

The Judge Advocate JOURNAL



Published By

JUDGE ADVOCATES ASSOCIATION

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Washington, D. C.

Bulletin No. 22

May, 1956

Publication Notice

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Proceedings in the United States Court of Military Appeals

In Memory of

HONORABLE PAUL W. BROSMAN

15 February 1956

Colonel Frederick Bernays Wiener, Secretary of the Judge Advocates Association, addressed the Court as follows:

May it please the Court:

This final tribute to Judge Paul W. Brosman is extended on behalf of the Judge Advocates Association, of which he had been a member since it was first formed.

In 1945, Judge Brosman, then a Lieutenant Colonel on duty in the Office of The Air Judge Advocate, was elected a Director of the Association; and from 1951 to 1953, he was once more a member of the Association's governing body, first as Director and then as a Vice-President. We who met with him at the Board's periodic deliberations knew his charm and warmth and friendliness; we felt the glow of his outgoing personality; and we grieve now that his zest and sparkle are gone, leaving so much the losers those of us who remain.

In the Judge Advocates Association, a group which constitutes the organized military bar insofar as any one group can aspire to that designation, Judge Brosman found congenial companionship. For he was, above all, a lawyer and a student. His years as a teacher of law

and as dean of a law school attested his intellectual interests—interests he did not forsake when he was translated to this Court. As General Caffey has said, he was largely instrumental in having the Judge Advocate General's School at Charlottesville accredited by the American Bar Association. And, like every good judge, he continued to teach through his pronouncements from the bench.

It is, of course, too early to attempt to make a definitive appraisal of his contributions to military law. Enough that Judge Brosman's lasting monument in that regard is contained in the first six volumes of this Court's reports. And while no one can say, least of all at this juncture, which of his opinions will endure over the years, it may still be ventured with some assurance that there will certainly be permanence in those that dealt with the purely professional problems of the military lawyer.

To what extent is the lawyer in uniform bound by the standards of the lawyer in mufti? In Judge Brosman's view, shared by his brethren, the answer was plain: The service lawyer's obligation is quite as rigid as that of his civilian brother.

For, after all, there is not only no divergence between the *Manual for Courts-Martial* and the Canons of Professional Ethics, there is actually a literal concordance between the two. And why should there be essential conflict between the ethical standards of the two professions, of law and of arms? The lawyer is required to represent his cause with undivided fidelity, with unflinching energy, fearlessly, by every honorable means at hand, and without violating confidences reposed in him. The soldier for his part is bound to speak truth, to deal honorably with his fellows, and, in all this world, to fear only God.

This view, that the same basic standards should be applicable, did not originate with Judge Brosman, nor was it first evolved following the creation of this Court. Nearly three hundred years ago, it was said in a text on *The Art of War*:

"Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if

it be intended that the soldiers should be kept in their duty and obedience."

And that passage, it is proper to add, graced the title page of an earlier edition of the *Manual for Courts-Martial*.

If, then, it is appropriate to venture a formulation of what is alike the aim and the goal of every dedicated military lawyer, it would be this: that he be guided both by the lawyer's reason and the soldier's faith. Only thus can he pursue the unending quest, only in that spirit can he hope to attain the ideal of justice ruling armies. That ideal was the one pursued by Judge Brosman; that ideal may well stand as his epitaph.

The unending quest, was in Paul Brosman's case so suddenly, so unexpectedly cut short. Yet who, when the end comes, would not wish to be taken likewise—without pain, without lingering, and at the height of one's powers? And so, in Holmes' fine phrase, "we end not with sorrow at the inevitable loss, but with the contagion of his courage; and with a kind of desperate joy we go back to the fight."



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.

Administrative Personnel Boards In The Armed Services

By Fred W. Shields *

There are a number of administrative boards of various kinds set up in the component departments of the Armed Services to deal with rights of personnel. The actions taken by them vitally affect and concern the rights of a considerable portion of the population who have served or are serving in the Armed Services. In theory they operate uniformly and are created under the authority of the same, or at least very similar statutes. In practice, however, while the basic procedure is substantially the same before corresponding boards in each department there, nevertheless, are rather significant differences in the manner in which the various boards operate.

Before undertaking any discussion of the various boards, it is believed that some reference should be made to the recent decisions of the Court of Claims in the *Odell*¹ and *Girault*² cases. In those decisions the Court has held that the filing of a claim before a Disability Review Board or a Board for the Correction of a Military or Naval Record does not operate to toll the running of the

Statute of Limitations against the plaintiff's claim.

The Court's decision on this issue requires two concurrent but separate proceedings to be initiated by a claimant. The government attorneys have repeatedly appeared in the Court and urged the dismissal of cases pending there where plaintiffs have not fully exhausted their administrative remedies by seeking relief through the Boards for the Correction of Military or Naval Records. (In this connection see defendant's Motion to Dismiss in *John M. Donnelly v. United States*, C. Cls. No. 30-53, decided October 4, 1955.) Although various district courts have held that a petition for writ of habeas corpus arising by reason of a man's conviction by a general court martial will not lie until the petitioner has exhausted his administrative remedy by seeking a new trial under the provisions of the Uniform Code of Military Justice, (*Cf. Gusick v. Schilder*, 340 U.S. 128; *Burns v. Wilson*, 346 U.S. 137; and *Osborne v. Swope, Warden*, U.S.C.C.A. 9th Cir., 226 F.2d 908), the practice of the Court

* Mr. Shields, a member of the bar of the District of Columbia, engages in private law practice. The views here expressed are the author's based on his own observations and experience.

¹ C.Cls. No. 145-55, Motion for Rehearing denied April 3, 1956.

² C.Cls. No. 50474, decided November 8, 1955.

of Claims in those cases where the plaintiff has not exhausted his administrative remedy by seeking relief through any of the administrative boards operating in the uniformed services is to suspend further action in the case in the Court of Claims while the plaintiff does exhaust his administrative remedy. Then, if relief is denied the plaintiff by the board or boards before which he seeks relief, the Court will permit him to continue the prosecution of his case in the Court of Claims. Cf. *Hamrick v. United States*, 120 C.Cls. 17, *Donnelly v. United States*, supra.

While the Court's practice in this respect may have some practical advantages, the fact remains that it is of doubtful legality. It would seem that a court either does or does not have jurisdiction of a case, depending upon whether or not the plaintiff has exhausted his administrative remedies. If he has not exhausted his administrative remedies it would seem that when the government moves to dismiss for that reason the motion should be upheld. Certainly if the administrative remedies provided through the various boards are permissive only and not mandatory so far as a plaintiff is concerned, as the Court indicates they are in the *Odell* and *Girault* decisions, there is no reason why proceedings in a case should be suspended while the plaintiff exhausts those administrative remedies. However, as a practical matter, there is presently no alternative to the double filing if the effect of *Odell* and *Girault* is to be avoided.

Perhaps the most important group of Boards which have been set up by the Armed Services are those functioning in connection with the determination of physical disabilities incurred by service personnel. For instance in the Army Disability Retirement System, the Medical Board is a board of three medical officers who assemble for the purpose of evaluating the patient's physical disability and determining from a medical standpoint whether the individual is fit or unfit to perform duty and to express a diagnosis or diagnoses, and to further determine medically whether the condition existed prior to the individual's entry into the Active Military Establishment. If in the opinion of the Medical Board an individual is unfit to perform the duties of the military, it recommends that he be evaluated by a Physical Evaluation Board.

The Physical Evaluation Board replaces the former Retiring Board. It is authorized and created by the Career Compensation Act, 63 Stat. 938. It consists of two line officers and a medical officer, none of whom are supposed to have had any previous knowledge of the case. They review the records that are transmitted to them by the hospital and a full and formal hearing may be had with the presentation of evidence. This is the first board at which the individual serviceman may have counsel. The Government furnishes military counsel or the individual may obtain civilian counsel at his own expense. This board in effect reviews the action of the Medical Board, and also makes a de-

termination of fitness for duty, the diagnoses, and the degree of the disability computed on a percentage basis under the V. A. Schedule for Rating Disabilities, and expresses an opinion as to whether a disability is temporary or permanent.

The proceedings of the Physical Evaluation Board are automatically reviewed by what is known as the Physical Review Council. The serviceman, if he disagrees with the findings of the Physical Evaluation Board, may file what is known as a rebuttal, which goes back to the Physical Evaluation Board and from there is forwarded to the Physical Review Council. It is in effect his appeal. The Physical Review Council consists of a lawyer, a doctor, and a representative of the personnel branch of the Armed Service. This is a non-voting board; there are no appearances before it, and the board may make recommended findings contrary to those of the Physical Evaluation Board. In the event the serviceman disagrees with the findings of the Physical Review Council, where the Physical Review Council has changed the decision of the Physical Evaluation Board to the detriment of the serviceman, he may file a rebuttal which goes to the Physical Disability Appeal Board. If the Physical Review Council concurs in the findings of the Physical Evaluation Board, the case is terminated and the decision is final so far as the Department is concerned.

The Physical Disability Appeal Board is a board at Secretary level and at this point there are variations between the manner in which this appeal is handled according to

the several services. In the Navy, the Board will permit for practical purposes a trial *de novo* with full representation by counsel before that board, the taking of new and additional evidence including the testimony of witnesses and, the personal appearance of the person concerned. Insofar as the Navy Board is concerned, if they differ with the Physical Review Council, the file, after the full board's decision is made, is returned to the Review Council and from there it goes to The Judge Advocate General for review and transmission to the Secretary for his action.

In the Army, the Physical Disability Appeal Board is for practical purposes the Army Personnel Board and is composed of a number of general officers. This board has two medical advisers and the disability retirement cases are referred to the medical advisers for their recommendations. There is no personal appearance before this board. The only representation that the serviceman has is in the form of a brief pointing out his differences with the Review Council. New evidence may be presented in writing. The Army Disability Appeal Board is comprised of all line officers with the result that the recommendation of one of the medical advisers is generally the determination of the Board.

In the Air Force, the Disability Appeal Board is the Secretary of the Air Force Personnel Council and this board sits in panels. There may be a General on the board; usually there are Colonels and Lieutenant Colonels. This board has medical

officers assigned to it and each sits as a voting member of the board. There is no personal appearance permitted before this board. A brief may be filed in the form of a rebuttal and that is the only representation by counsel which the serviceman has at this point. The action of this board is the action of the Secretary concerned and one never knows what happens in any of these appeal boards until after the Secretary has signed the order and the serious question arises as to whether or not at this point the Secretary is in *functus officio*.

In the event a serviceman is released from active duty by reason of physical disability not incident to his service, he may file with the Disability Review Board of the service concerned an application for review of his case. In each instance, the same board that heard his case originally, though there may be a different panel, is the Review Board. This is manifestly unfair because it requires one group of officers sitting in the same office to overrule other officers sitting in the same office. This is substantially true in all three services. At the Disability Review Board new evidence may be introduced, personal appearance by counsel and personal appearance by the former serviceman. It is very difficult to get a reversal in the previous proceedings by this Board.

In the event of unfavorable action by the Disability Review Board, an application can be made to the Board for the Correction of Military or Naval Records as may be appropriate, the object being to correct an error or an injustice. These Cor-

rection Boards are probably the most important of any of the administrative boards operating in the Uniformed Services. They are constituted under the authority of Section 207, Public Law 601, 79th Cong., 2d Sess., 60 Stat. 812, 837, 5 U.S.C. 456a, as amended by Public Law 220, 82nd Cong., 65 Stat. 655, 5 U.S.C. 191(a). Generally speaking, the purpose for the creation of the boards was to relieve the Congress of the responsibility of passing upon the vast number of private claims for relief arising by reason of the service of various individuals in the Uniformed Services.

In establishing the Correction Boards, the Congress gave to them virtually unlimited power and authority, subject in each instance, only to the approval of the Secretary of the Department concerned. The boards have authority to enter what amounts to a money judgment in payment of any damage sustained by reason of an error or injustice in an individual's record. The actual constitutionality of the boards is subject to some doubt for the delegation of power and authority is virtually unlimited with no standards whatsoever laid down in the statute governing the operation of the boards. See article, Overton Harris, 42 *Georgetown Law Journal*, 210.

The boards are composed of civilians and while they are, in each instance, employees of the department concerned, they seem to be at least reasonably free from interference or control by the service involved. While the boards are created by the same statute there is a

considerable difference in the way they actually operate. For instance, in the Army Board the policy has been to require the introduction of new and material evidence before that board will consider granting a hearing in a case. The Army sends cases involving disability retirement to the Surgeon General for his comments and this results in the same medical officer who handled the case before the Disability Appeal Board reporting on the case to the Correction Board. Under such circumstances, the chances of obtaining any change in the position of the Surgeon General on any pending case is extremely remote and, of course, the Correction Board is very sensitive to the opinions of the Surgeon General. The Army Board also consistently denies a hearing when one can be denied.

The Navy Board operates in much the same manner as the Army Board except that it seems to be more liberal in granting hearings. In practically all cases where a petitioner insists upon a hearing, the Board will grant one although, of course, the chances of obtaining relief after the Board has first suggested that a hearing is not called for in a particular case is not very good. The Board does have a strong sense of equity and makes a sincere effort to extend equitable relief where justified.

The Air Force Board for the Correction of Records is composed of seven of the top ranking civilian employees in the Air Force. It has an Executive Secretary and one Examiner, neither of whom is an attorney. Several members of the

Board are attorneys and one of the members is the Administrative Assistant Secretary of the Air Force. It is quite independent and grants a full and fair hearing and its decisions seem to reflect a conscientious effort on its part to correct injustices.

Generally speaking, all of these Correction Boards operate in a reasonably fair and impartial manner. They are created to do equity and by and large they fulfill the purpose. The procedure followed by the Boards does have certain inherent defects. For instance it would seem that the boards should grant a hearing in all cases in which the petitioner seeks one. In short, the right to a hearing should be definitely recognized and not granted as a matter of favor by a Board. The examiner should, in all instances, make known to the petitioner and his counsel the recommendation which he makes to the Board. Finally, in the hearings before the Board, the examiner who represents the government's position in any pending case should be required to state his position with respect to the case in the presence of the petitioner or his counsel. As these boards now operate, the petitioner presents his case before the Board then he and his counsel withdraw and the examiner states the government's position on the case. No reason is perceived why both parties should not be heard in the presence of the other, and to permit the government's representative to present his position to the Board in an *ex parte* hearing is manifestly unfair.

The services also have other statutory boards such as the Boards for the Review of Discharges and Dismissals. These boards have extremely limited jurisdiction and there is no real reason for their continued existence. The Correction Boards could easily handle all such cases and it is believed, handle them on a fairer and more equitable basis than do the present Discharge Review Boards. These boards have nothing to do with the elimination of personnel presently serving in the services but instead consider only the cases of persons who have already been discharged or dismissed. Each of the services has various types of boards which pass upon the elimination of service personnel. The Army Board is known as the Army Personnel Board and is composed of officers. The Air Force Disability Review Board is a part of the Air Force Personnel Council and acts for the Secretary in this capacity. The Navy has a similar board appointed by or under the direction of the Chief of the Bureau of Personnel. Little good can be said generally of any of the boards which the various services have created to handle the problem of the elimination of personnel. While a hearing is granted in most cases when insisted upon by a person being considered for elimination, the hearing in all too many instances is simply a useless formality. Each of the services have various directives stating the policy of the service insofar as the elimination of service personnel is concerned and these boards generally consider that the policy thus set out

is binding on them under any and all circumstances. Even where record entries are shown conclusively to have been erroneous, improper or made through malice, these boards generally accept them nevertheless. Substantial reform and improvement in the methods followed by the services in connection with the elimination of undesirable personnel is urgently required. The present system appears to be unfair and inadequate in too many instances to both the individual and to the service.

Conclusion

It is believed that the more important personnel boards presently operating in the Armed Services have been discussed, and that the reader can at least acquaint himself with the jurisdiction of each Board, as well as the way in which it functions.

It must be emphasized that attorneys who undertake to represent persons before any of these boards should appreciate the necessity of a thorough factual preparation of each case prior to presentation before the Board. For all practical purposes a finding of facts by many of these boards is final and conclusive. Certainly there is no effective review by the Courts of the facts as found by these boards unless there is some showing of arbitrary or unreasonable action on the part of a board. To establish arbitrary or unreasonable action is always difficult. Therefore, it is imperative that the factual presentation of the case be as thorough and as com-

plete as possible in the first instance.

Persons representing claimants before the Boards would also, in view of the decision of the Court of Claims in the *Odell* and *Girault* cases do well to file the case in the Court before seeking review by any

of the review or correction boards. Unless this is done the claimant after unsuccessfully seeking relief through a review board or the correction board may find that he is barred from relief in the courts by the running of the Statute of Limitations.



Statement of Policy

The Judge Advocates Association, an affiliated organization of the American Bar Association, is composed of lawyers of all components of the Army, Navy, and Air Force. 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 the Army, Navy or Air Force or are now connected with them in any capacity, active, inactive, or retired, and if you are interested in the aims herein set forth, the Judge Advocates Association solicits your membership.

The 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, Denrike Building, Washington 5, D. C.

The back pages of this issue contain a supplement to the Directory of Members, December, 1955.

THE LAWYER IN THE AIR FORCE*

By Major General Reginald C. Harmon

The Judge Advocate General of the Air Force

The history of the lawyer in the United States Air Force dates from the year 1947 when the Air Force became a separate military department.¹ On February 28, 1942, pursuant to the authority vested in him by Congress,² President Franklin D. Roosevelt established the Army Air Forces as a part of the United States Army.³ This was the formal beginning of the present-day Air Force. However, it was not until 1947 that the Air Force became a completely separate and autonomous branch of the Armed Forces with status equal to that of the Army and Navy.⁴ The first Secretary of the Air Force, the Honorable W. Stuart Symington, assumed office on September 19, 1947. Approximately one year later, on September 8, 1948, the first Judge Advocate General of the Air Force was appointed to office.

The predecessor of the Air Force

lawyer was the Judge Advocate of the United States Army. On July 29, 1775, 26 days after General George Washington assumed command of the Continental Army, the Continental Congress appointed William Tudor, a Harvard College graduate, as the first Judge Advocate of the Army. In 1776, soon after the United Colonies had become the United States of America, Congress awarded Mr. Tudor the title of Judge Advocate General. The Army has had Judge Advocates General⁵ and judge advocates ever since.

In 1948, the newly established Air Force "inherited" that great body of military law established and compiled by the Army Judge Advocate General Corps since the days of the Revolution. This was accomplished by an act of Congress which in effect made most of the Army's law, particularly that relating to military justice, applicable to the Air Force.⁶

* Reprinted by permission of the American Law Student Association and the author. This article appeared in *The Student Law Journal*, Volume 1, Number 4, p. 6 et seq., March 1956.

¹ National Security Act of 1947, Act of July 26, 1947, (ch. 343, 61 Stat. 495), amended by the National Security Act Amendments of 1949, Act of August 10, 1949 (ch. 412, 63 Stat. 578).

² First War Powers Act, Act of Dec. 18, 1941, 55 Stat. 838.

³ Executive Order 9082, dtd Feb. 28, 1942.

⁴ National Security Act of 1947, as amended, op. cit.

⁵ On January 27, 1954, Major General Eugene M. Caffey was appointed as the 21st Judge Advocate General of the United State Army.

⁶ Act of June 25, 1948 (ch. 648, 62 Stat. 1014).

Also, in subsequent transfer orders, the Air Force obtained some Army Judge Advocate officers who voluntarily formed a nucleus for the Air Force Judge Advocate General's Department.

Generally speaking, the lawyer engaged in legal work in the Air Force is a judge advocate. In order to become a judge advocate he (or she) must be an officer who has graduated from an accredited law school, has been admitted to practice before a Federal Court or the highest court of a state, and has been "designated" a judge advocate by The Judge Advocate General. By virtue of this fact, he is a member of the Judge Advocate General's Department⁷ and as such performs full-time legal duties. This department is authorized two percent of the total Air Force officer strength.⁸ Any qualified lawyer in the Air Force serving on active duty in the grade of captain or lieutenant and not on flying status can become a member of the Judge Advocate General's Department, if recommended by his local Staff Judge Advocate and if his professional training and ability are acceptable to The Judge Advocate General. Lawyers designated judge advocates by The Judge Advocate General are also certified as competent to perform the duties of trial and defense

counsel of general courts-martial. In addition, those with considerable legal experience are certified for duty as law officers.

It is recognized that the Air Force has many officers, and a few airmen, who have law degrees and have been admitted to civilian practice but are not judge advocates. Airmen are not designated as judge advocates. The officers of this group, usually as a matter of personal choice, are assigned to duty in investigative, liaison, intelligence, operations, and other specialized positions, some of which are totally unrelated to the field of law. In this respect the lawyer in the Air Force differs from the doctor and the minister who almost invariably are engaged only in their professional pursuits.

In 1948, the Air Force Judge Advocate General started with 72 legal officers who had transferred from the Army. Supplementing this number were a few reserve officers on extended active duty. These were the "charter" members of the Air Force legal organization. There are presently 1334 lawyers in the Judge Advocate General's Department of the Air Force, all of whom are performing full-time legal duties. Eleven of these are women, three of whom have the rank of lieutenant colonel.

⁷ On June 25, 1948, Congress established the Office of The Judge Advocate General of the United States Air Force and also provided for the designation of Air Force officers as "judge advocates" with relatively the same status as judge advocates of the Army. (The Act of June 25, 1948, ch. 648, 62 Stat. 1014.) Later, on 25 Jan. 1949, the Air Force administratively established its own Judge Advocate General's Department (GO No. 7, DAF, 25 Jan. 1949, as amended by GO No. 17, DAF, 15 Mar. 1949).

⁸ Par. 4, AFR 21-3, 3 Jan. 1956.

Part of this tremendous increase in the size of the Judge Advocate General's Department can be attributed to the steady buildup of the Air Force since 1948. The Air Force is a big business—billions of taxpayers' dollars are appropriated each year for its operation. The Air Force lawyer has the responsibility of seeing that this investment is protected. Money spent for aircraft, supplies, operations, overseas bases, research, and the like, must be spent in accordance with the law based on sound legal advice. This part of service law includes many functions such as contracts, procurement, taxation, litigation and patent laws. The inherent problems of these activities cannot be handled efficiently on a part-time basis. They require the services of full-time lawyers whose training and experience enable them to arrive at the most practical and economical solutions.

Another vital factor in the size of the Air Force Legal Department was the enactment of the Uniform Code of Military Justice by Congress, effective May 31, 1951.⁹ During World War I the services did not utilize lawyers to any great extent. In the Army many a lawyer was an ordinary "doughboy." The Navy Judge Advocate General's Office had no service lawyer on its Staff.¹⁰ During World War II, however, the Navy, as well as the Army, found much use for legally trained men. The great citizens' Army of this war had many defense counsel who fought for the individual rights

of an accused. Many of these civilian lawyers, then in uniform, criticized what they called "command control" and voiced general disapproval of the operation of the military judicial system. They argued that by controlling privileges, duties and promotions, commanders could in actual fact control the actions of members of courts-martial appointed under their command. After World War II, a committee of eminent civilian jurists was appointed by the President to study the overall problem of the administration of military justice and as a result of its recommendations the Elston Act of 1948 was enacted. Since this Act applied only to the Army and the Air Force, another civilian committee was appointed to evolve and formulate a military judicial code applicable to all the services. This study resulted in the Uniform Code of Military Justice, enacted in 1950 and implemented by the 1951 Manual for Courts-Martial. This new code greatly increased the need for officer-lawyers in all of the Armed Forces. In the Air Force, it made tremendous demands on the Judge Advocate General's Department to fulfill the increased responsibilities imposed thereby.

A cursory look at the Uniform Code of Military Justice points up the great demand for the lawyer in the service today. For example, three qualified lawyers, the law officer, trial and defense counsel, are required for the trial of each general court-martial. Since the in-

⁹ The Act of May 5, 1950 (ch. 22, 64 Stat. 108), 50 U.S.C., Secs. 551-736.

¹⁰ Vol. 6, No. 2, Vanderbilt Law Review, p. 172, Feb. 1953.

ception of the Code on 31 May 1951 through December 1955, the Air Force tried 7765 general court-martial cases. Also during this same period, there were 10,935 special courts-martial involving bad conduct discharges. After trial of a general court-martial or a special court-martial involving a bad conduct discharge, another lawyer must review the record of trial and prepare a written opinion thereon as to the legal sufficiency of the case. This review, required by law, must be submitted to the commander having general court-martial jurisdiction before he can act on the record of trial.¹¹ Further, under the Uniform Code of Military Justice, these records of trial must be forwarded to The Judge Advocate General for another review by lawyers who sit on one of several boards of review.¹² Moreover, upon request of the accused he is entitled to representation by a lawyer before the board of review and the United States Court of Military Appeals.¹³ This requires two more divisions of officer-lawyers, namely, appellate defense and appellate government, to represent the accused and the Government.

Certainly one of the most important duties of the judge advocate is to assist in the administration of military justice. About 50 per cent of all service lawyers

deal almost exclusively with criminal law. No military commander would contend that discipline is unimportant in the exercise of his command. Even in the days when General Washington commanded the Continental Army, a military code designed to enforce discipline was authorized by the Continental Congress.

One thing that should be emphasized is that military law is not all military justice. Nearly half of the lawyers in the Air Force have duties relating to civil law, commonly called military affairs. Military civil law deals, to name just a few of the areas, with contracts, claims, patents, promotions, retirement, litigation, legislation, international law, taxation, liaison with other Governmental agencies and legal assistance. The legal assistance program is of vital concern to all military personnel and goes to the very heart of the state of morale in the service. Though the commander usually thinks of military justice as being the judge advocate's job, it is not wise for the service lawyer to be only a good criminal lawyer. He should give equal emphasis to matters concerning civil functions, which invariably are the direct concern of the Air Force commander. It is by practicing this two-fold function that the service lawyer increases

¹¹ Uniform Code of Military Justice, Articles 61 and 65b; Manual for Courts-Martial, 1951, par. 85.

¹² Uniform Code of Military Justice, Article 66. Also see Uniform Code of Military Justice, Article 69, as to review of general courts-martial cases not forwarded under Article 66.

¹³ Uniform Code of Military Justice, Article 70.

his practical usefulness and his own importance to his commander.

In the modern Air Force the lawyer is not only concerned with military justice and civil law but also is confronted with new fields of law. Modern inventions like guided missiles, space satellites, and atomic weapon systems raise entirely new and novel questions of law. Just as the automobile and the airplane had its impact on the law, guided missiles and atomic weapons likewise affect the work of the Air Force lawyer. Not all of these legal matters are settled. To successfully cope with the legal problems of these scientific innovations, the service lawyer must insure that no legal impediments are allowed to abate the advancement of air power through research and development.

The judge advocate is the commander's advisor and representative in all matters pertaining to law, whether it be courts-martial, administrative matters, claims, contracts or procurement. In field service he must be prepared to deal with the law in any of its phases. He may be called upon to prosecute, defend or judge a person accused of crime. He may process claims for or against the Government. In this respect he deals with tort law when passing on the liability of the United States for torts committed by its employees.¹⁵ As an effective staff member, the judge advocate must be able to see command problems from the commander's point of view. This calls for an understanding of

the functions and problems of other staff agencies with which he works. In this regard, because the lawyer is viewed as a person of broad knowledge and sound judgment, he is frequently called on to contribute advice and personal effort toward solving command problems outside the field of law.

In the overall picture the Air Force is the client of all Air Force lawyers. At base level, however, the principal client is the commander. The Uniform Code of Military Justice provides in effect that the judge advocate has free access to the commander's office with respect to legal matters without regard for chain of command. Though the judge advocate might be a second lieutenant and the commander a one star general, the lawyer nevertheless is authorized by law to consult personally and directly with him.

Air Force lawyers are assigned at various bases all over the world. There are, for instance, judge advocates stationed in London, Munich, Naples, Paris, Madrid, Honolulu, Manila and Tokyo. Many of these officers are presently assigned to strategic bases where their duties involve legal negotiations with foreign countries in consonance with the plans, missions and policies of the United States State Department.

Except for a few remote bases like those in Greenland and Korea, the judge advocate is allowed to have his family with him, their travel being at Government ex-

¹⁵ Federal Tort Claims Act, 28 U.S.C. 2671-80, 62 Stat. 982.

pense. Obviously, at most overseas assignments, opportunities exist for the Air Force lawyer and his family for travel and general educational improvement. Some officers and members of their families enroll in foreign universities and obtain degrees while stationed overseas. Such things as the Tower of London, Champs Élysées of Paris, matadors in Madrid, Colosseum of Rome, Manila Bay and Fujiyama of Japan are among the thousands of sights for the Air Force lawyer and his family to see and enjoy. The normal tour for the judge advocate officer at overseas bases with dependents is three years. In many instances they like the assignment well enough to request a one-year extension.

By virtue of his profession as a lawyer, the judge advocate enjoys greater opportunity than the ordinary service officer to participate in high level Government conferences both at home and abroad, thereby meeting and working with high ranking United States and foreign officials. When stationed in any NATO country, he not only has the opportunity but in many instances is required to work daily with the judicial system, as well as those who administer the same, in that country.

Most judge advocates like base life where they are respectfully called "judge"—the same as local judges in civilian life. In addition, practically all bases have officers' clubs which have facilities for golf, bowling, tennis, swimming, and many other sports, available at nominal cost. Affiliated with these

clubs are Wives' Clubs which maintain a variety of worthwhile activities for officers' wives.

The professional standard imposed on the Air Force lawyer is the same as that imposed upon the civilian lawyer. The standards of integrity and professional ethics of the commissioned lawyer-officer are in accord with the principles set forth in the canons of professional ethics adopted by the American Bar Association. Both codes are based on principles of decency, integrity, loyalty, dignity and professional efficiency. There are, in fact, many similarities between the military practice of the Air Force lawyer and the civilian practice of the civilian lawyer. Much of the legal work of the Air Force lawyer in civil law is the same as that of the busy civilian practitioner. Moreover, both work in the interests of their clients whether it be the Air Force or an individual. With a military person accused of crime, an attorney-client relationship exists the same as in civilian life. Further, in carrying out the legal assistance program, Air Force lawyers practice law in practically the same manner as when dealing with the private affairs of clients in civilian life. When the many thousands of airmen come to Air Force lawyers for legal assistance, they are no different in desire than clients in civilian life. They want to be told what to do. Accordingly, just as the civilian lawyer's advice to a client is based on his knowledge and investigation of the law, so is that of the Air Force lawyer. There is no difference except that

the Air Force lawyer may not represent a serviceman in a civilian court.

In many respects the military legal office is run in the same manner as the civilian law office. The entire Judge Advocate General's Department can be compared to one huge law firm composed of over 1300 lawyers engaged in the practice of all kinds of law, with offices all over the world. Judge advocates are rated in a similar manner to lawyers in civilian practice—by their clients. Junior lawyers in a Staff Judge Advocate office are rated by the senior member who corresponds to the senior partner in civilian life. The senior judge advocate is rated by his commander, who is the representative of the senior judge advocate's client—the Air Force. As to the obvious situation of having different ranking officers in a military law office, Air Force policy provides for freedom of discussion between judge advocates regardless of rank. It might also be well to note that in many military legal offices there are civilian lawyers and they too are respected for their legal knowledge and not for their relative position in rank.

Young judge advocate officers in the Air Force are trained for duty while serving on the job. It is felt that this system of on-the-job training for young officer-lawyers coming on active duty is more effective and more economical than a specialized school program since they are productive while learning. The experience is much the same as practicing law in a civilian law

firm, the seniors train the juniors while actually handling legal cases.

With respect to flying, since the end of 1952, no officer in the Air Force can be designated a judge advocate and also be on flying status. Prior to that time many judge advocates were on flying status but it was reasoned that in an all-out emergency lawyers would be performing legal duties, not flying. Consequently, there was no justification for the Air Force lawyer to maintain flying proficiency.

The primary source for judge advocates in recent years has been the Air Force Reserve Officers Training Corps. Approximately 150-175 of these officers come on active duty with the Judge Advocate General's Department each year. After designation as judge advocates, they have the opportunity to vie for promotion through the rank of major general. (There are presently five general officers in the department.) Further, each of these officers receives \$10,000 free life insurance and may look to future retirement at three-fourths pay of his rank obtained. Some reserve officers, usually in the rank of captain or lieutenant, are recalled to active duty as judge advocates. However, at present, no direct commissions to civilian lawyers are available.

Many civilian lawyers are connected with the Air Force by virtue of their participation in the Air Force Reserve program. There are presently 89 Reserve specialized training units with an overall number of about 1200 lawyers engaged in reserve training. Those eligible for Judge Advocate Reserve train-

ing must hold an indefinite commission in the Air Force Reserve.

In conclusion, the practice of law in the Air Force presents a real challenge. Few civilian lawyers share such tremendous responsibilities as that of the judge advocate who must protect the billions of taxpayers' dollars spent in defense of our country. He must also be exemplary in officer qualities because of his intimate connection with the administration and enforcement of discipline. In the military community he insures that the individual rights of the American

citizen, as guaranteed by the Constitution, are protected. He must of necessity be an advisor, and confidence and faith in his advice are essential to the military system. Although the Air Force is much younger than its sister services, the Air Force lawyer is proud to be a part of an organization so vital to our nation's defense and is proud that the worthy traditions established by judge advocates, which began in the days of the Revolution, are now being carried on by Air Force lawyers throughout the world.



Going To Dallas?

A special train will bring lawyers from New York, Washington and Philadelphia to Dallas, by way of Chicago. It will originate in New York August 24 and reach Chicago on the morning of August 25, with arrangements being made for a stopover and a visit to the *American Bar Center*. The through Pullmans will operate over the Pennsylvania lines to Chicago, on the Burlington from here to Kansas City, and thence to Dallas via the M-K-T railroad. A big mid-west delegation will join the special train in Chicago.

Another interesting sidelight of the Dallas meeting is a projected 8-day post convention trip to Mexico, visiting Mexico City and a half dozen other resort centers by plane, train and motor coach. It will be an all-expense tour with a top price of about \$263.00 per person. Full information and reservations may be arranged through W. M. Moloney, General Agent, Burlington Railroad, 105 West Adams St., Room 711, Chicago 3, Illinois.

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.

JUDGE FERGUSON JOINS USCMA

Judge Homer Ferguson recently took the oath of office as an associate judge of the United States Court of Military Appeals, joining

Chief Judge Robert E. Quinn and Judge George W. Latimer of that bench. A former judge, United States senator, and ambassador,



Judge Homer Ferguson

Judge Ferguson will bring a broad background of legal and judicial experience to the bench.

Judge Ferguson served in the United States Senate, as a Senator from the State of Michigan, for 12 years from 1943 to 1955. He served for 10 years as a member of the Senate Judiciary Committee and for many years as a member of the Appropriations Committee. He was also Chairman of the Republican Policy Committee and a member of numerous other Congressional bodies, including the Senate Foreign Relations Committee.

He was widely regarded as one of the foremost lawyers in the Senate, as well as an authority on government organization and efficiency. Judge Ferguson was a sponsor of the law which created the second Hoover Commission and a member of the Commission. He left his mark on many of the important legislative enactments during his 12 years in the Senate, including the Internal Security Act of 1950, the Displaced Persons and Refugee Relief Acts and the St. Lawrence Seaway Act. As a member of the Senate's Permanent Investigations subcommittee and the Internal Security subcommittee, he conducted numerous investigations into communist influence in the United States.

Prior to his election to the Sen-

ate, Judge Ferguson was a circuit judge in Wayne County, Michigan, for more than 12 years. For three years he served as a one-man grand jury to investigate graft and corruption in the county government and in the government of the City of Detroit. His service as a one-man grand jury resulted in a wholesale clean-up of conditions in the area. Thousands of witnesses were questioned, indictments were returned, and convictions obtained against hundreds, including high-ranking political and law enforcement figures.

For the past year, Judge Ferguson has served as United States Ambassador to the Philippines.

Personally, Judge Ferguson is friendly and genial. His appearance is distinguished by a shock of unruly, white hair. Born in Pennsylvania, the new judge attended the University of Michigan, where he received his law degree and then practiced law in Detroit. He also taught night school at the Detroit College of Law before being appointed to the circuit bench in 1929.

He is married and has one married daughter (Mrs. Charles Beltz) living in Detroit. He belongs to numerous fraternal organizations, is a 33rd degree Mason, a member of the Presbyterian Church, and a member of the Republican Party.



THE DEPARTMENT OF DEFENSE AND THE ADMINISTRATION OF THE NATO STATUS OF FORCES TREATY ¹

By Mansfield D. Sprague *

The Status of Forces Treaty which I have chosen to discuss with you is a matter of great general interest throughout this country and throughout what I will refer to as the NATO world, meaning the nations which are parties to the North Atlantic Treaty Organization. It is important to us because it affects the day-to-day lives of our troops serving abroad. It is of great general interest throughout the NATO world because it represents what in my opinion is rightly regarded as one of the most impressive achievements of the NATO organization in the field of international military cooperation.

The Treaty is of special interest to that part of the public which is concerned with international affairs. And it is of supreme interest to those of us in the Department of Defense who as lawyers have the responsibility for administering the Treaty and integrating the scheme of jurisdiction which it provides with our Uniform Code of Military Justice. I feel, therefore, that in discussing this subject with you, you will be interested not only as citizens but, even more significantly,

as members of the military service which has had perhaps a longer experience in international affairs than any other. Finally and most important, you have completed special training in the field of military justice and many of you may well be intimately concerned with the administration of the Status of Forces Treaty and similar jurisdictional arrangements throughout the world.

Before discussing this subject in some detail, I think it might be pertinent and of interest to you if I mention briefly two recent court decisions bearing not only on our Uniform Code of Military Justice, but relating to this question of jurisdiction. In these two instances foreign governments are not involved.

Many of you, I am sure, have followed with interest the court proceedings in the case of former Airman Toth which finally culminated in the United States Supreme Court decision of last November holding that Section 3a of the Uniform Code of Military Justice was unconstitutional in that it deprived certain persons in civilian status of

¹See 15 J A J 1, 16 J A J 20, 18 J A J 15, 20 J A J 8 and 21 J A J 46 for other articles expressing various views and opinions on this general subject matter.

* Mr. Sprague, General Counsel, Department of Defense, delivered this address at the U. S. Naval School (Naval Justice) Commencement Exercises held at Newport, Rhode Island, on 16 December 1955.

the right to trial in civilian courts. This matter has had a curious history. After the Hesse Crown Jewels case and the Hirschberg case, it was recognized that a broad loophole existed through which in these days of widespread overseas activity by the Government many criminals would escape the toils of justice. As you know, under the military codes prevailing prior to 1950, personnel discharged from military service and returned to civilian life were not subject to trial by court-martial for offenses committed while serving in the forces abroad. It happens that the jurisdiction of the Federal courts has no application to offenses committed outside the territory of the U. S. except for a few major crimes such as treason. At the time of the hearings before the Congress on the Uniform Code of Military Justice, the Defense Department's spokesmen suggested that the proper way to close this loophole would be to expand the extraterritorial jurisdiction of the Federal courts. The Congress rejected this solution, and instead added a provision to the draft giving the military courts jurisdiction to try discharged military personnel who have become civilians for offenses committed while in the service. This is the provision which the Supreme Court has recently declared unconstitutional. Thus, what the Supreme Court has torn down is a form of jurisdiction which was not sought or wanted by the Department of Defense. I am hopeful that this void in our criminal procedure will be cured by Congress next spring

since to leave the gap unfilled violates our elementary ideas of justice.

More serious, perhaps, than the effect of the decision on discharged servicemen are the implications in an even broader category of cases. That this may be so is indicated by a still more recent decision in which the Federal District Court of the District of Columbia declared unconstitutional the provision of the Uniform Code under which military courts exercise jurisdiction to try *dependents* of servicemen for offenses committed by such dependents while accompanying the forces abroad. Judge Tamm, the District Judge, in handing down his ruling in the dependents case, relied on the language of the majority opinion in the Toth case. I do not need to tell this group how serious the consequences of this decision will be if the case is affirmed on appeal to the highest courts or if the ruling of the Toth case is applied to nullify the jurisdiction derived from the same provisions of the Uniform Code of Military Justice to try offenses committed by *civilian employees* accompanying the military forces abroad. You may be sure that the Department of Defense and the Services are fully alive to these possibilities, and will make every effort to secure an early and final and favorable resolution of the issues raised.

Returning now to the Status of Forces Treaty itself and the jurisdictional problems entailed therein, it is common knowledge that the Treaty has become a controversial matter on the domestic political scene in the United States. Not

that it has become a matter of partisan party politics; rather, the divergence of views cuts across party lines and appears to depend, to no small degree, on the attitude of the individual toward collective security. Indeed, the Treaty was approved by the Senate with broad bipartisan support on both sides of the aisle and by an overwhelming vote of 72 to 15. It was negotiated in 1951 by the Truman Administration; it was submitted to the Senate in 1953 by the Eisenhower Administration with the strong personal backing of the President who had also participated in the development of the Treaty while he was serving as Supreme Allied Commander in Europe.

Despite all this, however, as I have said, the Treaty has been controversial in this country. For example, it has been described as "a tragic abdication of sovereignty"; as "doing away with the Constitutional protection that our servicemen have in this country"; as denying "the protection of the Constitution and the precious Bill of Rights"; as "an insult to the American heritage"; as a "sell out"; and as an "appeasement of the petty resentments of foreign governments".

These are strong words; and, if true, the only choice of loyal citizens would be to take immediate steps to abrogate the Treaty at the earliest legally-permissible time. However, my purpose today is to show you that the Treaty is an essentially reasonable and workable arrangement for handling a novel problem in American foreign relations.

The problem is novel because the United States has never in peacetime had large bodies of troops stationed on foreign soil performing what may be called garrison duty for the Free World. Whether we should have such troops stationed abroad is a policy question which I take to be well established. The question I do wish to discuss is the exercise of jurisdiction over American forces abroad. To whose jurisdiction shall these forces be subject, that of the local courts of the foreign country or that of the military courts of the United States? Which shall prevail, the territorial sovereignty of the foreign country or the Uniform Code of Military Justice which has no territorial limitation in this respect. Must it be all in one and none in the other, or may there be a middle ground? And what if the shoe is on the other foot, and the arrangement must be reciprocal?

These are all questions of the utmost consequence because they involve one of the most jealously guarded and precious prizes of sovereignty, namely, the right of the regularly established courts of a country to administer justice to all and sundry. The history books are full of the evidence of the sensitivity of nations on the subject of jurisdiction. The legacy of ill will which we have inherited as a result of the Nineteenth Century extraterritorial arrangements in the so-called non-Christian countries is a commonly cited example. The revolutionary history of Mexico abounds in examples of demands for abolition of the special jurisdiction

reserved to the clerical and military classes of society. Our own Declaration of Independence complained that George the Third had "affected to render the military independent of and superior to the civil power" and had given assent to "acts of pretended legislation for quartering large bodies of armed troops among us; for protecting them by mock trial, from punishment, for any murders which they should commit on the inhabitants of these States". I dare say if one went back to the Magna Carta he could find further examples of sensitivity on the issue of jurisdiction.

On the other side of the coin, the Defense Department and the three Services know how important it is that military commanders have the power to control their forces and how desirable for this purpose it is that they retain military jurisdiction over them.

The NATO Status of Forces Treaty undertakes to strike a middle ground between these extremes, between the understandable insistence of host nations that their courts exercise full jurisdiction over visiting forces, and the natural desire of military commanders to retain exclusive court-martial jurisdiction over the forces committed to overseas military enterprises.

Before I go further, it may be useful to outline the basic scheme which the Treaty adopts for apportioning jurisdiction between the receiving, or host state, and the sending state. I think this scheme may be fairly summarized as follows: In a few rare cases, the sending state has exclusive jurisdiction as,

for example, when an offense is committed which is an offense against the law of the sending state, and not against the law of the receiving, or host state. Similarly, in a few rare cases, the authorities of the host nation have exclusive jurisdiction to try; for example, in cases where an act is an offense against the local law, but not against the law of the sending state.

Except for these few cases, the balance of jurisdiction covering the vast majority of offenses is stated in the Treaty to be concurrent. In this respect you readily recognize the parallel between the arrangements which the Treaty provides and the arrangements which prevail as between the civilian and military courts in the U. S. Thus, it is entirely fair to say that the Status of Forces Treaty in a certain sense follows a precedent long established in this country. The significant innovation of the Treaty⁷ is that it undertakes to specify when the concurrent jurisdiction of one state is primary and when secondary. Primary jurisdiction means, in effect, the first right to try. The Status of Forces Treaty provides that the military authorities of the sending state shall have the primary right to try concurrent jurisdiction cases in the following circumstances: (1) if the offense is solely against the person or property of another member of the forces of the sending State—an example of this would be the murder of one serviceman by another; and (2) if the offense arises out of any act or omission done in the performance of official duty. For example, the case of a

soldier on courier service running down a local inhabitant. In all other cases, the primary right to try rests in the receiving or host state. There is, however, a clause in the Treaty which provides for protection against double jeopardy so that there may not be two trials for the same offense.

The Treaty first came into force for the U. S. in the summer of 1953. At the present time, all of the members of the NATO Organization have approved the Treaty with the exception of Iceland, which has no Armed Forces, and Germany, which has only recently become a member. It is expected that Germany will accede in due course. The same jurisdictional pattern has been adopted in Japan, and indeed we have at present more troops subject to this type of arrangement there than in any other country.

The Department of Justice has considered at length the charges that the treaty violates hitherto accepted rules of international law and that it has the effect of depriving American soldiers, sailors and airmen of their Constitutional rights. The Attorney General has stated in recent hearings on the Treaty that there is no substantial basis in law for either conclusion. Indeed, he has pointed out that the Treaty actually accords to visiting forces a larger measure of jurisdiction than they would have in the absence of any agreement.

There is one other point bearing on the administration of the Treaty which I should make. The Treaty

provides that where one state has primary jurisdiction it will give sympathetic consideration to requests by the other state for waiver of that jurisdiction in cases of particular importance. Thus, if the state having primary jurisdiction chose to waive that jurisdiction it would be possible for the other state to obtain something very close to the exclusive jurisdiction which is the desire of most military officers with whom I have talked on this subject.

It is the policy of the Department of Defense to seek from receiving States, either informally or formally, a waiver of their primary jurisdiction in every case where such a request is consistent with our over-all relations with the country in question. I mention this policy because I wish also to note the response which we have had from foreign governments.

We have been especially gratified at the high percentage of waivers which have been granted by them. As a matter of international law under the Treaty, these foreign governments need not have waived their jurisdiction in a single case where the accused was subject to their primary jurisdiction under the Status of Forces agreement, since the granting of a waiver is entirely a matter of their discretion. But the Treaty does provide that they will give sympathetic consideration to requests for waiver in cases of particular importance. That this has occurred is attested by the fact that out of more than 6,000 cases in the two years the Treaty has been in force foreign governments

have granted waivers in about seventy percent of them. Foreign courts have tried less than 30% of the cases subject to their jurisdiction, and in most instances the penalty has been a small fine or a suspended sentence. Actual confinement was imposed in less than 1½% of all the cases subject to the jurisdiction of NATO courts, in other words, to about 90 individuals.

These figures indicate to me that our overseas personnel who have responsibility for carrying out the waiver policy are doing a good job in obtaining the cooperation of foreign officials. It requires no stretch of the imagination to realize that the success of our officers in obtaining waivers of jurisdiction from the foreign authorities is directly proportionate to the relationships they are able to establish informally at the working level. It frequently happens that a blunt demand for a waiver of jurisdiction is rejected in circumstances in which a different approach would have succeeded. This has been proven in fact. In this sort of work the Navy by tradition and long experience in dealing with local authorities in the port cities of the world, has developed a finesse and subtlety of approach which is most commendable. Unless I miss my guess, many of you gentlemen, when you leave Newport, will be in a position to carry on the best traditions of the Navy in dealing with the local authorities of

foreign countries, in a manner which will reflect great credit to your country.

It has also been claimed that widespread injustices have been perpetrated against our troops in foreign legal proceedings. Let me assure you that this is not the case. Our commanders in the field have made no such claims. Indeed one of their concerns has been that the sentences imposed abroad in some cases have been too light. At Congressional hearings last summer, the Defense spokesman was able on the basis of the record to assure the Foreign Affairs Committee that there had been no case under the NATO Status of Forces Agreement where we had felt justified in complaining of mishandling by a foreign government.

All in all, I regard the Status of Forces Treaty as a bold and imaginative solution for a novel problem in American foreign relations. I think it has so far worked extremely well, and I think it presents a continuing challenge to the personnel of the Department of Defense and the three Services to administer its provisions with intelligence, with primary regard for the long-term interests of the U. S. in its relations with our Free World allies and with special concern for the inescapable obligation which we all share to protect the legitimate interests of our service personnel abroad.



COURT OF MILITARY APPEALS WILL CONVENE SPECIAL SESSION AT DALLAS

The Judge Advocates Association has arranged with the United States Court of Military Appeals for a special ceremonial session of the Court to be convened at Dallas during the week of the American Bar Association's annual meeting. The Court will entertain motions for admission to its bar at this special session.

A member of the bar of any Federal Court or of the highest court of any state may apply for admission to the bar of the United States Court of Military Appeals by filing with the Clerk an application, the form for which will be supplied by the Judge Advocates Association upon request, together with a certification of the appropriate court of the applicant's membership in good standing at the bar. Admissions are granted on oral motion in open court. The applicant must be present to be admitted.

There are no fees charged for admission or certificates.

Persons interested in being admitted at this special ceremonial session may write either to the Judge Advocates Association or to Alfred C. Proulx, Clerk, United States Court of Military Appeals, Washington 25, D. C., requesting a form application for admission. The filing of application with certification of bar membership if to be presented at this special session may be made directly with the Clerk with a notation "Dallas session" or by mailing to the Judge Advocates Association, 1010 Vermont Avenue, N. W., Washington 5, D. C., which organization will provide sponsors to make the oral motion in open court and will coordinate the arrangements for the special ceremonial session in Dallas with the Judges and Clerk of the Court.



In the last twenty years, the American Bar Association's membership has grown from 28,000 to 85,000. The goal is 100,000 members by August 1956. If you are not a member of A.B.A., you too can grow professionally and help A.B.A. reach its August goal. Why don't you join A.B.A.?

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.

JAA MAKES AWARDS

The Board of Directors of the Association has directed that an appropriate certificate of award be prepared in the name of the Association to be given to the graduating student of each class of the various Service schools receiving the highest academic standing in the course on military or naval justice.

The award has been approved by the United States Naval Academy, the United States Coast Guard Academy, The Judge Advocate General's School, and the United States Naval School (Naval Justice). Since there will be no graduating class from the United States Air Force Academy for several years, that institution has taken the matter under advisement.

The award has already been made to Henry Haugen of Alameda, California, the graduate in the 1955 class of the United States Coast Guard Academy with the highest academic average in the course on military law. Lt. Donald E. Selby of Alexandria, Virginia, a graduate of the United States Naval School (Naval Justice) has received the award for his work in the course on naval justice. Very recently 1st Lt. Roger A. Hornstein, upon his graduation in the 22nd Special Class at The Judge Advocate General's School, was awarded the certificate by Maj. Gen. Eugene M. Caffey, The Judge Advocate General of the Army.



WISCONSIN MEMBERS OF JAA MEET

Charles A. Riedl of Milwaukee, JAA State Chairman for Wisconsin, called a meeting of judge advocates at the Schroeder Hotel, Milwaukee, on February 17th during the week of the Midwinter Meeting of the Wisconsin Bar Association. Richard N. Hunter of Waukesha presided. Dean John Ritchie III of the University of Wisconsin School of Law addressed the group on the history, purposes and work of the Association. Naval officers present stated the case for "a Judge Advocate General's Corps for the Navy" and distributed copies of the article by Henry M. Shine, Jr., in the Federal Bar Journal on "A JAG Corps for the Navy" and other materials. Alfred La France, President of the Wisconsin Bar Association, spoke of the status of the Harry Fleming case in CMA. Mr. La France urged that Wisconsin JAA members organize a State Bar Section on Military Law. Another meeting of the group is planned during the annual meeting of the Wisconsin Bar Association at Madison, June 21-22.

Recent Decisions

of the Court of Military Appeals

Accused's Right to Adequate Representation

U.S. v. McMahan, 6 USCMA 709,
2 March 1956

The accused was convicted of premeditated murder (and other crimes) and sentenced to death. On mandatory review, CMA observed from the record: that the accused was not represented by counsel at the pretrial hearing on the murder charge although the government presented 27 witnesses, 9 exhibits and 11 items of demonstrative evidence and the accused made incriminatory statements; that the GCM which tried the case was specially appointed for the trial of the accused's case and was appointed on the day before the trial began; that the defense counsel appointed also the day before trial had never before served in that capacity to a GCM in the command; that defense counsel was not shown to have had or used more than the one day to prepare the defense; that defense counsel did not ask for a continuance, did not examine any of the members of the court on voir dire, made no opening statement although a detailed one was made by trial counsel, offered no closing argument although the trial counsel argued the case extensively, and offered nothing after findings by the court in extenuation or mitigation, although there was some evidence available. The Court observed

that at some stages of the trial, the defense counsel performed his duties in an acceptable manner, but at the end of the trial particularly, he seemed to abdicate his duties to a degree that suggested he was figuratively pleading the accused guilty. In reversing the Army Board of Review's affirmation of the findings and sentence, the Court said that because this is a capital case, because it is not certain that defense counsel was assigned at such a time and under such circumstances as to permit the giving of effective aid in the preparation and trial of the case, and because of the cumulative effect of the omissions chargeable to the appointed defense counsel at the trial, it was convinced that the accused had been denied a fair trial. See U.S. v. Walker, 3 USCMA 355 and U.S. v. Parker, 6 USCMA 75.

Attorney-Client Relationship— The Legal Assistance Officer

U.S. v. McCluskey, 6 USCMA 545,
16 December 1955

In this case, the accused had been called to the office of the battalion adjutant with regard to his eligibility to occupy government quarters, there being some question concerning the legality of his marriage. It appeared that the accused might be guilty of bigamy; and, thereupon, the legal assistance officer was called into the meeting and for a while, the legal assis-

tance officer spoke privately with the accused. Later the accused executed a statement at the request of the adjutant in which he admitted his previous marriage and asserted his belief that he had been divorced. At a later date, the accused consulted with the legal assistance officer privately concerning the legal aspects of his domestic problem. Thereafter the same legal assistance officer was appointed trial counsel of a court-martial to which charges against the accused for bigamy, among other things, were referred for trial. This trial counsel in preparation for trial arranged to take depositions of relatives of the accused's first wife to establish that she was alive at the time of the accused's second marriage and also prepared correspondence as trial counsel soliciting information concerning the first marriage. Before trial, a new trial counsel was appointed, but nevertheless the depositions obtained at the request of the earlier trial counsel were offered in evidence over the objection of the defense counsel that they were tainted by a breach of the attorney-client relationship. Also, the earlier trial counsel who had been participating as legal assistance officer was called as a witness and he admitted that he had advised the accused concerning his marital complications on several occasions and that in his opinion he was acting as the accused's attorney on at least one occasion. The law officer overruled the defense objection on the ground that the legal assistance officer in writing the requests for the depositions assisted by an-

other was performing no more than an administrative task. The replies to the communications sent out by the legal assistance officer as trial counsel were withheld from the evidence. CMA held that the legal assistance officer acted as attorney for the accused, and all statements made to him during the pre-charge interviews were directed toward the purpose of securing legal guidance, and, therefore these communications were confidential and privileged in every respect. The legal assistance officer was ineligible to serve as trial counsel and the measure of aid which he afforded the prosecution after his appointment and before his relief was more than indirect or slight but resulted in the procurement of testimony on which rested the sole proof of one of the elements of the offense of bigamy. The professional impropriety of this act prejudiced the rights of the accused and, therefore, CMA reversed the board of review which affirmed the conviction, and remanded the matter to the board of review for reconsideration.

Search and Seizure—Duties of the Law Officer

U.S. v. Berry and Mitchell,
6 USCMA 609,
27 January 1956

The two accused entertained two frauleins in an overnight party in the hotel room where one of the soldiers was registered. During the evening, the girls were supplied with cigarettes, experienced aphrodisiac sensations, and all engaged in natural horizontal recreation each with the other. Several days later one of the girls complained to the

CID about the ill effects she attributed to the peculiar cigarettes furnished by the accused at the party, whereupon a CID agent accompanied by a German policeman went to the hotel room of the accused, asked if they could search the premises, and were told to go ahead by one of the men. As a result of the search, marihuana was found. Over the defense objection, this evidence was admitted by the law officer who, however, later submitted the question of consent to the search and seizure to the court members for their consideration. The accused were convicted of possession and use of marihuana, and of fornication in the presence of other persons. On petition of the accused, CMA held that the question of the admissibility of the evidence was interlocutory and its determination rested with the law officer. It was, therefore, error to submit that issue to the court-martial. Although this error may not have prejudiced the accused, the law officer's instruction to the court when he submitted the question of consent to the search and seizure indicated a confusion in his own mind as to the burden of proof on that question, which must necessarily have affected his own earlier ruling. Therefore, the convictions on the marihuana counts were set aside. With regard to the convictions of fornication, CMA held that although UCMJ, Article 134, is not intended to regulate wholly private moral conduct, the act charged and proven in this case was open, notorious, flagrant and discrediting to the military service since the participants knew that others were pres-

ent and it makes no difference that witnesses to each act were themselves engaged in similar acts at the same time.

Law Officer Summarizing Evidence for the Court

U. S. v. Berry, 6 USCMA 638,
10 February 1956

The accused was convicted of aggravated assault in violation of Article 128. In the instructions, the law officer summarized the accused's testimony characterizing it as a judicial confession of a lesser included offense but clearly stated that the court should disregard any comment or statement of his indicating any opinion as to guilt or innocence. On petition of the accused, CMA held that the law officer's comments were not prejudicial. The law officer may comment on the evidence provided he does not distort or add to it and he must not draw unwarranted inferences and must not emphasize portions in favor of one party and minimize those in favor of another. He must advise clearly that any expression of opinion made by him is not binding upon the court. The law officer did not exceed these rules. Judge Quinn in a concurring opinion, however, warned law officers from engaging in the practice of stating opinions as to guilt or innocence since they are unnecessary and may lead to overstepping the bounds of propriety.

Law Officer's Assistance to Court on Sentence Improper

U. S. v. Linder, 6 USCMA 669,
17 February 1956

The accused was tried for larceny and found guilty. When the court

opened for sentence but prior to the announcement of the sentence, the law officer asked the president of the court if he would like to have him examine the proposed sentence. The proposed sentence written on paper was handed to the law officer. It provided for confinement in excess of six months but imposed no punitive discharge. The defense counsel was not advised as to the proposed sentence. The law officer then asked the president if it had considered the provision of the manual to the effect that confinement in excess of six months may not be adjudged in the absence of a punitive discharge. The president responded in the negative and it was suggested that the court be closed for reconsideration. The defense counsel requested the paper shown to the law officer be attached to the record, which the law officer agreed would be done and invited the defense counsel to consider the paper then. However, the defense counsel and the accused did not see the paper on which the proposed sentence had been written before the court retired for further deliberations. When the court re-opened, a sentence was announced which included a BCD. The defense counsel then interrogated the president as to the effect of the law officer's action and moved that the law officer rule that the sentence could not be greater than that originally shown to the law officer on the piece of paper. This motion was denied. On certification from TJAG, Air Force, CMA held that the law officer's advice to the court went beyond the correction of minor clerical errors,

but consisted of advice concerning the punitive action which could be taken by the court. The fact that the law officer's action occurred in open court in the presence of the defense counsel and the accused does not change the fact that they did not participate in the session and were ignorant of the significance of the exchange between the law officer and the president of the court and the proceedings approximated a closed session discussion between the law officer and the court. Since this action related to a matter of substance rather than form, it constituted prejudicial error. The case was remanded for corrective action on the sentence.

Duty of President of SCM to Instruct

U.S. v. Pinkston, 6 USCMA 700,
21 February 1956

The accused was convicted by a special court-martial for failure to obey a lawful order in violation of Article 92, UCMJ. On discovery of a uniform deficiency at an inspection, the accused was admittedly ordered by an officer to procure certain uniforms by a certain date. Also admittedly, the accused failed to comply with the order. On a plea of not guilty, the accused testified he had not secured the uniforms because he had no money to buy them, could not get an advance of pay and was unable to borrow because of his bad credit. The president of the court made no reference, in his instructions to the court, concerning the accused's defense of impossibility and the non-lawyer defense counsel requested none. On petition, CMA held that under the

facts of this case, the impossibility of compliance with the order raised an affirmative defense requiring instructions to the court. The president of a special court-martial is required to instruct on affirmative defenses *sua sponte* where such defenses are reasonably raised by the evidence, in the same manner as the law officer in a GCM; and, the failure of the defense counsel, who like the president, was not a lawyer, to request such instructions will not be taken as a waiver against the accused. The decision of the Navy Board of Review affirming the findings and sentence without opinion was reversed and a rehearing ordered.

Misconduct of Court Member— The President

U. S. v. Smith, 6 USCMA 521,
9 December 1955

The accused upon a plea of not guilty was found guilty of involuntary manslaughter, wrongful appropriation of a motor vehicle, and fleeing the scene of an accident in violations of Articles 119, 121 and 134, UCMJ, respectively. The accused's defense was based on an alibi. The prosecution called rebuttal witnesses; and, thereafter, the president of the GCM recalled the accused stating that the court was convinced the accused was at the scene and asking the accused who was driving the vehicle. The accused reasserted his alibi. After further rebuttal, the president again recalled the accused and told him that the court did not believe his alibi and again asked who was driving the car. The accused again denied his presence at the scene. No objection

was made to this line of questioning. Thereafter, the court was instructed, closed briefly and reopened returning findings of guilty. On petition of the accused, CMA held the questioning by the president of the court improper. The language used by the president was said to be open to challenge in that he purported to represent the court not in the impartial role of a jury foreman but virtually as an assistant prosecutor. The circumstances indicated, since there was no objection by other members of the court-martial to the president's questioning, that the court had reached its determination on a basic issue before the case had been closed and prior to the instructions of the law officer. The failure of the defense counsel to object or challenge the president of the court was criticized but held not to constitute a waiver of the error. Accordingly, the decision of the board of review was reversed and a rehearing ordered.

Misconduct of Court Members— "Court Packing"

U. S. v. Sears et al, 6 USCMA 661,
17 February 1956

Two Airmen were convicted at a joint trial by a special court-martial of aggravated assault. The record showed the accused had had the trial continued and then obtained civilian defense counsel, whereupon, the Government further continued the trial and three additional members were appointed to serve on the court, all of whom were Judge Advocate officers. One of the Judge Advocate officers had testified against one of the accused in an

administrative proceeding and he became the president of the nine member special court. A challenge for cause directed to this Judge Advocate and president of the court was denied and he was peremptorily challenged. The other accused exercised a peremptory challenge against another of the Judge Advocate officers. One of the accused requested a severance but when the president granted this motion, the remaining Judge Advocate member of the court objected and the motion was denied. Throughout the trial, the Judge Advocate member of the court passed notes to the president at each point where a legal ruling was required and these communications between the member and the president appeared to be the basis of the president's rulings which were consistently adverse to the accused. The defense challenged this member's actions during the trial unsuccessfully. On petition of the accused, CMA reversed the Air Force board of review and ordered a rehearing. The Court stated that the appointment of the Judge Advocate officer as a member of the court could not be justified under the provisions of Paragraph 4 (d), MCM 1951 since the case before the court involved simple issues, principally factual, and there appeared to be no reason for the appointment other than the possible and practical difficulties which might arise from the professional presence of the civilian defense lawyer. The Court observed that the president in this case surrendered control over the proceedings to the Judge Advocate member and that

member went far beyond his duties as a member of the court to serve as an advocate or partisan and effectually joined the prosecution team. The situation became the same as if a law officer had assumed to exercise the fact finding function of the court. CMA observed that the situation "smacks of court packing" to render special treatment to the accused because they were represented by a civilian lawyer.

Impartial SJA Review

U.S. v. Hill, 6 USCMA 599,
27 January 1956

The accused was convicted of a robbery committed in conjunction with two other men who had been tried separately. The record of the accused's trial was initially reviewed in the SJA's office by an officer who had previously served as law officer at the separate trial of the accused's co-actors. This officer recommended approval of the findings of guilty, suspension of the dishonorable discharge, and reduction of the period of confinement from eight years to four years. These recommendations were concurred in by the SJA and accepted by the convening authority in his action on the case. On petition of the accused, CMA held that although there were separate trials of the co-accused, within the meaning of Article 6(c) UCMJ, these trials constituted the same case. Therefore, there was error for the same officer to have acted as law officer at a co-accused's trial and to review the record of trial of the accused. CMA stated that from the record, they could not conclude that the accused had been preju-

diced by the dual role of the reviewing authority, but that in the interest of justice "the appearance of evil should be avoided as well as the evil itself". The case was returned to the convening authority for review by a qualified SJA with no previous connection with the case.

Considering the Issue of Insanity on Appeal

U.S. v. Schick, 6 USCMA 493,
18 November 1955

The accused was sentenced to death for the premeditated murder of a child. The trial was in Japan where the only civilian medical experts available to the accused on the issue of his mental responsibility were Japanese and they, because of language difficulties and time limitations, were considerably handicapped and the effectiveness of their testimony was questionable. Upon mandatory appeal to CMA, the defense moved to remand the case to the board of review or to continue the matter until such time as a psychiatric report of the accused could be obtained from civilian psychiatrists. The continuance was granted. The result of the new psychiatric examinations and report indicated that the accused was permanently and incurably mentally ill and was unable to adhere to the right at the time of the offense. After the psychiatric report had been filed with CMA, counsel on both sides argued fully all the points raised on the appeal. CMA held that the matter should be remanded to the board of review for reconsideration of the question of the accused's sanity in the light of the

record of trial, the new psychiatric evidence, and any other evidence which the board of review might on its own deem necessary or desirable; holding further, that if the case should reach CMA again after board of review action, there would be no additional argument except upon new issues raised by the decision of the board of review on reconsideration.

Pre-Sentence Treatment of Prisoners

U.S. v. Bayhand, 6 USCMA 762.
30 March 1956

The accused was convicted of willful disobedience under Articles 90 and 91. The charges arose out of the accused's refusal to work on prison details with sentenced prisoners at a time when he was an unsentenced prisoner in pre-trial confinement on charges which were subsequently dismissed. On petition, the accused contended that the orders were illegal and in violation of Article 13, UCMJ. CMA held that the orders were illegal as a matter of law. Although persons awaiting trial can be required to perform useful military duties the same as other soldiers, Article 13 expressly states that persons awaiting trial shall not be subject to punishment other than confinement prior to sentence. The view has been expressed that work performed on detail with sentenced prisoners is punishment. Therefore, the orders requiring the accused to perform the same work under the same conditions in the same uniform without distinction with sentenced prisoners were illegal and the accused was improperly convicted of willful disobedience.

1956 ANNUAL MEETING

The Tenth Annual Meeting of the Judge Advocates Association will be held at Dallas, Texas, on August 28-29, 1956. Col. Gordon Simpson, chairman of the committee on arrangements, and Maj. Hawkins Golden have arranged to reserve the entire facilities of the El Fenix, a very popular and colorful Mexican night club. On August 28 there will be a reception with cocktails and hors d'oeuvres beginning at 6:00 p.m. followed by supper at 7:00 p.m. There will be a choice of menus,

either typical Mexican style supper or complete steak dinner. Following the supper, there will be dancing with music by a Latin American orchestra. This event is intended to be a full evening of JAG fun with no speeches. The cost of cocktails, hors d'oeuvres and supper will be \$7.00 per person.

You are urged to reserve these dates on your calendar so that the Tenth Annual Meeting of the Judge Advocates Association will be truly a gala and interesting reunion.

NOMINATING COMMITTEE, 1956

Pursuant to the By-Laws of the Association, the following members in good standing have been appointed to serve upon the 1956 Nominating Committee:

Lt. Col. Oliver Gasch, JAGC-USAR, Chairman
Gen. Edwin C. McNeil, USA-Ret.
Capt. William C. Hamilton, Jr., USAF Res.
Col. John E. Curry, USMC-Ret.
Maj. John A. Kendrick, USAF Res.
Lt. Col. Gerritt W. Wesselink, USAF Res.
Lt. Col. Thomas G. Carney, JAGC-USAR

Any advice that the members of the Association may wish to give the committee should be directed to the Chairman, Lt. Col. Oliver Gasch, United States Attorney, United States Court House, Washington, D. C.

MEETING OF JAG's IN TEXAS

Texas JAG's plan to have a breakfast meeting on Saturday, July 7, 1956 at the Rice Hotel during the annual meeting to the State Bar of Texas in Houston. Major George P. Red of 1513 Travis Street, Houston, is chairman in charge of the event. Members of the Association in Texas and other JAG's should plan to attend this meeting, and it is suggested that they contact Major Red.

SUPREME COURT TO DETERMINE POWER TO COURT-MARTIAL CIVILIANS

On 12 March 1956, the Supreme Court agreed to hear two cases that involve the right of the armed forces to try civilians by court-martial.

In *Reid v. Covert*, No. 701, the Government took a direct appeal from the decision of Judge Tamm in the District Court for the District of Columbia holding that Mrs. Covert could not be retried by an Air Force GCM. (For the text of his decision, see JAJ, No. 21, pp. 18-19.) Mrs. Covert moved to dismiss, on the ground that the appellant Reid, the Superintendent of the D. C. Jail, was not an officer of the United States within the direct appeal statute, 28 U. S. C. §1252; and also moved to affirm, on the ground that the decision in *Toth v. Quarles*, 350 U. S. 11, rendered the substantive questions so unsubstantial that further argument was not required.

The Supreme Court's order was (350 U. S. 985): "Further consideration of the question of jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

In *Kinsella v. Krueger*, No. 713, General Krueger, on behalf of his daughter, Mrs. Dorothy Krueger Smith, sought her release by habeas corpus from her imprisonment following affirmation of her conviction by the Court of Military Appeals (5 USCMA 314, 17 CMR 314). Judge Moore in the Southern District of West Virginia denied the petition for habeas corpus on 16 January 1956, holding Art. 2(11), UCMJ, to be constitutional. General Krueger appealed to the Fourth Circuit. The Government then sought certiorari before judgment in the Court of Appeals (28 U. S. C. § 1254(1); Supreme Court Rule 20), and this petition was granted (350 U. S. 986).

Both cases were argued on 3 May 1956.

Mrs. Covert and General Krueger are both represented by Colonel Frederick Bernays Wiener, JAGC, USAR, Secretary of the Association. Associated with Colonel Wiener in the Krueger case is Brig. Gen. Adam Richmond, USA-Ret., formerly Assistant Judge Advocate General, North African and Mediterranean Theaters of Operations.



General Meloy Addresses JAG School Grads

Maj. Gen. G. S. Meloy, Jr., Chief of Public Information of the Office of the Secretary of the Army, and Chief of Information and Education of the Office of the Army Chief of Staff, addressed the members of the 22nd Special Class upon their graduation from The Judge Advocate General's School on February 18th.

Gen. Meloy told the graduating JAG's that military discipline is a matter for which they must develop and cultivate a high regard and should never attempt to apply disciplinary measures by formula or en masse because each case requires personal attention and individual solution. He mentioned that the commander is responsible for the disciplinary policies of command, but that normally these policies are based on the recommendation of the judge advocate who

is an intimate and immediate advisor to the commander in all disciplinary matters. Gen. Meloy recommended that judge advocates not isolate themselves in their offices but they should make frequent visits to the units of the command to learn the problems of command and discuss them with the commanding officers and non-commissioned officers.

The graduating exercises were attended by Dean Ribble of the University of Virginia Law School and Maj. Gen. Eugene M. Caffey, The Judge Advocate General of the Army. First Lieutenant Roger A. Hornstein received the Judge Advocates Association's award and the American Bar Association's award for professional merit. The Commandant of the School is Col. Nathaniel B. Rieger.



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.

Notes on Procurement Opinions

Oral Acceptance of Bid Makes Valid Contract

The Quartermaster issued a notice of intent to purchase subsistence items of particular specifications. Claimant company quoted a price by telephone, basing its quotation erroneously on an item of lesser quality; and, after closing time, a Government purchasing agent orally awarded the contract to the claimant company, stating a purchase order would follow. The claimant company then placed an order with a subcontractor referring it to the proper specification. Claimant later learned of its error. The excess cost was charged against the claimant company's account and it applied for relief on the grounds of the mistake in its bid. In the opinion of The Judge Advocate General, Army, the claim should be denied. The acceptance of the contractor's offer by the contracting officer resulted in the formation of a valid and binding contract even though it was contemplated that a formal written agreement would follow. See 21 Comp. Gen. 605. Departmental regulations requiring that contracts be reduced to writing are not for the purpose of rendering void those contracts made without strict compliance, but for the purpose of protecting the Government. (JAGT 1955/6705, 16 September 1955)

Limits on Contractor's Liability for Loss of Government Property

An Army CPFF contractor was unable to account for the loss of certain Government owned property furnished in connection with the performance of the contract. The Army audit agency disapproved claimed costs of the contractor in an amount equal to the adjusted value of the lost or unaccounted for Government property. The contractor protested and the opinion of The Army JAG was requested. The contract provided that the contractor's liability arose only when loss or damage resulted from willful misconduct or failure to exercise good faith. The existence of the shortage caused by simple negligence or the failure of the accounting system was not evidence of bad faith or willful misconduct, and there was no authority for charging the contractor with the cost of the Government property not accounted for. (JAGT 1955/7261, 10 October 1955)

Amendment of Contract for Mutual Mistake After Performance

In this case a purchase order for seven reconditioned automotive motors contained no mention of an oral understanding between the contractor and the contracting officer whereby the Government was to turn in seven old motors as part of the purchase price. In any event,

at the time of the delivery of the reconditioned motors, an attempt was made by the Government to turn in seven old motors which were rejected by the contractor as not being the type required. The contracting officer denied the contractor's claim for adjustment because of the absence of a provision in the purchase order for turn-in motors; and, the opinion of TJAG, Army, was requested as to whether the purchase order could be amended after the contract had been completed and final payment made. The opinion was expressed that the purchase order could be amended to correct a mutual mistake under the authority of Title 2, First War Powers Act, following the procedure set forth in App. 30-408. (JAGT 1955/7414, 26 September 1955)

Acceptance of Bids

A limited time bid on surplus property was marked on its face accepted as of a date within the time limit, but a formal notification of the award was not made until after the expiration of that time. The bidder then said that he had made a mistake in his bid and requested that it be disregarded. The Comptroller General held that the bid had not been accepted by the Government within the time limit and the bid could not be revived without the bidder's acquiescence. The notation on the face of the bid proposal could not be considered a complete acceptance. (Ms. Comp. Gen. B 124127, 27 July 1955, 35 Comp. Gen. 50)

Rescission of Contract Where Surplus Property Improperly Described

An Army invitation for bids on surplus property identified an item by an incorrect serial number which would have made it appear that the item was a more recent and expensive model than it actually was. Upon discovering the error in description, the bidder to whom the contract was awarded refused to accept delivery and requested return of its deposit. The matter was submitted to the Comptroller General who held that the contract should be cancelled and the bid deposit refunded. Where the sale has not been consummated by delivery of the property nor payment made of the purchase price stipulated because of a gross misdescription of the article, there is no contractual relationship binding upon the bidder notwithstanding the disclaimer of warranties by the Government. (Ms. Comp. Gen. B 124150, 13 June 1955)

Legal Expenses in Negotiating CPFF Contract Not Reimbursable

The contractor in this case employed a D. C. attorney at the rate of \$25 per hour to act as its advisor during the negotiations for a CPFF contract, and continued the employment after the execution of the contract in connection with problems arising under it. The contractor then claimed the total fee for legal services as an allowable cost. It was disallowed. The contractor appealed to the ASBCA which held the expenses incurred in securing a contract and the expenses incurred in performing it are clearly sep-

arate and distinct and only the latter are to be reimbursed. The Board rejected the Government's contention that legal expenses should be charged as indirect cost and refused to distinguish between the various kind of services rendered by the attorney as being legal, administrative or liaison. The Board also refused to fix any limitation on the reasonableness of the time for particular services rendered by the attorney. (Wagner Iron Works, ASBCA 2138, 30 November 1955)

Contractor Entitled to Fair Value of Supplies Delivered under Voidable Contract

On a procurement restricted to small business, it developed that the contractor to whom the award was made did not qualify as a small business concern. However, some deliveries had been completed and the question arose as to whether the contractor was entitled to payment. The Comptroller General held that if the fair value of the supplies delivered was not less than the contract price, the supplier was entitled to payment of the contract price. (Ms. Comp. Gen. B 125491, 26 October 1955)

On a CPPC Contract, Payment of Overhead on Basis of Percentage of Cost is Illegal

The practice of paying overhead on the basis of fixed percentage rates should be discontinued in the opinion of the Comptroller General. On this basis, the amount paid as reimbursement for overhead will diminish or increase in proportion to the direct cost incurred rather than the overhead incurred by the con-

tractor. Such a basis for fixing overhead costs violates the express prohibition of cost plus a percentage basis and is illegal and inconsistent with the basic principle of a cost type contract in that it will not normally result in reimbursement of the actual cost. (Ms. Comp. Gen. B 126794, 27 January 1956)

Failure of Source of Supply as Excuse for Delay

An Army contract required the use of an alloy of certain specifications and the sole supplier of that alloy agreed to deliver the metal to the contractor under a supply contract fully disclosed to the Government. The contractor attempted performance but the alloy supplied was not satisfactory and the supplier refused to obtain the alloy from other mills. Delays in performance resulted. The contracting officer terminated the contract under the default clause on the ground that the default was not due to causes beyond the contractor or without fault or negligence. The contractor appealed to ASBCA which sustained the appeal. The Government by prescribing the use of the particular alloy also prescribed its source of supply so that the contractor could acquire its metal from no other source. Since the terms of its supply contract, fully disclosed to the Government, were not the cause of the difficulty, the causes of the contractor's failure to perform satisfactorily were beyond its control and not due to its fault or negligence. (Harwood Manufacturing Co., ASBCA 1831, 23 November 1955)

Waiver of Minor Informality

The high bidder for certain items of surplus property accompanied its bid with an uncertified check contrary to the invitation which required a certified check. Accordingly, a proposed contract with the second highest bidder was sent to higher authority for approval, but was withdrawn upon receipt of a certified check from the highest bidder two days later and the contract was awarded to the high bidder. The second high bidder protested to the Comptroller General who denied the protest holding that the failure to submit a certified check was not a material deficiency in the bid but an informality which could be waived by the contracting officer when in the public interest. (Ms. Comp. Gen. B 124333, 14 July 1955)

Contracting Officer's Approval of Equipment, a Recognized Deviation from Specifications

An Army contract for air conditioning equipment required the approval of the contracting officer of its various items. The contractor submitted a letter to the contracting officer proposing to furnish a trade-marked air washing component as described in attached literature and the contracting officer approved the equipment and it was installed, inspected, accepted and used. A subsequent inspection disclosed that part of the component equipment was not exactly as described in the literature. The contracting officer, thereupon, held this deviation to be a latent defect and recommended that the contractor be

held liable in an amount sufficient to correct the defect. The Judge Advocate General of the Army expressed the opinion that the approval of proposed equipment by the contracting officer constituted a recognized deviation from the specifications of the contract and there was no basis for the contention that there was a latent defect in the equipment furnished. (JAGT 1955/10011, 21 December 1955)

Mistake in Bids

The low bidder on an Army project alleged error in his bid prior to the awarding of a contract and supported the allegation by affidavits and the work sheets upon which the bid was based. The Comptroller General held that since the error was alleged prior to the award and since the corrected price would still be below the next low bid, the contract should be amended so as to allow additional compensation to cover the material and labor costs arising out of the mistake. (Ms. Comp. Gen. B 126736, 30 January 1956) However, where the mistaken bid had been accepted before the contractor made known his error, it was held that the bidder must bear the consequences unless the mistake was mutual or the error so apparent that it must be presumed that the contracting officer had or was chargeable with actual or constructive notice of it. (Ms. Comp. Gen. B 125754, 4 January 1956) However, in another case where a mistake in bid was alleged after the award had been made, it was held that where the variation in the amounts of the bids made

the probability of error apparent, the contract should be cancelled. (Ms. Comp. Gen. B 126305, 3 January 1956)

Contractor Need Not Appeal to ASBCA When His Claim for Unliquidated Damages is Denied

The specifications of an Army contract for resealing joints on an airfield runway were erroneous as to average size of the joints and total length. The contractor had relied upon the lineal footage specified. After partial completion, the contractor notified the Government of the additional footage of joints and was advised to proceed by the Government's engineer on the representation that there would be a re-measurement upon which compensation would be based. There was no written request for extra work nor any change order. After completion, the contractor submitted a request for additional payment on account of error in the specifica-

tions. The contracting officer denied the claim and the contractor filed an appeal with ASBCA under the disputes clause but had his appeal dismissed because it was not filed timely. Upon the contractor's suit in the U. S. Court of Claims, the Government moved to dismiss on the ground that the contractor had failed to exhaust its administrative remedies. The Court of Claims held for the contractor stating that since the contracting officer had no authority to decide a claim for unliquidated damages, it was not necessary to appeal to ASBCA from his decision. The Court held that the contractor was entitled to rely upon the erroneous specifications since the Government had special knowledge which could not have been reasonably discovered by the contractor. Where the Government misleads its contractor, it must answer in damages. (Railroad Waterproofing Corp. v. U. S., Ct. C. 102-53, 31 January 1956)



What The Members Are Doing

Connecticut

The New England members of the Judge Advocates Association had a luncheon meeting at the Statler Hotel at Hartford on April 17, 1956. Chief Judge Robert E. Quinn of the United States Court of Military Appeals was the guest speaker. The meeting took place during the week of the Northeastern Regional Meeting of the American Bar Association.

Harvey A. Katz was recently appointed as Prosecuting Attorney of the Town of Glastonbury. Mr. Katz also engages in the private practice of law in that city.

District of Columbia

Col. Smith W. Brookhart and Maj. Ralph E. Becker (1st O.C.), both members of the Association, recently announced the formation of a partnership for the general practice of law with offices in the Commerce Building, 1700 K Street, N. W. The firm name will be Brookhart, Becker and Dorsey.

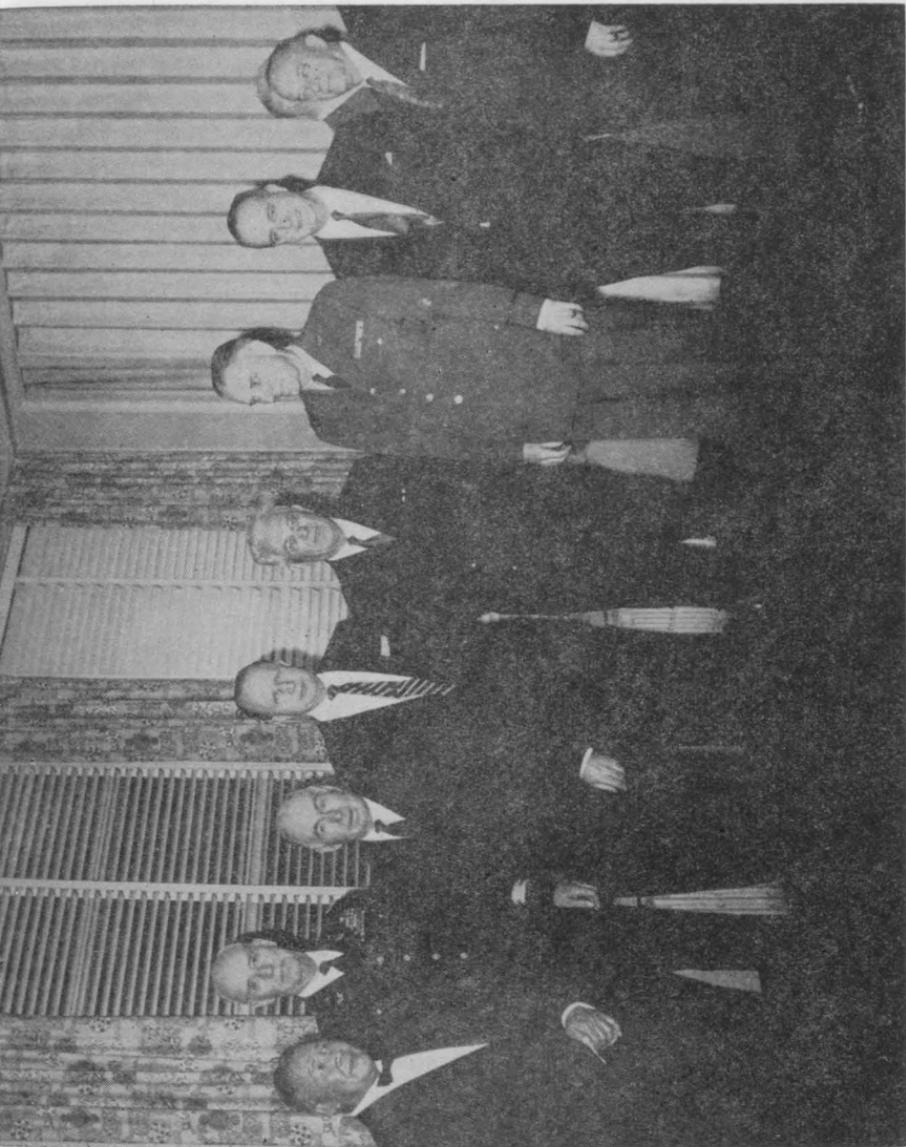
During the past year, Col. Mariano A. Erana has served as State Chairman of the Association for the District of Columbia. Mike Erana has continued the past practice of the local group in having regular dinner meetings throughout the year. The excellence of these events during the past year serves as a tribute to the caliber of Mike Erana's performance as State Chairman. Since the last issue of the Journal, there have been two meetings of

the Washington group. On February 1st at the Officers Club of the Naval Medical Center in Bethesda, the guest speaker was Gen. Carlos P. Romulo, Philippines Ambassador to the United States and the United Nations. The reception and supper were attended by over one hundred members of the Association and their guests. Gen. Romulo's address was interesting, informative, and characteristic of his fine forensic ability. On April 11th, the local group honored the newly appointed Judge Homer Ferguson of the Court of Military Appeals and our own member, Col. Oliver Gasch, who was very recently appointed United States Attorney for the District of Columbia. This meeting too was attended by about one hundred of our members and their guests. At the conclusion of the April 11th meeting, the group elected Col. Nicholas E. Allen, USAFR, as State Chairman for the ensuing year. Since the Judge Advocate Chapter of the Reserve Officers Association meets with the members of the Judge Advocates Association of the District of Columbia area, most of the members being affiliated with both organizations, an annual election was held for the officers of the JA Chapter-ROA on the same evening. The following were elected to the offices following their names for the coming year:

Col. Nicholas E. Allen, USAFR—
President



A part of the head table at the Washington JAA meeting on 1 February 1956. Left to right: Congressman J. J. Robison, R. Ky., Mrs. Harvey V. Higley, General Carlos P. Romulo, Col. Mike Erana and Mr. Harvey V. Higley, Administrator of Veterans' Affairs.



A group picture of some of the guests at the Washington JAA meeting on 11 April 1956. L. to R.: Col. Erana, Chairman of the local group, General Michelwait, Judge Quinn, Judge Latimer, Judge Homer Ferguson, General Harmon, Judge Kronheim and General Brannon.

Cdr. Clifford R. Stearns, USNR, Executive Vice President and Vice President for Navy Affairs

Col. Charles E. Royer, JAGC-USAR—Vice President for Army Affairs

Col. John R. Devereux, USAFR—Vice President for Air Force Affairs

Maj. Richard H. Love, JAGC-USAR—Secretary-Treasurer

Hawaii

Col. Allan R. Browne, formerly of Kansas City, Missouri, retired from the Army on January 31, 1956, after almost twenty-two years of service. Col. Browne before his retirement was Staff Judge Advocate for Pacific Army Headquarters stationed at Ft. Shafter, Honolulu. Col. Browne does not plan to be idle on retirement, but has accepted an appointment to the faculty at Punahou School in Honolulu and plans to undertake the private practice of law in that city.

Illinois

John B. Coppinger, Jr., recently announced the formation of a partnership for the practice of law under the style of Coppinger and Xanders with offices at 2508 Brown Street in Alton.

New Jersey

The Garden State of New Jersey has taken exception to the recent claim in this column that Texas "holds the record for the number of lawyers in one family". The claim of the Garden Staters is a "Strong" one indeed and will likely

withstand the challenge of any other state. Robert L. Strong (9th Off.) reports that he and his five brothers, being all the male children of their parents, are lawyers. In fact, he reports that all the male children in the past three generations of his paternal line (eleven in all) have been lawyers. Grandfather Strong opened offices in New Brunswick, New Jersey, in 1852 and the law practice now conducted by Bob Strong and his five brothers there has had a continuous history for 103 years. To add to the legal effect of the Strong claim, Bob advised that his wife's father is a lawyer too. Well, can you beat that?

New York

Paul D. Heyman recently announced the formation of a partnership to be known as Heyman & Siegel for the practice of law with offices at 150 Broadway, New York City.

Marshall G. Kaplan recently announced the opening of offices for the general practice of law at 50 Court Street, Brooklyn.

Abram N. Jones recently announced the removal of his office for the general practice of law to 334 Powers Building, Rochester.

Charles J. Klyde of Brooklyn, a member of the First Army, JA Section, Augmentation Group, was recently promoted to Lieutenant Colonel in the Army Reserve. Col. Clyde is Chairman of the New York Industrial Personnel Security Hearing Board.

Oklahoma

James H. Ross of Oklahoma City recently announced the formation of a firm under the style of Ross & Holtzendorff for the general practice of law with offices in the First National Building.

Oregon

Norman A. Stoll (6th O.C.) of Portland has been appointed to the Committee on Legal Ethics and the Committee on Statute Revision of the Oregon State Bar. Mr. Stoll is also a member of the Committee on Revenue and Special Authority Obligations of the American Bar Association's Section of Municipal Law.

Col. Benjamin Fleischman (3rd Off.) as long-time member of the Portland Chamber of Commerce Tourist Committee invites all Judge Advocates passing through the Portland area to call on him for assistance and hospitality.

Pennsylvania

Col. Fred Wade was recently awarded a Commendation Ribbon by the direction of the Secretary of the

Air Force for his meritorious service from 1 April 1953 to 16 January 1956.

Texas

Maj. Riley Eugene Fletcher was recently appointed Assistant Attorney General of the State of Texas assigned to the Veterans Land Division. Maj. Fletcher has been practicing law at Corsicana, but by reason of his new appointment, has moved his residence to Austin.

Utah

H. Byron Mock recently returned to the private practice of law with offices in the Walker Bank Building, Salt Lake City.

Wisconsin

Gerald Hayes, Jr., of Milwaukee, a mobilization assignee of JAGO, Air Force, was recently appointed a member of the Advisory Committee to the Standing Committee on Aeronautical Law of the American Bar Association. Mr. Hayes is Chairman of the Aviation Law Committee of the International Association of Insurance Counsel.



SUPPLEMENT TO DIRECTORY OF MEMBERS, 1955

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