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SELF-INCRIMINATION REFINED

By Col. J. F. Rydstrom *

When President Truman prescribed the Manual for Courts-Martial, 1951,¹ it is not likely that he intended to promulgate any rules which might work injustice for members of the armed forces. Whatever his intentions, however, the United States Court of Military Appeals has, in several recent decisions involving the privilege against self-incrimination, declared that he did so.²

The first of these decisions was *United States v. Rosato*,³ followed closely by *United States v. Eggers*,⁴ in which a unanimous Court determined that Article 31 of the Uniform Code of Military Justice⁵ permits an accused to refuse to make a sample of his handwriting. It held that requiring the accused to do so violated his privilege against self-incrimination

and that evidence obtained in violation of the privilege was inadmissible. These decisions were reinforced by one on voice identification, *United States v. Greer*,⁶ in which it was held equally a violation of Article 31 to direct that accused speak up during trial so that a witness could identify his voice.

These decisions are in direct contravention of the Manual for Courts-Martial, 1951, which specifically provides that the privilege against self-incrimination is not violated by requiring an accused to furnish exemplars of handwriting or voice:

"The prohibition against compelling a person to give evidence against himself relates only to the use of compulsion in obtaining from him a *verbal or other communication in which he*

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¹ EO 10214, 8 Feb. 1951, 16 F. R. 1303.

² The Court has not hesitated on several other occasions to consider whether particular provisions of the Manual for Courts-Martial, 1951, were in conflict with the Uniform Code of Military Justice. For example, it early determined that the rules in par. 73 of the Manual, on instructions, were inadequate (*US v. Clark*, (No. 190), 2 CMR 107), discussed *superior* competent authority for appointment of a court (*US v. LaGrange*, (No. 313), 3 CMR 76), and held bread and water punishment illegal when imposed by court-martial (*US v. Wappler*, (No. 1457), 2 USCMA 393, 9 CMR 23). More recently, it held that the individuals designated to take depositions for use in a general court-martial must be qualified to act as counsel before a general court-martial despite an indication in par. 117a of the Manual to the contrary (*US v. Drain*, (No. 4510), 4 USCMA 646, 16 CMR 220).

³ *US v. Rosato*, (No. 1375), 3 USCMA 143, 11 CMR 143.

⁴ *US v. Eggers*, (No. 1990), 3 USCMA 191, 11 CMR 191.

⁵ 50 USC 602.

⁶ *US v. Greer*, (No. 3155), 3 USCMA 576, 13 CMR 132.

expresses his knowledge of a matter and does not forbid compelling him to exhibit his body or other physical characteristics as evidence when such evidence is material. Consequently, it is not a violation of the prohibition to order a person (including an accused) to expose his body for examination by the court or by a physician who will later testify as to the result of his examination. Upon refusal to obey the order, the person's clothing may be removed by force. Also, the prohibition is not violated by requiring a person (including an accused) to try on clothing or shoes, to place his feet in tracks, to make a sample of his handwriting, to utter words for the purpose of voice identification, or to submit to having fingerprints or a sample of his blood taken." (Emphasis added.)⁷

The Court stated that, in Article 31(a), Congress intended to secure to persons subject to the Code the same rights secured to members of the civilian community under the Fifth Amendment to the Constitution, "no more and no less."⁸ The Court then proceeded to determine that certain phrases of the Manual, quoted above, were violative of Article 31 because they did not secure to a person subject to the Code this same standard of justice.

Had the justices of the United States Court of Military Appeals been directed to rewrite the Manual, I have no doubt of their right to choose that rule of law they deemed best, and to propose it for adoption by the armed forces. They were not asked to do

this, however, and I do question not only their right, but the wisdom, of rewriting the Manual in a case-by-case, *ex post facto* fashion.

My first concern is that judicial decisions interpreting the Fifth Amendment to the Constitution do not support the Court's determination. My second concern is with the effect of this determination upon the quality of justice at the trial level.

On the basis of existing law, the Court could not judicially enforce its view that demanding an exemplar of handwriting or of voice from an accused violated the privilege against self-incrimination. Article 31(a) provides, very simply:

"No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

Nowhere does Article 31 define what *physical conduct* falls within the scope of the privilege against self-incrimination, but each of the four subparagraphs of the Article, including the one cited above, makes specific reference to expressions of knowledge: "To answer any question," "To make any statement," and finally, "No statement obtained * * *." A layman reading the Article might, in his innocence, reasonably conclude that testimonial compulsion was the intended prohibition.⁹

The last paragraph of Article 31 establishes the manner in which the

⁷ MCM 1951, par. 150b, p. 284; 16 F. R. 1384.

⁸ US v. Eggers, supra, 11 CMR 191, 195.

⁹ The Fifth Amendment to the Constitution is perhaps more general in this regard, providing only that no person "shall be compelled in any criminal case to be a witness against himself." The intended scope of the prohibition is to be found only in judicial interpretations.

prohibition against self-incrimination may be judicially enforced:

"No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement *shall be received in evidence* against him in a trial by court-martial." (Emphasis added.)

Lacking a statutory definition of what physical conduct Congress had intended should come within the prescription of the Article, the President prescribed the rules to be applied at the trial level. These rules set forth in the Manual were clear, consistent, and concise.

The promulgation of a rule of evidence to cover this situation was clearly within the President's authority to prescribe. In fact, Congress directed him to do so in Article 36 of the Uniform Code of Military Justice:¹⁰

"(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code."

¹⁰ 50 USC 611.

¹¹ *Holt v. US*, 218 US 245, 31 S. Ct. 2, 54 Led 1021; Legal and Legislative basis, MCM 1951, p. 238.

¹² The United States Court of Military Appeals dismissed the Supreme Court's rule as dicta apparently not worthy of its attention. Judge Quinn cited the case in the Rosato decision as standing for the rule that an accused may be required to try on a garment to determine its fit, but dropped it after recognizing the Manual's reliance on it. Judge Brosman in the Eggers case ignored the Supreme Court's dicta, professing to find a *single* "—and faint—guiding light" in dicta of the Dean case of 5th Circuit Court of Appeals, referred to hereafter.

¹³ *Dean v. US*, 246 F. 568, 577.

There is no decision of a United States District Court which has applied a rule of evidence inconsistent with that prescribed by the President for use in courts-martial. There is nothing in Article 31 itself which shows the rule prescribed to be contrary to or inconsistent with the code.

In point of fact, the rule in the Manual quoted above is based upon a decision of the United States Supreme Court written by Mr. Justice Holmes in the Holt case:¹¹

"It is objected that [the accused put on a blouse] under the same duress that made his statement inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to *extort communications* from him, not an exclusion of his body as evidence when it may be material." (Emphasis added.)¹²

Opposed to this as the "Federal rule" is certain dicta, based on no discoverable precedent, appearing in the Dean case, a Court of Appeals decision:

"The defendant's constitutional privilege of refraining from giving evidence against himself by word of mouth, or by furnishing specimens of his handwriting."¹³

As to an exemplar of handwriting, there was only one case in point, from the Philippine Islands, upon which the United States Court of Military Appeals could find to rely,¹⁴ together with what the Court *deemed* to be the rule in Texas.¹⁵ As to voice identification, the Court relied upon certain state court cases¹⁶ which were patently distinguishable on the facts, and ignored a Pennsylvania Supreme Court decision¹⁷ which was directly in point but contrary to its own opinion of what the law should be.

The important consideration is that *there exists no Federal court decision* contrary to the rule prescribed by the President. It was not only his right but his duty, as directed in the basic law, to prescribe a rule of evidence to encompass this situation in which there were two Federal court cases with dicta on the subject: one the Dean case by a Circuit Court, the other the Holt case by the United States Supreme Court. Not illogi-

cally, the President declared the latter to be the law on the subject for the armed forces. This rule of evidence established by the President could not reasonably be disregarded by the United States Court of Military Appeals in the absence of any clear authority to support its own views.¹⁸

For the clear, consistent, and concise rule of evidence prescribed by the President to define the limits of the privilege against self-incrimination, the United States Court of Military Appeals substituted a new and refined rule to measure the physical conduct which is included within the privilege. This new rule is based on "active participation" and "affirmative conduct." If more than "passive cooperation" is required of an accused in producing incriminatory evidence, then his privilege against self-incrimination is violated.

This is no simple rule to apply. No sooner was it promulgated than the

¹⁴ Beltran v. Samson and Jose, 53 Phil. Is. 570.

¹⁵ Compare Kennison v. State, 97 Tex. Cr. R. 154, 260 SW 174, with Cox v. State, 126 Tex. Cr. R. 202, 70 SW 2d 1005.

¹⁶ Beachem v. State, 144 Tex. Cr. R. 272, 162 SW 2d 706; State v. Taylor, 213 SC 330, 49 SE 2d 289.

¹⁷ Johnson v. Commonwealth, 115 Pa. 369, 9 Atl. 78. For a competent discussion of the cases, see CM 366858, 13 CMR 450, 454.

¹⁸ Obviously, the President did not write the Manual himself. (Legal and Legislative Basis, MCM 1951, p. VI.) It was the consolidated effort of a number of service lawyers under the overall direction of Mr. Felix Larkin, General Counsel for the Secretary of Defense, who had worked directly with Congressional Subcommittees which drafted the Uniform Code of Military Justice. Drafts of the Manual were prepared and numerous changes made by him, as well as by The Judge Advocates General, the Attorney General, the Bureau of the Budget, and the Director of Archives. In addition, the chapter on Evidence was submitted for comment to Professor Edmund M. Morgan, Jr., head of the "Morgan Committee" which drafted the Uniform Code of Military Justice for Congress. None of the many and experienced attorneys who worked on and reviewed the Manual for Courts-Martial, 1951, in draft form, ever recorded a doubt as to the justice and correctness of this rule of evidence under discussion.

court divided upon what it had meant by it. Confronted with a case involving the extraction of urine from an unconscious soldier by means of a catheter,¹⁹ two of the justices found only "passive cooperation," physical conduct which was beyond the scope of Article 31. The chief judge, however, found this to be as repugnant to Article 31 as obtaining exemplars of handwriting and voice because the unconscious accused did not consent to such a shocking invasion of his person.

In the next case to come before the Court, accused was conscious but voluntarily cooperated in furnishing a urine sample by means of catheterization.²⁰ Judge Latimer held that Article 31 does not apply to obtaining urine specimens because reasonable coercion is permissible in obtaining such evidence; Judge Quinn found accused consented; and Judge Brosman, "after some hesitancy," concluded there was more than acquiescence although the case was "distinctly a close one" as to *consent*. He expressed his view as being that:

"* * * a suspected person may not lawfully be subjected to catheterization over his protest. However, I am sure that neither a suspect nor an accused need be warned that he is not required to permit this procedure."

His theory appears to be that an accused may legally be *ordered* to do that which he can, with equal legal right, *refuse* to permit. This view has the effect of making an accused's legal rights during interrogation dependent upon the extent of his prior legal knowledge, the very antithesis of the protection intended by Congress in Article 31.²¹

These observations upon "the new rule" bring me to my second, and more important, concern: the effect upon the quality of justice at the trial level of such decisions as those in the cases of Rosato, Eggers, and Green. Military lawyers in the armed forces recognize that their chief obligation is toward the effective administration of justice at the trial level, and experience has shown that the quality of justice at that level is not improved by nice qualifications of justice. No refinements serve only to confuse the administration of military justice.

To the serviceman seeking the truth in military law, the Manual of Courts-Martial, 1951, is the Bible. The rules, procedures, and injunctions set forth therein carry no less weight for him than does the Gospel for the true believer. Where the Manual is concerned, there are no unbeliefs in the armed forces for the President is Commander-in-Chief and his i-

¹⁹ US v. Williamson, (No. 3898), 4 USCMA 320, 15 CMR 320.

²⁰ US v. Booker, (No. 3836), 4 USCMA 335, 15 CMR 335.

²¹ At the time of writing, the decision in US v. Barnaby, (No. 4752), USCMA 63, 17 CMR 63, has been published which confirms the three divergent opinions of the three members. Accused furnished a urine sample *when ordered to do so*, and the Chief Judge, dissenting, found that this was requiring him to furnish evidence against himself in violation of Article 31. The majority held there is no privilege to refuse to furnish a sample of body fluid.

²² The Court itself has so recognized on numerous occasions, e.g., US v. Hemp, (No. 290), 1 USCMA 280, 3 CMR 14, 19; US v. Drain (No. 4510), USCMA 646, 16 CMR 220, 223.

structions are the law. Decisions which impugn this judicial Bible are sacrilege.

The Manual for Courts-Martial, 1951, was written, not for appellate judges, but for law enforcement officials, attorneys, and court members at the working level, for those who are actually involved in catching criminals and trying cases. At this level, clarity and consistency produce a better quality of justice than legal subtlety. Danger lies in the familiarity with the law of appellate judges which permits *them* to disregard provisions of the Manual. This familiarity is felt most vitally at the trial level where it breeds contempt of that entire volume as an authoritative source of guidance.

When the President establishes rules of evidence in accordance with a mandate of Congress, those rules are not lightly to be disregarded by a military officer who is appointed by the President. The service lawyer who follows those rules, and is declared to have been wrong, has nowhere to turn because the law has become entirely a matter of what the judges say it is. He can only await with apprehension the next pronouncement. The law of his partic-

ular case may have been settled, but the next case will present a variation not readily perceptible which, in that next case, will be found to have required a wholly different result by the United States Court of Military Appeals. The Williamson and Booker cases on extraction of body fluids are in point. Boards of Review had distinguished the rule of Rosato, Eggers, and Greer to their satisfaction in such cases.²³ Fortunately for the stability of the law, a majority of the United States Court of Military Appeals agreed there was a distinction, but note—the distinction was not so clear that all members of the Court agreed on the result. Had one judge hesitated further, the uncertainty would have increased.

In conclusion, it may be said that the Rosato, Eggers, and Greer decisions violated Article 36(a) of the Code, were unjustified by precedent, unwarranted by their facts, and unwise because of the uncertainty created. A summary dismissal of a provision of the serviceman's Bible, the Manual for Courts-Martial, 1951, creates a disrespect for that important document which can serve only to impair the quality of justice at the trial level.

²³ ACM 8386, Brints, 15 CMR 818; ACM S-7345, Milton, 13 CMR 747.



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Reconsideration — A New Weapon in Pleading

By George S. Prugh, Jr.*

A recent line of decisions from the United States Court of Military Appeals and from Army boards of review has revealed the presence of a gap in the Uniform Code of Military Justice and the Manual for Courts-Martial, 1951. This lacuna, an important one respecting jurisdiction, is currently being filled by "judicial legislation" but in a painfully slow and uncertain manner. Stated simply, the question is: who has jurisdiction over a particular case after the board of review has written its opinion and before the Court of Military Appeals acts on the accused's petition? Stated another way: when does the board of review lose jurisdiction over one of its cases?

The problem was first revealed in May of 1952 when CMA, obviously impressed at the time by its own great back-log of cases, ruled that a board of review has discretion to reconsider its own decision unless an appeal has been taken to the Court of Military Appeals (*United States v. Reeves* (No. 453), 1 USCMA 388, 3 CMR 122). This doctrine was somewhat surprising to those who had felt, as the board of review in the *Reeves* case had, that jurisdiction was lost to the board when it rendered its decision, in the absence of a di-

rective from the Court of Military Appeals to act in further consideration of the case. A new field was thus opened for speculation, and the problems were not long in appearing. If the board of review could write a decision on a case, send the decision on its way, and some time later recall that decision and reverse itself, where was the certainty so necessary in the action of an appellate body? Could the board of review be solicited by appellate counsel to reconsider its decision? If so, how was this to be done—by petition, by hearings, by motions and arguments? Were the boards required to issue supplementary decisions ruling upon these petitions or motions? Was there any point short of action by CMA that would deprive the board of the power to reconsider? Did the transmittal of the decision by TJAG have any effect upon the jurisdiction? What was the effect of all of this upon the time limitation for petitioning placed upon the accused? These and many other allied questions loomed before the widening eyes of the persons charged with these matters.

The importance of the concept was readily apparent. In these days when it is not unusual for a certified case to take one year from time of trial

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until final appellate action, or for the same processes to take a year and a half in petitioned cases, it becomes of the utmost significance to determine what forum should receive petitions for new trial or motions for reconsideration when, for example, a recent pronouncement of the law overrules a formerly well-accepted doctrine or for action upon the case when the accused becomes insane. Referring the matter to the wrong forum would cause considerable delay in the already lengthy proceedings.

Judge Latimer, author of the *Reeves* opinion, did set forth some guides for a solution to the problem. First of all, he made it clear that once jurisdiction had vested in the Court of Military Appeals the board of review is without authority to act in the case without some direction from CMA. The opinion suggests, without so stating, that CMA would have the jurisdiction if: (1) the action involved a mandatory appeal, as in a general or flag officer case of a death sentence [Article 67(b)(1)]; (2) the accused had been served with the board of review opinion; (3) the accused had petitioned CMA for a grant of review [Article 67(b)(3)]; (4) or The Judge Advocate General had certified the case to CMA [Article 67(b)(2)]. This dicta would have served as a rule easy of application had it not been for the rather unfortunate wording of the second category, and a subsequent remark that "unless an appeal to [CMA] has been taken", a board of review has the discretion to reconsider its decision. As a second basic rule, Judge Latimer said that jurisdiction was at all times in one of the three "judicial or

quasi-judicial bodies"—the court-martial (trial court), the board of review (appellate forum), or the Court of Military Appeals (appellate court). The Judge Advocate General was definitely *not* in the direct line of appellate succession between the board and the Court of Military Appeals. The Judge's third point was that the board's corrective power should at least extend to (1) clerical errors, (2) inadvertently entered decisions, and (3) decisions which are clearly wrong as a matter of law. Next, it was said that the board did not oust itself of jurisdiction for these purposes merely because it had signed the decision and transmitted it to The Judge Advocate General. Finally, as a caveat, it was made abundantly plain that The Judge Advocate General was without a right to return the case to the board upon his own initiative.

On the basis of the *Reeves* case, then, when does the board of review lose its power to reconsider its own decision? If TJAG has certified the case, then of course the board is without jurisdiction and if CMA has received a petition from the accused the board is likewise deprived of the power to act. But no deep study is required to see that there is still a gaping hole in the jurisdictional garment—the area lying between the writing of the board's opinion and the point at which the case either becomes final or jurisdiction vests in CMA.

Article 67(c), Uniform Code of Military Justice, provides that "The accused shall have thirty days from the time he is notified of the decision of the board of review to petition the

Court of Military Appeals for a grant of review. The court shall act upon such a petition within thirty days of the receipt thereof". Suppose the board renders its decision, TJAG does not certify the case but instead forwards the decision to the convening authority and directs that action be taken in accordance therewith, and the convening authority acts accordingly, serving the decision upon the accused and advising him of the starting of the thirty day period. Suppose further that the accused decides after a couple of weeks, that he should petition the board of review for reconsideration. What effect does his petition have upon the thirty day period? Or let us suppose that accused's counsel petitions the board of review and that the accused himself, usually at some place far removed from the Washington area where his Defense Appellate Counsel operates, without informing his counsel, petitions CMA. Which petition controls? Furthermore, when does the accused petition—when he signs it, when he delivers it to military channels, when it is received, or at some other less definite point in time?

In February 1953, CMA had occasion to cast additional light upon this matter in the case of *United States v. Jackson* (No. 1052) 2 USCMA 179, 7 CMR 55. Judge Brosman, in one of those all too rare cases where one judge is speaking for the entire court, dealt with a case where the accused and his counsel each forwarded within the thirty day period a petition, the accused sending his to CMA and the counsel sending his to the board of review. Although the accused's petition was lodged in military channels

before the counsel's, the latter's was first received by the appellate body. Agreeing with the ruling by the board of review that it was without jurisdiction to act, Judge Brosman noted that under CMA's rule (Rule 22(b), United States Court of Military Appeals Rules of Practice and Procedure) the petition was deemed to have been filed with CMA when it was "deposited in military channels for transmittal", and that as soon as it was so deposited, the petition operated to vest in CMA jurisdiction over the case. It was unnecessary for the court to decide whether the filing of a motion for reconsideration by a board of review suspends the running of the period within which a convicted accused may petition CMA. The opinion does not make it clear whether the determining factor was the filing of the petition to CMA before the making of the motion to the board of review [in other words, that the first in time determines], or whether any special significance should be attached to the source of the petition [in other words, that the accused's action would take precedence over a contrary action by his counsel], but a fair reading of Judge Brosman's opinion gives the clear impression that "first in time" is the rule to be applied. As will become apparent later in this discussion, it is pertinent to note that Judge Brosman did not refer to the transmittal to or by TJAG of the board's decision as having any particular bearing on the question of when the board of review loses jurisdiction to act. Clearly he reasoned the board had lost its jurisdiction because the accused had petitioned CMA, not otherwise. The opin-

was not re-argued before the board until 1 July 1952, it should be a fair assumption that the accused had received notice of the board's original decision before the motion to reconsider was made. Shortly afterwards, in a case factually similar in this regard to the *Brown* case, an Air Force board acted to reconsider in ACM 4992, *McNeely*, 5 CMR 427. In CM 353051, *Downs*, 5 CMR 295, an Army board reconsidered where information had been received, subsequent to its original decision, that accused lacked requisite mental capacity. Other cases followed: CM 354019, *Rouillard*, 6 CMR 341, where the board corrected an oversight regarding the law officer's instructional defect; CM 351164, *Lyles*, 6 CMR 440, where the board acted on its own motion to reconsider; ACM-S 3330, *Boyd*, 7 CMR 710, where almost three months elapsed between the original decision and the board's reconsideration; ACM S-3127 *Tribble*, 7 CMR 739, where the board acted to reconsider a defense motion "timely filed", six months elapsing between the original decision and the ordering that that decision be reconsidered; CM 358530, *Keeton*, 8 CMR 246, where the board vacated its earlier decision in order to permit accused to be represented by a special counsel; CM 361098, *Neuner*, 9 CMR 479, the first recorded "Decision Upon Petition for Reconsideration" (emphasis added) where the motion was denied on the ground that no reasonable basis for reconsideration had been established; CM 357571, *Tankersley*, 10 CMR 194, a fascinating problem in pleading where the board discovered it had been divested of jurisdiction under the *Jackson* rule

because the accused had already petitioned CMA, but appellate defense counsel then appeared before CMA to withdraw accused's petition, and the board was then reinvested with jurisdiction to reconsider the case; CM 361098, *Neuner*, 10 CMR 478, where the board received a *second* motion for reconsideration, entertained arguments anew, but reaffirmed its original decision; CM 362283, *Richmond*, 11 CMR 331, where, for the first time, it was reasoned that jurisdiction remained in the board *because no effort had been made to serve the accused with a copy of the original decision of the board*; CM 359523, *Palesky*, 11 CMR 563, where the decision was characterized as being "on Further Consideration", probably because the case like *Tankersley* had moved into CMA's orbit and then had been returned to TJAG by CMA on motion of appellate defense counsel; NCM 230, *Rosa*, 11 CMR 635, the first reported Navy board case on reconsideration [23 July 1953]; CM 364545, *Ryder*, 12 CMR 397; ACM 6728, *Hyde*, 12 CMR 710, where it was discovered that the accused's mental condition prevented delivery of the original decision to him *after* TJAG had transmitted the decision to the field; CM 362352, *Williams*, 13 CMR 158, where CMA had not only received a petition for review from the accused but had *granted* it, and thereafter at the request of the defense counsel the case was remanded to the board for reconsideration; CM 366023, *Williams*, 13 CMR 198, where the record was still in TJAG's hands when reconsideration was requested; CM 360857, *Smith*, 13 CMR 307, where the case was returned from CMA at de-

fense request for reconsideration; NCM 257, *Turpin*, 13 CMR 537; CM 355051, *Kunak*, 14 CMR 313, where appellate defense counsel had moved for a dismissal before CMA, but that motion was denied and the case returned to TJAG for reference to a board; CM 366858, *Rice*, 14 CMR 379, where the board had granted defense appellate counsel's petition for reconsideration a day before the accused filed a petition with CMA for review, the board holding that it had retained the jurisdiction to act, although TJAG had transmitted the original decision of the board before appellate defense counsel had even filed his motion with the board; CM 368517, *Collins, unreported*, 15 December 1953, where the board published a formal "Order Upon Motion for Reconsideration", granting the motion; CM 365587, *Joyal*, 14 CMR 436, returned from CMA to the board for further consideration upon the motion of the appellate defense counsel; ACM 7869, *Marshall*, 14 CMR 605; ACM 8307, *Wardell*, 15 CMR 773; NCM _____, *Keller*, decided 22 November 1954, where the board entertained a motion for consideration, predicated upon insanity of the accused, submitted almost 10 months after the board's first decision; NCM _____, *Evans*, decided 26 November 1954, also involving a motion for reconsideration resting upon accused's insanity, the board declaring it still had jurisdiction even though accused had earlier received for his copy of the board's initial decision. Certainly most of the cases, however, seem to develop logically the basic doctrines set down by the Court of Military Appeals. These special pleadings had obviously become use-

ful tools of the craft, and no practical problem seems to have been insurmountable.

The calm of the scene was not disturbed by CM 364135, *Korems*, decided 18 March 1954, and reported in 15 CMR 460, when the board of review determined that it was without jurisdiction to act in an Article 69 case which had been examined and passed to file in JAGO over six months before TJAG withdrew the case from the files and sent it to the board for review. The board noted that the appellate review provided by the Code had been fully, finally and effectively completed and jurisdiction to rehear the case on its merits was lost. Although the opinion stated that it was unnecessary to determine at what moment the appellate process terminated, it did say that "the notification to the convening authority, through his staff judge advocate, of legal sufficiency was analogous to the issuance of a mandate which an appellate court will not ordinarily recall and it would seem that the execution of the sentence, coupled with receipt of notice of legal sufficiency, was the equivalent of the carrying into execution of a civil criminal decree which, of itself, bars rehearing".

The same board of review, however, had occasion to act on a petition for reconsideration soon afterwards, in the case of CM 371409, *Sparks*, decided 8 June 1954. In this case TJAG had transmitted the original board decision to the accused who had acknowledged its receipt. Six days later the appellate defense counsel petitioned the board for reconsideration. Holding that it had become powerless to entertain the petition, the board

reasoned that jurisdiction had passed at least when the original decision had been *promulgated* by appropriate orders in the field. The opinion indicated that jurisdiction might even have passed when TJAG *dispatched* the decision to the field. If this were not so, said the board, a longer appeal period would be permitted the accused than the Code had established, for the board decision would not be known to be final, within the meaning of the *Sell* case, until the expiration of 30 days from receipt of the decision by the accused. The Rule of the *Weeden* case was explained as being consistent with this doctrine, for it will be remembered that in the *Weeden* case the motion for reconsideration was filed at the same time TJAG forwarded the board's decision to the accused. Apparently the board in the *Sparks* case felt that it was merely dictum in the *Weeden* case when the court announced that the accused could either petition the court or move the board to reconsider "after receiving notice of a decision of the board of review."

It was now obvious that at least this one board of review had discovered what was thought to be a congenital defect in the two-year old doctrine. But just one month later a different board of review acted in the case of CM 371588, *Estep*, decided 8 July 1954. Displaying the freedom permitted the boards because of the lack of clear guidance in the techniques necessary to the proper application of the reconsideration doctrine, the board issued a decision entitled "Decision on Motion to Rescind Order for Reconsideration and to Dismiss Motion for Reconsideration". This

board made it clear in its decision that TJAG had forwarded the board's original decision to the field and that the accused had duly received a copy of that decision. Jurisdiction was still vested in the board, however, "until the expiration of the thirty day period after receipt of notice of the decision of the board for appeal to the Court of Military Appeals, or until such appeal has been filed with that court".

On 6 August 1954, the board that acted in the *Sparks* case issued its decision on petition for reconsideration in CM 373211, *Smith*, holding that the board loses jurisdiction to act "when the decision is certified or when it is sent down pursuant to paragraph 100 of the Manual", thus being consistent with *Sparks* and contra to *Estep*. (Emphasis added). This *Smith* decision was certified by TJAG to CMA on 20 August 1954.

Two final decisions are available, CM 371588, *Estep*, decided 16 September 1954, and CM 372876, *Fennell*, 21 September 1954, each consistent with the earlier *Estep* decision. Neither refers to the *Sparks* and *Smith* cases.

Just as this paper was submitted for publication, the Court of Military Appeals handed down its decision in the *Smith* and *Sparks* cases (United States v. Smith, (No. 5516), USCMA _____, _____ CMR _____, decided 4 February 1955). By these decisions, CMA has finally cleared the air of much of the uncertainty and established guidelines for a full use of this new pleading weapon. In *Sparks*, Judge Brosman spoke for a unanimous court and ruled that "in the absence of change in the Uniform Rules governing proceedings before

boards of review, a motion for reconsideration may be submitted at any time before a petition, or a certificate for review, has been filed here [CMA], or until the 30-day statutory period provided for the filing of such papers has expired." Jurisdiction in this matter does *not* vest in the officer exercising general court-martial jurisdiction once the case is pending before or has been acted upon by a board of review, even where the decision of the board has been transmitted to and received by him. As for the possibility that infinite delays might be incurred in the handling of these petitions for reconsideration, the Court noted that the signing of a paper by a counsel is a certificate that it is filed in good faith and not for the purpose of unnecessary delay, and that "there is no right in an accused to petition without limit". A second motion for reconsideration by a board will have no effect in expanding the period within which an accused may petition the Court for review, nor will it extend the jurisdiction of the board—unless the motion is granted prior to the filing of a petition or a certificate in CMA. However, the filing of the first motion to reconsider does delay the inception of the 30-day period for certification, and an Air Force rule to the effect that the petition to CMA must nevertheless be made within 30 days from the time the accused was notified of the original decision of the board of review was incorrect. Finally, Judge Brosman hinted broadly that The Judge Advocates General should promulgate, under Article 66f, Uniform Code of Military Justice, uniform rules which will serve to narrow the

right to seek reconsideration if there was substance to the contention respecting unconscionable delays.

The *Smith* opinion added nothing to the *Sparks* rules, and without discussion held that a petition for reconsideration was timely even though the officer exercising general court-martial jurisdiction had received the decision of the board of review before the appellate defense counsel had filed his motion for reconsideration before the board.

What is the significance of this development—a rather outstanding one—of judge-made law? It is obvious that the drafters of the Code and the Manual had no inkling of the appearance of reconsideration on the military justice scene. To have such a procedure, however, is quite compatible with the basic philosophy likening boards of review to civilian appellate courts. New fields are thus opened to counsel to submit special pleadings, motions for reconsiderations to the boards and motions to CMA to return a case to a board for reconsideration.

Where a board refuses to assert jurisdiction for reconsideration what may the accused do? Certainly he may petition CMA. May he move CMA to vest jurisdiction in the board in advance of a grant of a petition by that court? No case has so held, but it would seem that if the board has denied the accused's motion for reconsideration the accused should then be empowered to move CMA to act on the case. And it would be simple enough for CMA to order the case returned to a board for reconsideration.

Does the thirty day period abate when the accused moves the board for reconsideration? In justice it would seem that it should, so long as the motion is in good faith and not merely for the purpose of delaying the proper disposition of the case. Probably the period abates until the accused has in due course received word from the board of its denial of the motion.

Since Government Appellate Counsel may petition the board for reconsideration, may that counsel also petition CMA to return a case to a board for reconsideration? It has not been done, and is not likely, but certainly no language in any of the opinions expressed to date would preclude it. This would be one method whereby TJAG could refer the case to a different board, however, and might be condemned on the theory that TJAG should not be permitted to "shop around" among his boards of review until he obtains a decision acceptable to him.

It would seem that the motion to reconsider may be made to the board on any of several grounds. Newly discovered evidence or a fraud on the court would be a basis for a new trial petition, not a reconsideration, which properly should be addressed to the board if jurisdiction still rests in that forum. Insanity is another matter which may always be considered by the board so long as it retains jurisdiction. Even where the accused has receipted for his copy of the board's initial decision, he may still petition for reconsideration even under the *Sparks* and *Smith* doctrine if his petition rests upon the insanity of the accused at that time. Quite properly too, a reconsideration of a rule of law

might form the basis for the motion. And of particular importance where jurisdiction remains with the board, a finding of fact might be reconsidered. In short, the field seems to be almost without limitation other than good faith and an absence of an appearance that the motion is purely dilatory.

The boards of review have gradually adopted the procedure of issuing formal orders or decisions in these cases. This salutary practice may well be followed and expanded. Formality has been emphasized in the Code procedures since their innovation. Counsel should prepare the motion, append a supporting brief, and furnish the board with a form of a decision consistent therewith and prepared for signature in the event the board chooses to grant the motion. Opposing counsel should be served with copies in order that he may make a timely appearance to contest the matter if he desires. Boards should hold hearings on the motions when it is determined they may be necessary. Except in the most patent cases it seems like good practice for the board to hand down a decision on the motion separate from its decision on reconsideration after the motion has been granted.

Certainly this formality would not be required in all cases, and shortcuts may be found as circumstances dictate. The careful pleader, however, will want to formalize the rulings where it can be done, and he should not overlook the opportunity to do so when time and the importance of the matter warrant.

Possibly it might be thought that all of this reconsideration business will place an impossible burden upon

the boards. This should not be so, for there is no reason that the boards cannot place the burden upon counsel, where it rightly belongs. There must, of course, be docket entries in the board's records, and where hearings are required there will be some time devoted to that that the boards might more profitably be spending in deciding other cases. But the order in form for signature should be prepared by each counsel. The counsel's briefs should set forth the issues with clarity and hearings should be rather infrequent.

Even if there is some extra burden on the boards, however, it is worth it. Far better to have an issue decided in the boards of review, whose numbers may be increased as needed, than to flood CMA, an overburdened and lonely creature, with issues that could easily and appropriately be disposed of in the lower forum. As a rule of thumb it can be stated that it is to the interests of good military justice administration in the various services that decisions be rendered on the lowest possible level. It is only logical that wherever it can be legally done, the matter should be returned to the board for necessary action.

There remains the question of time—the effect of the various motions upon the thirty days permitted the accused to petition the Court of Military Appeals. The Code does not elaborate on this point, as already noted. However, it would seem that the Rules of Practice and Procedure before both CMA and the Boards could provide for the effect these motions have upon the time. In no way

could the thirty day period be reduced, and almost any rules established by these appellate bodies would permit the accused at least some abatement of the time. An accused could hardly be heard to complain about the establishment of any such rules so long as they were fair and reasonable.

This much is certain: a new and a valuable tool has developed, but the craftsmen using it require some further detailed guidance in its application.

It is hoped that before long the rules of procedure for proceedings in and before boards of review, as well as CMA's Rules of Practice and Procedure can be revised to take reconsideration into account so that pleading will retain its usefulness and yet will not be perverted to the end that the burdensome appellate delays become even heavier.

In this brief glimpse we have been able to trace the development of a very small segment of our modern military law, more like a microscopic botanical study than a wide-screen legal travelogue. And yet it is a clear example of the means whereby the twist of the judicial twig contributes to the overall shape of the juridical tree. CMA could, of course, have settled this matter completely by fiat, so to speak. Instead, it set out, preliminarily, the basic rule and then permitted the operational branches to feel their way slowly and tentatively. CMA merely kept the development under its casual and sometimes belated but effective control. This seems typical of this Court's approach.

REVIEWABILITY OF NATIONAL GUARD DISCHARGE

The Court of Appeals of the State of New York recently held the Courts of that state without jurisdiction to review the form of discharge from military service in the New York National Guard. In *Karl F. Hausauer, C. G., NYNG vs. Gerald E. Nistal*, No. 139, it appears that Nistal, prior to enlistment in the NYANG in 1946, had served three enlistments in the U. S. Army Air Force and one enlistment in the U. S. Naval Reserve from 1937 to 1945 during which time he had been court-martialed twice but, nevertheless honorably discharged after each enlistment. With full disclosure to the NYANG enlistment officers, and on advice of those officers that the question related to civilian offenses, on his application for enlistment, Nistal gave a negative answer to the question "Have you ever been convicted of any offense?" In 1950, Nistal requested an honorable discharge to satisfy the requirements of his civilian employment, and after appearing before a Board of Officers he was discharged "without honor" for fraudulent enlistment. The discharge certificate was signed by

Hausauer as "Chief of Staff" "By Command of the Governor". The Court, affirming the dismissal of the action to compel review, held that Federal Statutes were inapplicable to the discharge of enlisted personnel of the National Guard. The Governor, who has the discretionary power to issue some kind of discharge, through his Chief of Staff, the Commanding General of the New York National Guard, had ordered the discharge without honor, and the civil courts cannot review that action,¹ neither can civil courts go back of the document to determine whether the Governor in fact commanded the action.² The Court recognized the possibility of prejudice to Nistal by the type of discharge given him, but distinguished a dishonorable discharge as a punishment for wrong doing from a discharge without honor as merely a discharge without commendation and found no applicability of the Uniform Code of Military Justice Statute of Limitations on fraudulent enlistment to a determination by the Governor on an application for voluntary discharge.

¹ See also *Patterson v. Lamb*, 329 U. S. 539, re reviewability of discharges from the U. S. Armed Forces.

² See *Haimson*, 5 USCMA 208 and *Marsh*, 3 USCMA 48, re impropriety of going behind the "command line".

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MILITARY JUSTICE IN THE ROK ARMY

By John Jay Douglass *

In July 1949, as United States troops were evacuated from South Korea, the United States Military Advisory Group to the Republic of Korea was established. This group, known commonly as KMAG, and called "Kmagee" by the natives, was created to bring into being an efficient and modern army for the defense of one of the world's newest republics. The advisory group, which consisted of less than 500 officers and men, included from the outset an advisor to The Judge Advocate General of the ROK Army in recognition of the need for advice and assistance in establishing a system of military justice for this embryo Army which had already been formed and was functioning as the Korean Constabulary.

The only United States military personnel in Korea on the 25th of June 1950 were those assigned to KMAG. Since the outbreak of that "war" or "police action", the size of KMAG has increased but not with the rapidity with which the Army of this small nation has increased, for it has become one of the four largest Armies in the democratic orbit. The Korean Army has been created as a

modern Army much along the lines of the United States Army and naturally faces many of the same problems which face any modern army. The growth of this Army and its efficiency, as proved in combat, has been in large part due to the efforts of its KMAG advisors. These advisors have served directly with their "counterparts" not only in training but in the day to day operation and administration of a modern Army. Advisors serve with all major staff sections in the Republic of Korea Army Headquarters, the Korean Pentagon, and at all major command levels. The KMAG advisors are just what the name implies. They do not command but they offer suggestions and advice based upon the latest and most modern military thinking.

Background of Korean Law

To fully comprehend and understand any system of military jurisprudence, it is necessary to know something of the history and jurisprudence of the people using the system of military law under consideration. Though as Winthrop says, in his treatise on Military Law,¹ "Mili-

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¹ Winthrop, *Military Law and Precedents* (2d Ed., 1920 reprint) 17.

tary law proper is that branch of public law which is enacted or ordained for the government exclusively of the military state, and is operative equally in peace and war." It has a background in the civil law of the state and the principles of law and government, as practiced by the nation, are carried over into the military law. Thus our Military Law "has derived from the Common Law certain of the principles and doctrines illustrated in its code"² and we shall see that this is also the case with the military law of the Republic of Korea. But on the contrary the root of the public law of Korea is not derived from the Common Law but has an entirely different root and has provided the peoples who make up its great Army with a military code from one system of jurisprudence and a civil code from an entirely different system of jurisprudence.

The Koreans are a Mongoloid people whose culture has its origin in and has been influenced mostly by the Chinese though they are a distinct people whose national integrity and history go back for more than 4,000 years. The peninsula had been alternately invaded by the Chinese and Japanese since the time of Christ but for several hundred years prior to 1900, Korea had isolated itself from the rest of the world and for this reason had come to be known as the Hermit Kingdom. This long period of isolation served to create a culture of its own and it had been governed by a system of law based totally upon either custom or royal decree. It was shortly after the turn of this century that the Japanese, as a result of the

Russo-Japanese war, became the masters of Korea and attempted to integrate Korea into the Japanese Empire. This action, almost without precedent in the history of the world, proved unsuccessful, for the Koreans resented losing their national identity. Realizing this, the Japanese then went to the opposite extreme and treated the Koreans as a subjugated people who had no rights whatever which any Japanese were obliged or even expected to respect.

Thus from early in the century until 1945 when this ancient land was occupied by American forces following the victory over the Japanese, the Koreans had been governed by a system of Japanese law. When the Japanese began their program of Westernization under the Emperor Meiji in the mid-nineteenth century, they studied the legal systems of various nations and finally adopted a modification of the legal code then in effect in the German Empire and the French Republic as the basis of Japanese law. This German and French Code, like all Continental European Codes, was developed from the Roman law and contained many concepts which are alien to the Anglo-Saxon law upon which the jurisprudence of the United States is based. Thus, the Japanese modification of the legal system then prevailing in Europe as interpreted and enforced by a Master upon a subjugated people was superimposed upon the ancient Korean customs.

In 1945, the United States set up a Military Government in South Korea and the first American social and legal concepts were injected into the Korean law and upon the Korean people.

² *Id.* at 41.

During the period of the American occupation this Military Government promulgated ordinances for the government of the people of this ancient land and though an attempt was made to promulgate laws adapted to the people, they were conceived in the light of American experience both civilian and military. This, then, was the third great influence upon the legal system of Korea.

In 1948, the Republic of Korea was established and a Constitution was adopted based upon the ideas of a people who were resentful of their subjugation by Japanese masters but whose lawyers were trained in Japanese law schools and familiar with Japanese concepts of law. The occupation by forces of the United States had not been of long enough duration for concepts to have changed but there had been an influence. In fact, this new Constitution decreed that the ordinances of the Military Government would remain in effect to the extent that they did not conflict with this new Constitution.³ Since that time, the law-making power has been vested in the National Assembly; though much of the substantive law as well as procedural law has been promulgated by Presidential Emergency Decrees which were authorized by virtue of powers of the executive granted by the Constitution, particularly during the period of national emergency.

Military Law of Korea

Historically, our own military law is considerably older than our Constitution⁴ and likewise the code of

military law currently in use in the Army of the Republic of Korea antedates the Constitution but by only 12 days; the Constitution was adopted on July 17, 1948. On July 5, 1948, the Major General William F. Dean, who was later to distinguish himself in the early days of the Korean war, then Military Governor of Korea, directed that the present Articles for the Government of the Korean Constabulary should become effective on and after 4 August 1948. Even a cursory examination of the English translation of the Articles for the Government of the Korean Constabulary reveals that they are the United States Articles of War, 1920 with only such minor changes of wording as was absolutely necessary to make them applicable to the Korean military force.

These Articles were simply the Articles of War with a table of maximum punishments attached; but whereas the procedures and explanations of our own code of military law have always been contained in the Manual for Courts-Martial of various years, there was no corresponding explanation promulgated for the military law of the Army of this newest Republic. Consequently to fill this vacuum those utilizing these articles proceeded to use the modes and procedures of their own civil law which, as we have seen above, were in general the Civil Law of Continental Europe to which they were accustomed and with which they were familiar. The Articles, which in the U. S. Army depended upon the procedure outlined in the Manual for

³ ROK Const., Art. 100.

⁴ Winthrop, *op. cit. supra* note 1, at 15.

Courts-Martial for the administration of military justice according to Anglo-American concepts of due process (a concept unknown in Korea), were divorced from their procedural counterpart and administered under a procedure so alien to the substantive law as to leave much doubt as to the ability of the two systems to function as a harmonious whole.

Before the system could be corrected or before the differences could be compromised, the nation and its Army were hurled into a war in which the armed forces were multiplied many times and the whole nation was engrossed with the problem of survival. The result has been, as one unknown writer of a paper found in the files of the Senior Advisor to the Judge Advocate General of the Republic of Korea stated, "a chaotic crazy-quilt of ancient Korean customs, American Articles of War, Civil Law procedures, and Presidential decrees and emergency laws and procedures which is inefficient and ill adapted to the realities which do now and in the future will exist in Korea, and which is confusing to the Koreans themselves and practically unintelligible to an American".

One might well question how it is that the Articles for the Government of the Korean Constabulary remain the military code of law in the Army of the Republic of Korea. As noted heretofore, the Constitution provided for a continuation of the ordinances which were not in conflict with the Constitution. And there is no conflict, for nowhere in the Constitution of

Korea is there made any reference to military laws or regulations. The failure of the Korean Constitution to contain a provision similar to that in the Constitution of the United States, which provides that the Congress shall "make rules for the government and regulation of the land and naval forces",⁵ has created further problems as we shall see. The Korean Constitution merely states that, "The mission of the national military forces shall be to perform the sacred duty of protecting the national territory",⁶ and in Article 61, "The President shall be the commander-in-chief of the National Military force. The organization of the National Military force shall be determined by law." In all likelihood the use of the Articles prescribed for use of the Constabulary by General Dean has continued for lack of time to create a more completely *Korean* system of military law. When questioned as to how it is possible to continue to apply the Articles for the Government of the Korean Constabulary to the Korean Army, the attitude taken by Korean lawyers is that, although no ordinance or decree or statute specifically sets this out, the Constabulary was created with the aim of establishing a Republic of Korea Army and the former is identified with the latter. This theory combined with Article 100 of the Constitution permits the present system to continue in effect.

The National Military Force was established by act of the National Assembly.⁷ This statute established the framework of a modern Army, includ-

⁵ U. S. Const., Art. I, Sec. 8.

⁶ ROK Const., Art. 6.

⁷ ROK, Act of 30 November 1948, Law No. 9.

ing a Judge Advocate General's Corps.⁸ Article 20 of the Act further provided that:

"Military personnel on the active list or called to duty, or a civilian attached to the Military Force shall be subject to military law. A trial for military personnel or civilian attached to Military Forces shall be adjudged by a Courts-Martial. Kinds of offenses or crimes and proceedings thereof shall be determined by law."

It was not until the Act of April 1953⁹ that a standard for the appointment of Judge Advocates was established by law. To be so appointed, a person is required to have the qualifications of a Judge, Prosecutor, or Attorney at Law, or he may be appointed as a Probationary Judge Advocate, as one who, after having practiced "The subjects prescribed by the Presidential Ordinance for not less than one year, has passed the regular examination." The qualifications for Judge, Prosecutor, or Attorney are set forth in the Lawyer's Act.¹⁰ As a sidelight, it is interesting to note that a lawyer cannot "indulge in commerce or any other business which has profit as its goal, or cannot be an employee of the operation above, managing partner, director or employee of a juridical person which has profit making as its object."¹¹ During the summer of 1953 it was necessary to draft lawyers to fill the needs of this rapidly expanding Army much as doctors were drafted into the United States military forces. The drain on the legal talent of Korea can be appreciated when one learns that out of 700 prac-

ticing lawyers in all of Korea, 165 are in the Army. This number still does not fill the needs of an Army of this size and many defendants are tried by a general court without the benefit of trained legal defense counsel.

The Judge Advocate General of the Republic of Korea Army, Brigadier General S. G. Sohn, has much the same function as The Judge Advocate General of the United States Army, Navy, or Air Force. He is responsible for the conduct of military justice administration in the Army, serving as legal counsel to the Chief of Staff, providing legal assistance to personnel of the Korean Army, and assisting in the settlement of claims. Unlike the claims service in the United States Military Forces, however, the Korean government pays no claims and the activities of the Judge Advocate General's Corps in this regard is to make a determination of liability for damages caused by Korean service personnel and ascertain that these claims are satisfied by the individuals responsible.

The main responsibility of The Judge Advocate General's Corps is, of course, the administration of military justice. The Korean system provides for trials by general court-martial, special court-martial and summary court-martial. The similarity of the jurisdiction as to persons and offenses of the provisions of the Articles for the Government of the Korean Constabulary to the U. S. system makes any recapitulation unnecessary. In each type of court there must be

⁸ *Id.*, Art. 12.

⁹ ROK, Law No. 243.

¹⁰ ROK, Law No. 63.

¹¹ *Id.*, Art. 18.

action by the convening authority prior to execution of the sentence. Though special courts-martial and summary courts-martial are authorized, they are not used in the ROK Army, this being the outstanding divergence from the United States system of military justice. Under the provisions of Article 62,¹² the limit of punishment which may be imposed by a special court-martial is six months confinement or forfeitures of two thirds pay per month for six months. Likewise Article 61 limits the punishment which may be imposed by a summary courts-martial and would be little used in the Korean Army for the realities of Korean life precludes, as we shall see, the effective use of fines and forfeitures as punishments for minor offenses. There is an even more elementary reason, however, for the failure to use special and summary courts-martial in the Korean system of military justice which is based upon the provision of Article 22 of the Constitution of the Republic of Korea which states:

"All citizens shall have the right to be tried in accordance with the law by judges whose status has been determined by law."

This provision of the Korean Constitution may be likened to that right of trial by jury in the United States Constitution: "The trial of all crimes, except in Cases by Impeachment, shall be by Jury."¹³ This right has never been considered to be extended to those accused tried by courts-martial.¹⁴ The United States Supreme

Court expressed the reason in *Ex Parte Milligan* when it said "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."¹⁵ As pointed out heretofore, the Constitution of Korea does not provide for any separate government of the military forces of the Republic of Korea. This failure provided an ample ground for attack by defense counsels upon every court-martial for the failure to provide a judge before which the citizen-soldiers might be tried. The Korean government, unable to rely on the law of war in the face of this positive declaration of the Constitution, thereupon hit upon another solution. They proceeded to make members of the Judge Advocate General's Corps judges under the law of Korea through the Judge Advocate Appointment Law, *supra*. Thus, there is compliance with the constitutional provisions whenever a member of the Judge Advocate General's Corps is a member of the court.

But here practical considerations enter. Judge Advocates are scarce because lawyers are scarce in Korea, and in consequence there are insufficient "judges" available to assign to special courts-martial and summary courts-martial. Thus, for very practical reasons this departure from the U. S. scheme has been made necessary. "This honest zeal for Constitutional government has made its contribution" as Lieutenant Colonel William E. Parker, JAGC, stated in an

¹² Articles for the Government of the Korean Constabulary.

¹³ U. S. Const., Art. III, Sec. 2.

¹⁴ *Ex Parte Quirin*, 317 US 1, 63 Sup. Ct. 1, 87 L. Ed. 3 (1942).

¹⁵ 4 Wall 2, 138, 18 L. Ed. 281 (1866).

unpublished paper dated 17 July 1953. It has been suggested by Colonel Marvin W. Ludington, JAGC, after a study of this problem that it might be possible to have "judges" ride circuit as members of special courts-martial or as summary courts-martial.

Article 99¹⁶ directs The Judge Advocate General to establish in his office a Board of Review consisting of three officers of The Judge Advocate General's Department. "Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the Chief Executive of Government under the provisions of Articles 94 and 96¹⁷ is submitted to the Chief Executive of Government, such record shall be examined by the board of review. The board shall submit its opinion in writing, to The Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the boards opinion with his recommendation directly to the Director of Department of Internal Security for the action of the Chief Executive of the Government." Other records of trial are examined in the Office of The Judge Advocate General and if found legally insufficient to support the findings and sentence are examined by a board of review. If the board also finds the findings or sentence legally insufficient, it shall submit its opinion to The Judge Advocate General who forwards his recommendation to the Director, Department of Internal Security, who may approve, disapprove, or vacate in whole or in part any find-

ing or vacate any sentence in whole or in part. Thus, as can be seen, the boards of review of the Korean Army have the same type of authority as their U. S. Army counterparts had under the 1920 Articles of War but which have now been amended in the Uniform Code of Military Justice to give the power formerly lodged in the Secretary of War (Director, Department of Internal Security) to the boards themselves.

The Articles set forth substantive crimes and the punishments are established by the Table of Maximum Punishments attached to the Articles. In addition, certain crimes which result from the present emergency situation are defined and are tried on the basis of the Presidential Decree of 25 June 1950.¹⁸ This decree was published and promulgated to meet the requirements of the emergency. As stated in an unpublished paper which was believed to have been written in mid-1951, found in the files of the Senior Advisor to the ROK Army Judge Advocate General, "This decree was made necessary because the Articles were not intelligible to the Koreans, or were not adaptable to the conditions of Civil War in Korea." This decree as amended provides in Article 13 that "in case of conflict arising between the crime as provided in this Law and that in any Criminal Law other than this Law, the Criminal Procedures as provided in this Law shall prevail." This decree set forth that whoever shall commit certain crimes "taking advantage of the

¹⁶ Articles for the Government of the Korean Constabulary.

¹⁷ *Id.*

¹⁸ Presidential Emergency Decree No. 1, amended by ROK Act of 30 January 1951, Law No. 175.

emergency situation" shall suffer death, imprisonment for life or imprisonment for not less than four years. These crimes include murder, arson, rape, destruction of facilities, plundering, or freeing prisoners in custody of jail or house of detention without authorization. This latter provision makes one wonder about the applicability of this decree to the release of North Korean non-repatriates during the summer of 1953 from the prisoner-of-war compounds.

Unlike the U. S. system of military justice in which the legislative enactment provides for maximum punishments by administrative action,¹⁹ the Military Government Ordinance promulgating the Articles for the Government of the Korean Constabulary also provided a Table of Maximum Punishments. Like so much of the rest of the imposed system of military justice, the punishment system can not in all cases be adapted to the realities of Korean life. Of particular importance in the American system of military justice is the use of forfeitures as a mode of punishment such as is provided in the Table of Maximum Punishments which accompany the Articles. The pay scale, however, of the Republic of Korea Army precludes the effective use of forfeitures. For example, until a recent pay raise went into effect, the basic pay of private was 30 hwan a month or roughly sixteen cents. On the other end of the scale, that of a full general in the ROK Army was 900 hwan or \$5.00 per month. It should be noted that all grades have a wartime allowance of 200% of base pay and in addition are given a free grain issue. Even

with those extra emoluments, the Budget Review Group of the Combined Economic Board, United Nations Command determined that the basic pay scale should need to be increased 29 times to meet the minimum cost of living. The absurdity of a two-thirds forfeiture of the sixteen cents a month paid a private in the ROK Army is readily apparent and the need for other means or methods of effective punishment to maintain military discipline is obvious.

Disciplinary Committees

Because of the inadequacies of the Articles, the shortage of trained legal personnel, and the defects of the punishment system imposed upon the ROK Army, other means have been found to accomplish the ends of discipline in this young Army. Discipline is particularly important due to the lack of a military tradition and the exigencies of a war for survival as a nation. There has developed a rather extraordinary system of punishment through disciplinary committees which is simple and much less formal than trial by court-martial. Article 102 ("Disciplinary Power of Commanding Officers") of the Articles for the Government of the Korean Constabulary is relied upon by The Judge Advocate General of the Korean Army as the legal basis for these disciplinary committees. Article 102 is an approximate translation of the familiar "104th Article of War" familiar to World War II American soldiers as company punishment which was intended as a method of minor punishment without leaving a blemish on the record of the soldier. The Ko-

¹⁹ Uniform Code of Military Justice, Art. 56.

rean Article 102 differs from the old "104th" only in that the Korean version provides for confinement "at guard house for not exceeding one week." By what Lieutenant Colonel Parker terms legal legerdemain, Article 102 is reconciled with a Presidential Decree to create the authority for the Disciplinary Committees. The Presidential Decree provides in part:

"Cases of misconduct by Army or Navy personnel or civilians attached to military units, such as violation of military discipline, neglect of duty and corruption of military morals shall be punishment according thereto, and that disciplinary action thereunder shall be divided into 'Severe Disciplinary Action' and 'Minor Disciplinary Action.'" ²⁰

"Severe Disciplinary Action" may include dismissal for officers, dishonorable discharge for enlisted men, demotion (which may be inferred also for lack of education unsuited an individual for his position), suspension from "military position" (including the wearing of the uniform), suspension of officers from duty up to three months at decreased salary, and decrease of pay up to two-thirds from one to three months. The grade of the offender indicates a lower limit of the command echelon at which their punishments may be imposed—for example, severe disciplinary action against an officer may be taken only by his division commander.

"Minor Disciplinary Action" may include imprisonment for enlisted men up to fifteen days with decreased rations and bedding. If a fifteen day confinement were to be legally reviewed, however, eight days would be held excessive, a conflict here being

recognized with the one week limit to confinement in Article 102 of the Constabulary Articles.

Demotions and dishonorable discharges as disciplinary punishment are not regarded as conflicting with the law. They are regarded as were administrative dispositions, functions of ordinary administration, rather than punitive actions. This function of the disciplinary committees comes into perspective for lawyers familiar with the American military administration when compared with boards of officers used in the United States Army for demotion and elimination of officers and the various administrative board proceedings for separation and demotion of enlisted men. The procedure developed by the ROK Army which is included in the military justice scheme quite conceivably may have contrived a saving in "paper work" while preserving most of the rights of the individuals.

In the operation of this whole disciplinary system, which may be thought to parallel the system of trial by court-martial, commanders are aided by disciplinary committees, which each appoints. The Central Disciplinary Committee for the ROK Army is appointed by the Chief of Staff. Every committee is composed of not less than four officers, of higher grade than the person "on trial", according to the English translation of Article 26 of the Presidential Decree, except in unavoidable cases. If the unit has a judicial officer, he is a member. If there is none, another having knowledge of the law may be appointed. Elsewhere in the decree, the proceedings of disciplinary commit-

²⁰ Presidential Decree No. 134, 25 June 1949.

tees are also referred to as trials, and a committee has authority similar to that of a court-martial to summon and examine witnesses and evidence, and provisions concerning courts-martial apply *mutatis mutandis* to matters for which no provision is made in the decree. Nevertheless, Korean lawyers adhere to the academic position that committee proceedings are *de jure* not trials but mere inquiries. Formal reports are made to the appointing authority, who actually imposes the punishment, if he approves the committee recommendations. If he disapproves the report, he may order the case referred for trial by court-martial.

There is no routine review of the proceedings of disciplinary committees by judge advocates, although a commander may of course request review. Review is rather regarded as a matter to be handled by the staff section in charge of personnel matters.

Action of disciplinary committees is not necessarily harsh. Very few officers were demoted in the first half of 1953, and no enlisted men discharged. For example, assault and battery by officers against woman employees of the Army might result in no more severe punishment than confinement at home for one or two weeks (the latter being legally excessive) without loss of pay. Patently, the only real punishment here is the record of the offense, which might affect promotion prospects. Punishments are noted in service records. In that no decision has been made to take legal opinion on the relative seriousness of offenses recommended to commanders for action by inspectors general or

provost marshals, the same possibility is present as in the American Army that serious offenses will be mistaken for minor and go without substantial punishment. Although in such cases the non-judicial disciplinary punishment theoretically would not bar subsequent trial by court-martial.

Trial by Court-Martial

Americans in Korea have frequently expressed surprise that the ROK Army has a system of military justice which is so much like that of the United States Armed Forces. Even when the system is explained, many observers are inclined to feel that this system is a paper device only and one not really used by the Koreans. This is a false belief as is the case with so many of the facts of life in lands where the language barrier and the difference in customs prevents complete understanding of the people. The rumor which spread at the time of the death of General Walker in the motor vehicle accident that all the ROK soldiers involved had all been summarily executed, is typical. This rumor gained such prominence that, the then Senior Advisor to the ROK Army Judge Advocate General, Lieutenant Colonel John P. King, wrote a memorandum to the Provost Marshal of Eighth United States Army explaining that the driver of the vehicle had been tried by general court-martial and sentenced to confinement for three years after a finding of guilty of negligent homicide and that no charges were preferred against the three other occupants of the Korean vehicle involved.

As a matter of fact, the ROK Army utilizes the court-martial system pro-

lifically. For the month of July 1953, statistics prepared by The Judge Advocate General's Office indicate that there were 428 trials by general court-martial. Of these cases, 38 were officers, 357 were enlisted personnel and 33 were civilians including Army civilian employees. The sentences for these offenders varied from 24 cases of capital punishment to five acquittals. It should be noted that 249 cases involved sentences to confinement for less than one year.

To anyone familiar with the U. S. court-martial system, attendance at a Korean Army court-martial would present him with a familiar scene physically because the observer probably would not understand Korean, the observer might feel that there were no differences in procedure. One should be disabused of this idea for even under the present Articles for the Government of the Constabulary there are concepts which are contrary to our system of justice. First, one might notice in an important case that all members of the court were wearing the cross pen and sword insignia of the Judge Advocate General's Department. There must in all cases, as pointed out, be at least one "judge" for each court-martial and the ROK Army will appoint as many JAGC Officers to the court as can be made available. In the courts held at ROK Army Headquarters in Taegu, a panel of JAGC Officers is permanently assigned to the Court Section of the Judge Advocate General's Office. Though challenges are authorized by Article 69,²¹ as a practical matter members of the court are seldom challenged. The law member, of course,

votes on findings and sentence as did the law member of U. S. military courts prior to the enactment of the Uniform Code of Military Justice. Moreover, his rulings are final and cannot be objected to or overruled by the court. Many of the procedural safeguards which we consider vital to our system of justice are not to be found in the ROK system of military justice. It is true that there is a presumption of innocence, but as Gen. Sohn explains, there is no concept of reasonable doubt in the jurisprudence of Korea. A trained lawyer as defense counsel is not required by the Articles, although Article 57 requires that a member of the Judge Advocate General's Department (Corps) must be appointed as trial judge advocate, if available. Although the articles make no provision for legally trained defense counsel, the trials held at ROK Army Headquarters do utilize the services of members of the Judge Advocate General's Corps as defense counsel, as do most courts-martial in the ROK Army. The accused may also secure the services of a civilian counsel and it is not unusual in important trials to see civilian counsel in his black robe and black cap appearing for the defense.

As hereinbefore indicated, the Manual for Courts-Martial, which is so vital and used so extensively in the administration of military justice in the U. S. Army, was not translated for use by the ROK Army. Nonetheless, the 1928 Manual is used as a source book for procedural rules and for rules of evidence. In general, however, it may be said that the pro-

²¹ Articles for Government of the Korean Constabulary.

cedural and evidentiary rules used are those of Korean civil law and vary greatly from the Anglo-Saxon rules. The hearsay rule is now said to have come into Korean jurisprudence by court decisions, but witnesses are still not extensively utilized for the presentation of evidence and the trial judge advocate may present much of the evidence, or present it by the use of affidavits secured before trial. This of course is a denial of the hearsay rule and a denial of cross examination to opposing counsel. To remedy this, opposing counsel is expected to bring the witness to court or present his own affidavit from the witness. An anomalous situation is found in the fact that the definitions of crimes found in the translation of the 1928 U. S. Army Articles of War are taken in large part from the Japanese criminal code, although recently the Korean National Assembly enacted a new criminal code containing the definitions of crimes and this is now the basic source.

Conclusion

As can be seen, there is now no "coherent, homogenous or indigenous system of military law" in effect in Korea. What cohesion there is to the entire scheme is provided by the efforts of The Judge Advocate General and his capable staff. No one is more aware of the defects of the present system than that office and they have made efforts through the Army itself to correct the deficiencies of the present system. This, of course, has been most difficult due to the military operations which have, since mid-sum-

mer 1950, taken the utmost in effort by the Korean Army and the Korean people. Unfortunately no beginning was made on correction of the system prior to the war which may have been due in part to the fact that the Judge Advocate General was not a lawyer. Improvement in the system of military law began with the appointment of Brigadier General Lee Ho and has continued under the present incumbent, General Sohn. Without waiting for the end of hostilities, the needs of discipline demanded attention and by order of the Chief of Staff of the ROK Army an Army Criminal Law Draft Committee was created.²² This committee was made up of one major general and one brigadier general who were not members of the Judge Advocate General's Corps but otherwise all the military personnel appointed to the committee were lawyers. Both General Sohn and General Lee Ho, now Vice Minister of National Defense, were named to the committee as well as four colonels, four lieutenant colonels and two majors. In addition the committee was made up of three members of the National Assembly, one member of the Standing Commission of the National Assembly, the Deputy Chief, Grand Prosecutor's Office, the Chief Administrator, Grand Court and the Chief, First Bureau, Office of Legislation. This committee began its work without instructions from higher authority for as Gen. Sohn stated, "no commander can give instructions to the commission because of the most professional and or academic work". This committee is preparing its work for the Army only

²² SO 57, Hq, ROK Army, 26 Feb. 52, as amended by SO 173-3, 15 June 1953.

and there is no liaison with the other Armed Forces which is to be regretted; although, both the Navy and the Air Force have relatively minor forces in the Korean defense program at this time.

Much of the work had, of necessity, to wait for the enactment of the new Criminal Code for Korea which was passed by the National Assembly in 1953. Prior to the enactment of this code, Korean civilian courts were relying upon the Japanese Criminal Code as it yet relies upon the Japanese law for much of the substantive law of Korea. The committee has divided its work in two parts preparing one code for military substantive law with a table of punishments for the various offenses. This code is now in such state of completion that it is expected to be presented to the National Assembly for action early in 1954; the other portion of the work of the committee has been devoted to preparing a new military procedural code. Should the substantive code be enacted by the legislature, it will be used under the present procedure until the adoption of the new code of procedural military law which will fit the problems of this new Army.

Though there is at present no English translation of the working draft of the new code, discussions with those working on the code indicate that the trend is further away from command control than is the Uniform Code of Military Justice of the United States Armed Forces. The whole theory of jurisdiction will be geographical. This may fail to appreciate the realities of modern warfare which may require the Korean Army

to engage an enemy without its border. It does mean that Judge Advocates for the various geographical locations will exert great influence over military criminal law to the exclusion of unit commanders. To further emphasize the influence of the Judge Advocates, only Judge Advocates will serve on the two types of courts now proposed. One court will be a three judge court and the other a one judge court. This, of course, is more within the spirit of that part of the Korean Constitution requiring that all men be tried before a judge, though it goes further away from the Anglo-Saxon concept of jury trial.

The committee has been in constant session and the sessions have not been unanimous by any means. The drafts have been accompanied by complete and full discussion by all members of the committee as well as by all of the leading figures in the Office of The Judge Advocate General. The observer may be sure that the military code finally recommended to the National Assembly will be one which is based upon the concepts and understandings of the best legal minds of the new Republic and will be better suited to the ROK Army than is the one which was presented to the embryo Army in 1948. That Koreans should create this code is in line with the thinking of those who have previously served as advisors to the ROK Army Judge Advocate General. As Lieutenant Colonel Taylor said in a memorandum which was staffed in KMAG in November 1951:

"These notes and observations indicate only that the present Korean military laws are about as confusing to the Koreans as they are to us, that our attempt to provide the Koreans

with our Articles of War as a ready made code for the administration of military justice was a mistake, and that the Koreans must, themselves establish their own system of military law if Korea is to have an effective Army. We may assist them in drafting such a code, and should try to do so to the best of our abilities, but can not do it for them nor should we try to force any of our legal standards or doctrines upon them. Only a Korean can effectively write law for Korea."

The Koreans have been permitted and encouraged to do just as Colonel

Taylor has suggested. What the result of their efforts will be remains to be seen. The real test of the work will be whether a new code will effectively promote the development of a combat effective Army and still meet the concepts of justice and law of the people from whom that Army is drawn. There is ample reason to believe that the present group preparing the code and the outstanding men who will administer the new code will meet the test as have the combat troops of the nation.



THE NOMINATING COMMITTEE—1955

Pursuant to the By-Laws of the Association, the following members in good standing have been appointed to serve upon the 1955 Nominating Committee: Capt. Edward F. Huber, JAGC-USAR, New York City, Chairman, and Col. John C. Herberg, JAGC-USAR, Maryland, Col. Daniel J. Andersen, USAFR, D. C., Cmdr. J. Kenton Chapman, USNR, D. C., Lt. Col. Harry L. Logan, Jr., JAGC-USAR, Texas, Col. Frank E. Moss, USAFR, Utah, and Lt. Col. Hugh T. Fullerton, JAGC-NG, California, members. Any advices that members of the Association may wish to give the Committee should be directed to the Chairman, Capt. Edward F. Huber, 61 Broadway, New York, New York.

A 1955 DIRECTORY OF MEMBERS

The Association is preparing a 1955 Directory of Members for distribution in May. All members in good standing will be listed in the directory. If you have not yet paid your 1955 dues in the sum of \$6.00, make your remittance promptly. Your cooperation will greatly facilitate the preparation of the Directory.

Members will be listed as their names and addresses appear in the Association's mailing list. If you have any instruction as to your listing or if the envelope containing this issue of the Journal carries your name and address incorrectly in any particular, advise the editor so that corrections may be made before the Directory is sent to the printer.

BOOK REVIEWS

MILITARY LAW

By Daniel Walker

New York: Prentice-Hall, Inc. 1954. \$9.75. Pages 762.

With military law in the process of becoming a "recognized" subject for law school teaching,¹ economic law, that of supply and demand, decrees that case books be compiled to fill the new need.

This one, by Daniel Walker, a former Commissioner of the Court of Military Appeals, is a good collection of the leading cases. The old standbys such as *Dynes v. Hoover*, *Ex Parte Quirin*, *Ex Parte Milligan*, are all here. But it is the large number of opinions of the U. S. Court of Military Appeals that distinguish this volume from others.² Even so, only about one-half of the book is devoted to military justice and of this only twenty-four pages to of-

fenses. The emphasis here is rather on procedure and due process—an understandable approach considering pre-1951 complaints. The phenomenal growth in the law of military appeals is reflected in the cases selected and the student is introduced to such newly-developed doctrines as "military due process", "general prejudice" and the limited power of the law officer to rule on matters of jurisdiction:

For the student or practicing attorney who hopes to become familiar with the law *as it is* under the Uniform Code of Military Justice knowledge of these cases is essential.³ And the availability of the precedents, due to the reporting system inaugurated

¹ See *The Teaching of Military Law in a University Law School*, Frederick Bernays Wiener, 5 *Journal of Legal Education*, No. 4, pp. 475-99, reprinted in *The Judge Advocate Journal*, Oct. 1953, pp. 15-25; *The Need for Including a Course on Military Justice in the Law School Curriculum*, Robert E. Joseph, 7 *Journal of Legal Education*, No. 1, pp. 79-83.

² The excellent *Military Jurisprudence, Cases and Materials*, published in 1951, by the Lawyers Co-operative Publishing Co. with the advice and counsel of a group of officers of the JAGC is a more detailed collection but was too early for the main flow of USMA opinions which began in 1951. A comparable case book is *Military Law*, by A. Arthur Schiller, published in 1952 by the West Publishing Co., but it also necessarily lacks the emphasis on the USMA.

³ That the book is deemed to be a fairly worthy conduit for that basic knowledge may be known from the fact that Judge Paul William Brosman of the USMA is a member of the Editorial Board of the Prentice-Hall Law School Series and Mr. Walker acknowledges the inspiration and encouragement received from Judge Brosman in preparing the work.

for the United States Court of Military Appeals, renders it easy for him to go to the full opinions. No longer need the military lawyer have to content himself with mere digests of opinions of generally inaccessible appellate reviews.

The remainder of the compilation covers such subjects as courts of inquiry, court-martial review in the Federal courts, martial law and military government, the law of war and military tribunals and even a fair representation of decisions in the field that JAGs know as "military affairs": enlistment and discharge; officers, their appointment, status and separation; the constituency of the Armed Forces; liability of servicemen in the civilian criminal courts; civil rights and liabilities of members of the Armed Forces; and civil relief acts. Without a library of Army Regulations it would appear difficult to teach anything beyond the barest fundamentals in this administrative field by the use of the book alone but there is value in calling attention to the respectable legal precedents in this area.

As in most modern case books the editor has supplied frequent introductory notes to the various topics. Footnotes and problems and refer-

ences to law review articles lead the student to further study and thinking. The Uniform Code of Military Justice is reproduced in full. Although large portions of the Manual for Courts-Martial, 1951, are also quoted at length throughout the textual portions of the work, the editor rightly believes that the entire Manual will be needed as a supplement in teaching the course.

The case book, as a whole, presupposes the availability of a well-equipped instructor to give the course. Especially so where the aim is, as it is here, to provide only basic understanding of the problems of military law rather than to set forth a detailed consideration of the frequently arising questions. The editor makes clear his hope that the broad picture will be emphasized rather than the minutiae. Thus the one semester course contemplated will not make JAG officers but it will certainly give the student an overall knowledge of the terrain and acquaint him with a working knowledge of the busiest criminal court system under American law—a system whose size alone warrants increased attention in the law schools.

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LEGAL CONTROLS OF INTERNATIONAL CONFLICT

A Treatise on the Dynamics of Disputes—And War-Law

By Julius Stone

Rinehart & Co. Inc., N. Y. 1954. 906 pp. \$12.00

“. . . of the 3,441 years of better known history ending in 1945, only 268 years appear to have been free of any known wars.”

With such statistics in mind Professor Stone is very much concerned about the current lack of attention to the laws of war. Contrary to the conclusion of many that the fearful prospect of future conflict demands that all efforts be concentrated on the complete banishment of war, he regards such a single-minded view as “a counsel both of unnecessary despair, and of unwarranted optimism.” Accordingly, the decision of the United Nations International Law Commission not to undertake a revision of war law is a serious error in his opinion.

Coming from so learned and distinguished a scholar in this field these opinions are deserving of considerable attention. Although he now occupies the chair of International Law and Jurisprudence at the University of Sydney, Australia, Professor Stone has also served as professor of International Law and Diplomacy at the Fletcher School of Law and Diplomacy and as Assistant Professor at Harvard Law School. His “The Province and Functions of Law”, has been a landmark in the field of jurisprudence since its publication in 1945, and the breadth of his scholarship was further evidenced by his joint editorship of the monumental “Cases

and Readings on Law and Society” in 1948.

In the present work the author has chosen to restore stature to the laws of war in an unusual way. One of the causes of neglect, he believes, has been the inconsistency between the static international law as found in the text books and the actual day by day conduct of the nations of the world. Therefore he has written an excellent text book, on international law but has integrated into it an examination of “the unstable dynamics of its operation in a world in travail.” His method is to supplement many of the text chapters with critical Discourses which examine “the forces which threaten the system with change or breakdown.” The result is a book with usefulness far beyond the confines of classroom and its treasury of references to post World War II materials makes it indispensable to any official or military officer dealing with the U. N., NATO, war crimes, aggressive acts, repatriation, military government, prisoners of war, and similar problems.

It must not be supposed that Professor Stone will be content with innocuous paper assurances in a revision of the principles of war law. If there is a secondary theme to the book it is that there must be realism about such treaties and conventions. War will continue to be hell and no powerful combatant is going to un-

duly restrain himself if he thinks he can gain victory otherwise. Those are the inescapable facts of life as the author sees them. Yet there may be areas where the combatant might be willing to be chivalrous if it would not cost him victory:

"The Writer joins in the prayers of men for the banishment of the scourge of war; but he sees no such early prospect of its banishment as warrants the neglect of efforts to reduce as far as possible the sufferings of combatants and non-combatants when it strikes. There are undoubtedly sectors of war-law, such as those dealing with prisoners of war and the sick and wounded, which have reduced the sorrows of war. A more balanced view required constant efforts to ensure that cruelty does not exceed what is inevitable in the pursuit of each side's objective of military victory. No aspiration to humanity set on paper in peacetime will be allowed by a belligerent in the heat of battle to bar its way to victory. It will only undermine respect for international law generally. But within that ever changing limit, international law can make an immeasurable contribution to the relief of human agency."

Nor must the lawyers wait too long before bringing forth workable rules. They must not risk the reproach uttered against the students in another field of law, that they were like members of a great orchestra which had for half a century been tuning their instruments, without yet playing a single note.

In a consideration of these realities he doubts that the ideals of chivalry, which ostensibly permeate the laws of war, have retained much life since the invention of explosive weapons capable of killing at a distance. But even if the rules of *land* warfare still

retain a trace of humanitarianism there are no rules by which the *air* warrior can expect any quarter, not even if he bails out. And worse off is the object of the airman's bomb. The author is dismayed that with the increased depersonalization of warfare the one who drops the atom bomb "does not regard himself, nor for that matter does the bulk of mankind regard him, in the same reprehensible light as a footsoldier of the Thirty Years' War, who joined in loot and rape of a captured German city."

The rapid passage from President Roosevelt's 1939 request that the belligerents refrain from "the bombardment from the air of civilian populations or unfortified cities" to the area bombing of 1944 and the atom bombing of 1945 impels the author to accept the fact that cities *will* be bombed and he places no hope in the pious declarations of illegality (mere "verbal illusions"). Better that we should recognize that workers in war and allied industries are "civilian quasi-combatants" and therefore, in the view of the enemy, legitimate military objectives. Thus only civilians not so engaged might hope for immunity. Once this distinction is accepted "Energies can then be released for the practical tasks of devising by international action the necessary safeguards for the residual immunity with some hope of belligerent respect."

To the 1949 Geneva Conventions he gives detailed attention accompanied by penetrating analysis of the legal aspects of the problems of unwilling repatriation raised in the Korean conflict. The new Convention

Relative to the Protection of Civilian Persons in Time of War, he wryly observes, is based on moral sentiment which in modern warfare seems no longer to exist. Yet it represents a considerable advance and certainly supplements the Hague Regulations on Land Warfare. But the absence of an international court to protect the rights set forth is regarded as a grave omission, and he is not too hopeful of effective implementation in the present state of the international community. Apparently he does not regard these conventions as broad enough in scope to satisfy the need for a thorough revision of war law.

Nor do they go far enough in the field of belligerent occupation. Aside from any question of mistreatment there are other difficult problems. "Most Western writers would agree that the Occupant could not transform a liberal economy into a communistic one; and Soviet writers would no doubt be concerned about the reverse transformation."

The post war occupations of Japan and Germany are regrettably not discussed. Thus by contrast this portion of the book appears more academic than other sections. Nevertheless the lessons derived from German occupations prior to defeat are stressed: "A modern Occupant can, while observing the specific prescriptions of the Hague Regulations against spoilation and appropriation, still reduce the local people and territory to economic ruin." The conventions have just not kept pace with the realities of economic life: "They assume a *laissez faire* economy in both the Occupant and the occupied States, giving little guidance for the positive

economic action which is now routine in modern States." This situation he characterizes as the "Twilight of Occupation Law" and asserts that before it emerges therefrom a rethinking going far beyond mere revision is required.

It is not surprising to find him skeptical also about atomic control. Its effectiveness presupposes an overhaul of most of the principles on which the present international community rests, foremost among them that of sovereignty. This he does not foresee. Thus for the present we should seriously face this more immediate problem: whether any political idea, noble or sordid, is worth defending by atomic warfare? To ask the question, he believes, does not mean abandonment of ideals but to use greater restraint and patience in working for their fulfillment.

As for naval warfare on merchant ships his cynicism is corroborated by the Nurnberg Tribunal's acquittal of Admiral Doenitz. The finding that the Allies also indulged in unrestricted submarine warfare should be a challenge to international lawyers to rethink their positions: rules must take into account the realities:

"War law, even at its most merciful, is no expression of sheer humanity, save as adjusted to the exigencies of military success, a truth as bitter (but no less true) about attacks on merchant ships, as about target area saturation bombing."

On the whole, however, Nurnberg comes off fairly well at his hands. Although he is gloomy about the future prospects of the rules announced, fearing their misuse for propaganda purposes, he solves the interminable *ex post facto* argument very neatly.

He does not entirely agree with the common-law growth concept (so ably advanced by the late Justice Jackson). Instead he thinks it better to admit doubt on the *technical* retroactivity of the charge of aggressive war but to stand strongly on the view that the *policy* against retroactivity was not violated. The Kellogg-Briand Pact for the Renunciation of War as an Instrument of National Policy and other documents "at least served to place the persons concerned sufficiently on notice of the growth of such a rule to be held to have acted at their own peril in contravening it. . . . It is better to take the position that even if such acts were not internationally criminal and punishable in 1945, the time had arrived when they would be made so, and that it was as well to start then as after some future war." As for the crimes against humanity they were so heinous and so universally condemned by other than Nazi systems of law that no person who committed them could have regarded them as innocent.

He foresees a greater life expectancy of the humanity count than to the aggressive war count mainly because the "vital interests" of States are not involved. The concept of crimes against peace must be evaluated in the light of what he calls "ominous trends". He doubts its deterrent value, for if only the defeated are to be adjudged guilty then the national leaders are not so much deterred as warned that they must not lose. And the trend towards the "nationalisation of truth" is even more discouraging. Government control of the organs of mass communication make it increasingly difficult

for the individual to form and express value judgments of right and wrong. ". . . it is perhaps the most tragic paradox of our century that the first collective attempt to bring home to individuals their responsibility for the scourge of war, should have been made in an age when the appropriation of truth by the State makes failure almost inevitable."

Can we not then look to the United Nations for anchorage in this sea of conflict? He is not too hopeful. In a chapter entitled "League the Contemptible and United Nations the Bold" he characterizes the U. N. Charter as inadequate because of the failure to learn and apply lessons from the League of Nations whose "techniques and machinery constituted an international asset which was spurned by the choice of a streamlined 'organic' structure for the United Nations security system." And the inevitable happened; the organic machinery broke down and regional defense pacts marked the end of the illusion. Some feared this anarchy even in 1945, but were regarded as cynics. "Men mostly saw what they wished to see—the face of ordered collective security; the other face was thus in the shadow. In 1953, by contrast, all men see it as a commonplace that two systems of uncontrolled national power confront each other, each inside and outside the United Nations. . . . According to its aptness for our present world it [the U. N.] may still either unite the nations for peace or divide them for war."

It must be apparent that to the hopeful idealist the book offers not too much encouragement but much to

think about. For the realist or for the worker in the field from day to day it provides excellent insights into the problems of our age with references to every facet of the subject that may have been discussed elsewhere. For either it is an indispensable guide. And for the student it is stimulatingly written with material for countless probing seminars.

The traditional historical and philosophical portions are as challengingly presented as the controversial.

As a concise text it well deserves consideration for inclusion in a Judge Advocate library.

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MILITARY GOVERNMENT COURTS IN GERMANY

By Eli E. Nobleman

Published as Training Packet No. 52 by The Provost Marshal General's School,
Military Government Department. pp. 261.

Captain Nobleman, a reserve officer of The Judge Advocate General's Corps and a member of the Judge Advocates Association, while preparing for military government work in 1943 became fully conscious of the need for a reliable reference work dealing with the activities of military occupation courts. Although occupation forces of the United States had used these tribunals during every major occupation over a period of about 130 years, there was no ready published work in the field except the brief accounts in such standard, but obsolete, works as Berkheimer on *Military Government and Martial Law* and Winthrop on *Military Law and Precedents*. The need was further manifested during the author's experience as prosecutor, judge and

presiding member of various military government courts in Germany; and, Captain Nobleman determined to do something about it.

As a doctoral thesis, Captain Nobleman has produced a survey and analysis of the international legal basis and the organization and operation of American military occupation courts during the past 130 years of military and legal history of the United States with particular emphasis and detail concerning the military government courts in Germany during and immediately following the combat phase of World War II. Underlying the theme of the entire work is the author's conviction that military government courts, properly organized and competently staffed, can be a most effective mechanism in the hands

of occupying forces to reorient the political thinking and outlook of the occupied population.

The book is copiously and accurately documented. The appendices contain verbatim historical military government orders, proclamations, directives, and ordinances and a very full bibliography and table of cases. Being thus ideally suitable as a source book for instructional purposes and

as a guide to further detailed study, The Provost Marshal General's School has adopted it as a "training packet". The work will be of invaluable assistance, not only to military personnel charged with the important responsibility of organizing and operating military government courts in the future, but to all students of international law as well.

RICHARD H. LOVE.



STATEMENT OF POLICY

The Judge Advocates Association, an affiliated organization of the American Bar Association, is composed of lawyers of all components of the Armed Forces. Membership is not restricted to those who are or have been serving as judge advocates or law specialists.

The Judge Advocates Association is neither a spokesman for the services nor for particular groups or proposals. It does not advocate any specific dogma or point of view. It is a group which seeks to explain to the organized bar the disciplinary needs of the armed forces, recalling, as the Supreme Court has said, that "An Army is not a deliberative body," and at the same time seeks to explain to the non-lawyers in the armed forces that the American tradition requires, for the citizen in uniform not less than for the citizen out of uniform, at least those minimal guarantees of fairness which go to make up the attainable ideal of "Equal justice under law."

If you are now a lawyer, if you have had service in any of the Armed Forces or are now connected with them in any capacity, active, inactive, or retired, and if you are interested in the aims herein set forth, the Judge Advocates Association solicits your membership.

The Journal is your magazine. If you have any suggestions for its improvement or for future articles, please bring them to the attention of the Editor. We invite the members of the Association to make contributions of articles for publication in the Journal. Publishability of any article submitted will be determined by the Editor with the advice of a committee of the Board of Directors composed of Lt. Col. Reginald Field, Col. William J. Hughes, Jr., Col. Charles L. Decker, USA, Capt. George Bains, USN, and Col. Louis F. Alyea, USAF.

NOTES ON CURRENT PROCUREMENT OPINIONS

Furnishing of Information by Military for Use in Private Patent Litigation

The owner of a patent for a hydraulic tire demounter requested information from the Government whether it had purchased a similar device from a named manufacturer stating that the information was desired for use in private litigation with the manufacturer to recover wages and royalties. The manufacturer had furnished a demounter to the Government for test purposes under the usual agreement providing for no expense or liability on the part of the Government. The Government had not bought the device, although one was still being tested. The Judge Advocate General of the Army was requested to give an opinion upon whether 18 USC 283 and AR 345-20 permitted the furnishing of the information. The opinion is expressed (JAGP 1954/7264, 19 Aug. 1954) that although the statute precluded the furnishing of information which might be made the basis of a claim against the United States, even where assurances are given that it will not be so used, nevertheless, the information requested could hardly support a claim against the Government or even a potential claim since using a patented invention solely for experimental purposes rather than for profit or practical advantage is not an infringement. Accordingly, to the limited ex-

tent requested, The Judge Advocate General held there was no legal objection to furnishing the requested information.

Failure to Appeal Default Termination Does Not Preclude Appeal from Excess Cost Assessment

A supply contract was terminated for default for failure to deliver within the time specified, the contracting officer finding that the failure to perform the contract did not arise out of causes beyond the control and fault or negligence of the contractor. The contractor did not appeal from the default action, but did appeal under the standard "Disputes" clause from the assessment of the excess cost of repurchase made several months later on the basis that the delay in performance was excusable. The Government contended that the question of excusability was foreclosed by the contractor's failure to appeal within thirty days; that the only open issue was the amount of the excess cost. The Armed Services Board of Contract Appeals (John Peterson, No. 1633, 26 Mar. 1954) held that under the contract in question, an appeal from the assessment of excess cost opened for its consideration the question of excusability of the default and that it was not necessary first to appeal from the prior decision of the contracting officer terminating the contract for failure to deliver. The

Board found in fact the delay not excusable and the excess cost properly assessed.

See Aero-Land Supply Company, ASBCA No. 1869, 25 May 1954, where a contract containing the standard default and dispute clauses was terminated for default for failure to make deliveries and the contractor appealed on the ground that default was excusable. The Armed Services Board of Contract Appeals held that default was not excusable and on a later appeal by the contractor from the assessment of excess cost, the contractor again contended that default was excusable. The Board held that it had already adjudicated that issue and denied the appeal.

Fully Obligated Annual Performance Bond Remains Obligated Although Contracts Completed

In non-construction contracts, performance bonds are required to the extent determined by the head of the procuring activity and the penal sum is specified by the contracting officer. However, a contractor anticipating entering into a number of supply or service contracts with a single agency may furnish a single annual performance bond to secure all such contracts and so long as the total of the penal sums required under such contracts does not exceed the penal sum of the annual bond, no additional bond need be furnished as new contracts are made. The Judge Advocate General of the Army was asked for an opinion as to whether new contracts may be obligated against the annual bond so long as the penal sums required on all *uncompleted* contracts do not exceed the penal sum of the annual

bond. The opinion is to the effect that if the annual bond has been fully obligated, additional bonds must be furnished for new contracts even though some of the contracts against which the annual bond has been obligated have been completed because the contractor remains liable for latent defects and fraud even after final inspection and acceptance, and the obligation of the performance bond is, therefore, not terminated by the completion of the contract, (JAGT 1954/6673, 26 Aug. 1954.)

Low Responsive Bid May Not Be Rejected in Favor of Higher Bid Offering Item Desired to Be Standardized

The Corps of Engineers requested approval by the Secretary of "Hobart No. HF 30G" generator sets for standardization, which request was denied. Thereafter, invitations for bids were issued for generator sets described as "Hobart No. HF 30G or equal". The invitation specified that standardization was contemplated. A submitted the lowest bid offering an item containing the specific components of the Hobart generator, but B submitted a lower bid for an "equal" item. The Judge Advocate General of the Army was requested for advice concerning whether an award could be made to A on the ground that his bid was the lowest which met the desired characteristics for standardization. It was held (JAGT 1953/2577, 24 Mar. 1953) that if the award is to be made pursuant to the advertised invitation, the contract may not properly be awarded to A unless there is a determination that the generator offered by B is not the equal

of the Hobart or that B is not a responsible bidder. The opinion states that all bids may be rejected if in the interest of the Government or if the bids are shown to be unreasonable or collusive, and in that event, there would be no objection to negotiating the contract. However, the desire to standardize would not in itself be an adequate ground for rejecting all bids in the interest of the Government, since approval of such standardization had been denied by the Secretary. Even if negotiation be utilized, there is still the requirement that negotiated procurements be made to the best advantage of the Government and price and other factors may still require the award being made to someone else than A.

Auctioneer Selling Surplus U. S. Property Required to Collect State Sales Tax

The Judge Advocate General of the Army was asked to render an opinion as to whether an auctioneer who has contracted to conduct an auction sale of surplus U. S. property in California may be required to collect the California sales tax from the purchasers at the sale. The opinion states that under California statute, the tax is required to be collected from the consumer by the auctioneer. While in JAGT 1954/6328, 22 July 1954, the opinion was expressed that although sales of surplus property by the Government are subject to state sales taxes, the Government and its agencies could not be required to collect such taxes for the state, the auctioneer contractor is not an agency of the United States and is required under California law to collect the

tax from the purchaser and make remittance to the state (JAGT 1954/8096, 1 October 1954). See JAJ No. 18, October 1954, page 36.

Contractor May Pay Actual Prevailing Wage Less Than Wage Erroneously Specified in Contract

A construction contract contained minimum wage provisions as required by the Davis-Bacon Act (40 USC 276a) obligating the contractor to pay wages not less than those specified in the contract which in turn were based upon a determination by the Secretary of Labor upon the prevailing wages in the area. The hourly rate specified for carpenters was \$2.85, but the actual prevailing wage in the area was \$2.75 per hour and this latter rate was used by the contractor in computing the bid and was the scale of pay actually made by the contractor in performance. Thereafter, the Department of Labor formally acknowledged the error and the fact that the contractor was actually paying the prevailing wage in the area. The contracting agency requested a decision from the Comptroller General, which held that although there was a technical violation of the contract terms, the carpenters were paid the wages prevailing in the area as contemplated by the Davis-Bacon Act; thus there would appear to be no reason for collection action against the contractor for the benefit of its employees. It was further held that since the contractor used the \$2.75 rate in computing its bid, and in fact, paid higher wages in the later stages of the contract, there was no legal basis for requiring an equitable adjustment in the contract

price. (Ms. Comp. Gen. B-119373, 27 July 1954).

Delivery Schedule Not Waived by Acceptance of Late Delivery

The fact that supplies were accepted by the Government under a contract at a date subsequent to the extended delivery date and that the Government negotiated with the contractor relative to the acceptance of non-suitable items during the months thereafter was held not to constitute actual or constructive waiver of the delivery schedule, but mere forbearance on the part of the Government in an opinion by the Armed Services Board of Contract Appeals (Taylor Corp., ASBCA 1795, 11 May 1954).

Reservation by Bidder of Right to Reject Award May Not Be Withdrawn After Bid Opening

Invitations for bids for the construction of a transmission line, the various portions of which were described in separate schedules, were issued by The Bonneville Power Administration. The low bid on schedule A contained a stipulation by which the contractor reserved the right to refuse to accept the award on that schedule unless he was also given the award on schedule B. After the bids were opened, the bidder, advising the contracting officer that it would not exercise its reservation, was awarded the contract for schedule A. A protest of award by the next lowest bidder was referred to the Comptroller General who held the award was improper. The Comptroller General held that the only firm offer contained in the bid was that on the combination of schedules A and

B, and that was not low. The effect of the bidder's waiver of its reserved right to reject an award on schedule A alone was in effect a new bid on that schedule after the bids had been opened. Conditions or reservations which give a bidder a chance to second-guess his competitors after bid opening must be regarded as fatal to the bid (Ms. Comp. Gen. B 120436, 20 Aug. 1954).

Revocation of Termination Notice Effective Only As a New Contract

A negotiated fixed price supply contract was terminated for the convenience of the Government, but shortly thereafter a further requirement for the contract of supplies was discovered and the contracting officer and the contractor executed a supplemental agreement, revoking the termination notice and reinstating the contract. The propriety of this action was the subject of an opinion of The Judge Advocate General of the Army, JAGT 1954/7103, 22 Oct. 1954. The Judge Advocate General expressed the opinion that the termination of a contract means the abrogation or extinguishment of the existing agreement, and a contractual obligation, so terminated, cannot itself be revived by revocation of the termination by use of a supplemental agreement. Such a supplemental agreement would constitute a new contract for the supplies and be subject to the advertising requirements of the Armed Services Procurement Act of 1947 (41 USC 151c), unless such advertising or solicitation would obviously accomplish no useful purpose, which determination was adequately supported by the facts in the

particular case. The opinion expresses also the view that inasmuch as the purported revocation of the termination notice resulted in a new procurement, additional quantities could be included in the supplemental agreement.

Basic Agreement Containing Only Standard Clauses Inappropriate

The Signal Corps proposed to execute with a contractor with whom it frequently contracted a basic agreement containing various provisions to be incorporated by reference in subsequent fixed price supply contracts. One portion of the agreement contained various ASPR and APP standard clauses, which were to be incorporated into subsequent contracts by specific references to the applicable clauses. The proposed agreement was forwarded for review to The Judge Advocate General of the Army (JAG 1954/8224, 18 Oct. 1954) who commented that although there is no legal objection to the proposed basic agreement, no useful purpose would be served by the instrument since it merely utilizes existing ASPR and APP clauses without deviation. The use of the proposed agreement would create unnecessary and undesired complexity of reference in subsequent contracts without achieving a simplification of negotiations. The purpose of the basic agreement could best be served by affixing to subsequent contracts mimeographed copies of those standard ASPR and APP clauses, which are deemed necessary.

Cost of Lease for Period in Excess of Contract Term Allowable if Reasonably Incident to Performance

The Armed Services Medical Procurement Agency awarded to a contractor two cost reimbursement contracts for the collection and furnishing of whole human blood. The first contract, which authorized the contractor to establish donor centers throughout the United States and make improvements in its existing centers, was executed on 1 December 1950 and called for completion by 1 July 1954. It was completed June, 1953. The second contract which authorized the contractor only to improve its existing centers was executed 28 April 1952 and terminated for the convenience of the Government on 22 July 1953. In September, 1951, the contractor entered into a five year lease for a building to be used as a blood donor center, which center was thereafter used in the performance of both contracts. Upon completion and termination of the contracts, the contractor unsuccessfully tried to cancel the remaining portion of the lease and then requested reimbursement for the cost of the lease for the full five year period. The extent to which the contractor was entitled to reimburse for the lease was submitted to The Judge Advocate General of the Army for opinion. The opinion states that the lease was authorized by the provisions of the first contract and the rent thereunder may be recognized as a cost under either contract at least for the period during which

the contract was in existence. The allocation of the rentals between the two contracts would depend on the terms of the second contract and the circumstances surrounding its execution and the intention of the parties. If the contracting officer concludes that it was reasonably incident to performance to take the building on a five year lease, he may allow the entire cost of the lease for the full

term and the contractor may be fully reimbursed upon final settlement of the contract even though all of the rental payments have not been made by him. The Judge Advocate General suggests that if the entire cost of the lease is allowed, arrangements should be made to protect the Government's interest in the remaining term of the lease. (JAGT 1954/7542, 15 October 1954).

EDITOR'S NOTE: The above notes have been extracted from the Procurement Legal Service of the Department of the Army, Circulars Nos. 13-19. The Procurement Legal Service contains digest of opinions of The Judge Advocate General, decisions of non-judicial agencies, decisions of Courts and general procurement information.

THE 1955 ANNUAL MEETING

The Ninth Annual Meeting of the Judge Advocates Association will be held at Philadelphia on August 23-24, 1955, during the week of the American Bar Association convention. Captain James S. Clifford of Philadelphia as Chairman of the Committee on Arrangements, and Captain Robert G. Burke of New York City, and Col. Fred Wade of Middletown, Pennsylvania, have made arrangements for the annual banquet to be held at the Naval Officers' Club at Philadelphia on the evening of August 23rd. The tickets for the annual banquet will be \$6.00 each. Since the facilities of the Club will limit attendance to 300 guests, you are urged to make advance reservations with the national offices of the Association accompanied by your check. The business meeting will be held on August 24th. Reserve these dates on your calendar now. The convocation at Philadelphia will be the biggest and best JAA meeting yet if *you* are there.

The Judge Advocates Association is a national legal society and an affiliated organization of the American Bar Association. Members of the legal profession who are serving, or, who have honorably served in any component of the Armed Forces are eligible for membership. Annual dues are \$6.00 per year, payable January 1st, and prorated quarterly for new applicants. Applications for membership may be directed to the Association at its national headquarters, 312 Denrike Building, Washington 5, D. C.

Please advise the headquarters of the Association of any changes in your address so that the records of the Association may be kept in order and so that you will receive all distributions promptly.

Recent Decisions of the Court of Military Appeals

Instructions to Court Martial Members Prior to Trial and Command Influence

**Ferguson et al (Army), 5 USCMA 68,
22 October 1954**

The accused were convicted of mutiny at a post stockade (Article 94). The board of review considered dehors the record of trial a transcript of statements made at a pre-trial conference held the day before the trial at which the convening authority, the chief of staff, the law officer, and members of the court were in attendance. At this meeting, the staff judge advocate explained that there had been difficulties at the post stockade and that firm and prompt action in cases coming out of these difficulties was necessary to avoid aggravation of the problem. The board of review held the error of command influence shown by these matters outside of the record was jurisdictional and held the findings and sentence void. On certification by The Judge Advocate General, the Court in three separate opinions held the board of review and the court could consider the transcript although outside the record. Judge Latimer would limit the consideration to the issue of jurisdiction; Chief Judge Quinn would make the consideration unlimited because of the general public nature of the question of command control; and, Judge Bros-

man concluded the transcript, although dehors the record, properly considered as part of the proceedings within the meaning of Article 39 and also among other reasons for considering the transcript, suggested the applicability of the writ of coram nobis since significant rights shown by events not appearing in the record were involved. The Court held the remarks of the staff judge advocate at the pre-trial conference contravened the provisions of the Code and Manual, but that the error of undue command influence thus shown was not jurisdictional so as to render the findings and sentence void. By divided Court (Judge Latimer dissenting), the decision of the board of review was modified by granting a rehearing.

**Navarre (Army), 5 USCMA 32,
15 October 1954**

The accused was convicted of wrongfully using morphine (Article 134). Upon voir dire examination, it was disclosed that three months before the trial, the commanding officer (not the convening authority) had conducted a course of instruction in military justice in which, through charts and statistics, there was shown disparity in treatment by special courts in accordance with the rank of the offender. It was also pointed out that an officer

had received low efficiency reports because he had been a member of several courts martial whose findings and sentences were determined to be improper by the rating officer. The defense counsel did not challenge any members of the court, each on voir dire disclaiming that he would decide the case on any other basis than the evidence presented. The question of unlawful command influence was raised by appellate defense counsel. The Court held that there was no error, pointing out that Article 37 was designed to preserve the integrity of military courts without unduly restricting those responsible for the conduct of military operations saying "forbidding or needlessly curtailing lectures designed to prepare prospective court members for the proper discharge of their important function" would be improper. The court observed that the commanding officer's instructions, on the facts of the particular situation, were entirely warranted to preserve morale and discipline. Judge Brosman dissented as to the issue of command influence, announcing the view that the mention of efficiency ratings constituted "a veiled threat" to court martial members in the performance of their duties.

**Deain (Navy), 5 USCMA 44,
15 October 1954**

The accused was convicted of desertion for an absence in excess of sixty days (Article 85). The board of review reduced the finding to AWOL and mitigated the sentence. The case went to CMA on petition of the accused. It appeared that the court was appointed by the commandant of a Naval district and that

the president, a Rear Admiral, was assigned to the district by the Bureau of Personnel to act as president and permanent court member, and that there were at least two other members of the court detailed as permanent members. The president submitted, from time to time, fitness reports on the permanent court members based upon their performance of duty as members of the court, and prior to convening a new court, the president would conduct a short indoctrination course in which he would indicate that on the question of whether an absence is prolonged, the court should consider the table of maximum punishments as a guide. The law officer testified on a challenge directed against the president for cause that he had heard the president say "that anyone sent up here for trial must be guilty of something". On the voir dire, the president testified that he did not recognize the presumption of innocence as a Constitutional right since he did not consider military persons as possessing Constitutional rights unless specifically given by Congress. The challenge against the president of the court for cause was not sustained. On petition of the accused, the Court held that the ruling on the challenge was prejudicial error and set aside the finding and sentence and ordered the charges dismissed. The Court stated that the president's concept of the Constitutional rights of military personnel standing alone was not bias to sustain the challenge, but his opinion that "anyone sent up here for trial must be guilty of something" demonstrated a fixed and deep-seated disposition to give less than full effect

to the presumption of innocence which impaired his impartiality and disqualified him. The Court also found his advice concerning the use of the table of maximum punishments as a guide for determining a prolonged absence was erroneous. The Court also criticized the practice of making fitness reports on the performance of permanent members of the court since such reports would have the effect of impeding the freedom and independence of action of those members.

Impartial Post Trial Review

Haimson (Army), 5 USCMA 208,
3 December 1954

On petition of the accused, the Court held the staff judge advocate is not disqualified to review a record of trial merely because he prepared for the convening authority a command endorsement to the charge sheet advising the trial counsel as to his duties, the nature of the charge, witnesses to be called, and availability of documents. Such an endorsement did not suggest that the convening authority had predetermined the issue of guilt or innocence, nor did it make the staff judge advocate a participant at the trial level by directing in detail trial tactics designed to secure conviction regardless of guilt or innocence.

Dougherty (Navy), 5 USCMA 287,
17 December 1954

The accused was convicted of a sexual offense and sentenced to a BCD among other punishments. The court by a letter of clemency unanimously recommended that the BCD be remitted. A Departmental letter of instructions provided that known homosexual individuals must be eliminated

from the service. The legal officer, although recommending reduction in the sentence of confinement and forfeiture, did not recommend that the BCD be remitted in view of the policy letter, and the convening authority indicated that it did not take action to remit the BCD for that reason. The board of review affirmed; and, on petition of the accused, the Court held that error was committed with respect to the sentence. The Court stated that the Code provides that the convening authority shall approve such part of the sentence as *he* finds correct in law and fact, and as *he, in his discretion*, determines should be approved. The record disclosed that the convening authority was erroneously prompted into belief that his discretion to remit or suspend the BCD had been withdrawn by the Departmental letter. The record was returned to the convening authority for reconsideration.

Clisson (Air), 5 USCMA 277,
17 December 1954

The accused was convicted of larceny (Article 121). After trial, the trial counsel conducted a post trial interview and recommended that the sentence as adjudged be approved. The post trial report signed by the trial counsel as Staff Judge Advocate was sent with the record of trial to the convening authority, whose staff judge advocate concurred, and the findings and sentence were approved by the convening authority and affirmed by the board of review. On petition of the accused, the Court held that there was prejudicial error and ordered the record returned to the convening authority for reference to a qualified staff judge advocate

without previous connection with the case for review. The Court stated: "A trial counsel may not thereafter act as staff judge advocate to the reviewing authority". The previous antagonistic role of trial counsel prevents his exercising that degree of impartiality required by the Code. (Judge Latimer dissented.)

**Hightower (Air), USCMA 385,
7 January 1955**

The trial counsel who prosecuted an earlier case out of which the charges of perjury and subornation against the accused arose, although appointed as trial counsel, did not participate in the trial of the accused for those charges. He did, however, as assistant staff judge advocate, conduct the post trial review and prepared the staff judge advocate's review over his signature. The staff judge advocate concurred in the review. On petition of the accused, the Court held there was prejudicial error as to the post trial review. Although Article 6c prohibits the trial counsel from serving as SJA in the post trial proceedings in the "same case", cases arising out of the same circumstances are to be regarded as the "same case" within the meaning of this prohibition. Prior connection with the case against the accused would affect the impartiality of the review. The fact that the SJA concurred in the review does not satisfy the Code requirement, and, therefore, a further review by a qualified staff judge advocate was directed. (Judge Latimer dissented.)

**Garcia (Army), 5 USCMA 88,
5 November 1954**

The accused, a civilian employed by MSTs, on conviction for robbery

among other offenses was sentenced to confinement at hard labor for nine months and to pay a fine of \$500 and to further confinement until payment of the fine not in excess of four additional months. The Government contended that the accused was not entitled to a review by CMA since the confinement imposed as punishment, was less than one year. On petition, the Court held that it did have jurisdiction under Article 67b(3). The court found that the alternative confinement to compel payment of the fine was part of the sentence and, therefore, the sentence was for a period in excess of one year, and the accused was entitled to a review by the Court.

**Prior Participation of the Law Officer
Schuller (Army), 5 USCMA 101,
5 November 1954**

While serving as acting staff judge advocate, the law officer of the court which tried an accused signed and submitted the pre-trial advice required by Article 34 recommending trial by GCM. The advice was signed without reading or checking the file at the direction of the staff judge advocate, it being contended that he acted only as agent of the staff judge advocate. Although a copy of the advice was in the defense counsel's files, the defense counsel stated that he was unaware that the law officer had signed the advice and neither the trial counsel nor the law officer disclosed that prior participation at the trial. The accused was convicted of wrongful appropriation and adultery, but acquitted of rape. The board of review held it was prejudicial error for the law officer to fail to show his

prior participation and ordered a rehearing. On certification by The Judge Advocate General, the Court affirmed the decision of the board of review (Judge Latimer dissenting). The Court held that the accused was deprived of his right to have a qualified staff judge advocate make an independent and professional examination of the evidence and submit to the convening authority an impartial opinion as to whether it supported the charges. Even if the acting staff judge advocate was acting as agent for the staff judge advocate, the responsibility for pre-trial advice rests on the person holding the office at the time the advice is signed, and the person signing the advice stated that he did so without knowing anything about the evidence. Moreover, there was an affirmative duty to disclose any ground for challenge, which duty the trial counsel and law officer neglected. The Court stated that it was unwilling to charge the accused with the consequence of the failure to exercise due care when it appeared that the trial counsel and law officer had actual knowledge of the disqualification. The Court concluded by saying that the accused was deprived of an important pre-trial protection, which, when coupled with the failure of the trial counsel and law officer to disclose the law officer's previous connection with the case, warranted a reversal of the conviction.

Protection Against Self-Incrimination

**Taylor (Army), 5 USCMA 178,
26 November 1954**

The accused was convicted of the wrongful possession of marijuana (Article 134). Military police acting

on a "tip" made a search of the billet occupied by the accused with others and the accused was asked without any warning under Article 31 to point out his clothing. The accused identified his clothing and the narcotic was found in his overcoat. The defense counsel at trial objected to the admission of the statement by the accused which identified his clothing. The objection was overruled and then a confession, which was subsequently obtained from the accused, was also introduced in evidence. On petition of the accused, the Court held that there was prejudicial error and ordered a rehearing, saying Article 31b provides that an accused or suspect may not be demanded to make any statement regarding the offense of which he is accused or suspected. Here the accused's statement regarded the wrongful possession.

**Howard (Army), 5 USCMA 186,
26 November 1954**

The accused as the result of admissions made as a prosecuting witness in another case was later charged with larceny and assault and convicted. At the other trial, he was not advised of his rights under Article 31. Upon his own trial, his judicial confession in the earlier case was received in evidence over his objection. The board of review applying Article 31 set aside the findings, holding the failure to warn him of his rights was prejudicial error. Upon certification, the Court reversed the board of review holding that Article 31b cannot be interpreted to apply at a trial, the provision offering only pre-trial protection to one who is being investigated for the commission of an offense.

**Barnaby (Army), 5 USCMA 63,
15 October 1954**

The accused was convicted of wrongfully using a narcotic drug. After being arrested, the accused at an Army hospital was ordered to give a urine specimen, which, upon analysis, revealed the presence of morphine. At the trial, the defense counsel objected that the sample had been obtained from the accused involuntarily and that thus he was required to incriminate himself. The objection was overruled. The Court on petition of the accused, held that the accused's protection of self-incrimination was not violated, stating that Article 31 does not apply since the furnishing of such a sample could not be considered a "statement" since the latter term refers only to testimonial utterances. (Chief Judge Quinn dissented on the ground that the order to give the sample actually compelled the accused to furnish evidence against himself in violation of the Fifth Amendment.)

Admissibility of Confessions

**Trojanowski (Army), 5 USCMA 305,
23 December 1954**

The accused was convicted of larceny from a fellow soldier (Article 121). Several days after the theft, the victim by force compelled the accused to confess and return some of the money to him. Several weeks later, the accused made a full confession, after a warning of his rights under Article 31, to an officer. As a part of the accused's case, the entire circumstances of the first confession were introduced and the accused in his own testimony admitted the larceny. The board of review found that

the first statement was coerced, and that its admission, notwithstanding other evidence, denied the accused of due process of law, and ordered a rehearing. On certification by The Judge Advocate General, the Court reversed the board of review holding the statement was not inadmissible because of the failure of the victim to warn the accused of his rights since Article 31b is applicable only to statements made by an accused or a suspect during the course of an investigation being conducted with some color of officiality. The Court also stated that since the circumstances of the coerced statement were voluntarily introduced in support of the defense theory and since the accused voluntarily admitted the larceny in his own testimony, he cannot complain.

**Grisham (Army), 4 USCMA 694,
24 September 1954**

The accused, a civilian employee of the Army in France, was found guilty of unpremeditated murder of his wife (Article 118). The accused notified both American and French authorities of the homicide and was interrogated, first, by the American military police, who warned him of his rights under Article 31, and then, by the French police through an American interpreter in the presence of the American military police. Thereafter, the accused was detained by the French authorities to whom he made additional statements through the American interpreter. The French authorities at no time advised the accused of his rights under Article 31. At the trial by Court-Martial, the statements made to the French authorities were admitted into evidence.

On petition of the accused, the Court held that there was no error in the admission of these statements since Article 31b is applicable only to interrogations conducted by persons subject to the Code and the French officials who took the statements in the instant case were not in that category. The failure of civilian law enforcement authorities to advise the accused of his rights under Article 31 did not operate to deprive the court-martial of any statements secured by the civilian authorities.

Legality of Search and Seizure

**Deleo (Army), 5 USCMA 148,
26 November 1954**

A French police inspector armed with letters rogatory of a French magistrate in the company of an American CID agent interviewed the accused who was suspected of illegal currency transactions. The accused's commanding officer called the accused to the orderly room where he was taken into custody by the CID agent who then searched the accused and found a counterfeit bill upon him. A search was then made of the accused's automobile on the post and his apartment in a nearby French town. While the French inspector was making the search of the apartment, the CID agent happened to notice evidence of forgery, a matter theretofore referred to him for investigation, and upon further search, found additional evidence of that offense. This evidence was admitted over objection, in the court-martial trial of the accused for forgery. After the French investigation was completed, the CID agent explained to the accused his rights under Article 31 and then took his

confession as to the forgery which was also used at the trial over the objection of the accused. The accused was convicted and from the board of review's opinion affirming the conviction, the accused petitioned the Court for review. The Court held that there was no error in the admission into evidence of the results of the search and the subsequent confession. The Court stated that the search was initiated by the French police and the military police investigator's presence was no more than an incidental element. Therefore, the search was not an American one within the prohibition and safeguards of the Fourth Amendment, and the only test to be applied to the search and seizure was one of reasonableness. The Court found the search and seizure reasonable for probable cause existed and the letters rogatory constituted the only judicial process available since no American court is available and empowered to issue warrants in France. The search being reasonable, the seizure was sustained since the evidence seized was relatively apparent though not related to the original purpose of the search. The Court went on to state that even if the search had been unlawful, the confession was admissible since it was not the result of the search. (Judge Latimer dissented.)

**Volante (Navy), 4 USCMA 689,
24 September 1954**

The accused, a post exchange clerk, was convicted of larceny (Article 121). There had been an inventory shortage in the PX and two soldiers employed in the PX determined to search the accused's personal effects because they were afraid that he

might be transferred and they would be charged with the shortage. They found some PX merchandise in the accused's wall and foot lockers and as a result of this discovery and report, a further official investigation by the provost marshal was made and thereafter the accused, having been explained his rights under Article 31, made a confession. The evidence thus obtained was admitted at the trial. On petition of the accused, the Court held that although the original search was illegal, there was sufficient evidence to support the law officer's conclusion that the search was made by the soldiers unofficially and motivated by personal interest. The Court stated that evidence obtained as a result of a search by private persons is admissible and not within the prohibition of Paragraph 152 of the Manual, which extends only to unlawful searches conducted by persons acting under the authority of the United States.

Former Jeopardy

Stringer (Army), 5 USCA 122,
19 November 1954

On the first day of a trial for larceny, the prosecution introduced some evidence which brought about expressions from the court concerning the inadequacy of the prosecution and the evidence being presented. Upon reconvening on the second day of trial, the trial counsel announced that the convening authority withdrew the charges and would refer them for trial by another court. Defense counsel objected to the withdrawal. On the second trial for the same offense, a plea of former jeopardy was overruled and the accused was convicted.

The board of review having affirmed the conviction, the accused petitioned the Court which held that there was prejudicial error and ordered the charges dismissed. The Court in its opinion stated that jeopardy attaches following the presentation of the evidence unless the trial is terminated prior to findings by reason of "manifest necessity". The majority of the Court held that the law officer should have ruled upon the mis-trial and that the convening authority had usurped that duty of the law officer. It concluded that the accused having been denied that ruling, which would have been subject to review, was prejudiced and the plea of former jeopardy should have been granted. On an unrelated point, the Court held that the prosecution's introduction of the deposition of a French National as proof of the corpus delicti in this non-capital case was improper in the absence of a showing of inability or refusal of the witness to testify.

Insanity — Alcoholic Amnesia

Bourchier (Navy), 5 USCA 15,
8 October 1954

The accused was convicted of rape (Article 120). The prosecutrix while waiting for a bus, accepted a ride with the accused, a stranger, and while enroute in his automobile, they made several stops on one of which at a golf course, she, out of fear, submitted to three acts of intercourse. The prosecutrix reported what had occurred to her husband upon arriving home and a medical examination indicated recent sexual intercourse. The defense claimed alcoholic amnesia. A psychiatrist called to substantiate the claim of the defense, over ob-

jection of the defense, testified that a truth drug would aid in determining whether the claim of alcoholic amnesia was genuine. The accused's petitions for review and for a new trial were denied and he then petitioned for reconsideration. Attached to the petition was the affidavit of a psychiatrist to the effect that he had administered truth serum to the accused and that under the influence of the drug, the accused related that he and the prosecutrix had gone to a drive-in restaurant and that while there the prosecutrix by improper conduct induced the acts which followed at the golf course, which were entirely with her consent and cooperation. This affidavit was corroborated by an affidavit of a waitress at the drive-in restaurant and there were other affidavits attacking the character of the prosecutrix with respect to chastity. There were also affidavits filed with the petition for reconsideration intimating command influence on the court. The court denied the petition for reconsideration saying that if the accused was characterized by genuine amnesia at the time of trial, then his testimony was truly unavailable at the trial and if there were a true recovery of recollection thereafter, new evidence would have been discovered. However, the defense made a conscious choice not to use the truth drugs in exploring the accused's mind at the time of trial. Some doubts were expressed by the court concerning the efficacy of evidence produced by truth serum interviews, but hinged its opinion on the basis that the defense did not use due diligence in fathoming the subconscious mind of the accused with drugs or in secur-

ing evidence attacking the prosecutrix' character and veracity. The Court further held that the attempts to impeach the verdict of the court-martial with affidavits concerning unsworn statements made by court members were impermissible. Judge Quinn dissented on the ground that serious doubt was cast upon the entire testimony of the complaining witness, who had accepted a ride with a stranger and made no effort to leave even though the opportunity presented itself.

**Burke (Navy), 5 USCMA 56,
15 October 1954**

The accused was convicted of sleeping on post after having been duly posted (Article 113). The evidence showed that the accused had four or five cans of beer a few hours before being awakened for guard duty and that he was under the influence and not in the best physical condition to perform sentinel duties. Witnesses stated that he was not drunk, but that he was suspected of having been drinking and was not entirely fit to perform his duties. Later the accused was found to be asleep on post. The defense was based on alcoholic amnesia. The conviction was affirmed by the Court. The Court stated that the record did not disclose that degree of inebriation as would make him mentally irresponsible for his misbehavior. Even though the accused claimed alcoholic amnesia, his behavior was such as to show that he was conscious of his acts. Voluntary intoxication not amounting to legal insanity is not a defense when a court martial can find the mental and physical condition of a sentry such that the posting officer was not charged

with notice that the sentinel could not perform his duties. (Judge Quinn dissented.)

**Smith (Army), 5 USCMA 314,
30 December 1954**

The accused civilian was convicted of premeditated murder (Article 118(1)) and was sentenced to be imprisoned for life. The accused fatally stabbed her husband, an Army officer, while stationed in Japan. The principal issue raised was insanity. The Court in affirming the conviction stated the military test of mental responsibility is phrased in terms of whether the accused was at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong and to adhere to the right. The Court specifically rejected as unacceptable in court martial cases the rule of *U. S. vs. Durham*, 214 Fed. 2d 862, to the effect that the test of insanity requires that unless the jury believe beyond a reasonable doubt either that the accused was not suffering from a disease or defective mental condition or that the act was not the product of such abnormality, it must find that the accused was not guilty by reason of insanity. The Durham case rule, the Court found, to be uncertain, would provide no guidance to the court-martial, fails to differentiate between mental defect and character or behavior disorders, would encourage malingering and would ignore the doctrine of partial responsibility, which is recognized in military law with reference to premeditation.

**Kunak (Army), 5 USCMA 346,
30 December 1954**

The insanity test of the Durham case was also rejected by the Court in this case. Here the accused was convicted of premeditated murder and sentenced to death. The accused shot and killed an officer who was seated in a mess tent. The defense was "irresistible impulse". The Court applied the rule as set forth in Paragraph 120b, MCM 1951, as the military test of insanity. The findings and sentence were reversed for the failure of the law officer to instruct to the effect that if, in the light of all the evidence, the court martial has a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder, it must find the accused not guilty of that degree of the crime. The record was returned to The Judge Advocate General for reference to a board of review for reconsideration of the degree of the homicide or return for re-hearing.

Place of Trial — Change of Venue

**Gravitt (Air), 5 USCMA 249,
3 December 1954**

The court-martial convened by an Air Force commander and composed of Air Force personnel for the trial of an Airman for premeditated murder, was, by direction of the convening authority, convened at an Army installation for reasons of convenience and availability of witnesses. The defense counsel moved that the court adjourn and reconvene at an air base on the grounds that because the vic-

tim of the homicide was an Army man, Army area was "hostile territory." The law officer overruled the motion. On mandatory review from a conviction for premeditated murder, the Court held that there was no error. Although a motion for change of venue is not specifically referred to in the Manual for Courts Martial, an accused is entitled to a fair trial and if the accused can demonstrate that the court would be adversely influenced by the atmosphere of hostility or partiality against him at the place of trial, he would be entitled to be tried at some other place. The law officer's denying the motion was proper, however, since the only ground advanced in its support was that the victims of the alleged misconduct of the accused were Army personnel. There was no evidence of any action or any declaration of hostility by Army personnel at the place of trial.

Prior Acts as Proof of Intent

Graham (Navy), 5 USCMA 265,
10 December 1954

The accused was convicted of desertion with intent to remain away permanently (Article 85). The prosecution's case was based upon extracts of the accused's service record and from that source there was also admitted into evidence over objection entries showing that the accused had been convicted of unauthorized absences on other occasions. The defense position was that these prior AWOL's were terminated by surrender and were not admissible. The law officer instructed the court that

such evidence could be considered only for the purpose of determining the accused's requisite intent to remain away permanently. In affirming the conviction, the Court held that prior acts of misconduct are admissible if they tend to prove motive or intent and if they shed light on the accused's mental attitude. The evidence of prior misconduct in this case was held to be distinctly relevant.

Duplication of Specifications

Johnson (Navy), 5 USCMA 297,
17 December 1954

The accused was convicted of two specifications alleging desertion, one by enlistment in another Armed Force (Article 85(a)(3)), the other with intent to remain away permanently (Article 85(a)(1)). The facts revealed that on 10 November 1952, the accused went AWOL from his ship and while in that status on 20 November 1952, enlisted in the Army without disclosing that he was not separated from the Navy. Upon discovery, he was returned to the Naval control. A board of review held that the two desertion specifications were duplications and that he could not be convicted and sentenced under both. On certification, the Court affirmed the action of the board of review holding that when Congress enacted the Uniform Code of Military Justice, it did not intend to create new desertion offenses; and, therefore, Article 85(a)(3) did not create a substantive offense but merely prescribed a method of proving the offense prescribed by Article 85(a)(1).

What the Members Are Doing

Alabama

Brig. Gen. James E. Morrisette, who retired from the Army in 1946, now engages in the private practice of law in association with the firm of McQueen & McQueen with offices in the First National Bank Building, Tuscaloosa. General Morrisette is lecturer in Constitutional Law at the University of Alabama, School of Law.

District of Columbia

Members of the Association in the Washington area honored Maj. Gen. Claude B. Mickelwait, Maj. Gen. Albert M. Kuhfeld, and Brig. Gen. Moody R. Tidwell, Jr., at a reception and dinner held at the Bolling Air Force Base Officers' Club on January 31, 1955. The occasion of the dinner was the recent promotion of these officers. Brigadier Generals George Hickman and Stanley W. Jones, who were also recently promoted, were unable to be present at this affair, but will be similarly honored in the near future.

Col. Randolph C. Shaw, until recently a member of the Armed Services Board of Contract Appeals, has announced his entry into the private practice of admiralty and administrative law with offices in the Warner Building in Washington.

Col. Frederick Bernays Wiener, Secretary of the Association, served a two weeks tour of active duty in December at the Army War College,

Carlisle Barracks, Pa., as a Consultant-Adviser during the Manpower Course. His present reserve assignment is Commanding Officer of the Mobilization Designee Detachment for the G-1 Division, General Staff, U. S. Army.

Florida

Lt. Michael Zukernick, recently separated from a tour of extended active duty as a Judge Advocate officer with the 45th Infantry Division, has announced his entry into the private practice of the law with offices at 420 Lincoln Road, Miami Beach.

Maj. Irving Peskoe, until recently Staff Judge Advocate, Macdill Air Force Base, having been released from active duty, has opened offices for the practice of law at 1000 North Krome Avenue, Homestead.

Hawaii

Judge and Mrs. George W. Latimer visited Hawaii from January 23rd to February 2nd. Judge Latimer conferred with military officers on the Uniform Code of Military Justice. On January 28th, Judge and Mrs. Latimer were guests of Judges Advocates and legal officers at a dinner at Fort Ruger's Cannon Club. Among the ninety guests attending were Capt. Chester C. Ward, USN, Legal Officer for the Commander-in-Chief, Pacific, Col. Allan R. Browne, Judge Advocate, U. S. Army, Pacific, Capt. Robert A.

Fitch, Legal Officer, 14th Naval District, Col. Jean F. Rydstrom, Judge Advocate, Pacific Division, MATS, Maj. R. A. Scherr, Legal Officer, Fleet Marine Forces, Pacific, Lt. James S. Cooper, Legal Officer, 14th Coast Guard, and Rear Adm. George L. Russell, formerly Judge Advocate General of the Navy, and presently Pacific Fleet Submarine Force Commander.

Illinois

Capt. Hugo Sonnenschein, Jr., of Chicago, recently announced the removal of his office to the Harris Trust Building and his association with the firm of Martin, Craig & Chester.

Louisiana

Harry S. Stephens (6th OC) recently announced the removal of his offices for the practice of law to the Ricou-Brewster Building, Shreveport.

Maryland

Capt. Robert E. Bullard recently announced the removal of his office from Silver Spring to 215 East Montgomery Avenue, Rockville. Capt. Bullard is Commanding Officer of the Service Company, 115th Infantry (Maryland National Guard).

Massachusetts

Lt. Levin H. Campbell, III, upon completion of a tour of active duty as Judge Advocate officer, has entered the private practice of law in association with the firm of Ropes, Gray, Best, Coolidge & Rugg, with offices at 50 Federal Street, Boston.

Michigan

John M. Pikkaart (1st OC) recently announced the opening of offices for

the general practice of law in the Kalamazoo Building at Kalamazoo.

Missouri

Bertram W. Tremayne, Jr., recently announced the formation of a partnership for the general practice of law under the name of Tremayne & Joaquin with offices at 25 North Meramec Avenue, St. Louis (Clayton) 5.

Nebraska

Col. R. C. Van Kirk, until recently assigned to the National Guard Bureau as Counsel, has announced the opening of offices for the practice of law in the First National Bank Building at Lincoln in association with Clayton Burkett Van Kirk. Col. Van Kirk is also Counsel to the General Outdoor Advertising Company, Inc., with offices in Washington, D. C.

New Mexico

Lt. Col. R. F. Deacon Arledge (1st OC), Judge Advocate of the New Mexico National Guard, recently retired as Judge of the Second Judicial District Court at Albuquerque and reentered the private practice of law with offices at Albuquerque in the Sunshine Building.

New York

Justin L. Vigdor, having completed a tour of extended active duty in the Army Judge Advocate General's Corps, has become associated with the firm of MacFarlane, Harris, Dankoff & Martin for the general practice of law with offices in the Central Trust Building, Rochester.

Michael J. Watman, of Staten Island, appears to be quite active in

veterans affairs, having been elected for the year 1955 as Vice Commander of the Tappen Post, American Legion; 1st Vice Commander of the County Catholic War Veterans and Judge Advocate of the Father Campbell Post of Catholic War Veterans, as well as Judge Advocate of the Flynn Post, AMVETS, and the Halloran Chapter of the DAV.

Abraham Spector, having completed a tour of extended active duty during which he was assigned to the Claims Division, BOJAG, Ft. Holabird, Maryland, and later as Assistant Staff Judge Advocate, New York Port of Embarkation, recently announced the return to private law practice with offices at 16 Court Street, Brooklyn 1.

Ohio

Lt. Col. Ralph G. Smith (9th OC) of Columbus was recently appointed as Judge of the Municipal Court of Columbus. Col. Smith is SJA of the 37th Infantry Division, Ohio National Guard.

Oregon

Capt. Norman A. Stoll (6th OC), recently announced the opening of of-

fices for the practice of law in the Failing Building, Portland 4. Capt. Stoll has been General Counsel to the Bonneville Power Administration.

Col. Benjamin G. Fleischmann (3rd Off), is busily engaged in research to substantiate the claim that the Portland, Oregon Chapter of the Reserve Officers Association of the United States, having been organized on May 3, 1921, is the first chapter of that Association.

Utah

Brig. Gen. Franklin Riter of Salt Lake City was installed as Worshipful Master of the Mt. Moriah Lodge No. 2, F. & A. M. at the annual banquet of the Lodge on December 20, 1954. Calvin A. Behle (1st CT) who has been Grand Chaplain was installed as a Trustee of the Lodge.

Wisconsin

Lt. Charles E. White, having recently completed a tour of extended active duty, has resumed the private practice of law as a member of the firm of Davison & White with offices in the Tremont Building, River Falls.

In Memoriam

The members of the Judge Advocates Association profoundly regret the passing of the following members whose deaths are here reported and extend to their surviving families and relatives deepest sympathy:

Lt. Col. Max Felix of Los Angeles, California, died October 6, 1954. Col. Felix, a charter member of the Association, was at his death engaged in general practice as a member of the firm of Lawler, Felix and Hall.

Capt. William S. Begg, a charter member of the Association, died November 18, 1954. Capt. Begg engaged in the private practice of law with offices in New York City.

