military petitioner must exhaust his military remedies. In their opinion, the court stated: "there are only very restricted circumstances under which an injunction could be justified, and that the injury the defendant faces is solely that incidental to every criminal proceeding brought lawfully and in good faith. Therefore, under the settled doctrine we have already described, he is not entitled to equitable relief even if such statutes are unconstitutional." The Plaintiff in that case, Terry A. Scott, has obtained a stay pending application to appeal the case to the U.S. Court of Appeals for the Fifth Circuit, so there is a possibility that the U.S. Court of Appeals for the

Fifth Circuit may rule on the "exhaustion doctrine" in the near future.

30. *Supra*. In that case, the court stated: "Our research has disclosed no reported case which has denied military courts the opportunity of finding facts relating to the exercise of their jurisdiction, except *Moylan v. Laird*, 305 F. Supp. 551 (R.I. 1969), which we expressly decline to follow. The *Moylan* court appears to have ignored the Constitutional limitations of 10 U.S.C. § 876 as well as every reported case on the subject." The Court also distinguished *Councilman Laird*: "In *Councilman v. Laird*, the Court of Appeals affirmed an injunction restraining the continuance of a court martial proceeding after an *O'Callahan* issue was first presented and rejected by the presiding judge of the court-martial. The issue of prior exhaustion of military remedies was not discussed in the opinion; an examination of the briefs discloses that the point was not raised. The sole question on appeal was whether the offense was "service connected." Accordingly, the case has no precedential value for our purposes."

Reserve Conference Keynote Address

These remarks were made by Major General George S. Prugh, The Judge Advocate General, United States Army, before the 1973 JAG Reserve Conference, on November 15, 1973

It is a privilege for me to be here again with you so that we can review the progress of the Corps during the past year and together review the challenges that confront us in the future.

Our Corps is now into its 198th year. Recently I received a picture of a portion of the famous old Bayeux tapestry that described all of the events leading up to, including and immediately following the Battle of Hastings in 1066. I was impressed that you could look at this tapestry, which was stretched around the room, and follow the sequence of events. It was one long, continuous picture. It has struck me that you and I are a part of this very long JAGC tapestry, 200 years' worth almost, of The Judge Advocate's role in performing services for our Army and our country. I take considerable personal pride in being a part of that scene. I hope you do too.

Conferences here at Charlottesville for our Senior Judge Advocates have been tremendous

successes and contributors to the progress of our Corps. First of all, they build a strong fraternal spirit, which I see evident here among our Senior Reserve Officers much as I see among our Senior Active Duty Judge Advocates. It's good to come to a conference where you are reunited with colleagues you do not usually see except at such affairs and you are downright glad to be with them. These conferences also build a great deal of affection for the School itself here in this wonderful community of Charlottesville. This School has come to be for all of us a general point from which we can build Judge Advocate Associations. Each time I come to such a conference I find a distinct reinforcement of my own personal dedication to the Corps, to the Army and to the great profession of which we are all members. This conference is geared to build upon the fraternal spirit and dedication of military lawyers. It's designed to give us what we need from the standpoint of professional information, professional exchanges and personal camaraderie.

I have just returned from several trips that took me to Judge Advocate installations in

various parts of the world. Most significantly, I spent 3 weeks in the Far East looking at all of our offices there and talking to substantially every active duty Judge Advocate assigned. I can report to you that your active duty colleagues are hard at work, fully occupied in the greatest variety of law work and they are doing it "damned" well! I wish that I could make a report regarding the key problems of improving discipline and racial relations, but really all I can say about it is that our people are heavily involved, are making real contributions and that I think definite improvement is being obtained. It is not the sort of improvement that is dramatically evident, however. The morale of our officers and their families overseas is first-rate. I was most especially struck by the magnificent spirit of our JAG families in Alaska who put on for Lieutenant Colonel Overholt and me a magnificent Alaskan banquet that the husbands had caught and shot and the wives had delightfully prepared. In short, from what I can see in my trips around the active duty JAG offices, the Corps is in good shape.

On the domestic scene we received a directive from the Secretary of Defense in June of this year requesting that plans be submitted "to revise the structure of the Judge Advocate organizations to place defense counsel under the authority of The Judge Advocate General . . ." We are at work developing such a plan, but we face real obstacles. The limitation of an officer to defense work alone reduces our utilization of officers generally and narrows the officers' experience and focus. It will be necessary to establish a supervisory hierarchy apart from the SJA. And, at the very time when the Army itself is reorganizing and greatly reducing the intermediate stages between DA and the field installations. And it will be necessary to provide for administrative support for these defense counsel, possibly in somewhat the same manner as we've been doing for the military judges.

Our present thinking is to establish a trial defense division with an estimated strength of 292 lawyers and 163 enlisted and civilian

support personnel in area offices satellited with major troop concentrations. Under the proposed plan, 6 regional offices would exercise control, supervision, and professional guidance over all defense counsel in the region's area office. A small central office would coordinate the activities of the regional offices and its chief would report directly to the director of the proposed defense legal services, which would coordinate the existing defense appellate division and the newly created trial defense division. The trial defense division would have area offices headed by a chief defense counsel, who would be the rating officer for all defense counsel under his control and he would report directly to the regional office. The senior defense counsel of a region would supervise and coordinate operations in area offices within the region, and rate his chief defense counsels. The chief, trial defense division, would supervise and coordinate all trial defense activities, and would be responsible for the stationing of all trial defense counsel. The director of defense legal services would exercise overall control through supervision of the chief, trial defense division. He would advise the Judge Advocate General on matters of defense interest.

Last February found the Army in a period of transition with a significant impact which will ultimately affect you as members of the reserve components and the "one Army" team. The total force concept is now a total force reality. I refer to of course the steadfast reorganization establishing FORSCOM with its 3 continental armies and subordinate Army readiness regions and groups with a total of 64 major USAR commands including 19 ARCOM's and 12 training divisions.

Let me illustrate what we have been doing in total support of FORSCOM and the "One Army" concept. Here, at the School, we have recently created a new position of Assistant Commandant for Reserve Affairs. Through this office, we expect to maintain closer liaison and contact with the lawyers who are in the Active JAG Reserve Components. For the first time, we are sending out into the field active

duty JAG officers and faculty members from the JAG School to work with and instruct JAG Reserve Components nationwide at their local unit training assemblies. On a selective basis, we have been inviting certain JAG reservists, such as seasoned attorneys, governmental officials, and judges, to perform their two weeks annual active duty training with us at the Pentagon. Many of our JAGSO detachments as you know are now performing their training at nearby Army installations, and thus are able to augment the services being rendered by the local SJA. Not only is this service of benefit to you, the JAG Reserve Officer, but it also supplies both our active duty JAG personnel and their clientele with a rather extraordinary and novel service.

I have noted, with particular pride, recent stories in the Army Reservist magazine relating to the mutual support activities of our JAG Reserve Components. The active Army has long been charged with support of the Reserve Components but the mutual support program gives you the greatly increased opportunity to reciprocate in many areas of your professional expertise.

The JAG section of the reserve 156th support group in Albuquerque, New Mexico has been supporting the legal office of Kirtland Air Force Base on weekends since last December. The Air Force SJA there is on record as saying and I quote, "These Army men are doing an absolutely outstanding job. We're loaded down most of the time. These reservists are real pros . . . plenty of civilian experience and they know the military. It's precisely the type of help we need."

At the headquarters of the 11th Naval District and Miramar Naval Air Station in San Diego, the 81st JAG Reserve Detachment is providing weekend legal assistance at the installation. The District Naval JAG Officer there says that the Army has provided invaluable service to the dependents and personnel of the Navy in our area. I could go on all day with stories such as these.

Now I would like to pass to you my ideas of what I think Reserve Judge Advocates can

contribute to our Corps and our Army today.

1. A *desire* to be a recognized part of the Army JAG team, anticipating he may some day be called to play an active duty role as a military lawyer. If the reservist doesn't have that desire he'll never become a satisfactory military lawyer.

2. A recognition that to be prepared for active duty he must keep his military law skills sharp—and they are not the same as his civilian skills. He must exercise his professional imagination by trying to predict what skills he will need for what kind of duty.

3. Participation in the process of development of military law by professional writings, suggestions, ideas, etc. There is not nearly enough of this done.

4. Representation as a military lawyer for the Army before the civilian community, by speaking, writing, corresponding, answering, etc.

5. A thirst for more knowledge about the Army, its policies, military law and his particular military job, so he can speak and act knowingly.

6. Strict adherence to highest personal, professional, ethical, and moral standards.

Having said that it's only fair for me to say what I think the Corps should be doing for you. First of all, I believe the Corps has an obligation to give you an opportunity to expand your capabilities through education and training in military law. The Corps must provide courses and instruction and the atmosphere for successful military law schooling. Secondly, the Corps should provide you reasonable opportunities for advancement, promotion, and assignments to positions of increasing responsibility. This means we must have an organizational concept which performs the mission required of us but also gives us some upward mobility. Thirdly, the Corps should provide you with a reasonably firm plan so that you can see what its functions and its programs are expected to become. You should, I believe, have a part in the planning process, and so one of the things the Corps is contributing to you is an opportunity

to participate in the planning process and to be a part of the overall sounding board that all of our military lawyers can be.

Well, with all of this we have much to do. Let's get to it! I want you to know that I am proud to be your partner.

Liquor Sales and The Military

By: Lieutenant Colonel Morris Bruce Peterson, JAGC, USAR The University of Tulsa College of Law

United States v. Mississippi Tax Commission, 41 U.S.L.W. 4774 (U.S. Jun. 4, 1973) resulted in the failure of the Mississippi Tax Commission getting a man on base in the first of what may go as a three-game series.

The Facts. In 1966 the State of Mississippi passed a local option law, thus repealing the former "dry" status of the state. The Mississippi law vested the Tax Commission as the exclusive wholesaler of all alcoholic beverages within the state, "including, at the discretion of the Commission, any retail distributors operating within any military post . . . within the boundaries of the State . . ." ¹ The Tax Commission was also given authority to add to the cost of such beverages an amount equal to cover the cost of operations of the state wholesale liquor business, to make it competitive with surrounding states, and render a profit. The Tax Commission marked up distilled spirits 17 per cent and wines 20 per cent.

Prior to 1966, officers' clubs, post exchanges and ships stores purchased their liquor direct from distillers located outside of the state. Following repeal of Mississippi's prohibition these nonappropriated fund activities were permitted the option of either purchasing liquor from the Mississippi State Tax Commission, or direct from the distiller; but in either event the state markup was imposed. These nonappropriated fund activities continued to purchase direct from the out-of-state distiller, who in turn added the markup to the cost of the liquor. To this the Government protested, but such protest fell on deaf ears in the Tax Commission. Then the Government sought to pay the markup into an escrow fund pending judicial determination of the legality of the markup. This arrangement was of no avail, and the nonappropriated funds

continued to pay the markup under protest. Finally, in November, 1969, the United States sought a declaratory judgment and injunctive relief against the collection of the markup by the Tax Commission from the out-of-state distillers and for reimbursements of the amounts paid under protest for the period 1966-1969. Four United States military installations were involved: Keesler Air Force Base and the Naval Construction Battalion Center, over which the United States exercised exclusive jurisdiction; and two installations over which concurrent jurisdiction existed by both the United States and the State of Mississippi, Columbus Air Force Base and the Meridian Naval Air Station.

How the Lines Were Drawn. The Government in its brief, both at the district court and Supreme Court level, argued that as to the two bases over which the United States exercised exclusive jurisdiction, article I, section 8, clauses 14 and 17 of the United States Constitution prohibited state regulation without the express consent of Congress. As to the two concurrent jurisdiction installations, the Government contended that the markup constituted an unconstitutional tax on a federal instrumentality ² interfering with federal procurement regulations and policy established by the Department of Defense. ³ Mississippi, on the other hand, placed all their eggs in one basket and relied solely on the twenty-first amendment to the Constitution. The second section of the twenty-first amendment reads as follows:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The three-judge district court bought the rationale of the Tax Commission and held

that the markup was not an unconstitutional foray into the federal domain.⁴ The district court took a rather novel approach as to the two bases over which the United States exercised exclusive jurisdiction. This was necessary in order to avoid prior Supreme Court decisions. The Supreme Court in *Collins v. Yosemite Park Co.*⁵ held that the twenty-first amendment did not have California power to prevent the shipment of liquor into and through her territory destined for distribution and consumption in a national park over which the government exercised exclusive jurisdiction. The Court said that this traffic did not involve "transportation into California 'for delivery or use therein'" within the meaning of the amendment. This ruling was later characterized by the Court as holding "that shipment through a state is not transportation or importation into the state within the meaning of the Amendment."⁶

Faced with these decisions the three-judge federal district court found that neither Keesler Air Force Base nor the Naval Construction Battalion Center, the exclusive jurisdiction installations, had promulgated any regulations concerning the transportation of liquor purchased on the reservations into the State of Mississippi; and in fact that patrons authorized to purchase from the beverage stores did transport the liquor into the state and consume it there. Thus, the district court held, *Collins* was not applicable as delivery and use was restricted to the park in that case.⁷ As to the two installations, Columbus Air Force Base and Meridian Naval Air Station, over which the United States and the State of Mississippi exercised concurrent jurisdiction, the district court relied on Supreme Court decisions involving state minimum price laws. In one of these cases *Penn Dairies Inc. v. Milk Control Comm. of Pennsylvania*⁸ minimum prices were placed on the sale of milk by dealers under the Pennsylvania Milk Control Act. Renewal of one dealer's license was denied because he sold milk in violation of the minimum price pursuant to a contract with the United States for milk to be consumed by troops stationed at a camp situated on land

belonging to the State of Pennsylvania and over which there had been no surrender of state jurisdiction or authority. The Supreme Court held that the statute was applicable with respect to these sales and the state could properly enforce its policy by denying the dealer a renewal of its license. The state law did not conflict with the legislation of Congress requiring competitive bidding in the purchase of supplies for the Army. Superimposed on this decision were subsequent pronouncements by the Supreme Court that hardly clarified a hitherto murky area. In a near companion case with *Penn Dairies*, the Supreme Court held that a state cannot apply its regulations fixing a minimum price for milk sales consummated on an Army base which was subject to exclusive federal jurisdiction.⁹

In 1963 the Supreme Court, in *Paul v. United States*,¹⁰ held that the State of California could not enforce its law fixing a minimum price on the sale of milk at wholesale with respect to milk sold to the United States at military installations for strictly military consumption and for resale at federal commissaries. The enforcement of such a minimum price law was found to conflict with the provisions of federal law regulating the procurement of all basic provisions by the armed services where appropriations of federal funds were involved. The statutes required competitive bidding and the awarding of the contract to the lowest responsible bidder. The Court distinguished *Penn Dairies* holding that subsequent to this decision there had been a comprehensive revision of the laws governing procurement of supplies and services by the War and Navy Departments. However, the Court did hold in *Paul* that purchases by the United States of milk for resale at military clubs and post exchanges—purchases not made out of appropriated funds and hence not controlled by federal procurement policy—were subject to minimum price laws in effect when the United States acquired the land for a military

The district court, pinning its hopes on the second section of the twenty-first amendment, installation.

sent their progeny on to Washington, D.C. via

certiorari without probing the other two issues raised by the Government, *i.e.*, whether the markup constituted a tax on a federal instrumentality immune from taxation or was in conflict with the federal procurement regulations and policy, and thus in violation of the Supremacy Clause.

In the Halls of the Supreme Court. Hampered by the narrowness of the lower court's opinion, the Court held that the twenty-first amendment did not cut as wide a swath as the district court envisioned. The Supreme Court's treatment of the exclusive jurisdiction federal enclave problem has not always been necessarily consistent.¹¹ The Court's opinion in the instant case centered around two facets: first the scope of the twenty-first amendment, and second the status of the federal enclave over which the Government exercised exclusive jurisdiction.

As to the first point, the Court reiterated the rule that the twenty-first amendment conferred something greater than the conventional state police power as to the importation of liquor destined for use, distribution or consumption within the borders of a state.¹² Thus the limitations otherwise imposed by the Commerce Clause are simply not present where intoxicants are destined for use, distribution, or consumption within the state.¹³ Following the rationale of the *Collins* case,¹⁴ the Supreme Court concluded that shipment of liquor from an out-of-state wholesaler to a military installation over which the United States exercised exclusive jurisdiction did not give rise to a nexus or event vesting the state with regulatory jurisdiction. The Court pointed out that the markup was not directed toward regulation of the case, consumption or disposition of liquor within the State of Mississippi, to which the second section of the twenty-first amendment is directed, but rather runs afoul of the provisions of article I, section 8, clause 17 of the Constitution regarding the exclusive federal legislation with respect to such territory.

As to the two concurrent jurisdiction military facilities, the scope of article I, section 8,

clause 17 was found inapplicable. Interestingly enough, at the Supreme Court level the State of Mississippi asserted the view that the markup was for all intents and purposes a sales tax, and that Section 105(a) of the Buck Act¹⁵ consented to the imposition of such a tax on the sale by wholesalers to the federal instrumentality. In reversing and remanding the case to the district court, the Supreme Court specifically directed the lower court to explore the parameters of the Buck Act, and specifically Section 197(a) that deals with various exceptions to the consent provisions. Section 107(a) states that the general consent provisions of the Act "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . ."

What on Remand? In this next series it is possible that the Mississippi Tax Commission may get a man on two bases—and it is remotely possible that they may get a man on all four bases. The second issue that the district court is going to have to look into is that of the possibility of a conflict regarding the markup and the federal procurement regulations and policy. In the dissenting opinion of Mr. Justice Douglas, joined in by Mr. Justice Rehnquist, the impact of the Buck Act is emphasized and Justice Douglas points out that, even viewing the markup in the worst possible light, as a sales tax, the legal incidence of this tax is not on a instrumentality of the United States, but rather on the wholesaler. The dissenting opinion appears to have taken the view that officers' clubs, ship stores, and post exchanges are in fact federal instrumentalities. This squares with a 1942 Supreme Court decision.¹⁶

The district court has some interesting options. First, as to the two exclusive jurisdiction bases, the Supreme Court has precluded the use of the twenty-first amendment on which to bottom the markup. Should the district court determine the markup not to be a tax on the wholesaler allowed by the Buck Act, then the Tax Commission strikes out twice. But should the court determine the markup to be a sales tax, then it's a new ball

game. They must then turn their attention to Section 107(a) of the Buck Act and ascertain whether the markup is removed from the consent provisions of Section 105(a). Even should this come to pass, a final hurdle remains with the lower court's determination of whether or not the markup provisions are in conflict with federal procurement regulations and policies.¹⁷ The lower court looked into this aspect of the case in the first instance, but reached no definitive conclusions.

As to the two concurrent jurisdiction enclaves, the district court must ignore the twenty-first amendment, as the Mississippi scheme is not designed to prevent the illegal diversion of liquor into the state, but is couched rather undeniably in revenue measure terms. The safest successful approach for Mississippi would be through Sections 105(a) and 107(a) of the Buck Act if the markup is deemed by the lower court to be a tax on the sale by the wholesalers to the federal instrumentality. Even if no sales tax is found, such a markup would presumably still be constitutional as legitimate state regulation—subject then only to a finding that such practice did not conflict with federal procurement regulations or policies.

Assuming that the lower court should find that the markup does not constitute a tax within the meaning of the Buck Act, thus precluding the markup on installations over which the United States exercises exclusive jurisdiction, but authorizing such regulation as to concurrent jurisdiction installations, it could result in a knot of truly Gordian proportions.¹⁸ Many of the larger military installations are comprised of both exclusive and concurrent jurisdiction land. Location of housing, clubs and bars then might be of major importance, insofar as state regulation is concerned.

Revision of Judge Advocate Officer Advanced Course for Reserve Component Officers

Effective this month the Judge Advocate Officer Advanced Course for Reserve component officers has been substantially reorganized and revised. There are three versions of

Footnotes

1. Miss. Code Ann. § 10265 *et seq.* (Cum. Supp. 1972).
2. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).
3. 32 C.F.R. § 261.4(c).
4. *United States v. State Tax Commission of the State of Mississippi*, 340 F. Supp. 903 (S.D. Miss., 1972).
5. 304 U.S. 518 (1938).
6. *Carter v. Virginia*, 321 U.S. 131, 137 (1944), *Johnson v. Yellow Cab Co.*, 321 U.S. 383 (1944), *aff'g* 137 F.2d 274 (10th Cir., 1943). Comments, 72 HARV. L. REV. 1145 (1959), 27 N.Y.U.L. REV. 127 (1952).
7. *Supra* note 4 at 907.
8. *Penn Dairies Inc. v. Milk Control Comm. of Pennsylvania*, 318 U.S. 261 (1943).
9. *Pacific Coast Dairies v. Dept. of Agriculture of Calif.*, 318 U.S. 285 (1943).
10. 371 U.S. 245 (1963).
11. *Evans v. Cornman*, 398 U.S. 419 (1970).
12. *California v. LaRue*, 409 U.S. 109, 114-115 (1972); *Seagram & Sons v. Hostetter*, 384 U.S. 35, 41 (1966).
13. On questions tried under the commerce clause and the twenty-first amendment with respect to the power of the state to control the transportation of liquor through and out of their respective jurisdictions, see *Ziffren v. Reeves*, 308 U.S. 132 (1939); *Duckworth v. Arkansas*, 314 U.S. 390 (1941).
14. *Supra* note 5.
15. 4 U.S.C. §§ 105-110.
16. *Standard Oil Co. v. Calif.*, 316 U.S. 481 (1942), held that a U.S. Army post exchange was to be regarded as a federal instrumentality for the purpose of a California law which exempted from the state gasoline sales tax "sales to the government of the United States or any department thereof for official use of said government."
17. 50 U.S.C. App. § 473. The Secretary of Defense implemented this statute by issuing Department of Defense directive 1330.15, (32 C.F.R. § 261.1-261.5).
18. The Commission of Intergovernmental Relations: A Report to the President (June 1955), 237. For an excellent analysis of the enclave problems, see note, 101 U. PA. L. REV. 124 (1952).

the Advanced Course intended primarily for Reserve component officers: the USAR School Advanced Course, the Correspondence Advanced Course, and the Nonresident/Resident

Advanced Course. Students may also combine credits received from these different versions.

Although the material covered in these courses had been updated periodically in the past, their substantive content had remained virtually unchanged for several years and actually differed somewhat in each of the three versions. In the meantime, the curriculum of the nine-month resident Advanced Course at The Judge Advocate General's School has been undergoing continuous evolution. Completely new subjects have been added, older ones dropped, and time devoted to others increased or decreased to reflect their current importance to practicing judge advocates and the latest developments in the law. Unfortunately, these changes had not found their way into the nonresident versions of the Advanced Course. The purpose of this reorganization and revision, then, is to achieve the maximum degree of parallelism in legal subjects among the three versions of the Advanced Course for Reserve component officers and between those versions and the nine-month resident Advanced Course.

A new Correspondence Course Catalog should be available next month, but figure 1 depicts what the revised Correspondence Advanced Course is like. There will be only a slight change in the credit hours required for basic legal subjects (military justice, civil law, procurement law, international law), 360 instead of the previous 378. The biggest addition to the course is the 65 credit hour legal writing program, announced in the July 1973 issue of *The Army Lawyer* and effective 1 September 1973. A 15 credit hour subcourse in management for military lawyers will now be required in addition. This brings the total credit hours for JAGC branch subjects to 440. However, the requirement for interschool subcourses (*i.e.*, non-legal subjects) has been reduced from 97 to 60 credit hours. The revised Correspondence Advanced Course will have a total requirement of 500 credit hours, an increase of only 25 hours over what was required prior to 1 September 1973. This is

actually a reduction of 40 credit hours compared to what has been required since 1 September 1973. Officers who have already completed a portion of the old Correspondence Advanced Course will be given equivalent credit toward completion of the revised course.

Requirements for the Nonresident/Resident Advanced Course (5-27-C23) will be identical to those for the Correspondence Advanced Course except that attendance at five two-week resident courses at The Judge Advocate General's School may be substituted for subcourses JA 133 and JA 134 in Phase II and for all of Phases IV and VI.

Although there has been no change in the total number of hours required for completion of the Advanced Course by USAR School, other changes are significant. The JAGC branch subjects to be included will be the same as for the Correspondence Advanced Course. However, the hours devoted to basic legal subjects have been reduced from 320 to 240. Since there has been no reduction in the substantive material to be covered, this means that very concentrated study will be required during the active duty training phases at which branch subjects are taught. To assist in accomplishing this, it is planned to hold the active duty training instruction in Charlottesville where The Judge Advocate General's School's resident faculty will be available to augment the USAR School instructors.

As may be seen from figure 2, USAR School phases will be changed substantially. Phase IA (also designated Phase VII at one time), which required the student to take the bulk of military justice instruction by correspondence or by attending the resident course at The Judge Advocate General's School, rather than by USAR School, has been eliminated. All military justice instruction will now be available directly in the USAR School.

Phase VII, made up of the same legal writing program and lawyers' management subcourse as in the Correspondence Advanced

Course, has been added. This leaves the total number of hours devoted to JAGC branch subjects in the USAR School at 320, the same as it was before.

Because of the change in phases, however, the civil law subjects which previously made up Phase VI and which otherwise would have been taught in the USAR School in July 1974 will not be taught until July 1975. Students who need this instruction before that time should arrange to take it by correspondence or by attending the two-week resident Civil Law II Course at The Judge Advocate General's School from 4 to 15 February 1974. Conversely, students who expect to attend the USAR School active duty training phase in July 1974 should not work on correspondence subcourses in military justice since they will get full credit for all military justice requirements by attending the USAR School instruction.

Figure 1

JUDGE ADVOCATE OFFICER ADVANCED
CORRESPONDENCE COURSE
(5-27-E23)

Phase	Subcourse Number	Title	Credit Hours	
Phase III	208	Command and Staff Procedures	10	
	240	Brigade Command and Control	3	
	273	Division Support Command Concept	2	
	241	Infantry Brigade and Battalion	6	
	642	Race Relations	3	
		Credit Hrs. in Phase III	24	
	Phase IV	124	Military Installations	18
		125	Military Assistance to Civil Authorities	6
		126	Claims	24
		127	Litigation Reports/Release of Information	6
128		Environmental Law	6	
120		Military Personnel Law	14	
121		Boards of Officers	6	
122		Legal Assistance	20	
123		Civil Rights	10	
129		Civilian Personnel Law/Labor Military Relations	10	
	Credit Hrs. in Phase IV	120		
Phase V	203	Division Administrative Operations	1	
	200	Records Management	2	
	254	Intelligence	3	
	287	The Insurgency Problem	3	
	641	Drug Abuse	3	
		Credit Hrs. in Phase V	12	
Phase VI	112	Government Contract Formation	20	
	113	Government Contract Administration	20	
	114	Special Aspects of Government Contracting	20	
	141	Law of Peace	19	
	142	Law of War	25	
	143	Selected International Matters Relevant to Judge Advocate Operations	16	
		Credit Hrs. in Phase VI	120	
Phase VII	150	Legal Research and Writing Program	65	
	152	Management for Military Lawyers	15	
		Credit Hrs. in Phase VII	80	
		Total Credit Hours	500	

CHANGES IN USAR SCHOOL ADT PHASES

OLD				NEW			
Phase	Subject	Credit Hours	Last Taught	Phase	Subject	Credit Hours	To be Taught
IA (or VII)	Military Justice	80	Correspondence or JAG School	II	Military Justice	80	7-20 Jul 74
II	Military Justice	27)	Summer 72	IV	Civil Law	80	Summer 75
	International Law	53)		VI	Procurement Law	40)	Summer 76
					International Law	40)	
IV	Procurement Law	40)	Summer 73	VII	Legal Writing Program	65)	Correspondence Course
	Civil Law I	40)			Management for	15)	
VI	Civil Law II	80	Summer 71		Military Lawyers		
		320				320	
I, III, V	Interschool Subjects	144		I, III, V	Interschool Subjects	144	
		464				464	

Figure 2.

Appearance of Witnesses at Court-Martial Proceedings

By: Colonel Edwin F. Ammerman, JAGC, Staff Judge Advocate, Headquarters, U.S. Army Health Services Command, and Criminal Law Division, OTJAG

Recent confusion in the field regarding the procurement of court-martial witnesses has sparked this two-part note. In Part I, Colonel Ammerman outlines a general procedure regarding requests for witnesses between military installations. Criminal Law Division, OTJAG, sets forth its policy regarding other aspects of the problem in Part II.

I.

Judge Advocates are requested to make their commands aware that telephonic dealings with witnesses for their appearance at court-martial proceedings as regards their travel is most times worthless and time consuming to Judge Advocates at the witness' installation. The best procedure when a witness at another installation is required is to (1) as early as practicable, call (or TWX) the Judge Advocate of the installation or command where the witness is stationed to *locate* the witness, *alert* him and his commander that he may be called, and *ascertain* his *status* or pending reassignment, separation, etc. (2)

When determined that the witness will be required, call (or TWX) the Judge Advocate giving him the information and fund cite. Usually the AG Personnel Office will publish TDY orders on the oral information furnished by the local JA; however, they will require confirmation by letter or TWX for backup. (3) Immediately dispatch written confirmation by letter or TWX to the command concerned restating the essential contents of the oral request made to the local JA as well as the fund cite.

Bear in mind that a telephone call or TWX sent out on Friday for a next Monday court appearance presents all kinds of problems. Some military installations are far removed from direct-line airport facilities and may require extensive overland commercial transportation just to get your witness to the airport. Your delayed or untimely TWX may cause many problems to the assisting local Judge Advocate. Witnesses required by overseas commands present even more problems.

The policy of the Office of The Judge Advocate General regarding requests for witnesses between installations is that such requests be timely and workable. Other than recommending that commands follow this policy of reasonableness, it is rare that OTJAG, or an activity thereof, becomes involved in requests for witnesses, except as indicated below.

II.

The Special Actions Branch, US Army Judiciary (HQDA [JAAJ-CC]), Falls Church, Virginia 22041 (Autovon: 289-1193/1194), processes requests for (1) civilian witnesses requested by overseas commands and (2) requests by overseas commands for military witnesses who are on leave in CONUS between permanent duty stations.

In regard to civilian witnesses, it is suggested that at least 25-30 days be allowed for the processing of such requests, as considerable time must be spent in contacting the witnesses and in coordinating with other agencies in order to arrange for the witness's travel.

In regard to military witnesses on leave between permanent duty stations, at least 15 days must be allowed, mainly to secure initial contact with the witness and to arrange for him to report to the nearest Army installation that can supply him with temporary duty orders and arrange for his travel.

In both the above cases, requests should be communicated by electrical message to the Branch, although telephonic requests will suffice if a follow-up message is forthcoming. The message should include, at a minimum, the witness' name, (former) grade, home of record (or leave address), telephone number (if available), next duty station (if applicable), trial site, trial counsel's name and phone number, trial dates, and the fund cite.

In regard to other requests, it is believed that the requesting command and the command where the witness is located should be able to handle all aspects of the procedure directly. However, OTJAG and the Judiciary stand by to assist in cases of necessity.

JAG School Notes

1. Advanced Class Update. The Advanced Class has completed its examinations for the first semester classes prior to Christmas, following the schedule of many colleges and universities throughout the country. This gave the class the opportunity to devote themselves to thesis research and writing during the period from immediately before Christmas until the beginning of the second semester on 21 January. The first draft of their theses are due at the end of January and oral presentations will be given in April.

2. Another Basic Class Graduates. The 70th Basic Class is now history. Major General Harold E. Parker, The Assistant Judge Advocate General, addressed the class on the evening of 18 December in order to permit the class to leave early the next morning ahead of the Christmas rush. A number of students are remaining at the School awaiting

port call during the holidays. The 71st Basic Class graduated from Phase I at Fort Gordon on 18 December, and many of them began arriving at Charlottesville the following day to await the beginning of their classes on 7 January 1974. The 72nd Basic Class will start arriving from its Fort Gordon training in mid-February. The 70th Basic Class did not attend Phase I training at Fort Gordon due to problems of admissions to the bar created by the multi-state bar exam. That class will probably be known as the "survivors of AP Hill" as they took three days of training at Camp AP Hill under the direction of the Combat Arms Officers at the JAG School. In addition, a representative of the Military Police School at Fort Gordon spoke on Provost Marshal Missions and Functions to this class giving them instruction they would have otherwise have gotten during Phase I.

3. Change of Command. A change of command ceremony and retirement of the Commandant will take place at the School on 18 January 1974. The present Commandant, Colonel John Jay Douglass, has accepted a position upon retirement as the Dean of the National College of District Attorneys located on the campus of the University of Houston in Houston, Texas. The eleventh Commandant of the School will be Colonel William S. Fulton, Jr., presently the Director of the Academic Department of the School. The new Director of the Academic Department will be Colonel Darrell L. Peck, presently the Deputy Director for Army-wide Training. During the graduation ceremonies for the 70th Basic Class Colonel Fulton announced that 937 Basic students had graduated from TJAGSA during the period in which Colonel Douglass was the Commandant.

4. New Building. Work is proceeding rapidly on the new JAG building and plans are now being made to move into the building during the late summer of 1974. It can now be seen rising above the trees behind the Barracks Road Shopping Center from Route 29 North (Emmet Street) in Charlottesville.

5. New Course. The first one-week short course in Management for Staff Judge Advocates will be given at the School beginning on 25 March 1974. Enrollment in this class is limited to field grade officers, preferably Staff Judge Advocates or Deputy Staff Judge Advocates. The course of instruction is taken from materials presently given to the Advanced Class which had proven to be extremely popular and worthwhile.

Criminal Law Items

From: U. S. Army Judiciary

Review Under Article 65(c).

Inadequate review by judge advocates of inferior courts-martial, pursuant to Article 65(c), Uniform Code of Military Justice, continues to be a matter of concern. A number of cases, brought to the attention of The Judge Advocate General under Article 69, have contained patent errors which should have been detected and corrected at the time of the supervisory authority's review. The frequency at which such uncorrected errors are observed leads to the conclusion that the importance of the Article 65(c) review is not properly appreciated by many judge advocates. It must be borne in mind that, for all practical purposes, the Article 65(c) review is the final review for records of trial by summary court-martial and by special court-martial which did not result in an approved bad conduct discharge. Paragraph 94a (2), *MCM, 1969 (Rev.)*, states that the finding of legal sufficiency by the supervisory authority renders the proceedings final, within the meaning of Article 76. Except for a case brought to the attention of The

Judge Advocate General under Article 69, there is no further review of records of trial by inferior courts-martial.

In order to protect fully the interests of both the accused and the Government, the judge advocate performing the supervisory review must assure that the proceedings, findings, and sentence as approved by the convening authority are correct in law and fact before the record is declared to be legally sufficient. When reviewing records of trial by special court-martial, the DD Form 494 checklist serves as a convenient guide. However, filling in the checklist, without carefully examining the record of trial to insure that it conforms to the checklist, is merely cosmetic, and falls short of the review required under Article 65(c). Unless the reviewing judge advocate carefully examines each record of trial, and insures that the proceedings, findings, and sentence as approved by the convening authority are correct in law and fact, there can be no true determination of legal sufficiency.

Judiciary Notes

From: U. S. Army Judiciary

1. Administrative Note.

Report on Military Personnel Convicted of Civilian Felonies. Staff judge advocates of commands concerned are reminded that the report (RCS DD-M(SA) 1061), for the period 1 July-31 December 1973, on the number of military personnel convicted of felonies in Federal and State Courts, is due by 5 February 1974. See HQDA letter, dated 4 June 1973, subject: Statistical Report of Criminal Activity and Disciplinary Infractions in the Armed Forces. The reporting requirement is primarily applicable to Army Forces Readiness Command; Army Pacific (as to Hawaii); Army Forces Command; Army Training and Doctrine Command; Army Materiel Command; Army Health Services Command; Army Communications Command; Army Security Agency; Army Intelligence Command; Army Air Defense Command; Army Recruiting Command; Army Criminal Investigations Command; Army Alaska; Army Forces Southern Command (as to the Canal Zone); Military Traffic Management and Terminal Service; Military Academy; Military District of Washington; and Chief of Engineers. The reports should be mailed to HQDA (JAAJ-CC), Nassif Building, Falls Church, Virginia 22041.

2. Recurring Errors and Irregularities.

a. Requests for Appellate Defense Counsel. Many records of trial are being received by HQDA (JAAJ-CC) without the accused's written statement whether he desires to be represented before the Army Court of Military Review by appellate defense counsel appointed by TJAG. To expedite completion of appellate review, this statement should be obtained as soon after trial as possible. Of course, this document is not necessary if the record of trial will not be forwarded to the Judiciary for examination under Article 69 or review pursuant to Article 66.

b. November 1973 Corrections by ACOMR of Initial Promulgating Orders.

(1) Failing to show a specification of a Charge as formally amended during the trial—four cases.

(2) Failing to show the correct service number in the name paragraph—two cases.

(3) Showing the date of the ACTION as 25 September 1973 rather than "25 Oct 73."

(4) Showing, incorrectly, that the sentence was adjudged by a Military Judge.

(5) Showing in the FINDINGS that the accused was found guilty of a Specification of a Charge rather than the Specifications of the Charge.

(6) Failing to show in the FINDINGS paragraph that the defense motion for a finding of not guilty as to a certain Charge and its Specification was granted.

(7) Failing to show the correct number of previous convictions considered—three cases.

(8) Failing to show that the sentence was adjudged by a Military Judge—two cases.

(9) Failing to show the pleas and findings verbatim.

(10) Failing to show the date that the sentence was adjudged.

(11) Failing to show the accused's service number in the name paragraph.

3. Note From Defense Appellate Division.

Post-Trial Delay and the Court of Military Appeals. In its recently released 1972 Annual Report to Congress under Article 67(g), Uniform Code of Military Justice, the Judges of the United States Court of Military Appeals expressed a continuing concern about post-

trial as well as pretrial delay in the administration of military justice. Noting that accused have often served their adjudged confinement prior to convening authority action and the completion of appellate review, the Court recommended consideration of strict controls over the processing time for every stage of the court-martial process.

The rules enunciated in *United States v. Burton*, 21 USCMA 112, 118, 44 CMR 166, 172 (1971), manifested the concern of the Court of Military Appeals over pretrial delay. (See *The Army Lawyer*, February 1972, Volume 2 at 1.) At the end of its last term the Court gave forceful content and meaning to the *Burton* rules with a series of appellate dismissals. *United States v. Kaffenberger*, 22 USCMA 478, 47 CMR 646 (1973); *United States v. Thomas*, 22 USCMA 479, 47 CMR 647 (1973); *United States v. Stevenson*, 22 USCMA 454, 47 CMR 495 (1973); *United States v. Marshall*, 22 USCMA 431, 47 CMR 409 (1973). In *United States v. Marshall, id.* at 435, 47 CMR at 413, the Court declared:

[T]he Government must demonstrate that really extraordinary circumstances beyond such normal problems as mistakes in drafting, manpower shortages, illnesses, and leave contributed to the delay. Operational demands, a combat environment, or a convoluted offense are examples that might justify a departure from the norm. Absent these or similar circumstances, the delay beyond 90 days cannot be justified by a showing that it was caused by difficulties usually encountered in the processing of charges for trial.

But while it has fashioned firm standards for pretrial delays on the one hand, the Court's decisions pertaining to post-trial delay do not provide for appellate dismissal absent another error and a showing of prejudice. *United States v. Timmons*, 22 USCMA 226, 46 CMR 226 (1973). However, utilizing its extraordinary writs power the Court of Military Appeals has forged a new tool to insure speedy post-trial processing.

In *Rhoades v. Haynes*, 22 USCMA 189, 46 CMR 189 (1973), the military supreme court found a prima facie case of inordinate post-trial delay in the 139 days between the petitioner's murder conviction and the date of its memorandum opinion. Consequently, the Court ordered the convening authority to take his action within 21 days. Subsequent to *Rhoades* the Court has on various occasions ordered the United States to produce a record of trial by a specified date (*Thornton v. Joslyn*, 22 USCMA 436, 47 CMR 414 (1973)), and specified actions to insure that convening authority action is taken (*Fiore v. United States*, Misc. Doc. No. 73-40 (September 4, 1973); *Michaud v. United States*, Misc. Doc. No. 73-43 (September 12, 1973)).

When the government demonstrates to the Court that the convening authority has taken his action, the petition is mooted and normal appellate review begun. In one exceptional case the Court of Military Appeals ordered the findings and sentence *set aside* upon learning that the delay was caused in part by the loss of a recording disc. *Tavares v. United States*, Misc. Doc. No. 73-52 (October 17, 1973, modified on November 12, 1973).

These developments underscore the fact that trial counsel and the staff judge advocate cannot lose interest in rapid disposition of a case once findings and sentence have been announced. Further, trial defense counsel must be ever alert to this important part of the court-martial process and to the expanding opportunity to serve their clients. An initial request for prompt review and action to the responsible staff judge advocate office and convening authority is appropriate and reinforces a subsequent petition filed directly with the Court of Military Appeals for extraordinary relief. Information and assistance regarding the timing and proper form of such petitions for extraordinary relief can be obtained from the Defense Appellate Division, United States Army Legal Services Agency, Autovon 289-1807.

**MONTHLY AVERAGE COURT-MARTIAL
RATES PER 1000 AVERAGE STRENGTH
JULY-SEPTEMBER 1973**

	General		Summary	
	CM	Special BCD NON-BCD	CM	CM
ARMY-WIDE	.17	.13	1.55	.62
CONUS Army commands	.20	.13	1.79	.67
OVERSEAS Army commands	.12	.12	1.15	.54
U.S. Army Pacific commands	.21	.09	1.08	.33
USAREUR and Seventh Army commands	.10	.13	1.20	.59
U.S. Army Alaska	.13	.20	1.53	.68
U.S. Army Forces Southern Command	.04	—	1.20	1.16

Note: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

**NON-JUDICIAL PUNISHMENT
MONTHLY AVERAGE AND QUARTERLY
RATES PER 1000 AVERAGE STRENGTH
JULY-SEPTEMBER 1973**

	Monthly Average	Quarterly
	Rates	Rates
ARMY-WIDE	19.24	57.71
CONUS Army commands	18.27	54.80
OVERSEAS Army commands	20.86	62.58
U.S. Army Pacific commands	20.75	62.26
USAREUR and Seventh Army commands	21.86	65.58
U.S. Army Alaska	15.10	45.31
U.S. Army Forces Southern Command	16.12	48.37

Note: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

Claims Items

From: U.S. Army Claims Service, OTJAG

1. **Thefts and Morale.** The November 1973 issue of *The Army Lawyer* contained two articles which brought renewed thought to the theft problem. Captain Dull and Miss Werrin in their article titled "Crime Victims' Compensation: Fair Play for the Good Guy" highlighted that the military has been compensating service member victims of crimes for certain losses while some states are only beginning to think of similar protections for their citizens. In addition, the article titled "Status of Theft Claims" pointed up the current statistical trends. Despite much effort in this area the theft problem appears to continue to pose a negative morale impact on the average soldier. In a recent sample survey (DAPC-PMP Report Number 35-73-E) of military personnel conducted by the US Army Military Personnel Center, several significant facts were revealed. First, over 45 percent of the men surveyed had experienced a theft of over \$5.00 while on a military installation. Second, over 37 percent of the men surveyed had not

reported thefts of over \$5.00 because they felt the report would be of little help in catching the thief. Third, over 81 percent of the men surveyed felt that their personal property was safer in their home town than on a military installation.

These findings again emphasize the fact that theft is still a crucial negative morale factor among service members. In CY 1972, the total payment for theft claims was \$3,351,394.00. The total payment for the period January 1973-September 1973 was \$2,090,690.00. The cost in money, although substantial, can not measure the actual loss of trust and demunition of good will by the soldier who becomes a victim of a theft.

It is important that the Staff Judge Advocate and his claims officer use their unique expertise as military lawyers to aid the commander and his other staff members in a continuing preventive theft program. Many judge advocates have supplied this Service with the

details of theft prevention programs which have obtained varying degrees of success. Those programs are described in detail in an article titled, "The Theft Problem Revisited" which was published in the August 1972 issue of *The Army Lawyer* and can be found at Appendix B of USARCS Bulletin No. 1. This Service would very much appreciate information concerning any other programs not listed in the above cited article which have proven successful. Information should be forwarded directly to the US Army Claims Service, ATTN: LTC James A. Mounts, Jr., Fort Meade, Maryland 20755.

2. Incident to Service — Damage to Motor Vehicles on a Military Installation. Effective 1 January 1974, the term "unusual occurrence" as used in paragraphs 11-4f(3) and 11-4f(4), AR 27-20, *no longer includes* hit-and-run incidents as was stated in Item 2, page 12, Volume 3, No. 1, January 1973, *The Army Lawyer*. Therefore, claims for damage resulting from hit-and-run incidents occurring on or after 1 January 1974, regardless of the extent of monetary loss incurred, are *not* payable under paragraphs 11-4f(3) or 11-4f(4), AR 27-20. This Army policy change, as stated above, was adopted at the 16 November 1973 Claims Chiefs' Conference, in order to insure uniformity in this area by all the Services. If hit-and-run damage is caused by a Government vehicle while being used for official purposes, the claim should be processed as a tort claim under Chapter 3 or Chapter 4, AR 27-20, depending on the "incident to service" character of the vehicle's use. If the Government vehicle causing the damage was not being used for official purposes, Chapter 5, AR 27-20 would be applicable, and if the military driver is identified, possible use of Article 139, UCMJ, and Chapter 9, AR 27-20 should be considered.

3. Recovery From Ocean Carriers for POV Damage. This Service has been informed by

the Military Sealift Command that they are experiencing difficulty in recovering from ocean carriers in certain instances due to failure of the claim file to properly reflect that payment of the claim for the damage to the automobile did not include preexisting damage. In addition, it may be necessary to check the authenticity of the documents in the possession of the claimant. Therefore, in cases involving damage to automobile shipment on ocean carriers, the claims officer must thoroughly examine all documents to ascertain the validity of the claim and if the original DD Form 788 is blank or missing, request a copy of same from the loading terminal for comparison with DD Form 788 prepared at discharge prior to adjudicating the claim.

4. U.S. Army Claims Service Policy for Providing Assistance to Staff Judge Advocates. In the December 1973 issue of *The Army Lawyer* various policies for providing assistance to staff judge advocates were discussed. The personnel of this Service are available to provide as much assistance as possible to SJA's concerning claims matters. Staff judge advocates are reminded of the provisions of paragraphs 1-7 and 1-8, AR 27-20. These provisions provide authority for direct communication between all claims echelons with respect to claims activities. In addition, inquiries as to the interpretation of AR 27-20 will be forwarded through claims channels to the Chief, U.S. Army Claims Service, Fort Meade, Maryland 20755.

5. Limits in the Depreciation Guide. Claims officers are again reminded to check the maximum limitations established by the Depreciation Guide (Table 11-2, AR 27-20) for payment of certain items prior to adjudication of a claim. Particular emphasis should be given to such high value items as watches, expensive jewelry and paintings.

Legal Assistance Items

From: Legal Assistance Office, OTJAG

1. Guide to income averaging for 1973 for a joint return. Here is a quick guide for determining whether income averaging can save taxes for a married person on his '73 joint income tax return.

If your average base period income is	You can't save any taxes in '73 unless your '73 income is over	You need this '73 income to save at least \$100 in taxes
\$ 4,000	\$ 8,000	\$ 11,333
6,000	10,200	11,333
8,000	12,600	15,333
10,000	16,000	19,333
12,000	17,400	19,333
14,000	20,000	22,500
16,000	22,200	22,500
18,000	24,600	26,500
20,000	28,000	31,333
25,000	33,000	35,333
30,000	40,000	43,333
36,000	46,200	49,000
40,000	52,000	55,333
50,000	64,000	69,000
60,000	76,000	79,333
90,000	120,000	125,000
100,000	140,000	145,000
200,000	No saving possible	

2. Ohio Vietnam Bonus. On November 6, 1973, Ohio elected to pay a State Vietnam Bonus. Information received indicates that it will be "sometime" in 1974 before the state will finally be prepared to handle the claims for the Vietnam Bonus. Additional information will be made available when received.

3. Gifts to Minors Act. Pursuant to Rev. Rul. 59-357, 1959-2 Cum. Bull. 212 the general rule is that a gift of property that is to be held by a custodian, during the donee's minority, under the Act meets Section 2503 (c) requirements and thus is a gift of a present interest. As various States lower the age of majority to 18, the property will pass to the donee at age 18. The question has been raised, how does this affect the status of a gift under the Act. IRS has held in Rev. Rul. 73-287, Int. Rev. Bull. No. 27 at 13 that Section 2503(c) of the Code merely established

the maximum age restriction but does not establish the lower age limitation and thus the gift satisfies the requirement. The rule requiring a gift to be one of a "present interest" applied only for purposes of the \$3,000 annual exclusion. The rules with respect to the \$30,000 lifetime exemption permit the gift to be a future or present interest (Sec. 2531 of the Code).

4. Veterans Benefits. Public Law 93-43 enacted June 18, 1973, established a National Cemetery System within the Veterans Administration. In addition to the service connected burial benefit of \$250.00 for funeral and burial expenses, section 5, Public Law 93-43, amended section 903, Title 38, United States Code, to provide for the payment of an amount not exceeding \$150.00 as a plot or interment allowance, when a veteran eligible for the statutory burial benefit is not buried in a national cemetery or other cemetery under the jurisdiction of the United States. Particulars as to other claims for payments, exceptions, special conditions and exclusions can be found by reference to 38 CFR, Part 3.

5. Misrepresentation in Car Sale—Damages. A purchaser of a used car was entitled to actual and punitive damages when a seller fraudulently misrepresented the vehicle as a 1967 model, when in reality it was a 1963 model with some external parts having been changed for 1967 parts. The evidence included that the vehicle could not have been a 1967 model and that the seller's agents as experienced new and used car salesmen could hardly have helped being aware of this fact. (*Central Chevrolet, Inc. v. Campbell*, Ga.Ct. App., No. 48013, dated April 13, 1973.)

6. Residency Requirements for Divorce. A Federal court in Hawaii invalidated and held unconstitutional the durational residency requirements of Hawaii Revised Statutes, Sec. 580-1, because they made a specific duration of

residency, requiring a person to be a domiciliary of a circuit for three months and the State for a year, absolute prerequisites to access to the divorce courts in violation of the equal protection clause. The court distinguished between domiciliary status and durational resi-

dency. The former requirement was not constitutionally objectionable whereas the latter impermissably discriminated against newly arrived, bona fide, domiciliaries. (*Mon Chi Heung v. Lum*, D.C. Hawaii, 359 F. Supp. 219 (1973).)

Personnel Section

From: PP&TO

1. **Retirements.** On behalf of the Corps, we offer our best wishes to the future to the following officers who retired after many years of faithful service to our country.

COL Robert E. Boyer, 30 November 1973

COL Charles K. Wright, Jr. 23 November 1973

2. Orders Requested As Indicated.

Name	From	To
COLONELS		
CARNE, William B.	OTJAG	USA Leg Svcs Agy Falls Church
LIEUTENANT COLONELS		
WASINGER, Edwin P.	Korea	Dis Bks Ft Leavenworth, KS
MAJORS		
DOMMER, Paul P.	USA Leg Svcs Agy Falla Chr	OTJAG
CAPTAINS		
CARTER, Jack E.	82d Abn Cp Ft Bragg, NC	JFK Ctr Ft Bragg, NC
DELINE, Donald A.	USAREUR	23d Avd Crse TJAGSA
DOOLITTLE, Garry O.	USAAC Ft Knox, KY	3d Rctg Dis Col Pk, GA
ENO, Woodrow E.	USATC Ft Gordon, GA	6th Rgn CID Pres of SF, CA
FOX, Timothy	Phy Dis Agy, WRAMC	Fitzsimmons Gen Hosp
GONZALES, Robert	4th Inf Div Ft Carson, CO	Korea
HANSEN, Donald L.	DLI Pres of Mont, CA	USAREUR
HANSON, Mahlon F.	USAG Ft Sheridan, IL	5th Rectg Dist Ft Sheridan, IL
HARVEY, Sanford	USAREUR	USA Leg Svc Agy Falls Church
HUSSON, John J.	USATC Ft Gordon, GA	4th Inf Div Ft Carson, CO
KARPINSKY, Jaroslaw P.	Elect Cmd Ft Monmouth	Tank Aut Detriot, MI
KEMP, John D.	USAREUR	101 Abn Div Ft Campbell, KY
LINDENMEYER, Mark R.	2d Armored Div Ft Hood, TX	USA Admin Ctr Ft B. Harrison
RAMAEKER, Gary W.	USA Alaska	STRATCOM Ft Huachuca, AZ
SMITH, Kenneth	USATCI Ft Polk, LA	4th Inf Div Ft Carson, CO
TOWNSEND, Richard	USATCI Ft Polk, LA	Flt Tng Ctr Ft Stewart, GA
WALLACE, John K.	Korea	Hawaii
WALLHAUSEN, Ernest W.	USAREUR	S-F TJAGSA
WILLIAMS, Herbert D.	82nd Abn Cp Ft Bragg, NC	USAT Sch Ft Benning, GA
ZOPP, Gerald M., Jr.	USA Alaska	USAG Ft Sheridan, IL

3. **Awards.** Congratulations to the following officers who received awards as indicated:

COL Vernon M. Culpepper, Meritorious Service Medal, 13 Jun 69-4 Jun 73

CPT Thomas F. Dewey, Jr., Army Commendation Medal, First Oak Leaf Cluster, Aug 72-Sep 73

CPT Thomas C. Lane, Army Commendation Medal, 8 Jan 71-15 Nov 73

4. Douglass Retires—Fulton New TJAGSA Commandant. The following message from Major General George S. Prugh, The Judge Advocate General, was disseminated to the field on 10 December 1973:

"Colonel John Jay Douglass, JAGC, will be retired from the Army and leave his present position as Commandant of the JAG School effective Jan 1974. COL Douglass, completing 30 years of distinguished military service, takes with him the best wishes of his many friends and colleagues for continued future success.

"Following his retirement from the Army, COL Douglass will become Dean of the National College of District Attorneys, University of Houston, Houston, Texas. The National College of District Attorneys, which is sponsored by a number of prominent professional organizations, including the American Bar Association, provides postgraduate professional training for lawyers primarily engaged in the field of criminal prosecution. The selection of COL Douglass for this prestigious post honors him, and it honors as well our School, our Corps, and the Army of which we are a part. I know I speak for the Corps when I reflect its pride in Colonel Douglass' selection."

"The new Commandant of the Judge Advocate General's School will be Colonel William S. Fulton, Jr., JAGC, presently Director of the Academic Department. COL Fulton, a 1971 graduate of the US Army War College, has established an outstanding record of military service which ranges from combat duty as an infantry platoon leader in Korea, to peacetime duty as a Corps Staff Judge Advocate in Europe. The Corps is called upon to give its full enthusiastic and continuous support to Colonel Fulton, the eleventh officer to assume the duties and responsibilities of Commandant in the history of the Home of the Military Lawyer, TJAGSA."

5. TJAGSA Library Needs USCMA Annual Reports. In order to complete its collection, The Judge Advocate General's School Library is in need of the following annual reports of

the U.S. Court of Military Appeals for the indicated periods: May 31, 1951-May 31, 1952; June 1, 1952-December 31, 1953; and January 1-December 31, 1954, 1955, 1956, 1957, 1961, 1963, 1969. Please send your copies to The Judge Advocate General's School, ATTN: Mrs. R. Vivian Hebert, Librarian, Charlottesville, Virginia 22901.

6. Help Wanted.

a. An E-7 Senior Court Reporter position is vacant in the Office of the Staff Judge Advocate, U. S. Army Quartermaster Center and Fort Lee, Fort Lee, Virginia, for an individual meeting the appropriate regulation requirements. Duty-related information can be obtained by writing or calling the Office of the SJA, Fort Lee, Virginia 23801, AUTOVON 687-1792 or 687-4103.

b. Civilian Attorney Vacancy

Position: GS-12 Attorney Advisor
Location: General Claims Division, US Army Claims Service, OTJAG Fort Meade, Maryland 20755

Individuals interested in the position should submit written application to: Chief, US Army Claims Service, ATTN: Mr. Joseph H. Rouse, General Claims Division, Office of the Judge Advocate General, Fort George G. Meade, Maryland 20755

7. New Council For Captains. Now JAG captains in the field can work along with the newly created Captains Advisory Council in bringing to the attention of The Judge Advocate General the problems, ideas and suggestions of today's JAG captain concerning the JAG Corps. The Council will be advising The Judge Advocate General personally of all constructive communications from the field.

The Council has selected JAG captains from over thirty major JAG offices to sound out the feelings of other JAG captains. JAG captains who desire to contact the Council can call or write any Council member at the Auto-von numbers and addresses below.

CPT Joseph Casper 227-2376	Department of the Army Office of The Judge Advocate General (DASA-PL) Washington, D. C. 20310
CPT Fitzhugh Godwin 227-2717	Department of the Army Office of The Judge Advocate General (DAJA-LTD-G) Washington, D. C. 20310
CPT John Golden 289-2462	USA Legal Services Agency (DAJA-CA) Nassif Building Falls Church, Virginia 22041
CPT Joseph Kulik 225-3322	Department of the Army Office of The Judge Advocate General (DAJA-PA) Washington, D. C. 20310
CPT Steven Needle 227-6000	Department of the Army Office of The Judge Advocate General (DAJA-AL) Washington, D. C. 20310
CPT Maurice O'Brien 289-2470	USA Legal Services Agency (DAJA-CA) Nassif Building Falls Church, Virginia 22041
CPT David Schlueter 289-1800	USA Legal Services Agency (JAAJ-GD) Nassif Building Falls Church, Virginia 22041
CPT Tony Siano 289-1194	USA Legal Services Agency (JAAJ-CC) Nassif Building Falls Church, Virginia 22041
CPT Fred Smalkin 227-6000	Department of the Army Office of The Judge Advocate General (DAJA-AL) Washington, D. C. 20310
CPT Jeffery Smith 225-9354	Department of the Army Office of The Judge Advocate General (DAJA-IA) Washington, D. C. 20310
CPT Terry Stepp 289-2462	USA Legal Services Agency (DAJA-CA) Nassif Building Falls Church, Virginia 22041
CPT Al Thomas 225-5750	Department of the Army Office of The Judge Advocate General (DASA-LTP) Washington, D. C. 20310
CPT Steve Todd 227-1418	Department of the Army Office of The Judge Advocate General (DAJA-MJ) Washington, D. C. 20310

CPT Gilbert Weller

289-1547

CPT John Willis

289-1736

USA Legal Services Agency
(JAAJ-DD)
Nassif Building
Falls Church, Virginia 22041

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Current Materials of Interest

Articles

Lunding, "Judicial Review of Military Administrative Discharges," 83 YALE L. J. 33 (1973). Argues that the current system violates developing standards of due process; examines the availability of judicial relief within the present system; and considers the jurisdiction of courts to review discharge practices.

Levie, "International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply" 67 AM. J. INT'L L 693 (1973).

Note, "Declassification of Sensitive Information: A Comment on Executive Order 11652" 41 GEO. WASH. L. REV. 1052 (1973).

Note, "Honored in the Breach: Presidential Authority to Execute the Laws with Military Force," 83 YALE L. J. 130 (1973).

Wasserman, "Grounds and Procedures for Deportation," PRAC. LAW., Nov. 1973, at 27.

Rothstein, "The Proposed Amendments to the Federal Rules of Evidence," 62 GEO. L. J. 125 (1973). An analysis of the differences between the Supreme Court proposals and House amendments, with suggested solutions to their conflicts.

Freymond, "Confronting Total War: A 'Global' Humanitarian Policy," 67 AM. J. INT'L L. 672 (1973).

Jacoby, "The Feres Doctrine" 24 HASTINGS L. J. 1281 (1973).

Publications

The Military Law and Law of War Review, Vol. XII-1 (1973) Revue de Droit Penal Militaire et le Droit de la Guerre.

Course

PLI Basic Trial Strategy Workshop, New Orleans, February 21-24. For more information write to: Practising Law Institute, 1133 Avenue of the Americas, New York, New York 10036 (212) 765-5700.

Speech

A September speech by Major General George S. Prugh, The Judge Advocate General, on the DOD Task Force on the Administration of Military Justice, given before the North Alabama Chapter of the Federal Bar Association, is highlighted at 20 Federal Bar Journal 343 (November 1973).

By Order of the Secretary of the Army:

CREIGHTON W. ABRAMS
General, United States Army
Chief of Staff

Official:

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