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DR. ZIMMERMAN LOSES VERDICT IN HAWAIIAN MARTIAL LAW SUIT

By WM. J. HUGHES, JR., Colonel, J.A.G.C., USAR, Washington, D. C.

The Zimmerman martial law case, mention of which was made in our last issue, was tried in Honolulu Dec. 5-22 and resulted in a verdict for the sole remaining defendant, Lt. Gen. Delos C. Emmons. The other defendants, former Governor Joseph E. Poindexter, Col. George W. Bicknell (G2) and Joseph J. Kelly, a member of the Hearing Board, were dismissed from the suit with prejudice at the close of Plaintiff's case. The jury deliberated two days before arriving at their verdict in favor of General Emmons, though apparently in his favor 8 to 4 from the first ballot. Judge Paul J. McCormick of Los Angeles presided, Judge Delbert E. Metzger and Judge Frank E. McLaughlin, District Judges in Hawaii, having disqualified themselves. In fact Judge Metzger was a witness for Dr. Zimmerman at the trial.

The suit as our readers may already know, was a damage suit filed in 1946 by Dr. Hans Zimmerman, German-born but a naturalized American citizen, against former Governor Poindexter, Lt. Gen. Emmons, Major Gen. Thomas H. Green later TJAG, the heads of the F.B.I., G. 2, and ONI, members of the Hearing Board which considered Dr. Zimmerman's case and several mysterious John Doe's. The basis of the suit was the claim that all the above acted illegally and in deprivation of the Doctor's constitutional rights in taking him into custody immediately after Pearl Harbor day and keeping him in custody until his release March 12, 1943. As is well known, Governor Poindexter de-

clared martial law in Hawaii and suspended the writ of *habeas corpus* on Pearl Harbor day. The various defendants had greater or less contact with the case depending on their functions at the time; each however was sued for the full amount, initially \$575,000; later the total amount was increased, by amendment at the trial table, to \$1,080,049.48. Punitive damages were asked in the amount of \$200,000.

The trial took a wide range. Dr. Zimmerman contended that he was a loyal American citizen and had patriotically offered his services and his clinic to the Army on Dec. 7. Notwithstanding the military authorities took him into custody two days later. The basis of this action was that his name appeared on a custodial detention list. He remained in custody until March 12, 1943. He was given a hearing before a Hearing Board December 21, 1941 but was not informed of the nature of the charges against him though the hearing record showed he knew his loyalty was in question. Nor was he given an opportunity to hear the F.B.I. testimony or cross-examine the Special Agent who testified. Incidentally the latter's testimony was not made part of the Hearing Board's record. Dr. Zimmerman called various prominent citizens who testified to his loyalty. However the Board on the strength of the F.B.I. testimony found that the Doctor, although an American citizen, was potentially dangerous to security and recommended that he be interned for the duration of the war. The Review Board composed of

the heads of the F.B.I., G. 2 and ONI, after considering the Hearing Board's record, concurred in the recommendation and on this basis, Lt. Gen. Emmons, who commanded the Hawaiian Department and was the Military Governor under Martial Law, ordered the Doctor's internment. His action was signed "By Command of Lt. Gen. Emmons" after which appeared "Thomas H. Green, Col. J.A.G.D., Executive." Dr. Zimmerman claimed the Hearing Board's procedure failed utterly to meet Due Process requirements.

Dr. Zimmerman was thereupon taken to Sand Island, in Honolulu harbor and held there until March 1942 when the increasingly difficult food problem led to a policy of getting everyone possible out of the Islands. Also, the position of Sand Island unnecessarily exposed the internees in the event the Japs came back. The internees, over a hundred in number, were therefore shipped to the mainland and wound up at Camp McCoy, Wisc. Dr. Zimmerman went along with them. After being held at Camp McCoy over a month various internees including Dr. Zimmerman were shipped back to Hawaii and once more confined on Sand Island. Dr. Zimmerman contended that both the original shipment to Camp McCoy and his return to Hawaii from Camp McCoy were deliberately timed to frustrate his several *habeas corpus* cases designed to secure his release. The Doctor was about to file a *habeas corpus* petition in Wisconsin at the time he was shipped back to Hawaii.

These *habeas corpus* efforts are worth mentioning. On February 19, 1942 while the Plaintiff was being held on Sand Island, his wife filed a

Petition for a Writ of Habeas Corpus in the United States District Court for Hawaii. The Court, Judge Metzger, denied it on the ground he was under "military duress," referring not to actual physical duress, but to the fact that by Proclamation of Governor Poindexter on Pearl Harbor day approved by President Roosevelt under Sec. 67 of the Hawaiian Organic Act, martial law was declared and the privilege of the Writ of Habeas Corpus was suspended. An appeal was immediately taken to the Circuit Court of Appeals for the Ninth Circuit. Just about this time the Doctor was removed to Camp McCoy, Wisconsin, which operated, under *Johnson v. Eisentrager* 329 U.S. 313 and older authorities, to moot the case due to physical absence of the plaintiff from the jurisdiction of the Court. However neither side brought this to the Court's attention and as already seen, the Doctor was returned to Sand Island from Camp McCoy in late April 1942 and jurisdiction was thus re-vested. The case was later argued in the Circuit Court of Appeals which by a two to one decision handed down December 10, 1942 upheld the dismissal below, though not on the ground of "military duress." The majority simply held that the suspension of the Writ by Governor Poindexter and President Roosevelt was valid and hence no *habeas corpus* suit could be entertained.

Dr. Zimmerman thereupon applied to the Supreme Court for a writ of Certiarari to review the C.C.A. decision. In the meantime Gen. Green, who was Lt. General Emmons' Executive for Martial Law, advised him, in late December 1942 that he thought it would be safe to release Dr. Zim-

merman, but on the mainland, not in Hawaii. Gen. Emmons thought the time not yet ripe to release him anywhere. However on February 11, 1943 he decided in the Doctor's favor and thereupon the Doctor was put aboard ship and released in San Francisco (with 35 cents in his pocket, as the Doctor later testified). Thereafter the Solicitor General filed a motion in the Supreme Court to dismiss the case as moot, which the Supreme Court granted.

All these things were laid at Gen. Emmons' door as part of Plaintiff's claim of a studied plan to deprive him, at every turn, of his constitutional right to his day in Court. The General's position was that the first removal of the Doctor to the mainland was dictated by military necessity, as was also his return to Hawaii from Camp McCoy, Wisconsin. His later return to San Francisco and his release there in March 1943 was simply the General's effort to give the Doctor what he wanted, or what the General thought he wanted, i.e. "out," and not to moot the Supreme Court case. As the General argued, it seemed too bad that a military commander must be on his guard not merely as to how and why he holds a man but as to how and why and when he releases him; that it could hardly be the law that he must release him at his peril, making sure at the time that he did not moot a law suit; a law suit, incidentally, brought for the specific purpose of securing his release.

The pros and cons of the several alleged mootings were submitted to the jury and considered as part of plaintiff's case.

The rights and wrongs of martial law also had an extensive airing at

the trial. Although plaintiff's counsel stated at the outset that he did not assail the validity of martial law, it turned out later that what he meant was that he did not assail its technical validity as of Pearl Harbor day, or for a short, a very short, period thereafter. He did, however, assail the validity of practically everything done under martial law. He called Governor Poindexter's Proclamation turning over most of the functions of the Civil government to the military an "abdication." In particular he assailed the closing of the civilian courts. A parade of ex-territorial judges voiced their firm opinion that this was entirely unnecessary and Federal District Judge Metzger testified to the same effect. Just what good it would have done Plaintiff to have the civilian courts open, but unable to grant relief (due to suspension of the Writ of *habeas corpus*) was never made clear. However the question of abdication *vel non*, or whether the civilian courts should rightly have been open or closed, was submitted to the jury.

Extensive testimony was likewise introduced to show that the Secretary of the Interior, the Governor of the Territory who succeeded Governor Poindexter, the Attorney General of the United States, and various other officials were dissatisfied with martial law from 1942 onward and made various efforts to have it rescinded. To that end a conference of all interested parties including General Emmons was called in Secretary of Interior Ickes office in December of 1942 at which time the various martial law controls were gone over with a fine-tooth comb. A former Attorney General of the Territory, who attend-

ed the conference by direction of the Governor to voice the latter's views, testified at length as to what took place at the conference and as to features of martial law deemed objectionable by the Governor. He also submitted in evidence, over objection, a twenty-five page memorandum made contemporaneously which described the subjects discussed, the views of the various conferees and the progress of the rescission program. The conference eventually resulted in the Proclamation of February 8, 1943 issued simultaneously by the Governor and the Military Governor (Gen. Emmons) which contained substantial recessions of military power to civilian hands. This Proclamation was approved by President Roosevelt. Its significant feature, from the defense standpoint, so far as the Zimmerman trial was concerned, was the fact that it continued martial law and reiterated the continuance of the suspension of the Writ of *habeas corpus*.

All the above testimony was submitted to the jury to consider in determining General Emmons' liability. The theory was, presumably, that if martial law measures were invalid, the detention of Plaintiff was likewise invalid.

Gen. Emmons testified in his own behalf and admitted quite frankly that at the time he ordered the Doctor interned in January 1942 he had no evidence that would stand up in a court of law. He said he read the Hearing record, wherein the Board held the Doctor had pro-Nazi leanings and was potentially dangerous to security and so recommended internment for the duration. This recommendation was concurred in by the Review Board, composed of the heads

of F.B.I., ONI and G. 2 in Hawaii. The General contended he had a right to rely on these experts. His position was that where the security of the Islands was at stake, he had no right to take a chance. His action in releasing the Doctor in March 1943, but only on the mainland, he justified by pointing out that the Japanese military and naval potential had deteriorated so greatly that there was no substantial risk of invasion of the Islands at that time even though the Japs found out the real truth about Pearl Harbor. This was the crux of the whole matter: the Japs never dreamed of the extent of the damage they inflicted in their exploit. The problem therefore, from Pearl Harbor day onward, was to prevent the Japs finding out the truth and launching a full scale invasion of the Islands which were practically defenseless. Hence the necessity of being ultra-cautious as to possible leaks through suspected pro-Germans. The General contended that the actual fact as to whether the Doctor was loyal or not was not the test; the question was whether he had reasonable grounds for his decision in the then context of war and as he saw the situation at the time. Also, there was no testimony as to actual malice, of which the Doctor himself, while on the witness stand, exonerated the General. In spite of this a sort of "synthetic malice" was argued in the event the jury found the General acted illegally. On this basis \$200,000 punitive damages were asked.

The Zimmerman case, taken as a whole, presents the problem of what a military commander may validly do to maintain internal security on American soil in an active theatre of

war under martial law. On the one hand it is S.O.P. that he should take no chances. As Col. Charles Fairman puts it so well "A commander should not be put in a worse position legally because he has contrived to keep disaster at arms length" (Law of Martial Rule, 55 Harv. L. Rev. 1253, 1288). He certainly should *not* be deterred from interning a man by the thought that years later, when the shooting is over, he will be compelled to justify his decision in a court of law or suffer the loss of his personal fortune. This is the state of the law at the present time, unless the true rule be, as the defense contended, that a military decision made in good faith, on reasonable grounds as known at the time, and without malice, is a complete defense. Particularly ought this to be the rule if the Writ of *habeas corpus* is suspended. As held in *Ex parte Uimmerman* 132 F. (2) 442, a prime purpose of the suspension is to enable the executive as a precautionary measure to detain, without interference, suspected persons. If so, can a Court, years later, in a damage suit against the General, sit in judgment on the General's war-time acts? Is there any other branch of the law wherein the law accords an unequivocal right to do a present act but serves notice the doer may be held legally responsible later? Thus construed the suspension of the Writ is a hollow mockery. In effect the false law would state to the Commanding General: "You may arrest the Defendant now if you wish but beware of damage suits when he is released!" Such a concept does not tend to give him the free hand the suspension imports; it has directly the opposite

effect. And so we see the law, by this impossible theory, pulling and hauling in opposite directions. The true rule, therefore, should be that the suspension of the Writ immunizes acts done in good faith by a Commanding General within the apparent scope of his authority. Only in this way may the purpose of the suspension be achieved and the hands of the public officer, in a time of admitted stress, be left free to take such action as he deems advisable for the public safety.

Yet, even so, there is the normal sympathy that decent Americans have for the thousandth man who may be unjustly interned. The superficial answer that he came out of the war whole and entire, while many lost their lives and limbs is, of course, no answer at all. He has *not* emerged whole and entire: he has lost his honor among men. There ought therefore to be some method by which he can vindicate himself, and I am not now referring to the Zimmerman case. For centuries the British have solved the problem by passing an Indemnity Act immediately following a martial law regime. Under this system an injured person may sue the military commander and obtain vindication and damages but the State pays the judgment. The General is thus left free to make hard decisions with the thought that if he is wrong the man will still have some relief; in any event he, the General, will not be penalized for making a decision any decent man naturally shrinks from. One of the ironies of life is that in Dr. Zimmerman's case, had he been a Japanese, either citizen or alien, and racially excluded or detained, he

could file claim with the Department of Justice and obtain substantial monetary relief. (Public Law 886, 80th, Congr., 62 Stat. 1231). Thus by a legislative freak an American citizen—and it must be remembered Dr. Zimmerman is an American citizen—has fewer rights than a dislocated Japanese alien. There is a substantial duty resting upon the Department of Defense to remedy this sort of discrimination.

As to the future of the Zimmerman case, there is a Motion for a New Trial pending based on alleged errors of law. Whichever way it is decided, or any subsequent appeal, the state of American law on this subject is entirely unsatisfactory at the present time. It seems reasonable that in the future Atomic age the occasions for recourse to martial law will be more rather than less frequent. (Through the Hopley Report on Atomic Defense, with incredible naivete, mentions martial law but once in its hundreds of pages). The commanding general, in charge of martial law, will be compelled to make many hard and quick decisions. Citizens will be taken into custody, property will be lost or destroyed, many mistakes will be made. Is the General to live in perpetual fear of lawsuits reaching his private property? If so Communist sympathizers have a potent weapon ready at hand with which to deter or paralyze military action. As Judge Learned Hand puts it in *Gregorie V. Biddle* 177 F (2) 579, 581, a rule penalizing public officials for mistakes "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

Not even the Statute of Limitations will protect the General. The Soldiers and Sailors Relief (?) Act suspends all Statutes of Limitations while the General is on active duty—an unparalleled stupidity designed to bring the lawsuits crashing down upon the General after his retirement, when, traditionally, his brethren in the Pentagon won't even tell him the time of day.

On the other hand a sweeping immunity statute, happy and headlong, is no solution. There is no rhyme or reason in jumping to the opposite extreme and protecting the General at the expense of the citizen. When mistakes occur, as they will, the citizen should have a remedy, and a certain one, a remedy not dependent on the circumstance that the General is worth \$10,000 or \$100,000 or that Congress might, we emphasize *might*, at some long distant date appropriate money to pay the judgment.

Something, however, is at last being done about it. President Truman a few days ago issued Executive Order No. 10207, January 23, 1951 (16 Fed. Reg. No. 18, p. 709) creating the "Presidents Commission on Internal Security and Individual Rights". Admiral Chester W. Nimitz is Chairman and the other members seem top-flight. The Executive Order provides broadly that the Commission shall make a study of the problem of providing for the internal security of the United States and at the same time protecting the rights and freedoms of individuals. With good minds at work something helpful may be expected dealing not only with the much publicized "Loyalty" programs and procedures but with the

equally important subject of the rights of both the military and civilians under martial law regimes. It is pointless to gloss over the rights of the citizen with the remark that in a war someone always gets hurt. The paradox is that in a democracy it makes sense that in

a war a citizen may be asked to lose his life; it makes no sense that he should be asked to lose his reputation.*

*Note—The plaintiff's motion for a new trial was denied by the Trial Court February 26, 1951.

AUGMENTATION OF THE ARMY JAGC

This report is to supplement the remarks made by Major General E. M. Brannon, The Judge Advocate General, Department of the Army, at the Annual Meeting of this association on September 20, 1950, as reported in The Judge Advocate Journal, Bulletin No. 6, October, 1950.

At the time of the above referenced remarks, the second group of JAGC-USAR officers to be ordered into active military service for supplementing those on active duty had been authorized, making a total authorization, as of that time, of approximately 235. Orders are now being processed for the third group, consisting of approximately 100 officers. The criteria remains the same with regard to authorized grades; namely, captains and lieutenants only. Some basic changes in the policy were made which will be of interest to members of the Association. Chief among these was the elimination of those in the Inactive Reserve from being considered. First priority was established for qualified volunteers (including, if a volunteer, an Inactive Reservist). The next priority, as pertains to JAGC, are those of the Volunteer Reserve. Finally, members of Divisional Troop Program Units of the Organized Reserve may be selected provided utilization of this category does not materially impair the mobilization po-

tential of the unit from which taken. It is interesting to note that for those Reservists who do not wish to be ordered into the active military service, exemption may now be granted for hardship reasons provided the officer has four (4) or more dependents, with dependents being defined as "lawful wife, legitimate children and dependent parents." Still another change occurred in the program when it was specified that the anticipated twenty-one (21) months of service must have been completed prior to a first lieutenant reaching age 41 and a captain reaching age 45.

While any mention of the Uniform Code of Military Justice does not pertain directly to the subject of this report, the approaching effective date thereof, May 31, 1951, does have certain indirect aspects with regard to this subject. Personnel-wise it is considered that adequate provision has been made with regard to the additional personnel required to administer properly the new Code. However, on that score, only time will tell. The Judge Advocate General's Course at Fort Myer, Virginia, is proceeding satisfactorily and the course in Military Justice has been rewritten to encompass the provisions of the new Code. In addition, the course of instruction beginning with the March class has been increased to eight (8)

weeks. Most of the additional time will be devoted to the increased requirements growing out of the new subject matter in the Uniform Code.

For those of you who have not been ordered to the active military service, serious consideration should be given to the possibilities now existing with regard to enrollment in ORC Schools. To provide additional training opportunities for Reserve officers, The Chief, Army Field Forces, has announced a program for the establishment of ORC Schools in all continental Army Areas. Approximately 60 of these school were activated by 1 January 1951, an additional 100 have been approved for 1952, and an ultimate goal of 334 is contemplated. To meet the requirements of this pro-

gram, the Office of The Judge Advocate General has prepared for the Judge Advocate Department of each school schedules and lesson material, including special texts, which, with the exception of a few basic military subjects, will cover the entire military legal field. Judge Advocate General's Corps Reserve Officers are urged to take advantage of the opportunities offered by this program, particularly the courses concerning military law. For information regarding ORC School material, address: The Judge Advocate General, D/A, The Pentagon, Washington 25, D. C., Attn.: Extension School Section.

Further information relating to the school program may be obtained from the Chief of your respective military district.

NOTE TO NAVAL RESERVE LAWYERS

The Editor has communicated with Admiral George L. Russell, the Judge Advocate General of the Navy, to ascertain if here has been any change in the Navy JAG's expansion program with regard to Reserve officers. The advice received is that the situation of the Navy JAG is substantially the same now as it was at the time of Admiral Russell's report in Bulletin No. 6 of the Judge Advocate Journal. It is interesting to note that the Navy has not yet had

occasion to consider the involuntary recall for law duties of any Reserve officers. This condition has been possible because volunteers from the Navy Reserves, among officers qualified as attorneys, have exceeded the number of billets that it has been necessary to fill. The Judge Advocate General of the Navy has also been able to compile a waiting list of volunteers more than adequate to fill all billets presently planned under the Uniform Code of Military Justice.

ANNUAL MEETING, 1951

The annual dinner of the Judge Advocates Association will be held on Tuesday, September 18, 1951, in the Ballroom of the Park Lane Hotel, 299 Park Avenue, New York City. Subscription price will be \$9.00 per person. The annual business meeting

of the Association will be held at 4:30 p.m., Wednesday, September 19, 1951, at the Park Lane Hotel. Advance reservations may be placed now by application to Colonel Arthur Levitt, Chairman of the Annual Meeting Committee, 369 Lexington Avenue, New York City.

THE ARMED SERVICES BOARD OF CONTRACT APPEALS

By REGINALD FIELD

The Armed Services Board of Contract Appeals was created on 1 May 1949 in furtherance of the unification program of the Department of Defense. In the twenty-two months of its existence it has proved a happy example of unified activity in a fruitful field—the administrative disposition of disputes arising in the performance of contracts for supplies and services relating to the national defense.

Prior to the creation of the present Board the Army Board of Contract Appeals had functioned in the field of Army and Air Force contracts. The Navy had a separate board.

The Army Board of Contract Appeals, formerly known as the War Department Board of Contract Appeals, was established on 8 August 1942 by a memorandum from the Secretary of War delegating to it authority to determine appeals to the head of the Department from the decisions of contracting officers. The early history of that board and its development from the War Department Board of Contract Adjustment established by General Orders No. 103, 6 November 1918, has been described by the late Colonel Hugh Carnes Smith, JAGD, until his death President of the Board, in the Federal Bar Association Journal of December 1943.

Wider authority was subsequently delegated to the Board by a memorandum of 4 July 1944, a principal source of the powers contained in

the Board's present Charter.

The need of an impartial board to determine disputes arising between the technical services and contractors to the Department of Defense is obvious. For a time (7 November 1941—8 August 1942) separate appeal boards in each of the technical services were established and functioned under the general theory that such decentralization of administrative disposition would expedite decisions and apply greater technical knowledge in the solution of disputes, but it was soon found necessary to place the determination of disputes above the reach of the technical service because of the desirability of having appeals considered by officers not concerned with the negotiating or carrying out of contracts; the reassurance of contractors; and the fact that the time of the officers and civilian officials in the procurement branches of the Services of Supply was so taken up with matters pertaining to the immediate and pressing needs of war preparation that they could devote but little time to the legal and factual questions arising in contractual disputes.

The creation of a unified Board directly responsible to the three Departmental chiefs has been favorably received by businessmen generally. As a result of its experience with the work of the Board, the Select Committee on Small Business, House of Representatives, 81st Con-

gress, in House Report No. 1576, recommended the establishment of a similar board of contract appeals in the General Services Administration, because of its satisfaction in the meritorious service performed by the Armed Services Board of Contract Appeals. See also the favorable comments in "The Disputes Article in Government Contracts," 44 Michigan Law Review 211.

The authority of the Board is contractual. The standard form of the "Disputes" clause (Armed Services Procurement Regulation 7-103.12) now provides:

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive; *provided* that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

Each of the Secretaries of the Armed Services has designated the Board as his duly authorized representative for the hearing of the

appeals provided for in the above clause. The Charter of the Board, dated 1 May 1949, modified 30 June 1949 delegates authority in the following language:

"4. The Armed Services Board of Contract Appeals is hereby designated and shall act as the authorized representative of the respective Secretaries of the Army, Navy and Air Force in hearing, considering and determining as fully and finally as might each of the Secretaries (a) appeals by contractors from decisions on disputed questions by contracting officers or their authorized representatives or by other authorities pursuant to the provisions of Armed Services contracts requiring the decision of appeals by the head of a Department of the Armed Services or his duly authorized representative or board, or pursuant to the provisions of any directive whereby the Secretary of a Department of the Armed Services has granted a right of appeal not contained in the contract; (b) appeals by Armed Services contractors pursuant to section 13(c)(1)(i) and section 17(c) of the Contract Settlement Act of 1944. When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue. Unless the contract provides otherwise, when in the consideration of an appeal it appears that a claim for unliquidated damages is involved therein, the Board shall, insofar as the evidence permits, make findings of fact with respect to such claims without expressing opinion on questions of liability.

"5. When a contract requires the Secretary of a Department of the Armed Services, personally, to render a decision on the matter in dispute, the Armed Services Board of Contract Appeals, in accordance with the procedure set forth in paragraph 6, shall make findings and recommendations

to the Secretary of the Department with respect thereto."

While the Board is authorized to act for each of the Secretaries, it is for administrative reasons divided into three Panels, the Army, Navy, and Air Force. The Chairmen of the Panel alternate annually as President of the joint Board. When an opinion prepared by a Member of the Board on an appeal has met with the approval of the other members of his Panel, it is then submitted to the members of the other two Panels for their concurrence unless the two other Chairmen shall waive a review by the full Board.

The Board has adopted simple Rules of Procedure published as a part of the Armed Services Procurement Regulations. The notice of appeal must be in writing and mailed or otherwise filed within the time specified in the contract or allowed by applicable provision of directive or law. No special form is specified but the notice should contain a reference to the contract by number, the department and agency or bureau cognizant of the dispute, the decision from which the appeal is taken, the date of the decision, the contractual provisions involved, the nature of the dispute and the relief sought. Appellants need not, but customarily do, appear by attorney. Because of the country-wide ramifications of procurement and the location of the Board in Washington, D. C., many of the contractors do not appear in person but submit their disputes upon the record with briefs or other memoranda supporting their contentions. Hearings are not ordinarily held except in the hearing room of the Board in the Pentagon, but if com-

PELLING reasons are presented the Board is authorized to consider requests for hearings at other locations.

Hearings are as informal as may be reasonably allowable and appropriate under all the circumstances, but in general the customary forms of judicial procedure are followed. Witnesses are sworn and the testimony is stenographically recorded and transcribed for the consideration of the Board, together with depositions of witnesses not presented at the hearing, exhibits, correspondence and other relevant and material evidence.

On 1 May 1949 there were pending in the Army Board of Contract Appeals and the corresponding Navy Board 341 appeals, approximately evenly divided. Since that time and until the 1st of March 1951, there have been received 579 new appeals, or a total of 920. In twenty-two months 649 appeals have been disposed of, leaving presently 271 matters on the calendar either being prepared for hearing, suspense, or incomplete for one reason or another.

Appeals reach the Army Panel from the technical services and the Armies. Out of 492 appeals it has been noted that 272 reached the Board through the Quartermaster General, 58 through the Chief of Ordnance, 49 through the Chief of Transportation, 38 through the Chief of Engineers, and the remainder from the Office of the Assistant Chief of Staff, G-4, the Surgeon General, the Chief of the Chemical Corps, the Chief of the Signal Corps, and the Commanding Generals of the six Army areas.

Analyzing the same group of appeals for subject matter and monetary

value, the total amount claimed except in 70 cases where the amount was not shown, amounted to \$2,014,862.16. The principal bases for relief were requests for the extension of time and the remission of liquidated damages or excess costs. Other claims arose from alleged extra work, reimbursement of claimed reimbursable expense in cost-plus-a-fixed-fee contracts, termination matters, the sale of surplus property, and miscellaneous disputes.

The records of the Army Panel indicate that it has awarded \$800,368.43, and has disallowed claims, including the amounts in withdrawn and returned cases, amounting to \$1,214,493.73. In the same period the Air Force Panel has disposed of 90 cases involving \$797,460, with awards of \$211,270 and disallowances of \$586,190.

Findings of fact of the Board, as the last administrative agency available before resort to the courts, are final and conclusive upon the

parties in subsequent litigation. When decisions of the Board involve pure questions of law the determinations do not have the same quality of finality, but as a practical matter frequently do terminate the disputes for all purposes. The Board has recently been advised that only 2 per cent of the matters finally decided by it have been brought before the United States Court of Claims, although because of the Statute of Limitations in such matters this figure is not necessarily a true indication of the number that will eventually reach that Court.

The advantages already secured by the work of the Board are the expeditious and impartial decision of disputes, uniformity of opinion, clarification of mutual rights and obligations under the standard provisions of Government contracts, avoidance of litigation, and the resultant confidence of the business world in the attitude of the Department of Defense toward their problems and legitimate complaints.

A strong Association can serve you better. Pay your annual dues. Stay active. Recommend new members. Remember, the Association represents the lawyers of all Armed Forces components.

A particularly interesting and learned article entitled "Freedom for the Thought that We Hate Is it a Principle of the Constitution?" by Col. Frederick Bernays Wiener, member of the Association, appears in the March issue of the American Bar Association Journal at Page 177. The article will provide good reading for the membership and is particularly timely and well documented.

The Manual for Courts-Martial, United States, 1951, may be obtained from the Superintendent of Documents, Government Printing Office, Washington 25, D. C., by requesting Federal Register, Volume 16, No. 29, Part II, February 10, 1951, and enclosing 30c to cover the cost.

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

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951

In the Journal of May, 1950, we published in these columns for the benefit of our readers the full text of Public Law 506, 81st Congress—The Uniform Code of Military Justice. On 31 May 1951, this code becomes effective and for the first time in the history of the nation all branches of its armed forces will be subject to the same military code, uniform in substance, and basically uniform in interpretation and construction. There will be slight divergences in practice between services—such as the right granted a person in the Army or Air Force to refuse non-judicial punishment under Article 15 which is not granted to personnel of the Navy and Coast Guard—but for practically all purposes, soldier, sailor, and airman will be treated alike.

Article 36 authorizes the President to prescribe regulations covering the procedure, including modes of proof, in cases before courts-martial, and requires that all rules and regulations be uniform insofar as practicable. The Manual for Courts-Martial, United States, 1951, is the Presidential regulation in this regard and it is contained in, and its use in the armed forces prescribed by, Executive Order 10214, 8 February 1951.

The text of the new manual presently may be found in Part II of the Federal Register of 10 February 1951, Volume 16, Number 29, pages 1303 through 1469. Except for an index which will appear in the bound volume, this is the complete text of the manual which is now being printed. General distribution of the bound volume to the field is expected during

May, 1951. The Manual for Courts-Martial, United States, 1951, will replace the Manual for Courts-Martial, 1949; Naval Courts and Boards, 1937; and the Manual for Courts-Martial, United States Coast Guard, 1949.

Early in 1950, in anticipation of the Uniform Code of Military Justice becoming law, the Judge Advocates General of the several armed forces met together to discuss the preparation of a manual on military justice which would be uniform for the entire National Military Establishment. At this conference it was agreed that a working group composed of representatives of all services should be formed under the administrative direction of the Judge Advocate General of the Army.

On 27 February 1950, the Interdepartmental Working Group for the preparation of the Manual for Courts-Martial, 1951, was formed and immediately embarked upon the task of drafting a Manual which it was expected would be prescribed by Executive Order. By 1 July 1950, the working group had prepared a large part of the text which was sent to representatives of the several services for consideration and approval. The first approved draft of the new manual was completed by 30 September 1950.

The services cooperated wholeheartedly in the preparation of the Manual and the areas of basic disagreement were relatively few. These were taken up with the Office of the Secretary of Defense and resolved. By the end of December, 1950, a broadly revised draft of the Manual was prepared which was approved by the

Secretary of each of the services, and by the Secretary of Defense.

A review of the entire Manual for Courts-Martial, United States, 1951, is not within the scope of this review, and subsequent articles may probe further into some of the intricacies of the new law such as appellate review, appointment and qualification of law officers and counsel of general courts-martial, new responsibilities of the law officer, and the like. A few features of the code which are implemented by the Manual for Courts-Martial, United States, 1951, might be observed.

Article 44c provides that a proceeding which is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses, without any fault of the accused, is a trial. Article 44a, analogous to the Fifth Amendment, provides that no person shall, without his consent, be tried a second time for the same offense. Paragraphs 56b and 68d, Manual for Courts-Martial, 1951, provide, however, that withdrawal of a specification or termination of the proceedings before findings, because of manifest necessity in the interests of justice is not a bar to further prosecution. These provisions recognize the decision in *Wade v. Hunter*, 336 US 684, 69 Supreme Court 834, that such an interrupted proceeding would not be considered a trial when the dismissal was because of urgent necessity.

Articles 55 through 58 provide certain general limitations in regard to sentences by courts-martial which implement the broad jurisdictional limitations of courts-martial as to punishment contained in Arti-

cles 18 through 20. These limitations are made specific in Chapter XXV of the Manual. For example, paragraph 126e provides that courts-martial may sentence an enlisted person to be reduced to an inferior or *intermediate* grade. Paragraph 126c(2) provides that in the case of noncommissioned or petty officers above the fourth enlisted pay grade, a summary court-martial may not adjudge confinement or hard labor without confinement (since those two sentences automatically reduce the individual to the lowest enlisted pay grade), and may not adjudge reduction except to the next inferior grade.

In order to take into account the different practices in the several services, the drafters of the code permitted many matters to be determined by the Secretaries of the Departments concerned. The Manual for Courts-Martial, United States, 1951, has followed the same procedure to a lesser degree. For example, Article 25c(2) provides that for the purposes of the Article, the word "unit" shall mean any regularly organized body as defined by the Secretary of a Department, and in paragraph 4a of the Manual, the various departmental definitions of "unit" are set forth. Other matters are left entirely to departmental regulations: e. g., the authority to promulgate regulations for Courts of Inquiry is, by paragraph 2 of the Manual, delegated to the Secretaries; and the designation of places of confinement will be in accordance with departmental regulations—see paragraph 93 and Appendix 14, Manual for Courts-Martial, United States, 1951. Preparation of these regula-

tions is going forward at this time, and pertinent extracts thereof will be set forth in a "pocket-part" included with the new Manual which is intended to keep the volume up to date.

The Uniform Code and the Manual for Courts-Martial, United States, 1951, enlarge the rights of the accused and bring courts-martial closer to the civilian counterpart of judge and jury. The Journal hopes to develop important phases of the new Code and of the Manual for Courts-Martial in succeeding articles.

Note—In our next issue we expect

to publish a commentary on the new Manual, pointing out the respects in which it effects changes in court-martial practice, apart from such changes as are apparent from the terms of the Code itself.

In general, the 1951 MCM follows closely the 1949 Army and Air Force MCM. Perhaps the most striking change which would not have been apparent from a study of the Uniform Code are (1) the provision that the law officer sits apart from the members of the general court-martial, and (2) elimination of the unsworn statement by the accused. From now on, the accused can make an unsworn statement only after the findings and before the sentence, and then only in extenuation and mitigation.

IN MEMORIAM

Lt. Col. Samuel E. Spitzer died October 30, 1950, of a heart attack in Seoul, South Korea. Col. Spitzer was thirty-nine years old, and a former attorney in Westchester County and Yonkers, New York. During World War II, while a Lieutenant in France on July 31, 1944, Col. Spitzer was cited for having captured 508 prisoners at Le Pont Gilbert. He received the Purple Heart, Silver Star, Bronze Star, and Croix de Guerre. During the current war Col. Spitzer was Deputy Army Judge Advocate, EUSAK, and had served in Korea since July 10, 1950.

Col. Edgar T. Fell died March 5, 1951, at Mt. Alto Hospital, Washington, D. C. Col. Fell was Chief of Claims, European Theater of Operations, during World War II, and was until his death Chief of the Claims Division of the Justice Department.

KIDNER PROMOTED BRIGADIER GENERAL

The United States Air Force announced on 22 December 1950, the appointment of Herbert M. Kidner, formerly of Pittsburgh, Pennsylvania, to the grade of Brigadier General.

General Kidner graduated with honor from Harvard College, received his law degree from the University of Pittsburgh and is admitted to practice before the Supreme Court of Pennsylvania and Federal Courts. He engaged in private practice from 1926 until 1941 at which time he entered on extended active duty as a Reserve officer in the Army. Presently, General Kidner is a member of the Regular Air Force.

During World War II General Kidner's duties included Board of Review, Assistant Commandant of the Judge Advocate General's School at Ann Arbor, Michigan, and Deputy Air Judge Advocate. He was awarded the Legion of Merit and Commendation Ribbon in recognition of his performance as Deputy Air Judge Advocate.

General Kidner's assignments in the Air Force have included that of Staff Judge Advocate of the Fifth Air Force in Japan, Air Force representative on the Manual for Courts-Martial, United States, 1951, member of the Judicial Council of the Air Force, and Assistant Judge Advocate General. Presently, he is assigned to Headquarters, United States Air Force, The Pentagon, Washington, D. C.

General Kidner has always been an active and interested member of the Association, having served as its President during 1945 to 1947.

The members of the Judge Advocates Association of the Washington, D. C. area with their wives and ladies, met at the Officers' Club of the Naval Gun Factory on January 29, 1951, to honor General Kidner upon his promotion. About 150 Regular and Reserve officers of all services attended the reception cocktail hour and dinner. Col. Fred Wade, the Association's Chairman for the District of Columbia, presided at the meeting.



General Kidner addressing Washington Area JAG's on occasion of the Association's dinner in his honor



A general view of Washington JAG's and their ladies at the Kidner dinner



The head table: Left to right, Gen. Johnson, Mrs. Kidner, Gen. Kidner, Col. Wade, Mr. Bennett, Mr. Goddin, Mrs. Harmon, Gen. Harmon



Another view of the head table: Left to right, Mr. Ullmer, Mrs. Johnson, Gen. Johnson, Mrs. Kidner, Gen. Kidner, Col. Wade

DIGEST OF CONTRACT APPEAL BOARD DECISIONS

Of interest to many members are the disputes between war contractors and the Government arising out of contracts between the military establishment and builders, manufacturers, and suppliers of components utilized by those contractors. In 1942 the Secretary of War set up a Board of Contract Appeals to hear, consider and determine, for and in his behalf, appeals directed to him by any such contractors who were aggrieved by adverse decisions of Government contracting officers. Under the name of the War Department Board of Contract Appeals, and later, the Army Board of Contract Appeals, that Board, in the nature of an administrative court, functioned from October 1942 until May 1950, when the Armed Services Board of Contract Appeals, combining the Boards of all three departments, was established. During that period of time more than 1500 decisions were rendered dealing with every phase of Government contract administration. A substantial body of

administrative contract law was thus built up which will no doubt serve as a precedent in the future for the determination of disputes that inevitably grow out of Government contracting. One of our members, Roswell M. Austin, Col. Hon. Res., and a member of that Board throughout its whole life, has performed the laborious task of digesting all of the decisions of that Board. The Government is publishing that digest, primarily for the use of the procurement agencies of all the departments, but it will be available to all lawyers who would like to procure it. It is slated to come off the press on or about April 1, 1951. If a substantial number of members foresee that the digest is something they would like to have in their law libraries, they should immediately get in touch with the Superintendent of Documents so that there will be assured a printing of enough copies to supply the demand. The price of the publication will probably be in the neighborhood of \$2.50 per copy.

Major General Reginald C. Harmon, The Judge Advocate General of the Air Force, indicates that there have been no substantial changes in the plans of his office for the recall of Air Force JAG reserve officers to extended active duty since his report to the members of the Association at its annual meeting in September, 1950.

APPLICABILITY OF THE 1948 ARTICLES OF WAR TO THE UNITED STATES AIR FORCE

By FREDERICK BERNAYS WIENER, Colonel, JAGC-USAR, Washington, D. C.

In the case of *Stock v. Department of the Air Force, et al*, 186 F(2) 968, decided by the United States Court of Appeals for the 4th Circuit on December 28, 1950, there was involved the question of the applicability of the 1948 amendments to the Articles of War to the United States Air Force. The plaintiff sought an injunction restraining the execution of a court-martial sentence to dismissal on the ground that such a sentence could not become effective until confirmed by the President, whereas in his case it had been confirmed by the Judicial Council. He contended that, since the 1948 amendments were enacted on June 24, 1948, to become effective on February 1, 1949, they were not within the Air Force Military Justice Act of June 25, 1948, providing that "The Articles of War and all other laws now in effect relating to the JAGD * * * shall be applicable to the Department of the Air Force * * *"

In rejecting this contention, the Court (Soper, Circuit Judge) said:

It will be thus seen that prior to the effective date of the Act of June 25, 1948, setting up a system of military justice for the Air Force, Congress had determined, in respect to court martials in the Army, that the power of confirmation of a sentence of dismissal of an officer other than a general officer should be lodged in the Judicial Council with the concurrence of the Judge Advocate General, rather than the President. The appellant, however, points out that

Section 244 of the Selective Service Act, 62 Stat. 642, 10 U. S. C. A. s1472 note (1949 Supp.) provided that Title II thereof should become effective on the first day of the eighth month after its approval; and therefore the appellant contends that the amendments to the Articles of War contained in the Selective Service Act do not apply to the Air Force because they had not gone into effect when Congress, in passing the Act of June 25, 1948, used the words, "now in effect" in describing the Articles of War made applicable to the Department of the Air Force.

This argument seems to us so frail that it disappears upon the most casual examination. It presupposes that Congress intended to confine the new Department of the Air Force to the old Articles of War indefinitely at the very time it was making changes to improve the system with respect to other branches of the Army. It assumes that Congress, which had decided to set up a single system of military justice for all branches of the Army, intended thereafter to apply one system in the Air Force and another in other divisions of the service; and it fails to suggest any reason why this differentiation should be made, doubtless because no such reason can be imagined. We reject the argument because a statute should not be given a literal reading if the result would be so extraordinary that it cannot have reasonably been intended by the legislature. *U. S. v. Brown*, 333 U.S.

18, 27; *C. N. S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103; *State of Md. v. U. S.*, 4 Cir., 165 F. 2nd 869.

That Congress had no such intention is clearly shown by the legislative history which may be properly considered in determining the Congressional purpose. *U. S. v. United Mine Workers*, 330 U.S. 258, 279-80. In the debate upon Title II of the Selective Service Act in the Senate the sponsors of the legislation stated unequivocally that the bill was intended to revise and modernize the court system in the Army and in the Air Force and that it was intended to cover both of these branches of the armed services. 94 Cong. Rec. 7754-6, 7761.

It could be argued, of course, that it would be no more unreasonable for Congress to enact one system of military justice for the Army and another system of military justice for the Air Force, than it has been for Congress to have enacted different systems of military justice for the Army and the Navy; the latter have been quite different for 150 years and will remain different until

the effective date of the Uniform Code of Military Justice. At the same time, it seems fairly certain from the opinion that the 4th Circuit would not feel disposed to accept the view of the Department of the Air Force that while the 1948 amendments to the Articles of War are applicable to it, the last four sections of Title II of the Act of June 24, 1948, which relate to the organization and composition of the JAGC of the Army, are inapplicable to the JAGD of the Air Force.

It might also have been noted that the action of the President in adopting the 1949 MCM for the Air Force amounts to a weighty administrative construction of the applicability of the 1948 Articles of War to the Air Force.

It will become necessary to discontinue distribution of the Journal and other publications of the Association to members who do not remain in good standing. It is important that you pay your annual dues. If you are not certain of your present dues status, write to the national offices of the Association for a statement.

WHAT THE MEMBERS ARE DOING

ALABAMA

Capt James N. Bloodworth, who is engaged in private practice at Decatur, Alabama, has recently been appointed City Recorder for the City of Decatur.

William E. Davis, Collector of Internal Revenue, Birmingham, our State Chairman for that state, reports that Edward N. Scruggs, of Guntersville, recently joined with his father, Claude D. Scruggs, as partners in the practice of law with offices at Guntersville. Edward Scruggs is the County Solicitor for Marshall County.

CALIFORNIA

Benjamin D. Frantz, 4th O. C., recently announced the formation of a partnership, Frantz and Dopkins, for the general practice of law with offices in the California State Life Building, Sacramento.

Maj. Thomas O. McCraney, 2nd OC, who served during World War 11 in General MacArthur's headquarters, has recently been appointed to the position of General Counsel of the Pacific Airmotive Corporation, Burbank.

CALIFORNIA.

The third series of Judge Advocate classes for qualified reservists were held the weekend of 17 and 18 March 1951, at Fort McArthur, according to the announcement of the ORC School Commandant, Colonel Arthur L. Cable. He stated that enrollment is still possible and pointed out that as a consequence of the uniform nature of military justice under present

legislation, previous classes have been attended not only by members of the Army Reserves but also by those of the Air Force, the Marines and the California Defense and Security Corps.

To keep the students abreast of current developments, particular attention will be given not only to the new Uniform Code of Military Justice but also to the revised Manual for Courts-Martial just promulgated by President Truman and February 8, 1951.

Lecturers for the March classes include two well-known Los Angeles attorneys, John P. Oliver, Colonel, JAGC-USAR, and David I. Lippert, Major, JAGC-USAR, Director of the legal department of the school.

DISTRICT OF COLUMBIA

Major General E. M. Brannon addressed the Junior Bar Section of the Bar Association of the District of Columbia at the monthly luncheon on March 20 upon the Army's plans with regard to the recall of reserve officers to duty in the Judge Advocate General's Corps.

Col. Frederick Bernays Wiener has recently been appointed Lecturer in Law at the George Washington University School of Law and is presently teaching a course in Military Law and Jurisdiction.

INDIANA

Vern W. Ruble, 12th Off., Bloomington, our State Chairman, called a breakfast meeting of the Indiana members of the Association during the mid-winter meeting of the State Bar Association at Indianapolis on the morning of January 27th. Maj.

James E. Johnson, Post Judge Advocate at Camp Atterbury, gave a brief talk on the Uniform Code of Military Justice. Most of the Indiana members attended the function to their great interest and enjoyment.

KENTUCKY

John A. Keck, 14th Off., of Sandy Hook, is now Commissioner of Highways for the State of Kentucky, and is alleged to be doing a great job toward getting Kentucky out of the mud according to Stuart E. Lampe, 18th Off., of Louisville, State Chairman of the Association.

Raymond F. Bossmeyer, 5th O. C., is a member of the Board of Aldermen of the City of Louisville.

Stuart E. Lampe is a Commissioner for Jefferson County and a member of the Fiscal Court of that county. He is a member of the firm of Ropke, Goldstein, Lampe & Poynter with offices in the Kentucky Home Life Building, Louisville.

MASSACHUSETTS

Ralph G. Boyd, 5th Off., a member of the law firm of Nutter, McClennen, and Fish, Boston, has been recently elected President of the West Point Manufacturing Company, textile manufacturers, and Chairman of the

Board of Dixie Mills Incorporated, Lanett Bleachery & Dye Works, and Columbus Manufacturing Company. He is also Director of Wellington Sears Company, textile selling agents.

MARYLAND

C. Warren Colgan, 20th Off., recently removed his law offices to the Fidelity Building, where Mr. James B. Lyons, Jr., will maintain his practice during Mr. Colgan's active military service.

MICHIGAN

Harrison T. Watson, 10th Off., recently announced the formation of a partnership with Thomas L. Lott and Edward S. Wunsch, for general and admiralty practice with offices in the Dime Building, Detroit.

NEW YORK

A. Chalmers Mole, 6th O. C., has joined Milton B. Ignatius in the practice of law with offices at 150 Broadway, New York.

TENNESSEE

Jack Wilson, 9th O. C., recently completed a tenure as Judge of the Circuit Court, Sixth Judicial District of Tennessee, and has resumed the practice of law in Chattanooga.

SUPPLEMENT TO DIRECTORY OF MEMBERS OF NOVEMBER, 1950

NEW MEMBERS AND OTHERS NOT LISTED IN DIRECTORY OF NOVEMBER, 1950

Paul Aaroe
Room 610
921 Bergen Avenue
Jersey City, N. J.

Richard F. Allen
Standard Life Building
Lawrence, Kansas

Harold A. Axel
263 West End Avenue
New York 23, New York

William A. Bader
945 Main St., Suite 400
Bridgeport, Conn.

John A. Berry
Streator, Illinois

William G. Bischoff
330 Market Street
Camden 2, New Jersey

Lt. Col. Walter C. Bowman, USAF
(Ret.)
Box 288
LaQuinta, California

J. J. Champagne
605 Columbia Building
Spokane, Washington

Bert E. Church
1108 N. Washington
Wellington, Kansas

Frederick L. Corcoran, Jr.
19 Wollaston Avenue
Arlington, Mass.

Henry B. Curtis
711 American Bank Building
New Orleans, Louisiana

Maron Price Daniel
Liberty, Texas

Herbert A. Davis
Box 472
Okanogan, Washington

Vardon E. Deixel
270 Broadway
New York 7, New York

Harold V. Dempsey
30 Vesey Street
New York 7, New York

Maj. George F. Dillemath, USAF
Hqs. 2nd Air Division
APO 61, % Postmaster
New York, N. Y.

Lt. Col. Leslie B. Dowing
Hibbs Building
Washington 5, D. C.

Milton M. Fidler
66 Court Street
Brooklyn 2, N. Y.

Leo E. Fitzgibbons
Estherville, Iowa

James R. Fitzharris
Escanaba National Bank Bldg.
Escanaba, Michigan

Col. James K. Gaynor
JAGO, Department of the Army
The Pentagon
Washington 25, D. C.

George B. Graham
951 O'Farrell Street, Apt. 21
San Francisco, California

John R. Harold
51 Chambers Street
New York, New York

Frank Higgins
251 State Street
Schenectady, New York

John B. Hill
240 Princess Street
Wilmington, N. C.

John H. Hudspeth
3107 28th Street
Lubbock, Texas

Abraham Jackel
172 East 91st Street
New York 28, N. Y.

Henry Jaffe
444 Madison Avenue
New York 22, N. Y.

Lt. Col. Harry Carl Kait, JAGC
801 Enderby Drive
Beverly Hills
Alexandria, Va.

Ely R. Katz
1003 Dupont Bldg.
Miami 32, Florida

S. Palmer Keith, Jr.
810 Massey Bldg.
Birmingham, Ala.

Ben L. Kessinger, Jr.
710 Security Trust Building
Lexington, Ky.

Earl Q. Kullman
120 Broadway
New York 5, N. Y.

Abner E. Lipscomb
11 E. Leland Street
Chevy Chase, Md.

William A. Lord, Jr.
17 Washington Park
Maplewood, New Jersey

Philip J. Maiorca
52 W. Main Street
Somerville, N. J.

Thomas A. McCarthy
40 Randolph Avenue
Dover, New Jersey

Robert E. Mills
123 W. Main Street
Ottawa, Ill.

Donald I. Mitchell
523 Beacon Bldg.
Wichita 2, Kansas

James E. Moore
608 Van Antwerp Bldg.
Mobile, Ala.

Alfonso Nisiovocia
207 Market Street
Newark 2, N. J.

Harold Nordlicht
51 Chambers Street
New York 7, N. Y.

Col. Jeremiah J. O'Connor
USCOA Legal
APO 777, % Postmaster
New York, N. Y.

Louis A. Otto, Jr.
Legal Section GHQ SCAP
APO 500, % Postmaster
San Francisco, California

Carl F. Pattavina
5020 6th Street, No.
Arlington, Va.

Capt. Irving Peskoe
P. O. Box 163
Barksdale A. F. B., La.

Samuel R. Pierce, Jr.
218 West 139th St.
New York, N. Y.

William A. Polster
1122 Guardian Building
Cleveland, Ohio

William O. Quesenberry
1319 F Street, N.W.
Washington 4, D. C.

Samuel G. Rabinor
163-18 Jamaica Avenue
Jamaica, New York

Calvin L. Rampton
State Capitol Bldg.
Salt Lake City, Utah

Theodore L. Richling
815 City National Bank Building
Omaha 2, Nebraska

Jack Rogers
Box 268
Rome, Georgia

Col. A. H. Rosenfeld, Jr.
1601 Oakcrest Drive
Alexandria, Va.

Maxwell A. Rubin
8 West 40th Street
New York 18, N. Y.

John N. Schilling, Jr.
206 Washington Ave.
Albany, N. Y.

Louis A. Schwartz
369 Lexington Avenue
New York 17, N. Y.

Edward N. Scruggs
P. O. Box 312
Guntersville, Alabama

Hugo Sonnenschein, Jr.
29 South Lasalle Street
Chicago 3, Illinois

Maury L. Spanier
39 Broadway
New York 6, N. Y.

Jerome Stein
1180 Raymond Boulevard
Newark 2, New Jersey

Paul M. Stocker
207 Colby Building
Everett, Washington

Swept S. Taylor, Jr.
P. O. Box 912
Jackson, Mississippi

William E. Thomason
500 North Avenue
Bryan, Texas

John V. Thornton
8918 88th Avenue
Woodhaven 21, New York

Jeremiah W. Torrance, Jr.
420 West 4th Street
Marion, Indiana

Lt. Col. Walter T. Tsukamoto
JA Hq. X Corps
APO 909, % Postmaster
San Francisco, California

Sidney Ullman
4318 N. Henderson Rd.
Arlington, Virginia

John M. Warnock
206 Colby Building
Everett, Washington

Maurice Wahl
135 West 16th Street
New York 11, N. Y.

William H. Wells
19 Prince Street
Bordentown, N. J.

Capt. S. B. D. Wood
 Director of Military Justice
 JAGO, Navy
 The Pentagon
 Washington 25, D. C.

Eugene A. Wright
 455 Olympic National Bldg.
 Seattle 4, Washington

Capt. John B. Wright
 5135 N. 9th Street
 Arlington, Va.

Wayne W. Wright
 455 Olympic National Building
 Seattle 4, Washington

James N. Bloodworth
 P. O. Box 312
 Decatur, Alabama

Otto F. Fusco
 3531 Rochambeau Avenue
 Bronx 67, New York

1st Lt. Paul D. Hess, Jr.
 Florida Hall, Apt. 241
 So. Post, Ft. Myer 8, Va.

Robert B. Hughes
 Title Guarantee Building
 411 W. 5th Street
 Los Angeles 13, California

Clifton H. Stannage
 32 Broadway
 New York, New York

Saul H. Wolf
 3102 Newkirk Avenue
 Brooklyn 26, New York

CHANGES OF ADDRESS

Benj. S. Adamowski
 Room 1137
 111 W. Washington Street
 Chicago 2, Illinois

Lt. Col. Paul L. Anderson, JAGC
 Hq. RYCOM
 APO 331, % Postmaster
 San Francisco, California

Richard B. Appleton
 340 West 57th Street
 New York 19, New York

Cable G. Ball
 % Stuart, Devol, Branisin & Ball
 34 Lafayette Loan & Trust Bldg.
 Lafayette, Indiana

Roy W. Bergmann
 Room 702, Title Guaranty Bldg.
 706 Chestnut Street
 St. Louis 1, Missouri

Capt. Philip F. Biggins, TC
 Staff Judge Advocate Office
 Seattle Port of Embarkation
 Seattle 4, Washington

Clarence J. Black
 First National Building
 Oklahoma City, Oklahoma

Col. Alfred C. Bowman, Chief
 Military Government Division PMGO
 Navy Building
 U. S. Army
 Washington 25, D. C.

John R. Bowman
 714 Columbia Building
 Pittsburgh 22, Pennsylvania

Capt. Herbert Burton Brill
 1142 Wakefield Drive
 Alexandria, Virginia

Herman M. Buck
 9 Derrick Avenue
 Uniontown, Pennsylvania

Gabriel H. Golden
807 First National Bank Bldg.
Dallas, Texas

James C. Graham
244 Arlington Road
Waterloo, Iowa

Meade F. Griffin
The Supreme Court of Texas
Capitol Building
Austin, Texas

Col. John A. Hall, JAGC
Office of the SJA
Hq. U. S. A., Pacific
APO 958, % Postmaster
San Francisco, California

Jerry A. Harn
1051 College Ave.
Claremont, California

John L. Howland
Office of General Counsel
Department of the Air Force
The Pentagon
Washington 25, D. C.

Russell F. Hunt
First National Bank
Box 2240
Tulsa, Oklahoma

William Pollard Jent
2665 Vineville Avenue
Macon, Georgia

Brig. Gen. Bert E. Johnson
4674 S. 36th Street
Arlington, Virginia

Maj. Bernard A. Katz
314th Air Division
APO 710, % Postmaster
San Francisco, California

Stanley K. Lawson
600 S. Main Street
Salinas, California

George L. Burns
5741 Virginia Avenue
Kansas City 4, Missouri

Lt. Herbert R. Burris
6412 Lee Boulevard
Falls Church, Va.

William F. Burrow
807 First National Bank Bldg.
Dallas, Texas

C. Warren Colgan
1105 Fidelity Bldg.
Baltimore 1, Md.

Willis F. Daniels
Commerce Building
Harrisburg, Pennsylvania

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Corps Staff Judge Advocate
Hq. I Corps
APO 358, % Postmaster
San Francisco, California

Henry Appleton Federa
% Orinoco Mining Co.
25 Broad St.
New York 4, N. Y.

Max Felix
1211 Selby Avenue, Apt. 11
West Los Angeles 24, Calif.

Benjamin D. Frantz
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Sacramento 14, California

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New Arrivals Section
APO 743, % Postmaster
New York, N. Y.

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611 Sunshine Building
Albuquerque, New Mexico

Gentry Lee
1107 First National Bank Bldg.
Tulsa, Oklahoma

Maj. John J. Madden
Hq. 6th Army, J. A. Section
Presidio of San Francisco
San Francisco, California

Robert W. Mapes
530 Park Avenue
New York, N. Y.

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Office of Special Investigation
Hq. USAF, The Pentagon
Washington 25, D. C.

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Cleveland, Ohio

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1408 Perry Avenue
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Omaha, Nebraska

Trueman E. O'Quinn
2300 Windsor Road
Austin 4, Texas

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Hq. 377th Trans. Major Port
Camp Kilmer, New Jersey

Col. Lester A. Prichard
3154 Sonoma Avenue
Santa Rosa, Sonoma Co., Calif.

Francis C. Quilty
110 East Main Street
Madison, Wisconsin

Dale W. Read
204 Blurock Building
Vancouver, Washington

Frank Reel
15 West 44th Street
New York 18, N. Y.

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Personnel Bureau
The Adjutant General's Office
The Pentagon
Washington 25, D. C.

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Hq. 6th Army Corps
Camp Atterbury
Columbus, Indiana

Harold Gill Reuschlein
194 Park Ridge Lane
Pittsburgh 16, Pennsylvania

Maj. Robert W. Reynolds
The Armored Center
SJA Office, Ft. Knox, Kentucky
Cecil A. Roley
2000 Taraval Street
San Francisco, California

James C. Ryan
Central Trust Building
Sterling, Illinois

Victor A. Sachse
370 S. Lakeshore
Baton Rouge, Louisiana

Martin Schenck
County Court House
Albany, New York

William H. Schrader
Room 2200, 105 W. Adams Street
Chicago 3, Illinois

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Hq. Air University
Maxwell Air Force Base, Ala.

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Staff Judge Advocate
Camp Pickett, Va.

R. H. Seabolt
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Englewood, New Jersey

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141st Tank Battalion
Ft. Campbell, Kentucky

Dale E. Shannon
Deputy District Attorney
Colorado Building
Fort Collins, Colorado

Douglas N. Sharretts
717 Title Building
Baltimore, Maryland

Everett E. Smith
303 Windsor Street
Silver Spring, Md.

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SJA, Hq. 4th Army
Ft. Sam Houston, Texas

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Joint Military Mission for
Aid to Turkey
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Geo. R. Taylor
Attorney Advisor
Legal Sect. Hq. Camp Kokura
APO 3, % Postmaster
San Francisco, California

Lawrence W. Thayer
902 Paulsen Building
Spokane, Washington

Norbert A. Theodore
Room 5, Berkeley Building
1224½ Washington Street
Columbia, S. C.

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Washington, D. C.

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Camp Breckinridge, Ky.

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3507 Beacon Lane, Churchill
Falls Church, Virginia

Paul F. Wanless
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Springfield, Illinois

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Hq. IX Corps
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Wilson Wright Wied
508 Land Title Building
San Diego 1, California

Robert H. Williams, Jr.
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Baltimore 18, Maryland

Jack Wilson
104 S. Bragg Avenue
Lookout Mountain, Tenn.

Col. Claudius O. Wolfe
Army Disability Review Board
The Pentagon
Washington 25, D. C.

Philip W. Yager
4214 Leland Street
Washington 15, D. C.

