

The Judge Advocate JOURNAL



Published By
JUDGE ADVOCATES ASSOCIATION

An affiliated organization of the American Bar Association, composed of
lawyers of all components of the Army, Navy, and Air Force

312 Denrike Building

Washington 5, D. C.

JUDGE ADVOCATES ASSOCIATION

Officers for 1954-1955

GORDON SIMPSON, Texas	President
ROBERT G. BURKE, New York	First Vice President
THOMAS H. KING, Maryland	Second Vice President
FREDERICK BERNAYS WIENER, District of Columbia	Secretary
JOHN W. AHERN, District of Columbia	Treasurer
JOSEPH F. O'CONNELL, JR., Massachusetts	Delegate to A. B. A.

Directors

Nicholas E. Allen, Md.; Louis F. Alyea, D. C.; Joseph A. Avery, Va.; George W. Bains, S. C.; Edward B. Beale, Md.; William H. Beck, Jr., Ga.; Oliver P. Bennett, Iowa; Ralph G. Boyd, Mass.; Eugene M. Caffey, D. C.; Charles L. Decker, Va.; Reginald Field, Va.; Osmer C. Fitts, Vt.; Edward F. Gallagher, D. C.; Abe McGregor Goff, D. C.; Reginald C. Harmon, D. C.; William J. Hughes, Jr., D. C.; J. Fielding Jones, Va.; Arthur Levitt, N. Y.; Ira H. Nunn, D. C.; Allen W. Rigsby, Col.; John Ritchie, III, Mo.; Fred Wade, Pa.; S. B. D. Wood, D. C., Clarence L. Yancey, La.

Executive Secretary and Editor

RICHARD H. LOVE
Washington, D. C.

Bulletin No. 20

July, 1955

Publication Notice

The views expressed in articles printed herein are not to be regarded as those of the Judge Advocates Association or its officers and directors or of the editor unless expressly so stated.

TABLE OF CONTENTS

	PAGE
Fallacious Attacks Against the Code	1
Tyranny by Treaty	8
The 1955 Annual Banquet and Meeting	17
A 1955 Directory of Members	17
The Annual Reports on UCMJ	18
Hoover Commission Recommendations	22
Recent Decisions of the Court of Military Appeals	24
Notes on Current Procurement Opinions	37
Letter to the Editor	41
New Stars in the Air Force JAGD	46
Book Review	52
What the Members Are Doing	54

Published by the Judge Advocates Association, an affiliated organization of the American Bar Association, composed of lawyers of all components of the Army, Navy, and Air Force.

312 Denrike Building, Washington 5, D. C. - STerling 3-5858

Fallacious Attacks Against the Code

By Henry M. Shine, Jr.*

Since the Spring of this year, attacks on the Uniform Code of Military Justice have multiplied in frequency. The sources of such attacks have ranged from inspired newspaper columnists to carefully selected members of Congress. Presumably the opinions and facts on which such attacks are based are derived from either The Judge Advocates General themselves, JAG officers and legal specialists, or high ranking officers of the Services who are not attorneys.

Unfortunately we have yet to hear sufficiently from those who have made the Code work, and work it has.

The general line of attack is three-fold. It dwells on the increased costs to the Services since the Code became effective in 1951; it bemoans the diminution in "combat effectiveness", or it alleges great delays. All too frequently there is a cautiously veiled inference that the Court of Military Appeals is the chief cause for delay and increased costs.

Let us briefly analyze the three-pronged assault.

As yet a truly objective all-inclusive cost analysis has not been presented by any of the Services. Last year The Judge Advocate General of the Air Force evaluated costs both before and after the adoption of the Code in an address he presented before the Annual Meeting of the Judge Advocates Association.¹ During the course of his remarks, he compared relative costs under the Elston Act and the Code. The salaries of the three general officers in the Judicial Council were not included because "all had full-time jobs exclusive of their Judicial Council work." One is prompted to ask: Did not AW 50, by law, specifically create the Judicial Council and therefore should service on it have been a primary duty and not one of a collateral and secondary nature? In addition, in order to serve on the Air Force Judicial Council, it was necessary to

* Mr. Shine, until recently Assistant to Commissioner Robert G. Storey of the Hoover Commission, is a member of the American Bar Association's Special Committee on Military Justice and the Federal Bar Association's National Committee of Military Law and Justice. The author acknowledges with thanks the technical assistance of JAG officers and legal specialists, both active and reserve, who aided in the preparation of this paper. The opinions expressed are those of the author.

¹ See "Progress Under the Uniform Code", an address before the Annual Meeting of the Judge Advocates Association on August 18, 1954 and reported in Bulletin 18, October 1954, Page 10, the Judge Advocate Journal.

promote three colonels to the rank of general officers.

Volume 4 AFCEM contained Judicial Council opinions that were published some time after the Code went into effect leading one to conclude that Judicial Council members were heavily burdened with dual responsibilities.

Six Air Force Boards of Review were in existence under the Elston Act and seven or eight under the Code. Can one rightfully infer that the Appellate Counsel's costs are solely increased by the creation of a Court of Military Appeals when 46% of the Boards of Review cases in fiscal 1954 utilized appellate counsel and only one case in 1600 was decided by the Court? In view of the 50% increase in size of the Air Force during the period analyzed by General Harmon, it is gratifying to note that one additional Board of Review was required for an increase of only 16%!

According to the annual reports of The Judge Advocate General of the Air Force there were 3,744 records of trial received in his office for review pursuant to Article 66 during 1954 and 4,933 during 1953, an appreciable decrease, which might provide an opportunity for a reduction in the number of JAG officers without reverting to the Elston Act system—yet assuring reduced costs!

The Navy for the same periods reviewed 7,196 records in 1954 and 9,542 in 1953. During the same years the total population (Navy and Marines) was 949,588 in 1954 and 1,043,659 in 1953. It is heartening to find that the percentage of cases reviewed dropped 24% while the strength of the Navy was reduced only 9%!

Still another attack via the March 24, 1955 column of Hanson W. Baldwin in the New York Times is made by The Judge Advocate General of the Navy. A figure of \$158 million in costs to the Services under the Code is cited. Is it not true that a major portion of such expenses prevailed prior to the Code? Should one believe that the \$320,000 annual cost for the Court of Military Appeals, plus "wages paid prisoners" have appreciably made the "costs enormous"? The \$158 million estimate is meaningless unless comparable statistics are given for operations under the AGN, AW and the Elston Act. Such comparisons should also show population figures, the salary and allowance increases in the Services and those costs which may be attributed to increased prices, e.g., equipment and supplies. Lest one believe that there have been "legal empires" created, the Navy, with the smallest number of full-time lawyers, provides adequate refutation for such allegations. In 1949, Admiral George L. Russell, then the Navy's Judge Advocate General, testified during hearings on the proposed Code that there were 239 regular law specialists and 29 reserve law specialists or a total of 279. The Navy's population was 449,175. During 1954 the Navy had 411 regular and reserve law specialists and a population of 725,720; increases of 132 and 376,545, respectively. Can one, with intellectual honesty, allege that "legal empires", with concurrent huge costs have evolved when there is practically an identical ratio of law specialists to population?

Time lags and paperwork could be reduced if the words of Admiral

Robert J. White are heeded: ". . . in a substantial number of cases, prisoners are held for unreasonable periods of time before the court-martial, despite Article 10 which commands 'immediate steps' to try or dismiss the charges. *Such unreasonable delays are due in large part to carelessness and negligence in making ordinary reports promptly and correctly.*"² (Emphasis supplied). In view of Admiral White's participation as a Senior Member, Board of the Study of Disciplinary Practices and Procedures of the United States Navy (1953) and because he is both a lawyer and a chaplain, additional comments of his are in order:

"Moreover, some officers still need a sharp reminder that the sufficiency of available evidence to conviction is a *question of law and not of policy*, and that *the law demands a trial without unreasonable delay.*" (Father White's emphasis.)³

The subject of "procedural delays" under the Code again prompts one to ask: "What were the time lags during the early World War II years in the Army and Navy before enough civilian lawyers had donned uniforms in efforts to cut back the interminable delays that then prevailed in both Services?"

Further, "built-in" delays can hardly be attributed to the Court of Military Appeals. The Court's aver-

age time is far superior to any function of the Services.

It is true guilty plea reviews are time-consuming and the respective Judge Advocates General and the Court are agreed that remedies are in order.⁴

Of course, any study of delays must include analysis of the workability of the Manual for Courts-Martial. Revision of the Manual for Courts-Martial is within the province of the respective Judge Advocates General, and the Code should not be subject to attack because of the administrative technicalities developed by the respective Services in the preparation of the Manual. Fortunately the Court of Military Appeals has not permitted boundless reliance on the Manual especially when such interpretations would be extensions of military law in derogation of principles of the Code.

Finally, we are faced with the "chamber-of-horrors" argument about "combat effectiveness". Would not disciplinary problems with concurrent need for courts-martial be considerably reduced if the morale of the Services was higher? Proudly the Coast Guard says:

"The continued decline of an already small incidence of courts-martial bears witness to the existence of a healthy state of morale among the personnel of the Coast Guard. It also reflects

² Volume 28, St. John's Law Review, Page 22, December 1953.

³ *Ibid.*

⁴ See Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury, January 1, 1954 to December 31, 1954, Page 5.

a diminution in AWOL offenses, which perennially constitute the bulk of all court-martial charges."⁵

Even though the Coast Guard is the smallest Service and operates under different conditions, its ratio of only 8.3 enlisted men per 10,000 tried by general court-martial is remarkable. Significantly, Coast Guard officials find no individual fault with the Code.

Turning again to Admiral White's comments, he states "faulty leadership in higher echelons usually exists in situations involving low morale and a high rate of disciplinary offenses."⁶ This leads me to conclude that the Code is frequently a whipping boy for those officers who either fail to understand the Code or are at least not attempting to make it work.

Closely allied to the charge about combat effectiveness is the strong plea, especially by the Navy, for greater authority for non-judicial punishment by commanding officers. Brigadier General Thomas R. Phillips, USA (Ret.), Military Analyst of the St. Louis Post-Dispatch, in a June 12 column points up the specious reasoning behind such proposals:

"The advocates of increasing the commanders' personal authority to punish use the paradoxical argument that this is for the benefit of the men. Their record

will not be stained by courts-martials, it is claimed. *There is some validity to this argument but not much.* The good leader maintains discipline by developing esprit and by giving his men pride in their efforts. He finds incentives much more potent than punishment.

"The poor leader resorts to punishment. If he has more authority, he will punish more. The person being punished may appeal to the next higher commander or may demand a court-martial. In the enlisted ranks, however, these privileges are not generally used. A majority of the experienced officers with whom the writer has discussed this proposal believe that while the number of courts-martial might be reduced some by increasing the commanders' authority, the possibility of abuses of it are so great that it far outweighs any benefits that might accrue." (Emphasis supplied)

The words of Admiral A. W. Radford would appear to contradict those Judge Advocates General who believe that the Code could not "withstand the mobilization" for war. Admiral Radford, while still the Commander-in-Chief of the U. S. Pacific Fleet, reported to the Chief of Naval Operations and to the present Judge Advocate General: "The Uniform Code has not affected combat operations in Korea."⁷

Admiral Radford also severely criticized the "technicalities and confusion in the Manual" and suggested that "consideration must be given to

⁵ *Supra*, note 4, Page 73.

⁶ *Supra*, note 2, Page 28.

⁷ See "Report of Survey of the impact of the law (UCMJ) and its implementing regulations upon ships operating under war conditions," published as Enclosure (1) to letter dated 1 October 1952, ser. 6733, from Commander in Chief, U. S. Pacific Fleet, to Chief of Naval Operations, Judge Advocate General and Chief of Naval Personnel.

eliminating the procedures and paperwork which are not essential in order to afford justice." General Eugene M. Caffey, Judge Advocate General of the Army, in his 1954 report on the Code,⁸ after stating that the Code "marks a great advance in the field of military justice," doubts "whether it can be readily adapted to wartime conditions." His chief concern with respect to appellate review is the need for decentralization. He believes there should be Boards of Review in the field, thereby precluding the necessity for sending to Washington from all over the world records of general courts-martial. Article 68, if implemented by the President, would permit The Judge Advocate General to establish in a branch office one or more Boards of Review. However, the authority of such a Board, as envisioned by Article 68, would relate to "all cases involving sentences not requiring approval by the President."

Any decentralization, regardless of degree of authority conferred, should be a progressive step in reducing both time lags and potential harm to combat effectiveness.

Apparently General Harmon and Admiral Nunn have changed their minds about the United States Court of Military Appeals and the Code. During 1949 hearings on the Code, the following exchange took place between Senator Morse and General Harmon:

Senator MORSE: "You have no particular objection to the so-

called Military Court of Appeals of the proposed bill?"

General HARMON: "Excepting the one I mentioned that I think it should be either military or civilian, and it should turn on the question of qualifications. The test should be the qualification of the man rather than the color of suit he happens to be wearing."⁹

In his latest individual report the General believes:¹⁰

"... in the event of a global war, the present excessive costs in both time and money would be multiplied many times and a very appreciable part of such increase would be caused by the necessity of transporting court-martial records from the various theaters of operation to Washington every time the accused desires to petition the United States Court of Military Appeals for a grant of review under Article 67(b)(3)."

On the other hand, Admiral Nunn, as recently as 1952, while hearings were held relative to his appointment as the Navy's Judge Advocate General, had the following colloquy before a Subcommittee of the Committee on Armed Services of the United States Senate:

Senator LONG: "I was somewhat dismayed, having had occasion to review, without seeming to reflect upon any officers under whom I served, court mar-

⁸ *Supra*, note 4, Pages 21 and 22.

⁹ See Page 291 of "Index and Legislative History of the Uniform Code of Military Justice." (1950)

¹⁰ *Supra*, note 4, Page 51.

tial procedure in the Navy. I hope that has been improved upon. I gained the impression that in many cases particularly summary courts martial and in some instances general courts martial proceeded from simply getting into the record some admissible evidence and relating that point forward upon an irrefutable presumption that, for example, if a man had been away 30 days he was guilty of desertion, although it is entirely likely that the young man may have intended to return, but once that presumption was established there was no hope of the young man overcoming it."

"I was successful myself in having one of those, at least, reduced or found guilty of a lesser charge.

"I certainly hope that we may have some improvement in that."

Admiral NUNN: "Senator, those situations when they existed were most deplorable, and it is my belief that the situation is greatly improved if not perfected under the new Uniform Code."

Senator STENNIS: "Do you think that helped—the new Code?"

Admiral NUNN: "Yes sir; I do think it helped. I am sure it helped. There is no doubt about it."¹¹

Fortunately the Code has helped with respect to the presumption of desertion that Senator Long inquired about. As recently as October 15, 1954, the Court of Military Appeals, in the *DEAIN* case (5 USCMA 44) which, as a United States Navy general court-martial, had dealt with desertion, found that Admiral Raddock, President of the Court, "was satisfied to accord the accused the benefit of the presumption of innocence *only* until *some* evidence was introduced" (Emphasis supplied).

Without review by an independent civilian-manned judiciary, which the Code provides, is it not possible that such a presumption as Admiral Raddock's would have gone unchallenged? Safeguards developed by the *DEAIN* case are not rare. One has only to peruse the facts and decisions in the *ROSATO* (3 USCMA 143), *BURTS* (3 USCMA 418), *LITTRICE* (3 USCMA 487), *FERGUSON* (5 USCMA 68), *ZAGAR* (5 USCMA 410) and *STRINGER* (5 USCMA 122) cases to realize that the Court and the Code have assured a system of military justice in which the American public and the accused serviceman may repose the utmost confidence.

Immediate, conscientious and sincere efforts should be made to remedy present administrative delays in the field. Responsible senior officers also must insist that all officers realize that the *Code did, does and can work*. It is beyond question that the procedural defects that are now evident

¹¹ See Page 53, "Nomination of Rear Admiral Ira H. Nunn to be Judge Advocate General of the Navy", Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, Eighty-Second Congress, May 1952.

after a four year period can be effectively and efficiently eliminated or reduced. Those who would revert to the AGN, AW or Elston Act are urged to heed the sage and fair words of the Honorable Paul J. Kilday, member of the House Armed Services Committee. Congressman Kilday speaking before the National War College, Washington, D. C., on February 24, 1955 said:

"The Congress has passed and placed into operation a uniform code of military justice. I am fully aware of the view of some officers of our Armed Forces that this code has constituted a severe handicap in performing their duties and functions of command. The code has been in effect long enough now that Congress should take another look at it. We should evaluate how effective it has been, how restrictive it has been, and what amendments may be necessary or desirable. On

*the other hand, I know of many criticisms leveled at the code which should be pointed elsewhere. I fear there is a tendency to charge to the code restrictive departmental regulations which were not promulgated because of the code. Likewise, it may be that the code is an easy scapegoat for some deficiencies of command. I make you a fair proposition: While Congress is reappraising the code and its work in formulating the same, you reevaluate the criticisms you have made of it, and determine how any thereof should be directed elsewhere."*¹² (Emphasis supplied)

In conclusion, this writer suggests that the critics of the Code and Court put an end to their constant attacks of a vague and carping nature. They should rely primarily on internal administrative remedies for a betterment of the military justice system.*

¹² Congressional Record, Vol. 101, No. 34, Appendix, A-1198, February 24, 1955.

* Editor's note: For recent comment upon the Uniform Code, see: "Military Justice Code" by Hanson W. Baldwin, New York Times, 24 March 55; "New Military Justice" by Hanson W. Baldwin, New York Times, 25 March 55; "Military Justice Code Revision Urged by Nunn", Norfolk Ledger-Dispatch, 26 March 55; "The Uniform Code of Military Justice Should Be Reviewed Immediately by Congress", Speech of Hon. James E. Van Zandt, M. C., Congressional Record—Appendix, 16 May 1955, pp. A 3326-27; "Conflict Seen Over Military Justice Code" by John G. Norris, Washington Post, 3 June 55; "Reforming Military Justice", an editorial, Washington Post, 5 June 55; "Military Justice" by John G. Norris, Washington Post, 6 June 55; "The Military Code of Justice Is in Need of an Immediate Congressional Review", Speech of Hon. James E. Van Zandt, M. C., Congressional Record—Appendix, 8 June 55; "First Things First, and Fast!", an editorial, Navy Times, 11 June 55; "Scrap Justice Code, Services Urge; Judges Promise a Fight", Navy Times, 11 June 55; "Coast Guard Crime Down", Navy Times, 11 June 55. See also HR 6583, 84th Cong. 1st Session (Brooks); and S 2133, 84th Cong. 1st Session (Russell); "Justice Comes to the GI", by Irving Ross, Pageant, August 55.

Tyranny by Treaty

By Oliver P. Bennett and Rolla C. Van Kirk *

One hundred and seventy-nine years ago our country proclaimed the independence of the United States of America and all her citizens. Foreign potentates and the barratorious empires of Europe were put on notice that Americans would no longer tolerate the evil practices of laws over which they had no control. To protect our people from the wretched canons of remote kingdoms our ancestors fought and died in a war called the "Revolution". To protect our ships and sailors and soldiers from the humiliations imposed upon them by foreign monarchs our ancestors fought and died in a war called the "War of 1812". In both of these wars the men of the National Guard made the ultimate sacrifice.

In 1951, one hundred and seventy-five years after our people secured their independence and were protected by the Bill of Rights, our Department of State negotiated for the surrender of the birth rights of those who wear the uniform of the United States. On July 15, 1953, the Senate of the United States ratified a vicious treaty which defamed and disparaged the rights of freeborn men who happen to be in the service of this formerly sovereign country.

Yes, it is true that American soldiers and Guardsmen abroad are sub-

ject to trial under foreign law and denied the constitutional protections for which many generations of militia men have gallantly laid down their lives. Yes, you G. I.'s and Guardsmen are now subject to the injustices that are handed down by magistrates and juries in those foreign lands where the people write "Yankee Go Home" on every wall and building. Yes, it is true that the kangaroo and Star Chamber court procedures; local police brutalities; and in some instances communist judges and juries are the rewards that our men in uniform earn by serving under the flag of the United States in Europe and Japan. Yes, it is indeed a sad travesty on Justice to deprive American troops overseas of the protection of the Government and Constitution for which they must give their very lives to defend. Above all it should not be forgotten that our boys in uniform are not abroad by choice but rather they are ordered overseas. And it is not inaccurate to state that every American serviceman abroad is a potential victim of the same horrible fates which befell Harry Oatis and Bob Vogeler.

Unconstitutionality

Every lawyer educated in this country knows well the two following

* Oliver P. Bennett of Mapleton, Iowa, a past president of the Association is a Brigadier General of the Iowa National Guard (Retired) and R. C. Van Kirk is a Colonel (Retired) of the Nebraska National Guard.

principles of American constitutional jurisprudence:

(1) That when a treaty conflicts or contravenes the United States Constitution the treaty becomes null and void, and of no effect.

(2) That all powers delegated to one branch of the national government cannot be re-delegated, but must be performed by that constitutionally appointed body. This second principle is significant in that if Congress is given certain powers and jurisdiction, Congress cannot transfer, grant, or convey to any other organ of the government, or any other government, the power given exclusively to it.

Every lawyer knows that Article 1 of our Constitution sets forth the powers of Congress, in the following manner: "ALL LEGISLATIVE POWERS HEREIN GRANTED SHALL BE VESTED IN A CONGRESS OF THE UNITED STATES". Further, Article 1, section 8, of our Constitution states, "THE CONGRESS SHALL HAVE POWER TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES. TO PROVIDE FOR ORGANIZING, ARMING AND DISCIPLINING THE MILITIA, AND FOR GOVERNING SUCH PART OF THEM AS MAY BE EMPLOYED IN THE SERVICE OF THE UNITED STATES".

Article II, section 2 provides: "THE PRESIDENT SHALL BE THE COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES, AND OF THE MILITIA OF THE SEVERAL STATES, WHEN CALLED INTO THE ACTUAL SERVICE OF THE UNITED STATES."

When the Bill of Rights was made a part of the Constitution, the Militia was protected against abolition by the second amendment which states, "A WELL REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE RIGHT OF PEOPLE TO KEEP AND BEAR ARMS, SHALL NOT BE INFRINGED."

The Fifth amendment provides, "NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES OR IN THE MILITIA WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; (UNDERSCORING SUPPLIED) NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB." Thus, with the aforesaid quotations from the Constitution clearly in mind, it can be seen that Congress and Congress alone can make and prescribe the rules and regulations under which our men in uniform or the National Guard, when on active duty, must abide.

Every lawyer knows that the President makes treaties and that the Senate ratifies these treaties by giving their advice and consent. Thus, the NATO Status-of-Forces Treaty was made by the executive branch of our government and ratified by the United States Senate. Article VII of the aforementioned treaty grants to the NATO countries and Japan ". . . EXCLUSIVE JURISDICTION

OVER MEMBERS OF A FORCE OR CIVILIAN COMPONENT AND THEIR DEPENDENTS WITH RESPECT TO OFFENCES RELATING TO THE SECURITY OF THAT STATE, PUNISHABLE BY ITS LAW, BUT NOT BY THE LAW OF THE SENDING STATE." Furthermore a subsequent portion of the treaty gives the receiving states primary jurisdiction over certain other offences. Thus under the agreements made by this treaty our servicemen overseas are made subject to the effects of foreign laws and the bizarre procedures of alien tribunals. Our soldiers must therefore abide by the rules and regulations made for them by Congress, and then they must also abide by the grotesque and anomalous laws of whatever country in which they happen to be stationed, because if a violation of a foreign law occurs the alien courts have jurisdiction. Consequently, our service men abroad are not at this time exclusively under the rules and regulations of Congress as the aforementioned mandate of the United States Constitution prescribed. It was the President and the Senate that made this treaty, not the Congress. Alien kingdoms and foreign potentates are making the regulations under which our boys overseas must endure, not the Congress as the Constitution exclusively authorized. Yet while this situation continues it is also in express violation and contravention of the United States Supreme Court doctrine laid down in *Geofroy vs. Riggs*, 133 U. S. 258, which case held that:

"The treaty power, as expressed in the constitution, is in its

terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and that of the States. *It would not be contended that it extends so far as to authorize what the constitution forbids.*" (Underscoring supplied)

Therefore, after an inspection of our Constitution, every rational man is compelled to conclude that executive agreements and treaties which surrender American G. I.'s to the local Star Chambers of the NATO countries and Japan, are in direct violation of the exclusive Congressional exercise of power to make the rules for the regulation of the land and naval forces.

Effect on the National Guard and Air National Guard

You may ask,—why the interest in the welfare of the National Guard and Air National Guard of the several States, Territories, Commonwealth of Puerto Rico and the District of Columbia by two old National Guard lawyers now retired? We will tell you. The National Guard was ordered overseas in two World Wars and Korea, and our sons and nephews who are presently in the National Guard may be again so ordered. We not only have their welfare and protection in mind, but the welfare of the entire National Guard which we have served faithfully for a total of over sixty years and naturally, have acquired a deep affection for it through the years.

Who is the National Guard? This question can be answered far more eloquently by quoting an article written by the National Guard Bureau and published by the National Guard Association, "The Nation's National Guard", which reads as follows:

"Civilian in Peace, Soldier in War . . . of security and honor, for three centuries I have been the Custodian, I am the Guard.

"I was with Washington in the dim forests, fought the wily warrior, and watched the dark night bow to the morning. At Concord's bridge, I fired the fateful shot heard 'round the world. I bled on Bunker Hill. My footprints marked the snows at Valley Forge. I pulled a muffled oar on the barge that bridged the icy Delaware. I stood with Washington on the sun-drenched heights of Yorktown. I saw the sword surrendered . . . I am the Guard. I pulled the trigger that loosed the long rifle's havoc at New Orleans. These things I knew—I was there! I saw both sides of the War between the States—I was there! The hill at San Juan felt the fury of my charge. The far plains and mountains of the Philippines echoed to my shout . . . On the Mexican border I stood . . . I am the Guard. The dark forest of the Argonne blazed with my barrage. Chateau Thierry crumbled to my cannonade. Under the arches of victory I marched in legion—I was there! I am the Guard. I bowed briefly on the grim Corregidor, then saw the

light of liberation shine on the faces of my comrades. Through the jungle and on the beaches, I fought the enemy, beat, battered and broke him. I raised our banner to the serene air on Okinawa—I scrambled over Normandy's beaches—I was there! . . . I am the Guard. Across the 38th Parallel I made my stand. I flew MIG Alley—I was there! . . . I am the Guard.

"Soldier in war, civilian in peace . . . I am the Guard.

"I was at Johnstown, where the raging waters boomed down the valley. I cradled the crying child in my arms and saw the terror leave her eyes. I moved through smoke and flame at Texas City. The stricken knew the comfort of my skill. I dropped the food that fed the starving beast on the frozen fields of the west and through the towering drifts I ploughed to rescue the marooned. I have faced forward to the tornado, the typhoon, and the horror of the hurricane and flood—these things I know—I was there! . . . I am the Guard. I have brought a more abundant, a fuller, a finer life to our youth. Wherever a strong arm and valiant spirit must defend the Nation, in peace or war, wherever a child cries, or a woman weeps in time of disaster, there I stand . . . I am the Guard. For three centuries a soldier in war, a civilian in peace—of security and honor, I am the custodian, now and forever . . . I am the Guard."

We cannot believe that our Founding Fathers, when they were so careful to guard the rights of our National Guardsmen as to their State status and would give Congress authority only to govern them while in the service of the United States, that they ever intended that the President could call or order these lads into the service of the United States and make them subject to be governed by some foreign power.

Sec. 58, National Defense Act, as amended, provides that a young man, seventeen years of age, may be enrolled in the National Guard or the Federally recognized organized Militia of the several States, Territories, Commonwealth of Puerto Rico and the District of Columbia. As a result of this age provision, the National Guard and Air National Guard are composed of thousands of young men who have not reached their majority and are not eligible for the draft; yet our Senate of the United States made these youthful guardsmen, while on active duty, and others in the military service, subject to trial by foreign judges and courts with no constitutional rights guaranteed to them.

Robbery of the Rights of Our Servicemen

Every minute of every day a swelling crescendo of parents, wives, and families are asking the question: "Why were our boys robbed of their rights?" The international heroes who drafted and approved this treacherous NATO Status-of-Forces Treaty have only one answer to give, that "Appeasement is Cooperation". Therefore an examination must be

conducted to determine exactly what rights were stolen from our boys in an effort to appease and cooperate with our so-called allies. The following is an incomplete list of some of the birth-rights and safe-guards which our men in uniform unwillingly forfeit when they are ordered overseas:

(1) No presumption of innocence, but a presumption of guilt before a trial.

(2) No provision for bail.

(3) No right to trial by jury.

(4) No burden of proof for the prosecution to overcome.

(5) Not necessary to prove guilt beyond a reasonable doubt.

(6) Trials may be held in secret.

(7) No right of pardon or executive clemency.

(8) No privilege against self incrimination.

(9) No provisions for due process of law.

(10) No privilege of appeal.

(11) No provisions against cruel and unusual punishment.

(12) No writs of Habeas Corpus available.

(13) Possibility of double jeopardy (G. I. Joe can be tried, convicted, and punished by any NATO country or Japan, and then after his release from alien incarceration he can then be retried, re-convicted, and re-punished by our military courts for the exact same crime).

Under this unholy Status-of-Forces Treaty our boys are denied the constitutional rights to which they are entitled in proceedings under the

Uniform Code of Military Justice, and which rights their ancestors fought and died to preserve. From the time of the Revolutionary War and the beginning of our Republic in 1789, until that deadly day of July 15, 1953, no American soldier, sailor, marine or National Guardsman was ever surrendered to any foreign tribunal.

Stare Decisis Et Non Quieta Movere

Many of the objections to Article VII of the unprecedented Status-of-Forces treaty can be discovered by a concise search of the revelant statutory case, and treatise law.

Schooner Exchange vs. McFaddon, 11 U. S. 116, is the first decision that warrants our examination. That action concerned a libel in admiralty in the United States District Court for Pennsylvania against the *Exchange*, in which the libelants, merchants of Baltimore, alleged that the ship had been wrongfully taken from their Captain and agent on the high seas by persons acting under orders of Napoleon, Emperor of France, and was at the date of libel, August 24, 1811, at Philadelphia; that she had not been condemned by a Court of competent jurisdiction; and praying that she be restored to the Plaintiffs, her rightful owners. The United States attorney filed a suggestion that the ship libeled was a public vessel of the French Emperor, which, having encountered stress of weather, was obliged to put into Philadelphia for repairs; that, if the ship ever belonged to the libelants, their property had been divested and became vested in the Emperor within a port of his empire according to the laws of France. The United

States attorney submitted whether the attachment ought not to be quashed and the libel dismissed.

The case went on appeal to the United States Supreme Court, where Chief Justice John Marshall delivered one of his foremost opinions. In that opinion Marshall discussed three types of instances whereby every sovereign is understood to waive the exercise of a part of that exclusive territorial jurisdiction which has been stated to be the attribute of every nation. The third classification noted by Marshall is at this time pertinent:

"A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

"In such a case, without any express declaration waiving jurisdiction over the Army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the

foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

The aforementioned remarks of the renowned Justice are not mere dicta, but rather they indicate the logical reasoning by which his decision was made. It is an inescapable fact that the essence of the *Exchange* decision is that any public armed force which enters the territory of another nation with the latter's permission enjoys an extra-territorial status.

After the Civil War the Supreme Court of the United States was again petitioned for a decision in a controversy similar to the *Exchange* case. Thus in *Coleman vs. Tennessee*, 97 U. S. 509, the Court reaffirmed Marshall's famous *Exchange* decision and went on to state that:

"It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood * * * to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions * * *." (Emphasis supplied)

The foregoing decisions of the highest judicial body in our government, plus the decision in the case of *Dow vs. Johnson*, 100 U. S. 158, illustrate beyond a doubt that the invitation or permission of the host country to enter its territories carries with it, at least unless clearly denied, an implied exemption or im-

munity of the personnel of visiting forces from the jurisdiction of the local courts and a consent to the functioning of the courts-martial system of such forces. In other words, the permission to enter carries with it an implied but none the less clear and definite consent to the exclusive jurisdiction over such forces of their own courts-martial authority.

After the aforesaid survey of the settled law no intelligent person would doubt that our boys in uniform and stationed overseas are or should be solely accountable to our own courts-martial and military law. Yet there are some "do gooders" and "one world lawyers" who fail to see the plainly printed law. It is also this group who fail to see the distinction between drafting an eighteen year old boy, or a seventeen year old guardsman and ordering them overseas, and then abandoning him to the caprices of some foreign potentate, and the wealthy American tourist who leaves his home voluntarily, goes to Europe or Japan voluntarily, and voluntarily subjects himself to alien jurisdictions. Is it not obvious that in the first instance there is no choice as to whether or not the chance of landing in a foreign dungeon should be assumed, whereas in the case of the tourist he voluntarily assumed the risk? And it is this same calibre of "feeble minded one worlders" who absolutely insist upon full and complete immunity from foreign prosecution for the employees of the State Department, who can quit and come home whenever the going gets too rough. Why should some friendless and poorly paid G. I. who is overseas and away from his home against his will be

forsaken when he is expected to lay down his life to defend the foreign peoples who are permitted by this treaty to persecute him. And compare the G. I. whose constitutional rights have been snatched away, with the high living, high paid individuals of the State Department who face only the dangers of a "hangover" and yet are completely enfolded in the protecting embraces of our Constitution and flag.

Notwithstanding the aforementioned Supreme Court decision there is additional ammunition on the side of our serviceman. Wheaton says¹: "A foreign army or fleet, marching through, sailing over, or stationed in the territory of another state, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place." Birkhimer says²: "It is well settled that a foreign army permitted to march through a friendly country, or be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place." Oppenheim says³: "Whenever armed forces are on foreign territory in the service of their home state, they are considered extra-territorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home state."

Without exception the foregoing authorities and citations vividly demonstrate the fundamental rule of international law pleaded by this article, namely: that when the armed troops of one nation enter or remain on the soil of another nation by permission, such permission carries with it extra-territoriality for the armed troops, and said troops are exempt from the civil and criminal jurisdiction of the courts of the host country.

In 1951, Congress after much research, effort and laborious study enacted the *Uniform Code of Military Justice*, and a worthy *Manual For Courts Martial, United States* was effected. Suffice to say, the manual and its included code were supposed to be the last word, final authority, and prime source of all military law under which every serviceman would be governed and the National Guard when in the Federal service, no matter how remote his foreign duty station. And to quote Senator John W. Bricker of Ohio:

"The *Uniform Code of Military Justice* permits any offense against the law of the country where troops are stationed to be treated as an offense against the Code. Article 5 of the Code provides that it shall be applicable in all places. What stronger evidence could there be of Congress' intent to make the Code applicable to every American serviceman wherever stationed."

Furthermore, extended investigation into the contents of the *Manual* reveals the following:

¹ *Elements of International Law*, Section 95.

² *Military Government and Martial Law*, Section 114.

³ *International Law*, (4th ed.), Vol. 1, Section 445.

"Under international law, jurisdiction over members of the armed forces of the United States or other sovereign who commit offenses in the territory of a friendly foreign state in which the visiting armed force is by consent quartered or in passage, remains in the visiting sovereign."

In light of the foregoing quotations can it be denied that there has been a rape and pilferage of the Constitutional rights of the American soldier, sailor or marine overseas. And in this connection it should be remembered that the Code, the law under which every serviceman lives, is read, interpreted, and illustrated to every G. I. not only upon his entrance into the service but also every six months thereafter. Our servicemen know the law under which they should be governed for it is explained to them by competent Judge Advocate General corps officers, but how many attorneys are capable of unraveling the intricacies of the Criminal Code of Japan, or the Islamic Code of Turkey, or the Mohammedan law of Morocco where G. I. Joe can get his hand cut off for stealing an apple or walking out of a restaurant while forgetting to pay his bill. It is submitted that few, if any, American JAG officers are capable of the Herculean task of explaining the aforesaid foreign laws which all will agree is the very minimum that ought to be done in behalf of our servicemen.

The *Omaha World-Herald*, the most widely read and quoted daily newspaper in our part of the United States, declared in an editorial under date of January 26, 1955, titled "It's a bad treaty", that:

"* * * The treaty is morally wrong and goes against the grain of patriotic American Citizens. It should be denounced, and jurisdiction in such cases should be returned to American military authorities."

Conclusion

The Status-of-Forces Treaty, unprecedented in the annals of International Law and contrary to the settled doctrines of American Constitutional Law, reflects a callous disregard for the rights of American Armed Forces personnel. The time has arrived when TYRANNY BY TREATY is upon us. And as Senator John W. Bricker of Ohio said: "Reasonable and honest men may differ in regard to the number of dollars Congress may give away with safety. But to give away the rights of Americans serving in the uniform of their country is unthinkable."

The fact is, our flag follows our soldiers; then we submit that our Constitution must continue to follow the flag as it has in all of our historic endeavors. The American serviceman who must if necessary die to protect the flag and the Constitution, deserves to have at least the unfettered protection of our two most valuable national assets.*

* See Congressional Record—Appendix, 25 May 1955, pp. A 3646-49, extension of remarks of Hon. H. R. Gross, M. C. See also 15 JAJ 1, 16 JAJ 20, 18 JAJ 15, for other articles expressing various views upon this subject matter.

The 1955 Annual Banquet and 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. The committee on arrangements is headed by Colonel James S. Clifford, Jr., of Philadelphia, with Captain Robert G. Burke and Colonel Fred Wade as committeemen.

The Annual Banquet will be held at the Officers Club, Philadelphia Naval Base, League Island, on Tuesday, August 23rd. Beginning at 6:30 p. m., there will be a reception and cocktail hour followed by supper. A fine menu has been planned. Dress will be informal, and, of course, your ladies and guests will be welcomed. Bus transportation from the Bellevue-Stratford Hotel in downtown Philadelphia and return is being provided for those without private transportation.

The guest speaker will be the Honorable Hugh M. Milton, II, Assistant Secretary of the Army for Manpower and Reserve Forces. Colonel Gordon

Simpson of Dallas, Texas, President of the Association, will serve as toastmaster. There will also be entertainment provided.

The price per cover will be \$6.00, which includes the full cost of the dinner and cocktails. To assist the Committee in its planning and to assure your own reservations, you are urged to order your tickets as soon as possible by sending your covering check to the Association at 1010 Vermont Avenue, N. W., Washington 5, D. C.

The Annual Business Meeting will convene at 4:00 p. m. on Wednesday, August 24th in the court room of the United States Circuit Court of Appeals for the Third Circuit in downtown Philadelphia. Among others of prominence in the field of military law, there will be in attendance at the meeting the Judges of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces.

Make your plans now to be in Philadelphia August 23-24.



A 1955 DIRECTORY OF MEMBERS

The Association is preparing a 1955 Directory of Members for distribution this Summer. 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.

THE ANNUAL REPORTS ON UCMJ

Article 67g of the Uniform Code of Military Justice requires the Judges of the United States Court of Military Appeals, The Judge Advocates General of the Armed Forces and the General Counsel of the Treasury Department, to meet annually to survey the operations of the Code and to report to The Congress on the status of military justice and to make proposals for legislative improvement. Reports for the 1954 calendar year were recently made and are here digested.

Joint Report

Because of irreconcilable conceptual differences between the Judges and The Judge Advocates General of the Armed Forces, no unanimous recommendations beyond those made in the last annual report* are made. Though the principles of those earlier recommendations are reaffirmed, it is reported that The Judge Advocates General desire some modifications even as to them. As an appendix to the report, the previous seventeen recommendations are reprinted. A hearing before the Armed Services Committees of the Senate and the House of Representatives is suggested. Separate reports have been made by the Court and each of the Services.

Report of the Court of Military Appeals

The Court reaffirms its approval of the seventeen recommendations made in the joint report last year, commends them to the consideration of the Congress, and requests favorable action. It does not favorably recommend any of the additional proposals now made by The Judge Advocates General because of its belief that a need for them is not demonstrated or that they are retrogressive and in derogation of substantial rights of members of the Armed Forces. Although the report does not set forth reasons for non-concurrence with the proposals of The Judge Advocates General, it does indicate that it considers those proposals "unnecessarily hostile to the purposes and intent of the Uniform Code".

Report of The Judge Advocate General of the Army

The Uniform Code of Military Justice is commended, in its main aspects, as a great advance in the field of military justice because it establishes one standard of behavior for all members of the armed services and, through the Court, establishes a source of final and authoritative

* See JAJ No. 17, June 1954, p. 5, for a full text of the Annual Report made in May 1954 and the 17 recommendations there reported. See also JAJ No. 17, June 1954, at page 15.

interpretation of the military criminal law. This report questions whether the Code would work in time of war, however, because of other principles, mostly administrative, embodied in it. Four general recommendations are made.

1. The appellate review system should be decentralized. The report recites the necessity of sure and speedy punishment for wrong doing as a necessary ingredient of discipline and the effect on wartime morale of a failure to have contemporaneous punishment for military offenses. It states that currently more than a year elapses between trial and execution of the sentence following review by the Court of Military Appeals. To reduce the time consumed in appellate review, it is recommended that Boards of Review be removed from Washington and located in Army areas and theaters of operation overseas, so that the records of trial would not have to be forwarded to Washington from all over the world before commanding generals could order sentences into execution. It is suggested that where substantial differences between Boards of Review on legal questions develop, it would then be sufficient to have them resolved by The Judge Advocate General or certified to the Court.

2. The range of non-judicial punishments and the authority of inferior courts should be enlarged. The report states that the Code imposes so many formalities on military justice and restrictions on commanding officers that to enforce discipline many petty and minor offenses result in special and general court-martial trials when they could better be dis-

posed of by the paternalistic application of non-judicial punishment and trials by summary court-martial if commanding officers had more authority in the range of punishments and if the jurisdiction of the inferior court was extended to persons who may now object to trial by summary court. Changes in the Code to effect these results would greatly relieve the military judicial system and improve discipline.

3. The law officer should be restored as a voting member of the court. As a member of the court, he can be of greater assistance to the other members in explaining intricate legal problems involved in trials.

4. Pre-trial investigations should be less formal. The present Article 32 should be simplified so as to permit less formalized pre-trial investigations with a saving of time and effort.

Report of The Judge Advocate General of the Navy

The report expresses the opinion that the Code in its present form could not meet the strain of war and full mobilization, and that the resulting failure of the military criminal process would cause such loss of discipline and order as to jeopardize the success of military operations. Further, it is reported that under the Code, men are now court-martialed for offenses that could be handled more effectively and fairly by commanding officers if they had authority to administer the more adequate non-judicial punishments that they had prior to the Code.

Legislation is proposed to make many detailed changes in the Code,

but, principally, these proposals are to increase the range of non-judicial punishment and the class of persons who may administer it, to make the law officer a voting member of the general court-martial, to permit under certain circumstances, and with certain limitations the trial of cases by qualified one member courts, to increase the range of punishments of summary and special courts-martial, to remove the disqualification of investigating officers, law officers and court members from subsequently acting as trial counsel, to provide for a waiver of pre-trial investigations in certain cases, to permit earlier execution of portions of sentences not requiring review, to do away with necessity of review by Boards of Review in "guilty plea" cases, to require certification by the defense counsel of materiality and substantial prejudice in all cases of petition to the Court of Military Appeals, to reduce to ten days the time between notice of decision by a Board of Review and petition for review by the Court of Military Appeals, and to make a new punitive article to cover "bad check" violations.

Report of The Judge Advocate General of the Air Force

This report states that so far as the Air Force is concerned, experience would indicate that military justice was more efficiently administered under the Elston Act than under the Uniform Code. The latter has resulted in a 40% increase in processing time of cases and a great increase in cost of appellate review without

any substantial increase in protection to the individual. It is estimated that in time of war and full mobilization, the centralization of appellate review in Washington would increase the expenditure of time and money to a prohibitive state. To guard against premature action, it is recommended that the Uniform Code with certain amendments be continued in effect for another year pending evaluation and study toward the end that legislation similar to the Elston Act be reframed and enacted to provide an efficient system of military justice that would work in time of war and not be over burdened in time of peace.

It is urged that the Congress take favorable action upon the seventeen recommendations of the last annual report, but with some modifications which are set forth in a proposed draft of legislative bill. Essentially, the changes recommended would increase the range of non-judicial punishments, permit trials by qualified one member courts under restrictive circumstances and within prescribed limits, limit appeals to the Court of Military Appeals by requiring a certification of "good cause" by The Judge Advocate General who would function through a qualified Judicial Appeals Board which must be applied to within ten days of notice of Board of Review action and may deny appeals only on unanimous vote, remove Boards of Review and branch Judicial Appeals Boards to the field in time of war and provide that portions of sentences not requiring review be ordered into execution when finally approved by the reviewing authority.

**Report of the General Counsel of the
Treasury Department for the
United States Coast Guard**

This report points with pride to the continued decline in an already small

incidence of courts-martial—a rate about one-seventh of that of the other services. It makes no specific additional recommendations over those heretofore reported in the 1954 annual joint report.



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.



Use the Directory of Members when you wish local counsel in other jurisdictions. The use of the Directory in this way helps the Association perform one of its functions to its membership and will help you. You can be sure of getting reputable and capable counsel when you use the Directory of Members.

Hoover Commission Recommendations Concerning Legal Services in Defense Establishment

The Commission on Organization of the Executive Branch of the Government, commonly known as The Hoover Commission, recently reported to the Congress certain recommendations with respect to legal services and procedure. Recommendations contained in this report which affect the Department of Defense are as follows:

Recommendation No. 7

Within the Department of Defense and its constituent military departments professional authority over the entire legal force and all legal services should be vested in a General Counsel retaining the present rank of Assistant Secretary of Defense. Legal advice and services to the Secretary, Deputy Secretary, and Assistant Secretaries of Defense should be furnished solely by a staff in the office of the Secretary of Defense under the direction of the General Counsel.

Recommendation No. 8

A legal career service for civilian attorneys in the Department of Defense should be developed and supervised by a Civilian Legal Personnel Committee, with tenure and continuity, acting pursuant to the policies and directives of the Office of Legal

Services and Procedure in the Department of Justice. This Committee should be composed of four members, one named by the General Counsel of the Department of Defense to act as chairman, and one named by the General Counsel of each military department. The members, except the chairman, should have had at least 8 years of Government legal service, the last 2 years of which immediately preceding appointment to the Committee should be in the department from which appointed. This career service would be a part of the legal career service for all civilian attorneys.

Recommendation No. 9

Professional responsibility for legal services in the three military departments, subject to the direction of the Department of Defense General Counsel, should be vested in the General Counsels of the Army, Navy, and Air Force, each to have the rank of Assistant Secretary. The authorization for any legal positions within, or the assignment of attorneys to any corps, bureau, command, post, or office in a military department, other than within the several Judge Advocate General's Corps, should be made only with the prior approval of the General Counsel of that department.

Recommendation No. 10

The Judge Advocates General of the Army, Navy, and Air Force should be professionally responsible to the General Counsels of their respective departments for the administration of military justice. They should also be responsible to the General Counsels for the legal work performed by uniformed lawyers in connection with military affairs, and for such other legal work as may be assigned. Each Judge Advocate General shall continue to be militarily responsible to his respective Chief of Staff, or Chief of Naval Operations.

Recommendation No. 18

The Army, Navy, and Air Force should have a Judge Advocate General's Corps or Department under the direction of Judge Advocates General. These Judge Advocates General should develop a program within the Armed Forces to recruit lawyers of ability upon graduation from law school or within 5 years thereafter for career military legal service, and to establish the corps or department on a basis of professional independence, sound promotion, and adequate compensation.

Recommendation No. 19

There should be no program affording an undergraduate legal education to officers of the Army, Navy, or Air Force. Should the need exist, Marine Corps officers not above the rank of first lieutenant (permanent or temporary) may be so trained. Each such Marine Corps lieutenant must contractually agree to remain on active duty in the Marine Corps for not less than 5 years after completion of law training and to seek admission

to the bar. If admitted, he should serve only as an officer-attorney in the Marine Corps.

Recommendation No. 20

Separate schools of military justice should be discontinued and a joint school for all four services created. The joint school of military justice should offer a curriculum of military justice and military affairs only. In addition to military attorneys, nonattorney senior ranking officers of all services whose responsibilities require a knowledge of the Uniform Code of Military Justice should be directed to attend the school.

At a recent meeting of the Board of Directors of the Association, there was full and complete discussion of all of the above recommendations followed by the adoption of resolutions expressing opposition to Recommendations 7, 8, 9 and 10, and approval of Recommendation 18. Gordon Simpson, President of the Association, appointed a committee composed of William J. Hughes, Jr., Chairman, Robert G. Burke and Fred Wade, to make further detailed study into the recommendations and report at the next meeting of the Board. Any members of the Association wishing to express their individual ideas upon all or any of the foregoing recommendations are urged to communicate their views by writing to Col. William J. Hughes, Jr., Bowen Building, Washington 5, D. C. The views and opinions of members of the Association will be of invaluable aid to the committee and the proper representation of the Association before the appropriate committees of the Congress.

Recent Decisions of the Court of Military Appeals

COMMAND INFLUENCE ON THE COURT-MARTIAL

Zagar (Army), 5 USCMA 410,
21 January 1955

On the day preceding trial of the accused for disobedience of a lawful order and assault (Article 91) all members of the court-martial attended a conference conducted by the staff judge advocate on pre-trial, trial, and appellate procedures. At the trial, each member of the court-martial was examined on voir dire about the conference and challenged for cause. Each member's account of the conference differed, but essentially all gathered the impression that by reason of the care in preparation and processing of charges, an innocent person would not be brought to trial. Each testified, however, that the conference would have no influence on him in reaching fair and proper findings according to the evidence and the instructions in the particular trial; therefore, the challenges were severally denied. The accused was convicted; the convening authority approved the findings; and, the board of review affirmed the conviction. On petition of the accused, the Court reversed the conviction and ordered a re-hearing, Judge Latimer dissenting. The Court held itself not bound by the court-martial members'

individual insistence on freedom from influence by the staff judge advocate's statements, since the members may not have been conscious of the extent to which they were in fact biased. The Court also stated "the necessity of avoiding untoward appearances" which may "sap public confidence in the essential fairness of military law administration". In this regard, the Court noted the time of the conference, the official position of the person conducting the conference as staff judge advocate to the convening authority, and the content of the remarks.

Whitley (Navy), 5 USCMA 786,
13 May 1955

The accused was convicted of larceny (Article 121) by a special court-martial. During the prosecution's examination of the first witness, the president of the court sustained the defense objection to trial counsel's method of examination, whereupon the trial counsel requested a five minute recess. Upon the re-convening of the court, the trial counsel announced "that the convening authority has requested that the court be recessed pending appointment of a more qualified president of the court". The defense counsel objected and a new, more senior member was added to the court as president, and the

trial proceeded to conviction. The board of review held this to be a procedural error and not prejudicial. On petition of the accused, the board of review's decision was reversed and a rehearing ordered. The Court held that after a plea has been entered, good cause must exist before additional members may be appointed to the court if there is a quorum present to continue with the hearing, and also that the convening authority cannot control the exercise by the court of the powers vested in it by law. The Court characterized the action of the convening authority as an imposition of "command control" over the very heart of the judicial processes. "To require an accused to stand trial before a court-martial manned by members who have been notified by positive acts that the commander deals summarily with those who decide adversely to the government is to place on him a heavy burden he is not required to assume".

POWER OF CONVENING AUTHORITY

**Hooper (Navy), 5 USCMA 391,
14 January 1955**

A Navy man on a plea of guilty was convicted of desertion by a general court-martial composed of Naval officers, but appointed by an Air Force officer commanding a joint command to whom had been delegated authority to convene general courts-martial by the Secretary of Defense and who had been empowered to refer for trial the cases of members of any of the Armed Forces assigned to, or attached to, or on duty with the joint command. The board of review reversed the conviction on the ground

that the court-martial did not have jurisdiction. On certification by The Judge Advocate General, the Court reversed the board of review, all judges concurring in the result. Judge Quinn held that a joint commander can exercise reciprocal jurisdiction under Paragraph 13, MCM 1951, without reference to the "manifest injury" provision, when specifically empowered by the President or Secretary of Defense, and that the accused was clearly a person subject to the joint commander's court-martial jurisdiction by the terms of the empowerment of the Secretary of Defense. Judges Latimer and Brosman arrived at the same result even though there had been no finding that the accused could not be delivered to the Armed Force of which he was a member without manifest injury to the service, because in their view the provisions of Paragraph 13, MCM 1951, to the effect that jurisdiction by one Armed Force over personnel of another should be exercised only when the accused cannot be delivered to the Armed Force of which he is a member without manifest injury to the service were no more than a policy directive and the question not having been raised below could not be raised for the first time on appeal.

**McClenny (Navy), 5 USCMA 507,
4 March 1955**

The accused was convicted of AWOL (Article 86). The evidence to establish the duration of the absence consisted of extracts from the accused's service record and from the Unit diary, some of which were signed by direction of and others were authenticated by the officer who

later convened the special court-martial. The defense disputed the accuracy of the entries in the service record. On petition, the accused contended that the convening authority was disqualified to act because he had authenticated documentary evidence used at the trial. The Court held that the mere authentication of documents did not constitute the convening authority an accuser at the time he convened the court, but that at most he was a witness as to the documentary evidence. The convening authority's mere appearance as a witness against an accused does not destroy his capacity to convene the court. The Court went on, however, to hold that the convening authority was disqualified to act as the reviewing authority with respect to the post trial review since he could not exercise the degree of impartiality required. The court-martial had decided the question of the conflict of the evidence against the accused and a proper reviewing authority would have the power to re-evaluate the evidence and reach a different conclusion. In this case, however, to do so, the reviewing authority would have to question the validity of his own official act and could hardly be said to be free of personal interest. The Court did not set the conviction aside, but returned the case to the reviewing authority for proper post trial review.

COMPOSITION OF THE COURT-MARTIAL

Allen (Army), 5 USCMA 626,
15 April 1955

On a trial for sodomy (Article 125) before plea, the defense objected

to being tried by a seven member court, actually convened, when the appointing order had named fourteen members. The record showed that the staff judge advocate and not the convening authority had routinely excused the absent members under the application of a system to divide the burden of trials equitably among the members of an out-sized court. From the board of review affirmance of conviction, the accused petitioned the Court which reversed the conviction and ordered a re-hearing. Judge Latimer dissented. The majority held that the reduction by one half in the number of persons legally charged with the duty of passing on the guilt or innocence of the accused was too fundamental to be overlooked as harmless error and the practice of other than the convening authority excusing court members was improper, particularly when the power to excuse attendance is made wholly independent of "practical availability" of the member to sit. To divide the burden of trials, the convening authority could alternately refer cases to two normally manned courts.

CONDUCT OF THE COURT-MARTIAL

Allbee (Coast Guard), 5 USCMA 448,
28 January 1955

After the court-martial retired to consider the sentence, the law officer was brought into the closed session for comment upon the form of the sentence. The law officer advised the court that the sentence as presented to him was legally excessive and there followed a detailed discussion on the applicable law. After the law

officer withdrew, the court deliberated further and later announced its sentence. The board of review affirmed the findings and sentence and the case was certified to the Court. The Court, without deciding whether the law officer participated in the court's deliberation, took a new approach than that taken in Keith, 1 USCMA 493, and McConnell, 1 USCMA 508. The Court said: "In applying a specific prejudice standard to the participation by a law officer in the deliberations of a court-martial, we propose hereafter to utilize a rebuttable presumption that prejudice did in fact result in such participation." In the present case, the intrusion of the law officer resulted in the imposition of a sentence less severe than that originally decided upon by the court. Thus, the error presented no likelihood of specific prejudice to the accused.

**Nash (Army), 5 USCMA 550,
25 March 1955**

After the court-martial closed to deliberate on its findings, it re-opened for further instructions by the law officer on whether more than one ballot could be cast in reaching findings. The law officer instructed the court that "with respect to further discussion on any balloting, irrespective of what the further balloting happens to be—it is within the prerogative of the president of the court whether he wants further discussion, re-balloting, or further re-balloting. That's within his prerogative and discretion." The conviction was affirmed by the intermediate appellate authorities and on petition of the accused, the Court reversed, ordering a rehearing. The Court held that al-

though there is good authority for the casting of more than one ballot, it is not discretionary with the president of the court-martial. Article 52c provides that all questions to be decided by the court other than actual vote on findings and sentence shall be decided by a majority vote. The question of re-balloting was, therefore, one to be decided by the members by a majority vote.

QUALIFICATIONS OF DEFENSE COUNSEL

**Long (Navy), 5 USCMA 572,
1 April 1955**

The accused, being tried by special court-martial, requested an enlisted man as individual counsel who was subsequently appointed as defense counsel. No other defense counsel was requested by the accused or appointed by the convening authority. On petition of the accused, the Court reversed and ordered a rehearing, holding that there was prejudicial error. The Court pointed out that Paragraph 6c of the Manual affirmatively provides that counsel appointed to act before special courts-martial shall be officers and that the appointment of an enlisted counsel to defend was inconsistent with the spirit of the Code and the requirements of the Manual. The convening authority should have appointed qualified defense counsel to be present at the trial unless his presence was waived by the accused.

**Green (Army), 5 USCMA 610,
15 April 1955**

The accused at pre-trial investigation requested counsel and the staff judge advocate designated a captain

in his office as counsel for the accused. After the investigation, the staff judge advocate ordered the captain to prepare a memorandum of expected testimony against the accused, which memorandum was given by the staff judge advocate to the trial counsel. At the trial, another officer was assigned as defense counsel for the accused and although he knew that this memorandum was in the trial counsel's file, he did not raise the question. From the conviction which was affirmed by intermediate appellate authorities, the accused petitioned the Court, which on review held that the actions of defense counsel appointed at the pre-trial investigation and the staff judge advocate were generally and inherently prejudicial. The defense counsel's preparation of the document in question was more than procedural irregularity—it had the distinct appearance of wrong doing. The document furnished a measure of aid to the Government, even though indirect and possibly slight, and indicated more than a fair risk that the captain in fact assisted in prosecuting his former client in violation of the attorney-client privilege.

AUTHORITY OF BOARDS OF REVIEW

Sparks (Army), 5 USCMA 453,
4 February 1955

The accused's conviction was affirmed by the board of review and the decision of the board was, three days later, transmitted by The Judge Advocate General to the officer exercising general court-martial jurisdiction over the accused. On 20 April 1954,

the accused received the decision, and six days later, petitioned the board of review for reconsideration. The board concluded it was without jurisdiction to entertain the petition on the theory that its decision had become final when it was transmitted, using an analogy of the civilian appellate court's practice of issuing mandates. On certification of the question, the Court held that the board had not lost jurisdiction. A board of review may reconsider one of its own decisions and it had jurisdiction to entertain the offered motion for reconsideration in this case, since no petition for review by the Court of Military Appeals preceded the denied motion for reconsideration, and thus pretermitted the exercise of board jurisdiction. The motion for reconsideration was, therefore, held to be timely.

Goodwin (Navy), 5 USCMA 647,
15 April 1955

In this case, a board of review concluded that a sentence of dismissal of an officer was inappropriate, and commuted it to a loss of 200 unrestricted numbers. The Judge Advocate General of the Navy certified the case to the Court, which held that the board of review was without authority to commute a sentence. A board may mitigate a sentence by a reduction of a punishment in degree or quantity, but it may not substitute a lesser penalty of a different nature. Only the President and Secretaries of the Departments or their assistants, if so designated, have the power to change a dismissal from the service to any other form of punishment.

WIRE TAP EVIDENCE

Noce (Army), 5 USCMA 715,
6 May 1955

The accused was convicted of communicating obscene language to a female over an exclusively military telephone system at a post in Alaska. The accused was identified by use of a monitor on the post switchboard, and he then confessed. On review, it was contended that the confession was inadmissible because it was obtained in violation of Section 605 of the Communications Act of 1934 (47 USC 605). The board of review affirmed the conviction, and accused petitioned the Court, which held that Section 605 does not apply to a communication confined to a military telephone system. The use of wire tap evidence in a criminal case is not prohibited by the Constitution, but only because of the rule of evidence prescribed in Section 605 of the Communications Act. That Act was designed to regulate interstate and foreign commerce and does not protect communications over a private unlicensed system.

Gopaulsingh (Air Force), 5 USCMA 772, 6 May 1955, held that Section 605 of the Communications Act has no application to a telephone communication made and completed within the boundaries of a foreign country.

DeLeon (Navy), 5 USCMA 747,
6 May 1955

In this case, the question arose concerning the admissibility of testimony of witnesses who overheard a telephone conversation by the use of extension telephones with the permission of one of the parties to the con-

versation. Here the Court held that a person who overhears a telephone conversation by means of an extension instrument, which he is authorized to use by one of the parties to the conversation, may testify as to its contents even though the other communicant did not know of or expressly consent to the listening in. The Court stated that in enacting Section 605 of the Communications Act of 1934, Congress did not make a telephone conversation a privileged communication; that accordingly, either party may disclose its contents to whatever extent he desires.

**PROTECTION AGAINST SELF-
INCRIMINATION**

Jones (Army), 5 USCMA 537,
18 March 1955

The accused was suspected of using drugs and upon arrest, was asked to give a sample of his urine, but was unable to do so. Without objection on the accused's part, he was given intravenous injection of fluid and still unable to produce the requested sample. Thereafter, a sample was obtained over his objection by catheterization. Analysis of the sample disclosed the presence of narcotics, and the analysis was admitted into evidence upon the accused's trial for wrongful use of morphine. The accused was convicted and on petition to the Court, the conviction was reversed, and the charges ordered dismissed. The Court held that the evidence thus obtained was inadmissible because it was obtained not only without the accused's consent, but over his active protest.

In Barnaby, 5 USCMA 63, it was held that an accused may be ordered

to produce a specimen of urine, which specimen will be admissible in evidence, and in Williamson, 4 USCMA 320, it was held that a specimen would be admissible even though obtained by catheterization if the accused was unconscious at the time and not rendered unconscious by law enforcement personnel. This most recent case concludes that the obtention of the sample over the accused's protest, however, constitutes a denial of military due process.

THE ADMISSIBILITY OF CONFESSIONS

Dandaneau (Navy), 5 USCMA 462,
11 February 1955

The accused who had been absent without leave upon surrendering himself was engaged in conversation by an officer who had known him for some time. The conversation was on a personal basis, but during the course of it, the accused made incriminating statements. Later, the same officer saw the accused on an official basis, explained Article 31 to him and advised him that he was under investigation and proceeded to question him. The accused repeated the same statements that had been made in the earlier conversation. The accused was convicted of violation of Articles 85 and 87 and the confession obtained was used in evidence. On petition of the accused, the Court held that the first statement was not obtained in an official capacity and was, therefore, admissible without the necessity of showing preliminary warning under Article 31 and further that the first statement could not in any way improperly taint the statements made in the sec-

ond conversation. Judge Brosman dissented, taking the position that more was required to purge the first conversation of its odor of officialty than a mere reading of Article 31.

Pavoni (Navy), 5 USCMA 591,
8 April 1955

The accused was convicted of wrongful appropriation of an automobile and attempted larceny of its motor (Articles 121 and 80). A complete confession was made by the accused in which he also admitted that as a juvenile, he was convicted of stealing, Dyer Act violations, burglary, and carrying a gun. The entire confession was received in evidence and the accused failed to testify and presented no evidence. The conviction was affirmed by intermediate appellate authorities and the accused petitioned for a review to the Court of Military Appeals. The Court held that there was no prejudicial error. The evidence of prior offenses contained in the confession was inadmissible, but that the evidence of guilt in the particular case was so compelling that no reasonable member of the court would be influenced by the incompetent evidence of the prior offenses.

Howell (Air Force), 5 USCMA 664,
15 April 1955

The accused was advised of his rights under Article 31 and was informed that he was a suspect of an alleged larceny. A few days later, the accused's First Sergeant interrogated him and told him that if he told the truth, he would try to have the matter disposed of at squadron level and that a trial would probably

result in a severe sentence. After this discussion, the accused indicated that he wanted to make a statement, and he was taken by an OSI agent to an office where, after being advised of his rights, a confession was made. At the trial, the defense counsel objected to the admission of the confession in evidence on the ground that it was the result of an unlawful inducement. The accused did not testify on this issue. From a conviction affirmed by the intermediate appellate authorities, the accused petitioned the Court. The Court held that there was no error, finding nothing in the conversation between the accused and the First Sergeant that indicated a promise in terms sufficiently clear and compelling to have forced the confession. The Court held that the confession was not induced by promises of immunity, clemency or substantial benefit.

**Dykes (Navy), 5 USCMA 735,
6 May 1955**

The accused Marine was convicted of larceny (Article 121). He contested the voluntariness of a confession offered in evidence by the prosecution, which was admitted into evidence over objection. The law officer instructed the court that his ruling admitting the confession was final, but that its weight and credibility were for the court's determination. The defense counsel did not object to this instruction. On petition of the accused, the Court held that although the instruction may have been subject to clarification, it was not incorrect and the failure to complain at the trial was fatal to the

assertion of prejudice on appeal. The Court pointed out that when a confession is assailed as involuntary, the law officer rules on its admissibility, but the court retains the task of passing on the weight or credibility of the confession with due recognition of the human experience indicating that involuntariness diminishes the trustworthiness of a statement. If the court-martial concludes that the confession was involuntary, it is free to disregard it entirely.

**Villasenor (Air Force), 6 USCMA 3,
3 June 1955**

The accused was convicted of larceny. He had been assigned to the duty of collecting funds on behalf of the Dependent Aid Association. After having made some collections on a particular day, he was observed placing money in an envelope, sealing it, and writing on its face, Dependent Aid, \$437, and dropping the envelope in the safe. When the accused failed to appear for duty the next day, the envelope was opened and found to contain only \$325. Upon return from AWOL, the accused confessed to taking over \$100. The prosecution established the amount of the loss by the accused's writing on the envelope in which he had placed the funds in the safe. On petition to the Court, it was urged that the evidence exclusive of the confession was insufficient to establish the corpus delicti, that is, that the notations on the envelope were admissions and could not be used to corroborate the confession. The Court found that there was no error in the conviction, finding that the no-

tations on the envelope were book entries made in the regular course of business, made contemporaneously with the act done by the accused to safeguard the funds; that, therefore, the notation on the envelope could be used to prove the facts which they purported to report. Therefore, the Court held that the admission could be used to establish the elements of the corpus delicti.

LIE DETECTORS AND TRUTH SERUM

Massey (Army), 5 USCMA 514,
4 March 1955

The accused was convicted of performing indecent acts and attempting such acts. The prosecution presented testimony of alleged victims, whereas the defense relied upon character evidence and psychiatric evidence to the effect that the accused had no homosexual traits. Testimony of a polygraph expert as to the result of lie detector tests given the accused and several of the prosecution witnesses was excluded by the law officer. After the trial, the defense submitted a certificate of a neuropsychiatrist who had examined the accused under the effect of sodium pentothal and who expressed an opinion that the accused was not guilty of the offenses. The staff judge advocate in his review concluded that the convening authority could not consider evidence outside the record concerning the accused's innocence. On petition of the accused, the Court held that there was prejudicial error as to the post trial review. The Court concurred with the staff judge advocate that results of either a sodium pentothal interview or a lie

detector interrogation are inadmissible in evidence, but the staff judge advocate's review unduly limited the scrutiny which might properly have been accorded the record by trial by the convening authority. Under Article 64, the Congress gave the convening authority a broad discretionary power over findings and sentences and the convening authority is not limited to the evidence of record or to that which would have been admissible at trial. The staff judge advocate's advice to the convening authority was, therefore, not according to the law and the accused may well have failed to receive the benefit of a conscious exercise of discretion by the convening authority on the effect, if any, that he may have wished to grant to the lie detector and truth serum results.

QUALIFICATIONS OF EXPERT WITNESSES

Adkins (Navy), 5 USCMA 492,
4 March 1955

In a trial for sodomy, considerable inconsistency and contradiction developed in the testimony of prosecution and defense witnesses. In rebuttal, an agent of the ONI was permitted to testify that after having investigated 300 to 400 cases of homosexuality in the preceding ten years, he had never known a confirmed homosexual to intentionally name and falsely accuse the wrong person. From a conviction, affirmed by intermediate appellate authorities, the accused petitioned the Court. The Court held that there was prejudicial error in permitting the agent of the ONI to testify as an expert to express an opinion on the truthfulness

of homosexuals. Although the law officer is permitted wide discretion in determining whether a witness is an expert, he exceeded sound limits in ruling that the agent of ONI was so qualified on this particular subject when he lacked any sort of medical or scientific training in psychiatric disorders. In view of the contradiction of the prosecution witnesses by defense witnesses, the error was concluded to be prejudicial.

DEFENSES — SELF-DEFENSE, DRUNKENNESS, AND INSANITY

Adams (Army), 5 USCMA 563,
1 April 1955

In a trial for murder, it developed that the deceased and the accused had engaged in an argument in which the deceased threatened to kill the accused. The accused retired to his tent where he loaded his rifle and thereafter, the deceased entered the accused's tent, carrying two rocks. The accused backed the deceased out of the tent with his rifle when the deceased grabbed another rifle and began to load it, whereupon the accused fired twice, killing the deceased and another soldier in a nearby tent. The law officer gave an instruction on self-defense which would indicate that the accused's tent was not his home and that the court would have to find that the accused retreated as far as he could before it could return a not guilty verdict. The accused was convicted of murder reduced to voluntary manslaughter by the board of review. On petition of the accused, the Court reversed the board of review and ordered a rehearing. The Court stated that a military person's place of abode is the place

where he sleeps and keeps his private possessions and that this may be a tent or even a fox hole where he is entitled to stand his ground against a trespasser to the same extent that a civilian is entitled to stand fast in his own home. The Court concluded that the accused had no obligation to retreat before defending himself against an armed intruder since the accused was in his own home. He had retreated as far as the law requires.

Jackson (Army), 5 USCMA 584,
8 April 1955

The accused was convicted of assault with intent to murder by shooting at Jenkins with a rifle. The evidence indicated that the accused had been drinking, but was not drunk, and had been shortly before the incident put out of a tent by Jenkins. A little later, a shot was fired at a sergeant who entered the tent and upon seeing the man who fired the shot inquired who it was and got the reply: "It was me, Jackson, and I was firing at Jenkins and shooting to kill." The law officer instructed the court on the effect of intoxication and advised that the question of the voluntariness of the verbal statement made by Jackson to the sergeant was a matter for its determination. On petition, the accused urged that the law officer erred in failing to instruct on the lesser included offense of assault with a dangerous weapon because evidence of intoxication indicated a want of specific intent. The Court held that there was no error in the law officer's instruction because to require instructions on intoxication and a lesser included of-

fense raised thereby, there must be evidence of intoxication of a certain degree and sort, characterized by a discernible relationship to the potential absence of a capacity to entertain specific intent. The evidence in the record was not sufficient to reveal that the accused had reached that degree of insensibility of mind which would destroy his capacity to entertain a specific intent. Judge Brosman dissented upon the basis of Backley, 2 USCMA 496.

**Burns (Air Force), 5 USCMA 707,
29 April 1955**

In a trial for assault with intent to commit grievous bodily harm and robbery, the accused relied on the defense of insanity. The psychiatrists were in agreement that the accused could distinguish right from wrong, but disagreed over the accused's ability to adhere to the right. The defense doctors were of the opinion that in committing the assault, the accused was in a psychotic state and acted from an irresistible impulse, but that this episode ended with the assault and did not encompass the theft. The law officer gave general instructions on the effect of insanity. Following convictions on the offenses charged, the board of review affirmed the findings as to robbery and reduced the assault charge to an assault with a dangerous weapon. On petition, the accused urged that the failure of the law officer to instruct the court on the effect which a mental impairment short of legal insanity may have on the specific intent required in the offense of robbery was prejudicial error, and also that lar-

robbery was a lesser included offense of robbery. The Court held that when appropriate, the law officer must instruct not only on the general effect of legal insanity, but also on the effect that the accused's mental responsibility might have on the specific intent required for the offense charged. Observing that robbery consists of an assault which requires no specific intent and larceny which does, the Court said: "On the basis of the evidence, an instruction as to the effect of the accused's mental condition was required only as to the assault. None was required as to the larceny. The law officer did not differentiate between the two offenses, but his failure to do so did not harm the accused."

IMPEACHMENT OF WITNESSES

**Turner (Army), 5 USCMA 445,
28 January 1955**

In a trial for unpremeditated murder, the government sought to impeach the accused's credibility by witnesses who testified that they had opportunity to form an opinion of the accused's character as regards truthfulness and in their opinion, his word was not to be relied upon even under oath. On petition of the accused, the question presented was whether these personal opinions of the veracity of the accused were admissible. The Court held the evidence was proper, citing Haimson, 5 USCMA 208, to the effect that: "The current Manual for Courts-Martial permits proof of character not only by means of reputation evidence, but also through reliance on the opinions of witnesses —."

Hubbard (Army), 5 USCMA 25,
11 March 1955

On cross examination of the accused on trial for wrongful use of a narcotic drug, the trial counsel asked him if his commanding officer suspected him of using narcotics and whether he had ever been apprehended by the agents of the MP CID who were looking for narcotics. The accused was convicted and on petition, the Court held this attempt to impeach credibility was prejudicial error. The Court said that even assuming the applicability of the rule permitting cross examination regarding offenses not resulting in conviction, there was no showing of an act of misconduct affecting the accused's credibility. Suspicion of wrong doing cannot be substituted for the fact of wrong doing as a basis for impeachment. The innuendoes and insinuations of the cross examination would incline the Court to believe accused guilty of the offense charged.

Berthiaume (Army), 5 USCMA 669,
22 April 1955

During the trial of accused for robbery, the defense counsel attempted to impeach prosecution witnesses by asking one "Haven't you recently confessed to stealing a radio?" and another "Isn't it a fact that in civilian life you were convicted of a crime involving moral turpitude?" Trial counsel's objection on the ground that impeachment must be founded on proof of a conviction was sustained by the law officer. Accused was convicted. On petition of the accused, the Court held that under the Manual, there is an extremely broad scope of impeachment, cross examination and

impeachment by cross examination as to prior acts of misconduct and is not restricted to offenses which have been the subject of conviction. Although the accusatory form of the question may have been objectionable, the law officer's ruling may reasonably have inferred that the inquiry could not be pursued unless there was evidence of conviction. Evidence of recent theft by the witness would affect the credibility of the witness. He could also inquire of a witness if he had been convicted of a crime involving moral turpitude.

Moore (Army), 5 USCMA 687,
22 April 1955

On cross examination of the accused on trial for aggravated assault (Article 128), trial counsel asked if accused had been convicted of wrongfully using a military pass with intent to deceive. Defense counsel objected on the ground that the offense did not involve moral turpitude and could not be the basis of impeachment, but was overruled. The accused admitted the conviction by summary court-martial. On petition of the accused following conviction, the Court held that the offense contained an element of fraud and, therefore, involved moral turpitude. The conviction afforded a proper basis for impeachment.

Hutchins (Army), 6 USCMA 17,
3 June 1955

Accused on trial for larceny, upon cross examination, was asked questions concerning his personal checks which had been cashed and dishonored and also his writing checks

against an account which had been closed. Objection to this line of inquiry was overruled. Having been convicted, the accused petitioned the Court which held the attempted impeachment proper. The Court approved cross examination calculated to bring out acts of misconduct on

the part of a witness even though they have not resulted in conviction if they amount to matters touching upon the witness' worthiness of belief. The misconduct inquired into by the trial counsel was found to "hardly speak well for his credibility".



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.

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:

Col. Joseph Moss of Philadelphia, Pennsylvania, who died February 16, 1955.

Lt. Col. Harry Green of Chattanooga, Tennessee, who until his recent death was Staff Judge Advocate of the 17th Air Force.

Lt. Col. Alton W. Teale of Suffern, New York, who died May 28, 1955. In March, Col. Teale had been appointed chairman of the Committee on School Legal Problems of the National Institute of Municipal Law Officers.

NOTES ON CURRENT PROCUREMENT OPINIONS

Waiver of Performance Bond

Although ASPR provide that the requirement of a performance bond shall not be waived when required by an invitation for bids, nevertheless, the Service Secretary is authorized to make individual deviations from the requirement when justified by special circumstances, including a reduction in contract price. Problems concerning the evaluation of bids and the interests of the Government and the unsuccessful bidders are presented in each case; therefore, each case must be studied individually. Where, however, other bidders are not prejudiced by a waiver of the bond requirement as where there is a substantial difference between the low bid and others and the cost of bond does not present a problem in the evaluation of bids, there is no objection to approving an individual deviation. (JAGT 1954/9393, 24 November 1954)

Award to a Late Bidder

Where a delivery of a bid is delayed by the routine procedures of the security office of a base, but actually made to the officer in charge a few minutes after the appointed time and before any of the bids have been opened, it may, nevertheless, be considered for an award over the protest of the next lowest bidder. (34 Comp. Gen. 150, 1954)

Application of Small Business Procedures to Defense Procurement

Although the basic authority of the Department of Army to contract is found in laws other than the Small Business Act, Section 214 of that Act does authorize the Department under appropriate conditions to restrict awards to small business. Where negotiation under ASPA is utilized, no further authority to restrict proposals to those submitted by small business is required since the restricting of proposals in negotiated procurements is already within the Secretary's discretion as affected by ASPA, which states it to be the policy of Congress that a fair proportion of contracts be placed with small business concerns. (JAGT 1954/5306 and 1955/1104, 11 January 1955)

Loyalty Requirements as to Contractors' Employees

Even though not required by statute, a contractor may be required by contract to assure that persons employed in performance of the contract satisfy loyalty requirements. If it is decided as a matter of policy to impose such a contractual requirement, the proposed clause should incorporate the desired language of the statutes but omit reference to the statutes themselves. (JAGT 1954/9301, 20 December 1954)

Use of Government Expendable Property in Private Research

It has been implied that the opinion in JAGT 1954/7472, 15 September 1954, limited the loan of Government property for use in private research to durable equipment. In a recent clarifying opinion, it has been held that that opinion is limited to the loan of equipment but that present regulations provide two methods of furnishing property for use in research and development work, the first being a regular research and development contract under which the contractor may be furnished property of all kinds for use in performance of the contract, and the second, the loan of certain types of property for use on research projects which, though not conducted especially for the Government, are of interest to it, the property to be returned upon completion of the project. Formalizing a loan of property does not make it a contract for research and development and the relationship continues as a bailment, but where there is sufficient Governmental interest, there is ample authority to negotiate a regular research and development contract, which can be varied to meet the circumstances of the particular case and under which Government property may be furnished without regard to the limitations applicable to the loan procedure. (JAGT 1954/9508, 6 December 1954)

Reasonableness of Reimbursable Attorneys Fees

The reasonableness of attorneys fees incurred by a contractor under a contract requiring reimbursement of such fees is to be determined primarily as an independent decision by

the contracting officer guided by the following factors: (1) The fees generally charged in the locality by attorneys of similar reputation and experience; (2) the pecuniary value of the matter to the Government; and (3) the difficulty of the matter involved, taking into account the special competence of counsel in the field and giving consideration to the assistance of The Judge Advocate General and Department of Justice lawyers. The contracting officer requires no authority from JAGO to negotiate for a more satisfactory fee schedule. (JAGT 1955/1158, 12 January 1955)

Chamber of Commerce Dues as an Allowable Cost

Chamber of Commerce dues, although not automatically allowable under ASPR, may be reimbursed if it is shown that the membership directly aided the cost plus fixed fee contractor in performing his contract. Reimbursability is to be determined by the contracting officer. (JAGT 1954/10481, 7 January 1955)

Ambiguity in Contracts

An advertised fixed price contract contained a specification to rewind a transformer and "place in first class operating condition". The contractor, upon commencing performance, discovered and notified the contracting officer of other work needed and the contracting officer advised that the obligation to place in first class operating condition made the additional work the contractor's obligation at no extra cost. After performance, the contractor claimed additional compensation for the work beyond the rewinding of the transformer. The contract was held to be ambigu-

ous, and accordingly the ambiguity should be resolved in favor of the contractor and against the Government, since the Government prepared the contract. (JAGT 1954/10233, 20 January 1955)

Transportation Charges Including Insurance

The Government Losses in Shipment Act (5 USC 134c) provides no executive agency shall expend money for insurance against loss in shipment of Government property, except as authorized by the Secretary of the Treasury. The Comptroller General has held, however, that if transportation rates offered are regularly fixed to include the cost to the carrier of indemnity insurance and the carrier will not accept Government shipments at a rate exclusive of such costs, the total charges properly may be paid as transportation cost without contravening the above statute. Additional charges for increased protection of Government property, however, beyond usual charges would constitute a payment for insurance and would be prohibited.

Amendment of Bid to Include Mistakenly Omitted Taxes

An invitation for bids provided that the contract price should include all applicable taxes, but the bidder erroneously excluded taxes in making his bid in the mistaken belief that Federal Excise Taxes would be directly reimbursable. Before award, the bidder discovered his error and asked that his bid be amended by adding the amount of taxes. It was held where a mistake in bid is discovered

prior to award, the military department involved is authorized to permit the bidder to correct the mistake if there is clear and convincing evidence establishing both the existence of the mistake and the bid actually intended. See Ms. Comp. Gen. B 119977, 24 May 1954. Accordingly, it was held that the bid may properly be amended and as amended, considered for award. (JAGT 1955/1798, 7 February 1955)

Security for U. S. Claim for Excess Profits

The Renegotiation Board entered into an agreement with the contractor for the elimination of excess profits amounting to \$68,000, and provided for installment payments and an assignment to the Government of the proceeds of sale of certain real estate. The contractor sold the property and took a purchase money mortgage for \$100,000 and then offered to assign the mortgage to the Government as security for the debt. On a question concerning the acceptability of the assignment, The Judge Advocate General of the Army held that the assignment of the mortgage would better secure the interest of the Government and that the Secretary of the Army had authority to participate in the assignment, execute a release should the mortgagor redeem, and reassign the mortgage upon satisfaction of the renegotiation indebtedness. (JAGT 1955/1662, 1 February 1955)

Liability of Contracting Officer in Sale of Surplus Property

A contracting officer is not peculiarly liable for losses suffered by

the Government in connection with the disposal of surplus property in the absence of fraud, even though at a sale of surplus property it may develop that it was sold to other than the highest bidder. (JAGT 1955/1043, 24 January 1955)

Contractor Entitled to Adjustment for Changes Made for Its Own Convenience

In preparing for production under a fixed-price supply contract for a newly designed device, the contractor discovered shortcomings in the design and proposed changes in the specifications, all of which were approved by the contracting officer who issued change orders making the necessary changes in the specifications. The contractor requested an equitable adjustment in the contract price, which the contracting officer denied on the ground that the changes were made at the contractor's request and for its convenience. On the contractor's appeal to the Armed Services Board of Contract Appeals, it was held that "regardless of the source of the original proposal, when a change is ordered and the modification is approved by the contractor, the sole remaining question is whether the change increases or decreases the cost of performance. The resolution of that question does not depend on the convenience of the change to the contractor, or, for that matter, to the Government." Thus, the contractor was entitled to an equitable adjustment in the contract price even though the changes were ordered for the contractor's benefit and this adjustment may include en-

gineering expense in developing the modifications. Lonergan Mfg. Co., ASBCA No. 1601, 20 April 1954.

Applicability of Buy-American Act

Supplies purchased by the contractor for use as component parts in the manufacture of the end product are acquired for public use and as such must satisfy all the requirements of the Buy-American Act. Therefore, the contractor should include Buy-American stipulations in his subcontracts for supplies and should comply with the requirements of the Act in making such purchases. (JAGT 1955/1875, 25 February 1955)

Government Entitled to Damages for Breach of Contract Where No Repurchase Made

The standard "Default" clause for fixed-price supply contracts gives the Government the right upon default of the contractor to terminate and repurchase the supplies elsewhere, holding the contractor liable for excess costs of repurchase. It also provides that the rights and remedies of the Government above mentioned are not exclusive and are in addition to all other rights and remedies provided by law. The Comptroller General recently held that the Government was entitled to common law damages under a defaulted contract containing this clause even though no repurchase had been made. The measure of damages would be the difference between the contract price and the market value at the time of the breach. (Ms. Comp. Gen. No. B 122238, 25 January 1955)

Letter to the Editor:

I have read "SELF-INCRIMINATION REFINED" by Jean Rydstrom in the February 1955 issue of the Judge Advocate Journal. I am compelled to take nominal issue with everything in it except the author's name. It is more in sorrow than in anger that I find myself in this position. I at first determined that a scholarly point-by-point refutation was required; however, further reflection convinced me that such would serve no useful purpose. I therefore limit my observations solely to the end of keeping the record straight. Incidentally, I know Jean well and like him, and I am entitled to take a few falls out of him.

The author's main complaint seems to be a combination of a charge of Sacrilege (his words) and Blasphemy (see Greenleaf on Evidence, Vol 3, p. 74, Circa 1842) on the part of the Court in being unwilling to blindly accept the Manual as taking precedence with and only slightly after the Holy Writ. At the outset I think we should know just what is the legal basis of the Manual. Under the law generally (I make no effort to discuss commutation, convening of courts, or similar matters) the President has the authority to prescribe rules (Art. 36) covering "procedure, including modes of proof" in courts-martial; he also has the authority to set maximum limits on sentences (Art. 56). In regards to Article 36,

supra, it might be of interest to note that during the hearings on UCMJ many Members of Congress had very grave doubts regarding the provision that he would apply the Federal principles of law and rules of evidence "as he deems practicable". Many Members wanted the Federal rules period, it was only because of prolonged argument on behalf of the military that the present Article came out as written.

The article seems to either misunderstand or misapply the terms "procedure" and "modes of proof". As I read the dissertation, I gather that those terms cover everything in all military processes of every kind and nature, even specifically including those cases where the Manual, deliberately or otherwise, misinterprets or misapplies the law of Congress as enacted in UCMJ. That same attitude towards this so-called Bible also applies in those instances wherein it may conflict with our Constitution, on such occasion I suppose the Constitution must necessarily fall. As I understand the law, it appears unquestionable that once the Manual gets outside of sentences and procedures and modes of proof it becomes strictly a suggested guide—a handbook—to help those in the military legal set-up. If the Manual's definitions of the crimes defined by the Congress are correct, then all well and good; no one is hurt by the

definitions being repeated outside of the Code. The same applies to those instances where the Manual, by happenstance or otherwise, may express correct principles of law; certainly no one is harmed by the fact that the coverage happens to be right.

The article is quite vehement in its criticism of the holdings by the Court on 'self-incrimination', which is apparently construed as either a mode of proof or rule of procedure. It states that only testimonial compulsion is prohibited and that "judicial decisions interpreting the 5th Amendment to the Constitution do not support the Court's determination". It cites the old *Holt* case in the Supreme Court (1910), which involved only the putting on of a blouse, as being the final authority that self-incrimination applies only to "extort(ing) communications" from an accused, and that the President very properly relied on the same in promulgating the Manual rule. It then advises that "the important consideration is that *there exists no Federal Court decision* contrary to the rule prescribed by the President". The emphasis is his. The present state of the record requires me to abandon my "no scholarly approach" just to fault him a little bit. Allow me to preface my remarks by advising that the 5th Amendment to the Constitution has been repeatedly tied to the unreasonable search and seizure covered by the 4th Amendment, prohibiting the use of evidence so obtained as a violation of both. One thing the author loses sight of is that even with a search warrant you cannot legally seize mere evidence of crime. So, while the courts do not

permit him to obtain a search warrant to seize handwriting exemplars, he sees no objection to forcing the accused to manufacture the same. If we carry out this very logical approach we can consistently and conscientiously prohibit the extortion of oral confessions but still fully preserve the amenities of law and order by merely compelling the accused to write or type his confession. To state the proposition is to answer it. He overlooks that Larkin told the House Committee conducting hearings on UCMJ that Art. 31 retained "the constitutional protection against self-incrimination" (HH 988). In *U. S. v. White*, 322 US 694 (1944) it was stated (698):

"The constitutional privilege against self-incrimination * * * is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him *or to force him to produce and authenticate any personal documents or effects* that might incriminate him. (699) It protects the individual from any disclosure, in the form of oral testimony, *documents or chattels* sought by legal process against him as a witness." (This time the emphasis is mine.)

In *Davis v. U. S.*, 328 US 582 (1946) it was stated (p. 587) that search and seizure and self-incrimination have a dual purpose: "protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him." I hasten to call these things to Jean's attention in order that if he

happens to prosecute a murder case he will not issue a subpoena *duces tecum* against the accused directing him to produce the weapon. I have also noted his remarks regarding the catheter decisions and suggest that I would be receptive to a reasonable bet regarding the outcome in a Federal Court on the question of the compulsory use of such instrument. In regards to the statement about no contra Federal cases, I have cited only the two above to show that such exist. For the many, many other similar decisions I refer to the Annotations in USCA on the 5th Amendment at page 141, et seq., and the current Pocket Parts, page 89, et seq.

The complaints to the effect that those in the field will be unable to know what law to follow, based on the fact that the Court has very properly struck down the Manual where in conflict with the Code or Law, could spring from a guilty conscience, or merely from outraged pride of authorship. I think it only fair to advise that Jean, on behalf of the Air Force, was one of the little cabal that was originally responsible for the present Manual. The outcry about what former President Truman did or did not intend to do in promulgating the Manual begs the issue, even if meritorious. The President, of course, never read the Manual, he was advised it was all right, he thereafter signed Executive Order 10214 prescribing it for the military.

I am unable to let go by without answer the statement in the latter part of the article to the effect that the Manual, "the Bible", carries no less weight for the serviceman than does Gospel for the true believer. On

the other hand, in all fairness, I believe the author must concede that the views of some lawyers regarding this Manual are somewhat similar to those evidenced by certain religions in regards to the recent version of the King James Bible. Necessarily implicit in the Gospel-Holy Writ approach is the intimation that the author and his accessories had Divine Inspiration in concocting the Manual. While conceding its unearthly aspect in many respects, I do not think it fair to attempt to shift the blame.

One minor item regarding the sanctity of this Manual may be of interest. In the spring of 1951, after I had been recalled to active duty in the Air Force, I noted the ridiculous language in the Manual (p. 239), to the effect that a presumption is merely an inference and an inference a presumption. Any student, whether in English or law, knows that a presumption is mandatory while an inference is permissive. Even I knew those things and, feeling that an error had inadvertently slipped into the Manual, I went to Jean regarding this item. He said he thoroughly disagreed with the coverage but that the Army representative insisted upon its being included. I thereupon went to Roger Currier who was one of those acting for the Army and again made my representations. Roger agreed the item was wrong but stated it was put in at the request of the Navy. When appropriate opportunity presented itself I made my complaint to John Curry who was one of those acting for the Navy. John told me the statement was both incorrect and silly, but that it had been included in the Manual

at the specific insistence of both the Army and the Air Force. I can only say that someone made a mistake in not blaming it on either the Coast Guard or the Public Health Service.

There is one other item that requires quoting although I have doubts as to what the answer is. We are told that "danger lies in the familiarity with the law of appellate judges which permits *them* to disregard provisions of the Manual". I am not sure just what the author is getting at. Is he complaining about the novelty of having top legal authorities in the court-martial system who are familiar with the law?

In closing, I merely wish to prevent the author from falling back on any alleged second line of defense and claiming he was only concerned with Art. 31, not with the Constitution, on the theory that those in the service do not have constitutional rights unless Congress sees fit to grant them by separate statutes. The perfect answer to such position, if taken, is a quotation from *U. S. v. Hiatt*, 141 F. 2d, 664, where the court stated (666):

"An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the Nation's Armed Forces and has taken the oath to support that Constitution with his life, if need be."

Don't misunderstand my position to be that I deny Jean's right (or that of anyone) to tee off on the Code, Court, weather, or any other subject. I merely have the right to reply. I concede that Jean, in at-

tacking the Court, has a good if not authoritative precedent. I refer to the speech by The AF JAG at the Bar Convention last year advocating a return to the Elston Act, or possibly the Articles of 1775. One of these days I'll do a job on that little gem. I am sure General Harmon won't mind, he understands those things; anyway, it's all right if I start off any future active duty tour assigned to espionage duty in enemy territory in full uniform. By way of finale, please let me remove any unintended sting from my remarks by a salutation in my rough and ready school-boy Latin: *Pax in tuum, pax in omnes vos.*

(P. S.: My courteous, restrained but brilliant reply to Jean does not mean I have overlooked a somewhat slanted and questionable item by one Prugh in the same issue. However, a cursory inspection of the contents of the same indicates it would be sufficient to assign some boy to do a job on it. Incidentally, it appears to me that attacks by the military on the Code and Court are increasing in tempo. Whether these spring from a common front is not known, although it is entirely possible that Unification is at last working in one respect. But assuming there is such increase I am considering appointing myself, ex officio, as hatchet man to take up the gage on behalf of UCMJ—believe me, I love controversies. Let me hasten to add that I do not consider the Code perfect, nor do I by any means agree with all decisions by CMA, but you do not see my name on any of them. As long as the attacks are factual and fair they should give rise to some real worthwhile

discussions. Insofar as the present two Articles are concerned, I am willing to give those gentlemen Aces and Spades and beat them hand-running five times out of four.)

R. L. TEDROW*.

* Mr. Tedrow is Chief Commissioner of the United States Court of Military Appeals. The above "Letter to the Editor" reflects his *personal* observations only.



A strong Association can serve you better. Pay your annual dues. If you are uncertain as to your dues status, write to the offices of the Association for a statement. Stay active. Recommend new members. Remember the Judge Advocates Association represents the lawyers of all components of all the Armed Forces.

Your professional success, important cases, new appointments, political successes, office removals, and new partnerships are all matters of interest to the other members of the Association who want to know "What The Members Are Doing." Use the Journal to make your announcements and disseminate news concerning yourself. Send to the Editor any such information that you wish to have published.

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. Aleya, USAF.

New Stars in the Air Force JAGD

MAJOR GENERAL ALBERT M. KUHFIELD

Albert M. Kuhfeld was born of pioneer parentage at Hillyard, in the State of Washington, January 25, 1905. His father, born William Gustav Kuhfeld, was a supervisor for the Northwestern Railroad. His mother, Robina Meldrum Kuhfeld, was born in Scotland and came to this country at an early age where she grew up during the period of frontier development in the Northwest. General Kuhfeld completed elementary schooling at Adams School and high school at Central High in St. Paul, Minnesota. In 1921, he entered the University of Minnesota where he graduated from the Law School in 1925 receiving on that occasion his LL.B degree. During his junior and senior years at the University of Minnesota Law School, General Kuhfeld was selected as one of the editors of the Minnesota Law Review, a position he held for two years. He served as assistant advertising manager of "Ski-u-mah", official student body magazine, and while in the Law School became a member of and was elected a chapter officer of Chi Chapter, Gamma Eta Gamma, professional law fraternity. General Kuhfeld enrolled in the ROTC Course at the University of Minnesota. During this period of ROTC training he became a Battalion Commander and ultimately was appointed as a commis-

sioned officer (2nd Lt.) in the Infantry Reserve.

Upon graduation from Law School, General Kuhfeld passed the state bar examination and was admitted to practice before the Supreme Court of that state in 1926. He thereafter entered into the general practice of the law in St. Paul, Minnesota. One of the first legal positions held by General Kuhfeld was as law editor in the field of real property and future interests for The Mason Law Book Company located at St. Paul, Minnesota, which company was engaged in a complete revision of Girard's "New York Real Property Law." For this editorship General Kuhfeld was personally recommended by the then Dean of the University of Minnesota Law School.

During the year 1927 General Kuhfeld was offered a full partnership in the oldest law firm west of the Missouri River, the firm of Keohane and Kuhfeld, located at Beach, North Dakota. He accepted the offer and moved to North Dakota in the latter part of the year to begin the practice of law in that state. In the same year he was duly admitted to practice before the North Dakota Supreme Court and enjoyed considerable appellate work before that judicial body.

In 1930, General Kuhfeld was elected States Attorney for Golden Valley County and was reelected for a second term. During his term as States Attorney, General Kuhfeld was at one time appointed Acting Assistant Attorney General as special criminal prosecutor of a "rustling" case. On the 8th of June in 1930, he married Olive Leone Peterson, a teacher at Beach, North Dakota.

In 1934 he was appointed as Assistant Attorney General for the State of North Dakota and served continuously in that capacity under two successive Attorneys General. Among other things he was legal advisor to the North Dakota Workmen's Compensation Bureau; he rendered opinions on legal matters to Boards and Commissions in the various municipalities of the state and to various state officers. In addition he conducted a considerable volume of trial and appellate work for the Attorney General. Upon request of various state agencies and legislative committees, he prepared drafts of bills and amendments to existing law for consideration by the State Legislature and he then appeared before legislative committees in connection with such legislation.

By 1939 the Legislative Assembly of North Dakota considered it necessary to completely revise the legal code of North Dakota and enacted legislation providing for a Code Commission of three lawyers of the state to prepare the revision. Appointments to the Commission were delegated to the Supreme Court. That court selected Assistant Attorney General Albert Kuhfeld as Chairman of the Code Commission and chief

revisor. During the period of his service in this post he was granted leave of absence from the Attorney General's office. The revision project encompassed the integration into a new legal code of sixty-four major titles or divisions, the last revised code of 1895, all the intervening session laws of the state and the decisions of the Supreme Court of North Dakota. It was completed in all material respects by the beginning of March 1942, when General Kuhfeld was called to active duty with the Army for war service.

Except for a short interval, General Kuhfeld continued his reserve status during the "long armistice" prior to World War II. This effort had its ultimate reward with the outbreak of hostilities when there was need for gigantic mobilization and trained Reserve Officers. General Kuhfeld, having been promoted in October 1930 to First Lieutenant, Infantry Reserve, was called to active duty on March 3, 1942, and thereafter reported for duty to Camp Crowder, Missouri, with the Infantry. He was shortly assigned as Assistant Operations and Training Officer. His promotion to Captain came in September 1942. By October 1942 he was again serving in his chosen profession, the law, and was appointed an Assistant Staff Judge Advocate, 7th Service Command, Omaha, Nebraska. Shortly thereafter, he was appointed Acting Staff Judge Advocate, Camp Phillips, Salina, Kansas. In February 1943 he attended the graduate Army JAG School at Ann Arbor, Michigan, graduating three months later in May. He thereafter served a tour of

temporary duty with the War Department in Washington, working on legal matters and was promoted to Major. The next month, June 1943, he departed the United States for his first overseas assignment.

Upon arrival in Brisbane, Australia, he was appointed Executive Officer to the Staff Judge Advocate, Headquarters, Fifth Air Force. He then served with this command as the Assistant Staff Judge Advocate until June 1944, when the then Fifth Air Force became Far East Air Force and the Advance Echelon, Fifth Air Force, in New Guinea, became Fifth Air Force. At this time he was appointed Staff Judge Advocate of Fifth Air Force, and in October 1944 he was promoted to grade of Lt. Colonel. The Fifth Air Force conducted operations over a large area of the Southwest Pacific and Japan and General Kuhfeld participated in the battle campaigns for New Guinea, Southern Philippines, Luzon, the Bismarck Archepeligo and the Philippine Liberation. During these campaigns he saw service at Brisbane, Australia; Port Moresby and Nadzab, New Guinea; Owi and Biak in the Dutch East Indies; Leyte (where he received the Bronze Star to the Philippines Service Medal for participation in the Leyte landings); Mindoro; Ft. Stotzenberg on Luzon and Okinawa. While in Okinawa he was awarded the Bronze Star Medal. General Kuhfeld culminated his long trek across the Pacific by landing at Tachikawa Air Base in Japan at the time of the Japanese surrender with the advance Air Force echelon under General K. B. Wolfe. He continued to serve in Japan until March 1946,

when he returned to the United States. He had been promoted to grade of Colonel in November 1945 and while serving in Japan he was awarded the Legion of Merit for exceptionally meritorious conduct in the performance of outstanding service to the United States as Staff Judge Advocate, Fifth Air Force.

Shortly after arrival in the United States from the Pacific Theater, General Kuhfeld put into effect his plan to return to the civilian practice of law. He went to Camp McCoy, Wisconsin, to await separation. He duly received orders to this effect and was within thirty minutes of processing out when he received a telephone call from the Air Judge Advocate in Washington asking him to delay separation two months until June to permit him to set up a new General Courts-Martial Jurisdiction at Biggs Field, Texas. General Kuhfeld agreed, with the proviso he be released in June. It was not until September of 1946 however that new separation orders were ultimately issued. Fully expecting to separate, General Kuhfeld had the new orders in his pocket when an official telegram arrived offering him a regular commission in the Army. It was not destined that General Kuhfeld return to civil life for after a short period of serious reflection, General Kuhfeld accepted the regular appointment.

In February 1947, General Kuhfeld became the Deputy Command Judge Advocate, Headquarters, ATC, at Gravelly Point, Washington National Airport. When the Department of the Air Force attained its autonomy in 1948, General Kuhfeld

was assigned to Headquarters, USAF, as Chairman of the only Air Force Board of Review existing at that time. It was during his period of service in that judicial position that he wrote a number of the landmark cases in the Air Force law of Military Justice. In the month of April 1949 General Kuhfeld was appointed Brigadier General, USAF, and at this time was also appointed Assistant Judge Advocate General for Military Justice, and was further appointed one of the three General Officers of the Air Force Judicial Council, then the court of last resort in the Air Force. The Judicial Council had been recently established by Congressional enactment containing articles covering Military Justice, more familiarly known as "The Articles of War."

General Kuhfeld continued to serve as a member of the Air Force Judicial Council for the entire two years the Council existed and sat in final judgment upon the determinative Air Force cases of the time which came before it. When the Uniform Code of Military Justice became effective on 31 May 1951, the Judicial Council was replaced by the United States Court of Military Appeals, a civilian court, and General Kuhfeld continued to serve as Assistant Judge Advocate General for Military Justice.

Within two years and on 20 February 1953, General Kuhfeld had been elevated to the post of The Assistant Judge Advocate General, USAF. On 27 October 1954, he was promoted to the grade of Major General, USAF. By virtue of this appointment he became historically the second Major General in the Judge Advocate General's Department of the Air Force.

Any account of General Kuhfeld's life would fail to provide a complete insight into his fundamental sense of justice, his concept of the value of the human individual and his unswerving determination to achieve the end he believes is right, without reference to Department of the Air Force policy covering its rehabilitation and training program for young men of the Air Force, who under enlightened criteria, are considered salvageable for further military service and as worthwhile citizens of this country. This retraining program—for such it is considered and called, rather than the serving of confinement under court martial sentence—is not only a program in which General Kuhfeld maintains an intense interest but is one for which he has worked strenuously to create and subsequently to make go. Thus, against a background of initial official reservation and doubt, the first retraining organization of its kind in any service was created and set up at Amarillo Air Force Base, Texas, with the designation: 3320th Retraining Group. The basic purpose of the Retraining Group is to accept, as a trainee, the first offender, the young service man away from home for the first time, as well as the older airman, who for many different reasons ultimately find themselves under court martial sentence, facing confinement and ultimate discharge or bad conduct discharges back into civilian society.

The emphasis at the Retraining establishment is on retraining in the literal sense of the word. There are no cells, no bars and no armed guards. Enlightened supervision, under trained professional and tech-

nical experts, and the honor system are employed. In General Kuhfeld's mind, the important facts to be learned from experience data flowing from Amarillo are first of all, that the basic concept that American boys as first offenders can be successfully salvaged, has been substantiated and secondly, that the cost to the taxpayer per man per day to salvage an airman at the Retraining Group is actually less than just holding him in confinement in the guard house. In addition, the original investment of the Air Force and the taxpayer in the airman's training is returned and the payoff is made again when the airman ultimately returns to society with an honorable discharge. General Kuhfeld regards the Air Force as having made significant progress along this frontier of human relations.

As The Assistant Judge Advocate General of the Air Force, Major General Kuhfeld, has endeavored to constantly raise the professional level of the military law practice. This effort flows from the philosophy that the entire Judge Advocate General Department in the Air Force should approach its mission of handling the Department's complex, world-wide problems as a firm of professional attorneys with the Air Force as its

client, rather than as a military staff group within a rigid military caste system based purely on rank and command. To further the excellence of the JAG Department he has consistently urged the highest qualifications of attorneys appointed in the JAG Department of the Air Force. In addition, he maintains an abiding interest in the civilian community of lawyers who hold Reserve assignments with the Air Force and devotes much of his time furthering the JAG Department Reserve Training Program. In just a little under seven short years, since the Department of the Air Force became autonomous, the Judge Advocate General's Department has become one of the largest law offices in the world.

In addition to the Legion of Merit and the Bronze Star Medal, General Kuhfeld's decorations include the World War II Victory Medal, the Army of Occupation Medal (Japan), the Asiatic-Pacific Campaign Medal with five Bronze Stars and the American Theater Ribbon.

PERRY H. BURNHAM,
Major, USAF
Chief, Education & Training
Division
Office of The Judge Advocate
General.



BRIGADIER GENERAL MOODY R. TIDWELL, JR.

Moody R. Tidwell, Jr., is a native of Oklahoma, married and has one son.

He received his education from the public schools of Miami, Oklahoma, The Western Military Academy, Alton, Illinois, and the University of Oklahoma from which he received his LLB degree.

General Tidwell was in the general practice of law at Miami, Oklahoma, until he was called to active duty in October 1940. He is admitted to practice before the Supreme Court of the United States, Supreme Court of Oklahoma, and the Federal District Court of the District of Columbia.

General Tidwell was commissioned a second lieutenant in the Finance

Department, United States Army Reserves in June 1924 and remained an active member of the Officers Reserve Corps until his integration in the Regular Service in 1947. His assignments have been: Chief of the Claims Division, Office of the Chief of Finance, Washington, D. C., 1940-1943; Office of the Under-Secretary of War as a member of the Board of Contract Appeals, Washington, D. C., 1943-1948; Staff Judge Advocate, Far East Air Forces, Tokyo, Japan, 1949-1952; Staff Judge Advocate, Headquarters Air Materiel Command, Wright-Patterson Air Force Base, 1952.

He has been awarded the Legion of Merit with one OLC, the Bronze Star and the Commendation Ribbon.



Attention is called to the excellent military law publications of The Lawyers Co-operative Publishing Company, Rochester, New York. Lawyers Co-op publishes Court-Martial Reports—Armed Forces, Court-Martial Reports—Air Force, Digest of Opinions of The Judge Advocates General, U. S. Court of Military Appeals Reports and Advance Opinions, Military Jurisprudence, and Compendium of Laws—Armed Forces. For descriptive information on these publications, see 15 JAJ 26, October 1953.

Book Review

MONATT'S TAX ATLAS

By Samuel M. Monatt

Matthew Bender and Company (1955)

This current volume is a new edition of a time-tested, practical handbook on federal taxes—income, gift, estate, social security, and excise taxes, among others. Although this handbook is encyclopedic in content, its explanations, instructions, and illustrations have been selected on the basis of experience and common sense. For this reason, tax problems which are important to the average family and to the average business firm are rightfully accorded special treatment. As a general rule, for the solution of each tax problem, instruction is effected through specific illustrations, and guidance is gained by detailed, step-by-step advice. It is clear that pains have been taken to avoid ambiguity and to assure understanding.

For the general practitioner, therefore, this "how-to" handbook is quite useful, particularly, I believe, as an aid in discerning the tax consequences of ordinary business and family transactions and as an aid in preparing tax returns. It is intended to be a practical and handy guide and so has been designed with a topical table of contents and a topical index, cross references, and citations. The citations, however, are generally limited

to references to the Internal Revenue Code (1954) and for the most part to the Regulations thereunder. For the convenience of the general practitioner this book includes a tax calendar; check list (business and personal: taxable and nontaxable income and allowable and nonallowable deductions); tax rate tables; specimen returns (individual, corporate, partnership, personal holding company, fiduciary, etc.); and a separate identification of temporary problems created by the new Code. In addition, the general practitioner is advised on how to compute tax penalties and how to obtain rulings and refunds. He is, of course, shown at every opportunity how to effect tax-savings.

In short, this is a one-volume guide to federal taxes which, I believe, effectively achieves its purpose. Most general practitioners, in need of a greater sophistication in tax matters, will appreciate the clean-cut nature of its explanations, its everyday examples, its helpful references, and its line-by-line examination of the important types of federal tax returns.

SHERMAN S. COHEN,
Major, USAFR.

AMERICAN BAR ASSOCIATION ACCREDITS ARMY JUDGE ADVOCATE GENERAL SCHOOL

The Department of the Army announced on May 2, 1955, that the graduate program of the Army's Judge Advocate General's School, Charlottesville, Virginia, had been approved unanimously by the House of Delegates of the American Bar Association.

This is the first time the American Bar Association, the national accreditation body for law schools, has accredited such a program.

The Judge Advocate General's School, first established as a permanent school by the Department of the Army on August 2, 1951, provides instruction and training in military law and the duties of a staff judge advocate, with emphasis on the administration of military justice under the uniform code of Military

Justice. The school conducts assigned activities of the Judge Advocate General's Corps pertaining to research, planning and publications, procurement, military justice, comparative and international law, claims and military affairs. It also prepares legal texts for Army-wide use, and prepares and administers extension school courses and prepares and distributes literature for the Judge Advocate General Branch Departments of the U. S. Army Reserve Schools.

Colonel Charles L. Decker was the first Commandant of the school which operates under the direct control of Major General Eugene M. Caffey, the Judge Advocate General of the Army. The present Commandant is Colonel Nathaniel B. Rieger.



What the Members Are Doing

Arizona

During the A. B. A. Regional Meeting in Phoenix a group of JAG's got together for luncheon and a "session" on April 14th. Among those present were Col. Don T. Udall (5th Off.) of Holbrook, Maj. Harry S. Stevens (17th Off.) of Phoenix, Maj. John P. Clark (4th Off.) of Winslow, and Maj. Henry L. Merchant of Tucson.

District of Columbia

Col. Mastin G. White (2nd Off.) recently announced the formation of a partnership with Tom Connally, formerly U. S. Senator from Texas, for the general practice of law with offices in the Union Trust Building. Col. White was one time Solicitor of the Department of Agriculture and of the Department of the Interior.

Maj. Richard H. Love recently announced the association of Malcolm W. Houston with him for the general practice of law in the District of Columbia and Maryland. Mr. Houston, a member of the Association, is a native of Keene, New Hampshire.

Col. "Mike" Erana (5th Off.) was recently elected president of the JA Chapter—ROA and state chairman of the J. A. A. for the District of Columbia. He succeeds Cmdr. J. Kenton Chapman. Highlights of the year's monthly dinner meetings of the members in the Washington area were the March meeting when Sen-

ator Strom Thurmond of South Carolina, ROA president, and Senator James O. Eastland of Mississippi addressed the group and the May meeting when the Royal Thai Ambassador, Mr. Pote Sarasin, was guest speaker.

Illinois

Hugo Sonnenschein, Jr., has become a member of the firm of Martin, Craig, Chester and Sonnenschein for the general practice of law with offices in the Harris Trust Building, Chicago.

Robert J. Nolan (6th O. C.) recently announced the removal of his offices for the general practice of law to 105 South LaSalle Street, Chicago 3.

Kenneth H. Clapper has announced the formation of the law firm of Foreman, Meachum and Clapper with offices in the Baum Building at Danville.

Massachusetts

Capt. William J. Kelly has been assigned as SJA of the 6520th Support Wing at L. G. Hanscom Field, Bedford.

New Hampshire

Col. Samuel Green (12th Off.) of Manchester is the Judge Advocate General of the New Hampshire National Guard. Col. Green has law offices in the Bell Building in Manchester.

New York

Joseph H. Levie has become associated with the law firm of Aranow, Brodsky, Einhorn and Dann. Mr. Levie's offices are at 285 Madison Avenue, New York City.

Col. Arthur Levitt was elected to the office of The Comptroller of the State of New York at the November elections. Col. Levitt, a member of the Board of Directors of the Association, continues a very active interest in the Association, notwithstanding the heavy and important duties of his public office.

North Carolina

James B. Craighill (17 Off.) recently announced the formation of a new partnership for the practice of law in which John P. Kennedy, Jr., also a member of the Association, is a member. The firm, under the name, Craighill, Rendleman & Kennedy, has offices in the Law Building, Charlotte 2.

North Dakota

Everett E. Palmer (6th O. C.) who engages in private law practice with offices in the Hapip Building at Williston is City Attorney for Williston and was recently named District Deputy Grand Exalted Ruler for the State in the Benevolent and Protective Order of Elks.

Ohio

Col. James Arthur Gleason of Cleveland reports that at the A. B. A. Regional Meeting at Cincinnati on June 9th a group of JAG's met for luncheon at the Terrace Plaza Hotel.

Col. Edward L. Douglass, Jr. (16th Off.) of Cincinnati was host and Judge Paul H. Brosman of U. S. C. M. A. was guest speaker. Some of those reported present were: Maj. William K. Yost (6th O. C.) of Massillon, Col. Martin R. Glenn of Louisville, Kentucky, Maj. Richard B. Wills (2nd O. C.) of Youngstown, Col. Harold K. Parsons of Cincinnati, Cmdr. Harold M. Baron of Cincinnati, Col. Andrew G. Mehas of Cincinnati. Judge Brosman stayed with the group several hours answering informally questions raised concerning UCMJ and COMA. During the evening Judge Brosman and Col. and Mrs. Gleason were guests of Col. and Mrs. Douglass at the Cincinnati Country Club.

Oklahoma

Lt. Col. George R. Taylor of Oklahoma City was recently appointed Assistant Insurance Commissioner for the State of Oklahoma. Col. Taylor formerly engaged in private practice at Stillwater. Following World War II, he served on War Crimes Review Boards in Germany and Japan and more recently was an Occupation Courts Administrator in Japan.

Texas

Col. Robert E. Joseph of San Antonio attended June graduation ceremonies at West Point to proudly observe his son become *Lieutenant* Robert E. Joseph, Jr.

Utah

Gen. Franklin Riter of Salt Lake City was elected President of the

Utah Department of the Reserve Officers Association on April 1st. General Ricer was reelected Utah State Delegate to the House of Delegates of the American Bar Association.

Vermont

Osmer C. Fitts (5th Off.) recently announced the formation of the firm of Fitts and Olson for general law practice at Brattleboro.

Virginia

John Alvin Croghan recently moved his law offices to 102 North Washington Street, Alexandria.

Blake B. Woodson, (8th O. C.) recently announced the formation of the law firm of Walker and Woodson. The firm will have offices at 242 Court Square, Charlottesville.

The Virginia State Bar extended congratulations through its May issue of the "Virginia Bar News" to Major General Eugene M. Caffey, a graduate of University of Virginia Law School and a member of the bar of that Commonwealth. The occasion of this recognition was the an-

nouncement that the American Bar Association had extended its accreditation to the graduate branch of the JAG School located at Charlottesville.

Col. Charles L. Decker, formerly Commandant of the JAG School at Charlottesville, has been assigned to new J. A. duties in England. Col. Cameron F. Woods is presently the Acting Commandant of the School with Col. Nathaniel B. Rieger as Deputy.

Lt. Edward R. Parker, having completed a tour of extended active duty, recently announced his return to the practice of law with offices in the Mutual Building at Richmond.

Wyoming

Lt. Col. George F. Guy of Cheyenne was recently appointed Attorney General of Wyoming. Col. Guy is also the Judge Advocate General of the Wyoming National Guard.

Lt. Col. Louis F. Alyea has been assigned as Staff Judge Advocate of the 13th Air Force based in the Philippines.



