

SAVE - Page 28

Bulletin No. 18

October, 1954

# The Judge Advocate JOURNAL



Published By

**JUDGE ADVOCATES ASSOCIATION**

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

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**Washington 5, D. C.**

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**Bulletin No. 18**

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## Publication Notice

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

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# THE ANNUAL MEETING

On August 17, 1954, at the University Club, Chicago, Illinois, the Association held its annual banquet. More than 200 members and their guests attended. The President, Col. Joseph F. O'Connell, Jr., of Boston, Massachusetts, presided, and served as toastmaster. Col. O'Connell introduced the honored guests at the head table, which included Judge and Mrs. Robert E. Quinn, Judge and Mrs. George W. Latimer, and Judge and Mrs. Paul W. Brosman of the United States Court of Military Appeals; Rear Admiral Glass, Commandant of the Ninth Naval District; Rear Admiral Ira H. Nunn, The Judge Advocate General, Navy; Major General R. C. Harmon, The Judge Advocate General, Air Force; Major General C. B. Mickelwait, The Deputy Judge Advocate General, Army; Col. and Mrs. Robert Lancefield, Judge Advocate, Fifth Army, and Capt. William Mott, Judge Advocate, Great Lakes Naval Station. Dinner music was provided by an orchestra from the Fifth Army Band, and entertainment furnished by the 60 man Blue Jacket Choir of the Great Lakes Naval Station.

Col. O'Connell introduced the Honorable Thomas J. Dodd, member of Congress from the State of Connecticut, who spoke upon the subject of the need for direct legal action against Communism rather than the past system of indirect approaches to the problem. Congressman Dodd spoke briefly of his committee, which

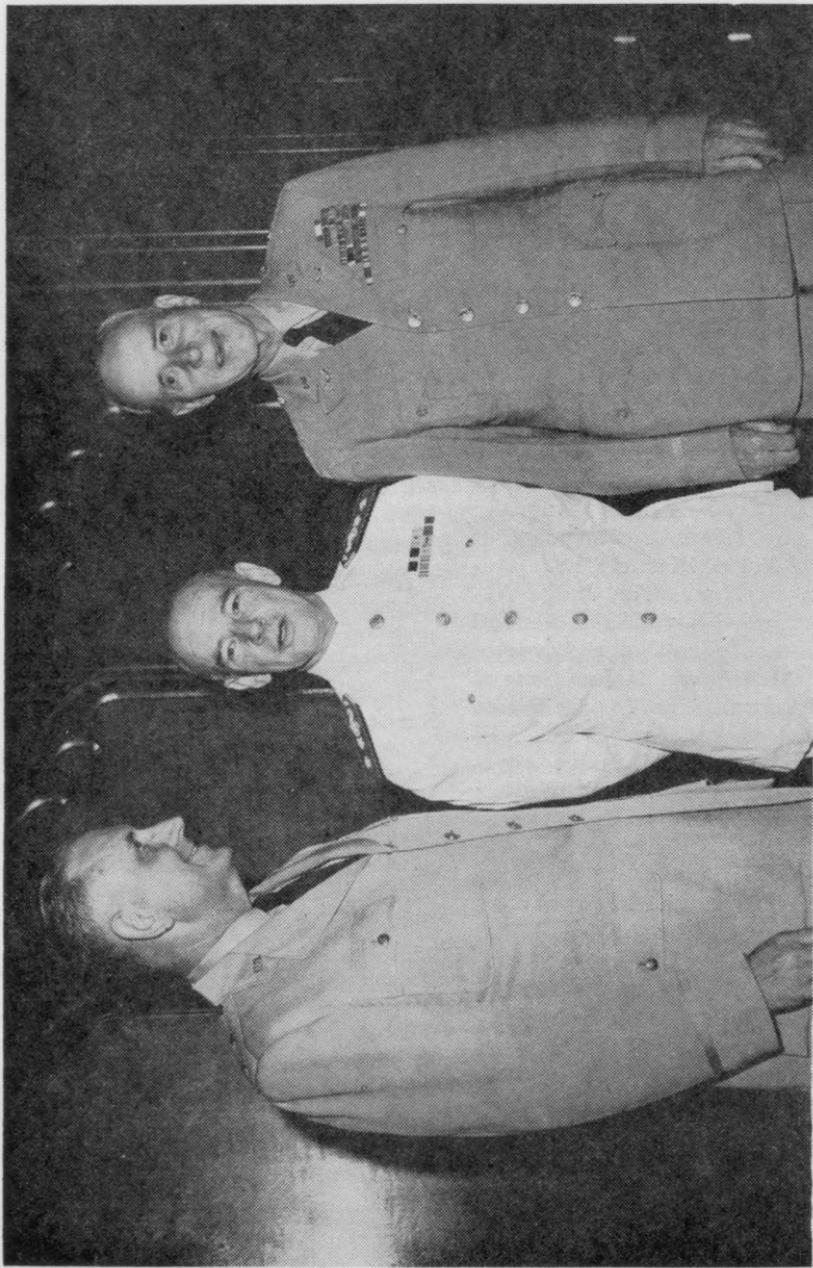
recently returned from Europe after investigating the resurgence of Communism and Fascism, and spoke favorably for legislation directly outlawing the Communist Party in the United States.

Certificates were presented to the past Presidents of the Association: Colonel Howard A. Brundage, General Herbert M. Kidner, General Ralph G. Boyd, Colonel William J. Hughes, Jr., Colonel Alexander Pirnie, Colonel George Hafer, Colonel John Ritchie, III, and General Oliver P. Bennett.

During the afternoon, preceding the banquet, the Association had sponsored a special ceremonial session of the Court of Military Appeals, which was convened at 3:00 p. m. in Judge Barnes' Court Room in the Federal Court House. More than 325 lawyers were admitted to the bar of the Court.

The annual business meeting of the Association was convened at 4:00 p. m. on August 18, 1954, at the headquarters of the Chicago Bar Association. The meeting was called to order by Col. Joseph F. O'Connell, Jr., President, who presided.

Mr. Cody Fowler of Tampa, Florida, past President of the American Bar Association, was introduced as a member of the subcommittee of the Hoover Commission studying the matter of the furnishing of legal services to the Armed Forces both by military lawyers and civilian lawyers. He outlined the scope of the inquiry



U. S. Navy photograph

Top legal officers of the Armed Forces at the Annual Banquet: l. to r., Maj. Gen. Reginald C. Harmon, TJAG, Air; Rear Adm. Ira H. Nunn, TJAG, Navy; and Maj. Gen. Claude B. Mickelwait, Deputy TJAG, Army.

and stated that the purpose of the subcommittee is to seek the improvement, better coordination, and greater efficiency of legal services to the Armed Forces. Mr. Fowler solicited advice of the members of the Association and stated that when the investigation is completed and correlated, its conclusions will be made available to the Association for further study and comment.

The President then called upon General Harmon, The Judge Advocate General of the Air Force, for a report. Gen. Harmon spoke at length comparing the administration of justice under the Uniform Code of Military Justice and under the Elston Act. His conclusions were that there is no improvement in the quality of justice, but that the new system is much more expensive; therefore, the Uniform Code of Military Justice is not functioning as it should, and that it would be desirable to return to a system more comparable to its predecessors. A full statement of Gen. Harmon's remarks is contained in this issue of the Journal.

At this point, Judge Latimer, Associate Judge of the Court of Military Appeals, by way of report for the Court made a reply to Gen. Harmon's remarks. Judge Latimer stated that full debate upon the present system of military justice as compared with its predecessor systems had been conducted in the Congress upon the broad question of whether justice in the Services should be strictly military or governed to some extent by civilians. He acknowledged that there were some delays in the administration of justice caused by the existence of the Court, but reminded that at least

thirty days of that delay (processing time had been increased by thirty-four days over that of the Elston Act) is the statutory period within which the accused may take an appeal to the Court and that certainly such a slight delay was not too much for the consideration of another appellate agency. Judge Latimer further stated that the number of reversals made by the Court is not a criterion of the success of the present system, but a more important indication of the success is to be seen in improvement of the quality of trials as reflected by the records of trial coming before the Court. On that point Judge Latimer expressed the belief that the Court was largely responsible for this improvement in the quality of justice at the trial level. With respect to the increased costs of administering the Uniform Code of Military Justice, Judge Latimer argued that we do not weigh dollars against individual liberty, but on the contrary we must instill in the soldier faith in the system of military justice.

Judge Latimer referred to his distinguished colleagues on the Court and stated that it was his belief that their work was a credit to the United States and the military services and had resulted in no impairment of the disciplinary powers of the services. Since the Court started in September, 1951, he reported that 5,412 cases had come up for the consideration of the Court, of which 3,667 came from the Army, 879 from the Navy and Marine Corps, 722 from the Air Force, and 16 from the Coast Guard. The Judge Advocates General had certified 175 of those cases to the Court and 22 were considered as mandatory death cases.



U. S. Navy photograph

A general view of the Annual Banquet with head table in the background.

All other cases were considered on the petition of the accused. Of all those cases, 4,532 had been processed by the Court within a thirty-day period. That the procedures of the Uniform Code of Military Justice are time consuming, Judge Latimer admitted; but, he stated that the Court had formed its own civilian committee and also a committee of the Judges with The Judge Advocates General to study ways and means of improving the Court and its procedures and that they had come up with some specific recommendations which would reduce the time element without a sacrifice of individual rights. Judge Latimer reiterated that the Congress had determined that civilian judges should have the final say in matters of military justice and urged that the Court needs the support of all military and civilian lawyers and that that support had been forthcoming from most quarters.

Judge Latimer then proceeded to outline the work of the Judges observing that Judge Quinn in the past thirteen months had written 101 opinions, Judge Brosman had written 126 opinions, and that he had written 115 opinions. In the same time, an average United States Supreme Court Judge would write 10 or 12 opinions, according to Judge Latimer. He admitted that they do not get all the Constitutional and difficult and involved problems that the Supreme Court receives, but stated that the Court has very many complicated and Constitutional problems, too. Its job is further complicated, he said, by the fact that the present system is a new system of justice and law and

that there are many doubts and uncertainties among those administering it. Therefore, the Court has been required to spend considerable time in instructing those persons charged with the administration of the Code.

One notable improvement, he said, under the new system is reflected in the records of trial, which show that both prosecution and defense are being conducted in an excellent manner—cases are being tried on both sides in a truly lawyer-like manner. He noted, too, that boards of review are writing fewer memorandum opinions and are putting in much more study and work on the cases, all of which is reflected in the quality of their opinions. He specifically defended innovations concerning the functions of the law officer.

Judge Latimer expressed very strongly his belief in the value of the contribution of the Uniform Code of Military Justice to military justice and the role of the Court of Military Appeals. He said that he is satisfied that the Court has a place in our judicial system and is here to stay.

Col. O'Connell then called upon Admiral Nunn, The Judge Advocate General of the Navy, to report. The Admiral declined to enter the debate and said that the Navy was not having too much difficulty with military justice, although it would prefer a restoration of the old Articles for the Government of the Navy. He stated that the Uniform Code of Military Justice has created an adversary system of jurisprudence and it is probably the best system of litigation. Heretofore, the Navy had used a paternalistic system and it worked, as far as he observed, all right. He did



U. S. Navy photograph

Another general view of the Annual Banquet.

observe that the new Code in many cases makes criminals of young men where they were merely delinquents under the earlier system, pointing out that 80% of the Navy cases are merely the result of some form of absenteeism. The old paternalistic system imposed by the Articles for the government of the Navy placed upon the Commanding Officer a need for the highest virtue and the finest example. He observed that the spirit of the military permeates also the legal profession and that any system of justice established will in operation serve substantial justice.

General Mickelwait, The Deputy Judge Advocate General of the Army, was called upon by the President to make a report. Gen. Mickelwait stated that he did not wish to engage in statistics or philosophy, but merely wished to state that the Army is doing its very best to comply with the Uniform Code of Military Justice and the decisions of the Court of Military Appeals. He stated that JAGO has recently created a new international law division to meet the impact of legal questions arising from our international associations and that the training division is now conducting instruction in international military law preparatory for service in foreign military situations. Gen. Mickelwait stated that it seems that the Army's JAGC is always burdened with some special project and until recently they were involved in the Army-McCarthy hearings, rendering assistance to Mr. Welch, Army counsel. He also stated that the Congress is very apt to pass a special relief bill for those who suffered death, injury, and property damage in the Texas City disaster.

Gen. Mickelwait stated that this special relief came after his participation in the successful defense of the United States after seven long years in these cases, but that undoubtedly the Secretary of the Army will be required to investigate and make awards, all of which will be another special project for JAGO, Army.

Gen. Mickelwait stated that the school at Charlottesville is expanding and paying particular attention to the training needs of reserve officers, particularly through the USAR schools. He announced that on 19 September, there will be a conference of Judge Advocates from all over the world to be held at Charlottesville for one week.

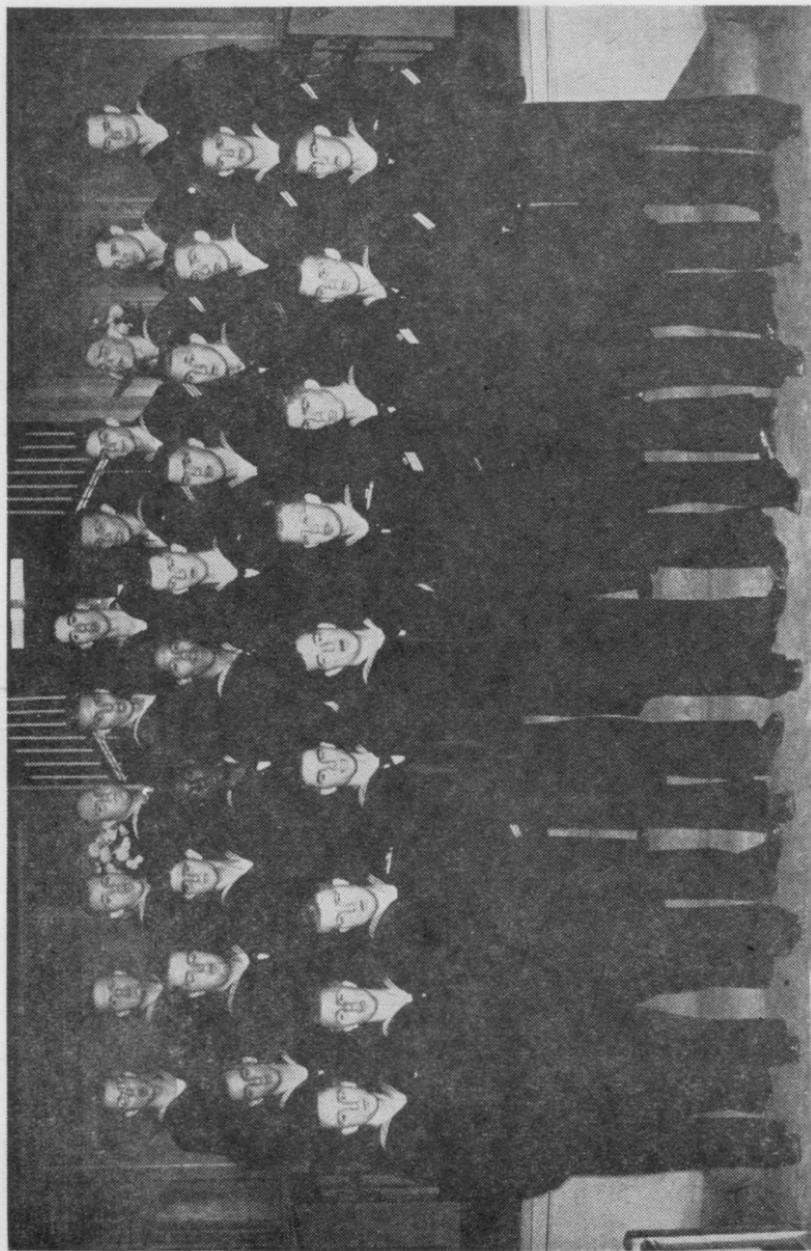
The Report of the Board of Tellers was read and the following were announced to have been elected to the offices set opposite their names:

President — Col. Gordon Simpson,  
Texas  
First Vice President—Col. Vern W.  
Ruble, Indiana  
Second Vice President—Capt. Robert  
G. Burke, New York  
Secretary—Col. Frederick Bernays  
Wiener, Washington, D. C.  
Treasurer—Lt. Col. John W. Ahern,  
Washington, D. C.  
Delegate to the American Bar Association—Col. Joseph F. O'Connell,  
Jr., Massachusetts

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##### Navy

Capt. George W. Bains, South Carolina  
Lt. Col. J. Fielding Jones, Virginia  
Capt. S. B. D. Wood, Washington,  
D. C.



U. S. Navy photograph

The Great Lakes Blue Jacket Choir which entertained at the Annual Banquet.

**Army**

Col. Joseph A. Avery, Virginia  
Col. Edward B. Beale, Washington,  
D. C.  
Col. William H. Beck, Jr., Georgia  
Gen. Ralph G. Boyd, Massachusetts  
Col. Charles L. Decker, Virginia  
Lt. Col. Reginald Field, Virginia  
Col. Osmer C. Fitts, Vermont  
Lt. Col. Edward F. Gallagher, Wash-  
ington, D. C.  
Col. Abe McGregor Goff, Washington,  
D. C.  
Col. William J. Hughes, Jr., Wash-  
ington, D. C.  
Col. Arthur Levitt, New York  
Lt. Col. Clarence L. Yancey, Louisiana

**Air**

Lt. Col. Nicholas E. Allen, Washing-  
ton, D. C.  
Lt. Col. Louis F. Alyea, Washington,  
D. C.  
Col. Thomas H. King, Washington,  
D. C.

Col. Allen W. Rigsby, Colorado  
Col. Fred Wade, Pennsylvania

In addition to the above elected of-  
ficers and Directors, the governing  
body of the Association will include  
in the current year Gen. Oliver P.  
Bennett of Iowa and Col. John  
Ritchie, III of Missouri, past Presi-  
dents, and The Judge Advocates Gen-  
eral of each of the services, Admiral  
Ira H. Nunn, Navy, Major General  
Eugene M. Caffey, Army and Major  
General Reginald C. Harmon, Air  
Force.

At the end of the meeting, Gen.  
Mickelwait took the floor in support  
of a resolution seeking active support  
of the NATO status of forces agree-  
ment, particularly in the light of cur-  
rent criticism arising out of the Keefe  
case. Gen. Mickelwait's remarks are  
set forth at length in this issue of  
the Journal.

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## In Memoriam

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

Col. Vern W. Ruble, USAF-Res., of Bloomington, Indiana, who died as a result of injuries received in an automobile accident on September 14, 1954. Col. Ruble had long been a member of the Association and at his death was its First Vice President.

Col. Frederick J. Lotterhos of Jackson, Mississippi, who died January 13, 1954. At his death, Col. Lotterhos was serving as Associate Judge of the Supreme Court of Mississippi.

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# Progress Under the Uniform Code

By Major General Reginald C. Harmon \*

This is the sixth time I have appeared before the annual meeting of your Association as Judge Advocate General of the Air Force. In order that your rejoicing may not be premature in anticipation that this may be my last appearance, I shall have to inform you that if the Lord is willing your indulgence will have to last for two more annual meetings after this one. If I live, keep my health, and am not fired in the meantime, I shall serve two more years in this capacity and unless you change your policy about inviting all three of us to speak, my appearances will continue for that period.

I always feel that these talks at your annual business meeting are somewhat in the nature of annual reports to the stockholders. While your membership only comprises a small percentage of the 160 million stockholders of the outfit which employs us, the government, you represent many others, not only in your capacity as practicing lawyers but in your capacity as members and officers of an organization of military lawyers to which the public should look for leadership in the field of military law.

Since I happen to be the only Judge Advocate General of any service past, present or probably future, who, in

that capacity, has or will have the experience of administering all three systems of military justice in existence in recent times, the Articles of 1920 as implemented by the 1928 Manual, the amended Articles commonly known as the Elston Act as implemented by the 1949 Manual, and the Uniform Code of Military Justice as implemented by the 1951 Manual, I feel it is my duty to you and the people you represent, in reporting on our progress under the Uniform Code, to make some comparison between that and our progress under the system which immediately preceded it.

After all, the legal department I head in the Air Force is your legal department as much as mine and the military service it serves is also yours as well as mine. You and the people you represent contribute the money for their support. Therefore, it is to the best interest of all of us to know the real facts concerning the system under which we operate.

These legal departments provide the legal service for the military establishment of the country. The efficiency of that service and the adequacy of the system of military justice we use will have much to do with the effectiveness of the military

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\* The Judge Advocate General of the Air Force. An address delivered at the Annual Meeting of the Judge Advocates Association at Chicago on August 18, 1954.

establishment. At the same time, as I have told you before, in a freedom-loving democracy such as ours, our methods as well as our system must be in full conformity with the fundamental principles of human rights under which our Nation was founded and under which it has thrived. The efficiency of operation of the military establishment and the noble principles of the Nation it serves are both of tremendous importance. One cannot be sacrificed for the sake of the other.

As many of you know, during the entire period since the war when there has been much discussion and many hearings on the reformation of our system of military justice, I have been one of the few military men who has been perfectly willing to admit that there were defects and abuses in the old system and that reform was in order, much in the field of administration and some in the field of statutory change. Now, I am equally willing to admit to the inadequacies of our present system.

While it would be difficult to compare the results under the first system with those of the last two, I do think it necessary to make some comparison between our operation under the present system and that under the system which immediately preceded it, which do lend themselves to comparison.

I should like to compare the results of the last year under the Elston Bill with those of the third year under the Uniform Code which ended May 31st of this year. Both systems had been in operation similar lengths of time at the beginning of each of the periods under comparison. During the last year under the Elston Bill,

0.4 of 1% of all cases reviewed by boards of review were reversed by the Judicial Council. During the third year under the Code, approximately 0.1 of 1% of all such cases were reversed by the Court of Military Appeals. This last year, the Air Force had 4,795 cases received by my office in Washington for review by boards of review. In each and every one of these cases the accused had a right to petition the Court and did so in 365 cases. With the exception of the few still pending, five have been reversed by the Court. Two additional cases were reversed, in which the accused did not petition the Court but which I certified to it on the ground that I did not agree with the opinion of the board of review myself.

I should like to invite your attention to the fact that under the Uniform Code, not only can the Judge Advocate General certify to the Court but the accused has a right to petition the Court also, whereas under the Elston Act, the accused did not have the right to petition the Judicial Council. In spite of this, an analysis of the figures I just gave you will demonstrate that the rights of the accused were just as well protected under the Elston Act as under the Uniform Code of Military Justice.

Now we have heard a lot of talk about the unreasonable and imperious attitude of convening authorities generally. As I have told you before, I will be the first to admit that things were not perfect on that front under the Articles of 1920. However, the statistics show that during the last year of operation under the Elston Act convening authorities reduced confinement in 25% of the cases,

while under the Code they reduced confinement in 18% of the cases. Convening authorities suspended the execution of punitive discharges during the last year under the Elston Act in 24% of the cases and during the last year under the Code, in 28% of the cases. I believe these figures show that the attitude of convening authorities as indicated by their action, has remained about the same in the two periods. If their attitude was unreasonable and imperious under the Elston Act, the Uniform Code has not done anything to change it. However, I might say that I do not think it was unreasonable in either period even though it may have been in some instances earlier.

The Judge Advocate General reduced confinement in 5% of the cases during the last year under the Elston Act and in  $\frac{1}{4}$  of 1% of the cases during the last year under the Code. He suspended the execution of discharges in 6% of the cases during the last year under the Elston Act and in only 3% of the cases during the last year under the Code. Now I hope you will not jump to the conclusion that the attitude of the Judge Advocate General has become more imperious in the passing years. It may be self-serving to say this, but I believe the attitude remained the same but due to the inexperience of the personnel in the Judge Advocate General's Department during the earlier period, adjustments were probably more needed then.

Now that we have had an opportunity to take a quick look at the conditions during the last year of operation under the Elston Act and the conditions during the last year

under the Code, I should like to compare the relative costs of the two systems as well as the processing time under each. The Judicial Council cost us about \$650 for office space and \$25,290 a year for personnel salaries. Since the three general officers in the Judicial Council all had full time jobs exclusive of their Judicial Council work, no part of their salaries has been charged to this function. So leaving that out, the total cost was \$25,940 per year to the Air Force. Under Public Law 458 of the 83rd Congress, the appropriation for the Court of Military Appeals for this year is \$320,000. Since the Air Force is one of the three major participants, it should be charged with approximately \$100,000 a year. The Appellate Counsel's maintenance and utility costs for office space is \$3,010 per year and personnel salaries \$149,130, making a total of \$152,140, which added to the \$100,000 Air Force share of the salaries and expenses of the Court, makes a cost of operation under the Code of over a quarter of a million dollars, or approximately ten times the cost of operation under the Elston Act. This does not include rent for office space for Appellate Counsel. This difference in cost does not take into consideration the many other added people required by the Code in addition to those added for Appellate Counsel.

I am sure all of you will concede that processing time is an important factor in the efficiency of the military service. During the last year under the Elston Act, the average processing time in the Air Force was 84 days. During the last year under the Code, despite the fact that our organiza-

tion was older and more experienced, the processing time had arisen to 118 days, or 34 days longer.

As evidence of the fact that additional personnel are needed under the Code than those needed under the Elston Act, I submit that the average Air Force strength was about 50% higher for the last year under the Code than it was during the last year under the Elston Act, while the JAG officer strength was about 117% higher. This cannot all be charged entirely to the added requirements of the Code because we were new and somewhat under strength during the earlier period and were up to strength under the later one. However, in all fairness, I should like to point out that some of these additional lawyers, even though expensive, have, in my opinion, contributed much to the efficient administration of military justice and even if we were to go back to the Elston Act, I would recommend that perhaps half of the increase be retained. This is indicated by the effects of counsel before boards of review. In 46% of the cases, the accused requested representation by counsel before boards of review. This 46% of the cases received 71% of the reductions in confinement by the boards.

Since I am talking to lawyers, I think it is within the realm of propriety for me to be so inmodest as to say that I believe court-martial procedure has become more orderly, as have all of the other affairs of government, as lawyers have had more to do with it. The Code has had a beneficial effect in giving lawyers a more important part. However, there is no reason why lawyers could not

be given the same important part under the Elston Act and the number required would be much less.

I believe the greatest single objection to the Uniform Code is its tendency to destroy what once was the principal asset of the military justice system, that is, the swift and certain punishment of the guilty man. The certainty of punishment and the promptness of prosecution seem to be becoming a matter of historical interest. I believe there are two principal reasons for this—

(a) The Code is unnecessarily laden with "built-in" delays. There are too many reviews on reviews indiscriminately granted to all offenders. I can see no reason why an accused who understandingly pleads guilty to a simple offense like absence without leave, or larceny, should have available to him all of the reviews granted to the man convicted of a heinous crime who says he is innocent and fights it all the way. Yet that is the fact under the present Code.

(b) In the administration of the Code, in many instances form has been elevated over substance. In case after case convictions have been set aside for reasons that do not seem to the ordinary man to have the slightest bearing upon either the fairness of the trial or the fundamental rights of the accused. Yet, when faced with the problem concerning some really fundamental right of the accused, like that of unreasonable search and seizure, the safeguards which the services have set up and carefully maintained under the earlier laws are struck down.

Published reports of court-martial activities reflect that up to the end of 1953, more than 700,000 court-martial cases of various kinds were tried under the Code in all of the services. During that period, less than 7% of that number were reviewed by boards of review, and 421 decisions were rendered by the Court of Military Appeals. These figures indicate that less than 1% of the cases serious enough to warrant review by a board of review and less than one in sixteen hundred was decided by the Court. The Air Force Judicial Council, under the Elston Act, reviewed a greater percentage of the cases and its decisions were at least as favorable to the accused as those of the Court.

I submit that the picture I have presented proves beyond any reasonable doubt that so far as the Air Force is concerned, the Elston Act did a better job than the Uniform Code of Military Justice in enforcing discipline in that service on the one hand and just as good a job in protecting the rights of the individual on the other. All of this was done at one-tenth of the cost as far as top appellate review is concerned, plus an additional saving of perhaps 200 lawyers, after leaving plenty to provide lawyers where needed in each case, at an average annual salary each of approximately \$7,500 per year, amount-

ing to a money saving of \$1,500,000 per year. This saving is in addition to the expense of 34 days each in processing time, for 4,795 cases, to include only those which came to Headquarters, or a total of 453 man years of the accused involved, with the resultant loss to the Government in pay and allowances.

I hope you will bear in mind that this tremendous additional cost in both money and time was incurred in the administration of this Uniform Code when the Nation was not fighting a global war with fronts all over the world. In such an event, the expense and delays would be multiplied many times by the necessity of transporting court-martial records from the various theaters to Washington, unless Congress saw fit to establish branch courts throughout the world which would be even worse. It is quite obvious that the establishment of branch offices by The Judge Advocate General under the authority of Article 68 of the Code would be completely useless unless branch courts were established also.

May we join together in an effort to devise a safe, yet simple, system of military justice which provides prompt and efficient justice at a reasonable cost to the American people and which will work in time of global war.



The back pages of this issue contain a supplement to the Directory of Members, July, 1953, which should be used with the supplements previously published in issues 15, 16 and 17 of the Journal.

# The NATO Status of Forces Agreement<sup>1</sup>

On 23 August 1953, there entered into force as to the United States a new multilateral treaty regarding the status of the forces of one NATO state when in the territory of another NATO member. The Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces—commonly referred to as the NATO Status of Forces Agreement—had been signed at London by all the original members of NATO on 19 June 1951. All of the NATO members, except Iceland, Italy, Denmark, and Portugal have now ratified it.

When the Status of Forces Agreement was before the Senate<sup>2</sup> and also since that time, it has been subjected to bitter criticism from several quarters, largely because of its provisions on criminal jurisdiction over military personnel. Much of this comment has been based on lack of understanding of the situation preceding the Treaty and of what the Treaty attempts to do. Some of it unfortunately reflects hostility to our very partnership in the North Atlantic Treaty Organization.

## Criminal Jurisdiction Under the Agreement

What are these jurisdictional provisions which so shock the adver-

saries of the Status of Forces Agreement? A sending state—that is, a state which stations its forces in another NATO state or sends them through that state—has primary jurisdiction over two categories of offenses committed by the members of its Armed Forces or by civilian employees of the Armed Forces:

a. Offenses against the property or security of the sending state or against the person or property of a member of the Forces, a civilian employee, or a dependent, and

b. Offenses arising out of any act or omission done in the performance of official duty.

In other cases the authorities of the receiving state—that is, the state which receives the visiting forces—have jurisdiction, as, for example, when a soldier, off-duty, assaults a citizen of the receiving state. However, exclusive jurisdiction is reserved to the sending and receiving state respectively if the offense, including a security offense, is punishable by the law of the one state but not by that of the other.

The Agreement provides that each state will give sympathetic consideration to requests for waivers of its

<sup>1</sup> Statement of Major General Claude B. Michelwait, Deputy Judge Advocate General of the Army in support of a Resolution submitted at the annual meeting of the Judge Advocates Association at Chicago on August 18, 1954. The Resolution was referred to the Association's Governing Board for consideration and action.

<sup>2</sup> See 15 JAJ 1, "Safeguarding the Rights of American Servicemen Abroad" an address by Senator John W. Bricker on this subject. See also 16 JAJ 20.

jurisdiction by the other state. The experience of the Armed Forces has been that the countries in which United States forces are stationed give waivers of their jurisdiction in the great majority of cases.

The Agreement also contains a "bill of rights" guaranteeing in the courts of the receiving state, the rights to a prompt and speedy trial, to be informed of the charges, to be confronted by witnesses, to obtain witnesses by compulsory process, to have legal representation and an interpreter, and to communicate with, and have present at the trial (if the rules of the court permit) a representative of the sending state.

#### Situation With NATO SOF

During World War II, United States forces stationed in foreign countries generally enjoyed, by bilateral agreement, immunity from the jurisdiction of the local courts. These arrangements are described in two learned articles by Colonel Archibald King in the *American Journal of International Law* in 1942 and 1946. But other wartime agreements involving other countries and areas did not always concede exclusive jurisdiction to the sending state.

It is, of course, not susceptible of argument that a sovereign receiving state may make it a condition to the admission of foreign forces that they share their jurisdiction with the local authorities. Recourse to varying understandings of customary international law is fruitless in this field of negotiation of arrangements regarding the status of visiting forces. International law becomes relevant only if the parties have not made other

provisions about jurisdiction. As stated by the Attorney General:

"There is, of course, no restriction in international law upon the terms of any agreement upon the subject, as the receiving state need not permit the ingress of the forces, and the sending state need not send them, if the conditions are not respectively satisfactory."

With the end of World War II, foreign states declined to maintain in force the special wartime arrangements which had been provided for the juridical status of United States forces. When new arrangements were negotiated for the peacetime stationing of forces abroad, foreign countries were unwilling to give a complete immunity from jurisdiction to the forces of the sending state. They were particularly concerned about offenses committed by off-duty soldiers against the inhabitants of these countries—the killings, assaults, sexual crimes and highway offenses which, even in the best-regulated of armies, inevitably take place. They resented, too, a regime for visiting forces that was the same as that prevailing in occupied countries, where the local authorities exercised no control whatsoever over the occupying forces.

This unwillingness to grant a complete immunity from local jurisdiction was not the result of any anti-American sentiment. The parties to an agreement on the status of the forces of the Brussels Treaty Powers, the precursor of the North Atlantic Treaty Organization, provided no immunity whatsoever from the jurisdiction of the courts of the receiving state. This agreement, to which the

United States was not a party, stipulated that any offense, committed off-duty or on, against a national of the sending state or of the receiving state could be tried in a court of the host state. The agreements concluded bilaterally with the United States, most of which are classified, were generally more generous in their provisions.

### The Negotiation and Ratification of the NATO Status of Forces Agreement

The NATO Status of Forces Agreement was freely negotiated in 1951 between twelve sovereign states. It represents what these states could agree to be the desirable measure of the sending state's jurisdiction—a protection which extends to all of the individual's acts while he is on duty or associating with his fellow countrymen. It is when he goes into town of his own free will on his time off that the soldier really becomes subject to local jurisdiction.

The Status of Forces Agreement was thoroughly considered in all its aspects by the Senate when its advice and consent to ratification were sought in 1953. General Bradley, then Chairman of the Joint Chiefs of Staff, General Ridgway, then Supreme Allied Commander, Europe and Admiral McCormick, then Supreme Allied Commander, Atlantic, submitted statements to the Foreign Relations Committee emphasizing the military necessity for the Treaty and its re-

sponsiveness to the needs of the Armed Forces. The Senate gave its consent to ratification by 72 votes to 15. At the same time it adopted a resolution calling upon the Executive Branch of the Government to request a waiver of the jurisdiction of the receiving state in those cases in which an individual might, if tried in the foreign court, be deprived of any constitutional safeguard he would enjoy if he were being tried in the United States. A representative of the United States is also required by this resolution to be appointed to be present at each trial in a foreign court to observe the proceedings and to report any denial of the rights guaranteed by the Agreement.

### The Working of the Agreement

How has the Status of Forces Agreement worked in practice? In France, to take a typical case, the coming into force of the NATO Status of Forces Agreement brought no change in the percentage of cases subject to French jurisdiction which were actually tried by that country, as compared to the pre-Status of Forces period. In 1953, over 90% of the cases subject to French jurisdiction, that is, off-duty offenses against Frenchmen, led to waivers of French jurisdiction. Of these cases, that of Keefe and Scaletti, two American soldiers tried in a French court, has attracted considerable attention.<sup>3</sup> Keefe and Scaletti have been pictured as healthy American

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<sup>3</sup> For a collateral sequel to this case see *United States ex rel. Gladys Keefe v. John Foster Dulles, Secretary of State*, United States Court of Appeals, District of Columbia Circuit No. 12107 decided 16 September 1954. Denial of writ of habeas corpus, affirmed.

boys, who were sentenced to five years at hard labor and solitary confinement for a carefree prank—a “high tooting joy-ride” as one columnist put it. Here are the facts:

Keefe and Scaletti, each of whom had an impressive prior court-martial record, met in a guardhouse in Germany. A day or so after arriving at Orleans from this guardhouse, they went AWOL and got drunk. Late that night they hailed a cab to take them out on the highway to hitch a ride to Paris. A mile out of the city, where they stopped the cab and Scaletti garrotted the sixty-five year old driver, Keefe placed a shirt in the driver's mouth, struck him, and knocked him out of the cab. They left him on the ground and drove off to Paris in the stolen vehicle. The French police arrested the two some days later. The case being one subject to French jurisdiction under the Status of Forces Agreement, they were tried by a French court before which they admitted their guilt. The American Army observer reported that they had a fair trial and that no anti-American sentiment appeared in the proceedings. It was brought out that the taxi driver had been incapacitated for thirty days. The two were sentenced to five years in prison, not at hard labor and without banishment from France, for what an American commentator called this “minor” offense. This is the typical instance in which the critics of the Status of Forces Agreement profess to find their sense of Justice outraged.

During the latest period for which statistics are available, 1 December 1953 to 30 June 1954, the French waived jurisdiction in well over one

thousand cases out of one thousand one hundred fifty one. Only eleven of the cases in which local jurisdiction was reserved resulted in unsuspended sentences to confinement. The largest confinement imposed in any of these cases was thirteen months. Surely these figures show no cause for concern.

### The Alternatives

The alternatives on the Status of Forces Agreement are clear. Denunciation of the Treaty could not lead to the free negotiation of a more comprehensive immunity from local law, which our NATO partners believe to be unjustified. The withdrawal of the United States from the Treaty would be tantamount either to a declaration of lack of interest in NATO or to a demand that our position vis-a-vis the other thirteen members become that of Russia with respect to its satellites. Circumstances imperatively demand that wholehearted support be given to the NATO Status of Forces Agreement as evidence of our continuing support of NATO itself.

### President Eisenhower's Position

It is fitting to refer in conclusion to the views of President Eisenhower, whose service as Supreme Allied Commander, Europe, makes him doubly qualified to speak of the significance of the NATO Status of Forces Agreement. In his press conference of 28 January, he was asked whether American soldiers are being deprived of their constitutional rights by the Status of Forces Agreement. He replied:

"The status of forces agreement was one for which he had worked very seriously when he was in Europe, for this reason:

"Fundamentally, any foreigner in the United States could be tried by a United States court if he committed a crime of any kind. And units of other nations came here occasionally. This same thing happened in a foreign country.

"Now, these people, he wanted to point out, were partners. In no case, where we made agreements with other nations were we trying to establish or act like their satellites. That was a philosophy that seemed to him repugnant to the whole concept of freedom, of liberty.

"Now, we went in there, we had people—and remember this: the status of forces agreement, as he recalled the provisions—and, after all, it was two years ago that he studied them—any crime that was committed between individuals of our units, they were tried by us. Anything that happened when the man was on official duty, they were tried by us.

"The actual time when the man was exposed to some kind of action by a foreign court was when he was

on leave. And he was in exactly the same status, as a practical measure, as Mrs. Craig was when she had gone there.

"Now, if she had committed an offense in France, or wherever she was, would she have expected to come back to the United States to be tried? She would have been tried, and she would accept that risk when she went over there.

"Now, the difference was that a soldier was ordered, but he did have his post, he did have his unit. And it was still expected that when he went off of his own territory and went off on leave, on his own status, on his own personal status, that he did become responsible to their courts.

"Even there, there were certain safeguards in the way he was represented, and the information given to our embassies.

"Now, this same thing applied to people who were here. All these treaties were reciprocal, and that was the thing to remember. They were arranged so as to do justice to the very greatest possible extent to the individual, and to meet national needs."

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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.

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# Intoxicating Liquors on Military Installations

By Major Earl A. Snyder \*

It is a matter of widespread knowledge that the Department of Defense recently was persuaded by the force of public opinion to change its position with regard to the sale of intoxicating liquors on military installations. For prior decades this matter had been either tacitly ignored or subtly winked at; the existing law prohibited the sale or dealing in intoxicating liquors on military installations.<sup>1</sup> In 1951 Congress passed the Universal Military Training and Service Act<sup>2</sup> which had a specific provision relating to the sale, consumption, and possession of intoxicating liquors on military installations.<sup>3</sup> The provision authorized the Secretary of Defense to regulate these matters. Here was a realistic view of the problem and it seemed to cry for similarly realistic regulation.

Almost two years passed before the Secretary of Defense promulgated regulations permitting the sale of intoxicating liquors on military installations. The furor created, however, was only a little short of cyclonic; public opinion forced a re-evaluation of the area.

With such a controversial background in the forum of the layman, it is a cause for wonder that some astute legal scholar has not attempted to persuade that the provision permitting regulation by the Secretary of Defense is in fact a nullity. His argument, in brief, might run that since the previous enactment<sup>4</sup> was never specifically repealed it still remains in effect and must be construed along with the provision in the Universal Military Training and Service Act. When the two provisions are construed together, so the polemicist urges, there is nothing left but complete prohibition. For that reason, he shrewdly concludes, why all this argument between the Women's Christian Temperance Union and the Department of Defense?

Such a potential donnybrook deserves a closer scrutiny than has been accorded it. It seems advisable for legalists to examine these legislative monsters set to destroy one or the other and, in the process, an important segment of Armed Forces public relations. Only this time the examination should be carried out in a calm, dispassionate, legal forum.

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\* Major Earl A. Snyder, USAF is assistant SJA of the Seventeenth Air Force.

<sup>1</sup> 31 Stat. 785; 10 U. S. C. 1350; Section 38, Act of February 2, 1901.

<sup>2</sup> Public Law 51, 82nd Congress.

<sup>3</sup> *Ibid.*, Section 6.

<sup>4</sup> See note 1, *supra*.

Section 6, Public Law 51, 82nd Congress, reads:

"The Secretary of Defense is authorized to make such regulations governing the sale, consumption, possession of, or traffic in, beer, wine, or any intoxicating liquors to, or by, members of the Armed Forces, or the National Security Training Corps, at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association, violating the regulations authorized hereunder, shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punishable by fine of not more than \$1,000, or imprisonment of not more than twelve months, or both."

Section 38, Act of February 2, 1901 (31 Stat. 785; 10 U. S. C. 1350) reads:

"The sale of or dealing in beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or Army transport, or upon any premises used for military purposes by the United States, is hereby prohibited. The Secretary of War is hereby directed to carry the provi-

sions of this section into full force and effect."

Frequently, it is necessary to construe statutes having the same purposes or objects *in pari materia*.<sup>5</sup> This would require statutes, although in apparent conflict, to be construed, as far as reasonably possible, harmoniously. But if there is an irreconcilable conflict between the new provision and the prior statute relating to the same subject matter, the former will control as it is the later expression of the legislature.<sup>6</sup> However, application of the rule that statutes *in pari materia* should be construed together is most justified in the case of statutes relating to the same subject matter that were passed at the same session of the legislature;<sup>7</sup> if a subsequent act is in irreconcilable conflict with the act under consideration the subsequent act must prevail.<sup>8</sup>

It is submitted that the two statutes cited above are in irreconcilable conflict. The prior enacted statute, section 38, Act of February 2, 1901,

<sup>5</sup> 2 Sutherland, Statutory Construction (3d Ed.) 535-536, and cases cited thereunder.

<sup>6</sup> 2 Sutherland, Statutory Construction (3d Ed.) 532, and cases cited thereunder; early cases to the same effect are *Rex v. Cator*, 14 Burrows 2026, *Rex v. Davis*, 1 Leach (C. C.) 271 and *Norris v. Crocker*, 13 How. 429.

<sup>7</sup> 2 Sutherland, Statutory Construction (3d Ed.) 537, and cases cited thereunder.

<sup>8</sup> *Ibid.*, at 539; to the same effect, see *Thompson v. St. Louis-San Francisco Railway Company, et al.*, 8 F. Supp. 785, involving the removal of a suit filed against Federal Court Receivers, from the State Court to a Federal District Court. Under the Federal Employees' Liability Act passed in 1908 such removal was not permitted, while under the Removal Act for Officers of United States Courts, enacted in 1916, removal was permitted. The Court in construing the effect of the statutes said, "there is a conflict in the two statutes involved in the determination of this case, . . . In such instances, . . . under a well-established rule of statutory construction, the latest enactment will control, and will be regarded as an exception to, or qualification of, the prior statute." See also *Washington v. Miller*, 235 U. S. 422; *U. S. v. Mullendore* (C. C. A.), 35 Fed. 2d 78.

unequivocally prohibits "the sale of or dealing in beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or Army transport", whereas section 6, Public Law 51, 82nd Congress, just as unequivocally authorizes "The Secretary of Defense . . . to make . . . regulations governing the sale, consumption, possession of, or traffic in, beer, wine, or any intoxicating liquors to, or by, members of the armed forces, or the National Security Training Corps, at or near any camp, station, post, or other place primarily occupied by members of the armed forces or the National Security Training Corps."

It could hardly be argued that if section 38, Act of February 2, 1901 was in effect, section 6, Public Law 51, 82nd Congress could have any efficacy at all. It seems perfectly plain that Congress, in passing section 6, Public Law 51, with its universal application and much broader scope could not have intended to leave section 38, Act of February 2, 1901 in

full force and effect. It is contrary to reason and good sense to suppose that such could have been the intention; the provisions of the later enactment are too inconsistent and conflicting with those of the earlier act. During the time it was in effect section 38 absolutely prohibited many things that might be made perfectly legal under section 6, Public Law 51.

Admittedly, the Secretary of Defense may regulate by prohibiting. This is precisely what the prior enactment has done; but under the later enactment the authority of the Secretary of Defense is wide enough to regulate not only by prohibiting, but by freely allowing or by regulating in any degree between the two extremes. If the legislature meant anything by the later enactment, then it is suggested that the later enactment is in irreconcilable conflict with the prior one and the later enactment must control.<sup>9</sup>

The enactment of legislation presupposes some consequential change

<sup>9</sup> *State v. Kolb, et al.*, 201 Ala. 439, 78 So. 817, 818. Although this case is not on all fours factually with the subject now under consideration, it is analogous legally. In a prior enactment the legislature of Alabama provided that the Commissioner of Agriculture and Industries should appoint a clerk and he and his bondsmen would be pecuniarily liable for any derelictions of the clerk. By a later enactment of the legislature, practically the same provisions were enacted with the exception of the provision relating to the pecuniary liability of the Commissioner and his bondsmen for the dereliction of his appointed clerk. In the instant case the clerk did convert State funds, and the State of Alabama sued the Commissioner and his bondsmen to recover the funds converted. The question resolved itself into whether or not the former act, or at least the section dealing with the pecuniary liability of the Commissioner for the dereliction of his appointed clerk, was repealed. The Court says; "while the latter act (later enactment) does not directly refer to or mention the first, yet many of its provisions necessarily repeal or take the place of provisions of the first. . . . It would be impossible for both acts to stand and be enforced because their provisions are in conflict; and to that extent, of course, the latter must control."; to the same effect, see *Chase v. U. S.*, 256 U. S. 1; *Earle v. Board of Education*, 55 Cal. 489; and *Christy v. Board of Supervisors of Sacramento County*, 39 Cal. 3, in which it was stated, "A statute may be repealed

in the existing law, either by addition to the pre-existing law, or by qualification or deletion of an existing provision. The legislature is presumed to intend to achieve a consistent body of law; where such cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation is readily found in the terms of a later enactment.<sup>10</sup>

When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two

acts, the latest legislative expression prevails and the prior law yields to the extent of the conflict.<sup>11</sup> It is the underlying theory behind the legislative process that through the legislatures and Congress is met the current public demands resulting from changing social, economic, and political conditions.<sup>12</sup> While it is true that there is a presumption against implied repeal, such a presumption in many cases produces unsatisfactory results. The emphasis belongs upon the purposes and objects behind the expression of the new statute with fair consideration to surrounding conditions and former legislation.<sup>13</sup>

<sup>9</sup>—Continued.

by express words or by necessary implication . . . if a later statute be wholly repugnant to an older one, so that, upon any reasonable construction, they cannot stand together, the first is repealed by implication though there are no repealing words. The reason is that the last expression of the legislative will must prevail, and must supersede all prior legislation which is entirely inconsistent with it," and *Ex parte Bryson* (D. C. Cal.) 21 Pac. 2d 695 which involved a prior enacted local option liquor law and a subsequent State prohibition law. The court held that the subsequent State prohibition law impliedly repealed the local option liquor law and the latter (earlier enactment) was not in force notwithstanding the fact that the prohibition law was later repealed.

<sup>10</sup> *Sutherland Statutory Construction*, (3d Ed.) 461-462, and cases cited thereunder.

<sup>11</sup> *Ibid.*, at 463, *et sequitur*, and cases cited thereunder. *Allison v. Phoenix* (Ariz.), 33 P. 2d, 927, 93 A. L. R. 354, 361, says, "It is the universal rule of constitutional and statutory construction, so well known as to need no citation in support thereof, that a later enactment prevails over an earlier one of equal rank insofar as the two are in conflict."; to the same effect, *Common School District No. 52 v. Rural Special School District No. 1*, 146 Ark. 32, 225 S. W. 21; *State v. Gaudrone*, 109 Wash. 397, 186 Pac. 870; *Witts v. Skelton*, 240 Fed. 265; *Piedemann v. Skelton*, 244 U. S. 660; *Anchor Line v. Aldridge*, 280 Fed. 870.

<sup>12</sup> *Sutherland, Statutory Construction*, (3d Ed.) 472, and cases cited thereunder.

<sup>13</sup> *Lewis v. U. S.*, 244 U. S. 134. In this case the facts revealed that for a number of years there had been surveyors general who surveyed certain lands in certain states. In the Sundry Civil Appropriations Act of 1909, money was provided to enable the Secretary of the Interior to complete this surveying which was unfinished because of the discontinuance of the offices of the surveyors general. That appropriation bill made no provision, such as had been

The Supreme Court of the United States has likewise adopted the attitude that when there are two acts of Congress on the same subject and the last embraces all the provisions of the first and adds new provisions and imposes different or additional penalties, the latter act operates without any repealing clause as a repeal of the first.

*United States v. Tynen*, 11 Wall. 88, 78 S. Ct. 153, involved an Act of Congress of March 3, 1813, relating to the regulation of seamen on board public and private vessels of the United States, and an Act of Congress approved July 14, 1870, amending the Naturalization Laws and prescribing certain punishment for their violation. The Act of 1813 made it an offense, among other things, to feloniously use a false certificate of citizenship and provided for imprisonment for a period of not less than three nor more than five years, or a

fine of not less than \$500 nor more than \$1,000. There was no express repeal of the Act of 1813 in the Act of 1870. The Supreme Court stated, in holding that the latter act impliedly repealed the prior one, ". . . if the two are repugnant in any of their provisions, the latter Act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."<sup>14</sup>

It is submitted that not only are the two statutes quoted above in irreconcilable conflict but also that Section 6, Public Law 51, 82nd Congress, covers the whole subject covered by section 38, Act of February 2, 1901.<sup>15</sup> It is suggested that the later enact-

<sup>13</sup>—Continued.

customary in former years, for salaries of surveyors general. The Supreme Court of the United States upheld the decision of the Court of Claims that the act was effectual to abolish the office of surveyor general for the state involved in the instant case and said, "It is true that repeals by implication are not favored. The repugnancy between the later act upon the same subject and the former legislation must be such that the first act cannot stand and be capable of execution consistently with the terms of the later enactment. As we view it, such conflict does appear in this instance."

<sup>14</sup> To the same effect, *Davies v. Fairbairn*, 3 How. 636; *Bartlet v. King*, 12 Mass. 537; *Com. v. Cooley*, 10 Pick 37; *Pierpont v. Crouch*, 10 Cal. 315; *Norriss v. Crocker*, 13 How. 429; and *U. S. v. Yuginovich*, 256 U. S. 450, in which it is said, "It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments".

<sup>15</sup> Statutory Construction, Crawford, 196, and cases cited thereunder. To the same effect, see *State v. Marxhausen* (Mich., 1919), 171 N. W. 557, where it is said, "Repeals by implication are not favored in the law. *But where the later act covers the whole subject*, contains new provisions evidencing an intent that it shall supersede the former law, or is repugnant to the earlier act, it operates as a repeal." (Italics added); *Shannon v. People*, 5 Mich. 85 in which it is said, ". . . that where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals by implication the former statute, though there be no repugnance."; and *Porter v. Edwards*, 114 Mich.

ment is by far the broader statute and covers the entire subject not only of "sale of or dealing in beer, wine or any intoxicating liquors . . ." as was covered in the prior enactment, but also ". . . the sale, consumption, possession of, or traffic in, beer, wine, or any intoxicating liquor . . .". Similarly, the later enactment applies to a wider area geographically than the prior one. Section 6, Public Law 51 is applicable to any place ". . . at or near any camp, station, post or other place primarily occupied by members of the armed forces or the National Security Corps . . ." whereas section 38, Act of February 2, 1901, applies only ". . . in any post exchange or canteen or Army Transport, or upon any premises used for Military purposes by the United States, . . .".

It may be argued that "Army Transport" is outside the ambit of the geographical locations set out in section 6, Public Law 51. It is suggested that such argument may be readily disposed of by reference again to the all-encompassing geographic wording of section 6, Public Law 51, ". . . or other place primarily occupied by members of the armed forces or National Security Corps". By some it may be urged that the rule of *ejusdem generis* or *noscitur a sociis* should be applied to the phrase ". . . or other place primarily occupied by

members of the armed forces or National Security Corps."

The legislative history of section 6, Public Law 51, reveals that it was introduced on the floor of the House of Representatives, Friday, April 13, 1951, by Representative Cole of New York.<sup>17</sup> The introduction was preceded, however, on April 3, 1951, by a lengthy discussion of the entire problem, by Representative Bryson of South Carolina.<sup>18</sup>

On April 3, 1951, Representative Bryson said in part, ". . . Mr. Chairman, I know that the distinguished members of this House share with me the hope that the young men who serve in the National Security Training Corps will return from their service as good, responsible citizens, ready to take their rightful places in civilian life. If any change in their character takes place while they are in training, we certainly do not want it to be for the worse. We do not want any of these boys to return as alcoholics and criminals destined to spend much of their lives in mental and penal institutions, suffering the heartbreaks of broken homes . . ." and ". . . It is our moral obligation to provide for the suppression of vice, gambling, and the use of alcoholic beverages in places which will be frequented by the young men of the National Security Training Corps."<sup>19</sup> From this and

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<sup>15</sup>—Continued.

640, 72 N. W. 614, "The rule is well settled that a new statute covering the same ground as the former act, supersedes it for all further cases, without the necessity of repealing words."

<sup>17</sup> 97 Congressional Record 3253 *et seq.* (Apr. 13, 1951).

<sup>18</sup> *Ibid.*

<sup>19</sup> 97 Congressional Record 4006 (April 13, 1951).

from a perusal of the discussion by Representative Bryson as a whole, it will be seen that it was his intent to provide for the regulation of the use of alcoholic beverages in places frequented by members of the National Security Training Corps.

On April 13, 1951, Representative Bryson proposed an amendment to the Universal Military Training and Service Act to effect this intent.<sup>20</sup> After a discussion of the amendment which Representative Vinson, Chairman of the House Armed Services Committee, opposed, Representative Cole then introduced what ultimately became section 6, Public Law 51. At that time Representative Cole stated, ". . . We should leave it up to the President to impose regulations with respect to the control of this problem, which we all admit is severe. My criticism of the amendment offered by the gentleman from South Carolina (Mr. Bryson) is that it applies only to the Training Corps not to all camps and posts of the armed forces . . .".<sup>21</sup> This amendment was accepted by the House after Representative Vinson indicated that the amendment ". . . is along the right lines, and as far as the Committee is concerned we will accept the amendment . . .".<sup>22</sup>

From the foregoing excerpts of legislative history, it may be seen that the amendment proceeded from one narrow in scope—relating only to

the National Security Training Corps—to one which was all-encompassing. Further than this it evolved from one which suppressed the ". . . furnishing or possession of alcoholic beverages containing over one-half of one percent of alcohol by volume . . ." <sup>23</sup> to one in which ". . . the Secretary of Defense is authorized to make . . . regulations governing the sale, consumption, possession of or traffic in beer, wine, or other intoxicating liquors . . .".<sup>24</sup>

With such an evolutionary background it is submitted that the intent of Congress was that regulation was to be authorized for all places in which members of the armed forces might be stationed. Patently, it is submitted, this includes "Army Transport". In such a context the words of the Supreme Court concerning the application of the *ejusdem generis* rule is pertinent. It has said ". . . while the rule is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. . . . If, upon a consideration of the context and the objects sought to be obtained and of the Act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> 97 Congressional Record, 4006 (April 13, 1951).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 88-89.

fail.”<sup>25</sup> One is led ineluctably to the conclusion that the later enacted statute is controlling.

While all this may furnish an adequate answer to critics who base their disputations on what they believe to be valid legal grounds, it is not, of course, an answer to the emotionalism

wrought by distraught mothers seeking to protect their immature offspring from the primrose path. It is suggested that the answer in that direction lies not in the legal field, but in the public relations one. This, it is believed, is beyond the capabilities of mere lawyers.

<sup>25</sup> *Morris v. City of Indianapolis*, 177 Ind. 369, 94 N. E. 706.



## Ceremonial Session of CMA at Chicago

Under the sponsorship of the Association, a special ceremonial session of the United States Court of Military Appeals was held in Chicago on August 17, 1954, in the United States Court House. Chief Judge Robert E. Quinn and Associate Judges George W. Latimer and Paul W. Brosman, sat en banc for the session. Mr. Alfred C. Proulx, Clerk of the Court, was assisted by Mr. Fred Hanlon and Miss Virginia Siegel. Three hundred thirty-seven lawyers were admitted to the bar of the Court at this session. Maj. Gen. Claude B. Mickelwait, USA, sponsored thirty-four active duty officers. Rear Adm. Ira H. Nunn, USN, sponsored forty-two active duty Naval officers, and Maj. Gen. Reginald C. Harmon, USAF, sponsored nine active duty Air Force officers. The motion for admission

was made by Alfred C. Proulx in behalf of two hundred applicants. Although some of the members of the Association were admitted on special request, upon motion made by the aforementioned sponsors, fifty-two members of the Association had their motions made in their behalf by Maj. Richard H. Love, the Executive Secretary of the Association.

Those members of the Association admitted on motion of Major Love include the following:

### CALIFORNIA

John Joseph Brandlin, Los Angeles  
Walter Frederick Brown, Los Angeles  
John H. Finger, San Francisco  
Ingemar E. Hoberg, San Francisco

### DISTRICT OF COLUMBIA

James Adams Bistline

**FLORIDA**

Donald Kingery Carroll, Jacksonville  
 Edward Strobel Hemphill, Jacksonville  
 Philip Alfred Pacyna, Tampa

**ILLINOIS**

Jacob M. Arvey, Chicago  
 William Webb Brady, Elgin  
 David Alexander Bridewell, Chicago  
 L. Sheldon Brown, Evanston  
 John Bampffield Coppinger, Alton  
 Richard H. Deutsch, Chicago  
 Seely P. Forbes, Rockford  
 Arthur W. Kennelly, Chicago  
 Martin J. Kennelly, Chicago  
 David F. Matchett, Jr., Chicago  
 James Andrew McLendon, Chicago  
 Robert J. Nolan, Chicago  
 David S. Pochis, Chicago  
 Harold F. Ronin, Chicago  
 Charles T. Shanner, Chicago  
 Hugo Sonnenschein, Jr., Chicago  
 Demetri James M. Spiro, Chicago  
 William G. Vogt, Carrollton

**INDIANA**

James Wilson Draper, Muncie  
 Jeremiah Wilson Torrance, Jr.,  
 Marion

**IOWA**

James Louis Bennett, Des Moines  
 Martin Tollefson, Des Moines

**KANSAS**

David Jerome Harman, Columbus  
 William Jennings Wertz, Topeka

**KENTUCKY**

John Pleasant Sandidge, Louisville

**LOUISIANA**

John Villars Baus, New Orleans  
 Paul Macarius Hebert, Baton Rouge

Cicero Columbus Sessions, New Orleans

**MICHIGAN**

Frederick Rolshoven Bolton, Detroit  
 John G. Starr, Grand Rapids

**MINNESOTA**

Edward Pickering Barrows, St. Paul  
 Goodrich Morgan Sullivan,  
 Mahtomedi

**MISSOURI**

Henry Philip Andrae, Jefferson City  
 William Franklin Fratcher, Columbia  
 John H. Hendren, Jefferson City  
 Lowell L. Knipmeyer, Kansas City  
 Philip A. Maxeiner, St. Louis

**NEBRASKA**

Charles Bentley Paine, Grand Island

**NEW YORK**

Kenneth C. Schwartz, Mount Vernon

**OHIO**

George Percival Bickford, Cleveland

**TEXAS**

Leon Jaworski, Houston

**VERMONT**

Osmer C. Fitts, Brattleboro

**WISCONSIN**

A. Stephen Boeder, Milwaukee

**WYOMING**

George Frederick Guy, Cheyenne

The membership of the bar of the United States Court of Military Appeals as of September 21, 1954, includes 2,785 members.

# Notes on Current Procurement Opinions

## Denial of Payment for Partial Performance of Contract Obtained By Debarred Bidder

The Walsh-Healey Act (41 USC 37, Section 3) provides that "no contract shall be awarded" to any person found by the Secretary of Labor to have violated certain provisions of the Act "until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred". Bidding under a different name from that under which it had previously been debarred, a contractor was awarded a supply contract under which it made substantial deliveries before its identity was discovered and the contractor was notified that its contract was cancelled as "void ab initio". The contractor presented claim for the items delivered and anticipated profits on the balance of the contract, contending that the three year debarment period had commenced with the trial examiner's findings of violations before the Secretary's final determination and had expired before the contract had been awarded. The Comptroller General held that the period of ineligibility commenced only on the date of the Secretary's final action; that the contractor was ineligible at the time the contract was awarded; that the contract was unenforceable and that no recovery could be allowed for the value of the benefits conferred on a theory of an implied contract (33 Comp. Gen. 63).

## Requirement for Filing Litigation Reports

Army agencies administering Government contracts are directed to the provisions of AR 27-5 and SR 27-5-5 both dated 3 April 1951 requiring reports of the commencement of legal proceedings and litigation reports. It is essential that all reports pertaining to legal proceedings under the Bankruptcy Act and state insolvency laws be submitted expeditiously so that appropriate agencies may prepare and file timely proofs of claims on behalf of the United States in order to protect fully the interest of the United States and to preclude the disallowance of otherwise valid claims because of untimely filing (see *In re Super Electric Products Corp.*, 200 F. 2d 790).

## Rubber Stamp Signature Sufficient for Invoices

The Comptroller General has advised that an invoice certificate completed with a rubber stamp signature of the proper company official could be properly certified for payment since the rubber stamp afforded the United States the same protection as a handwritten signature (*Ms. Comp. Gen. B-118192*, 15 Jan. 1954).

## Reimbursability of Taxes Improperly Paid

A contractor paid a city sales tax on an automobile purchased for use in the performance of a cost plus

fixed fee construction contract; his subsequent request for refund was denied and thereafter the period of limitations expired. He sought reimbursement for the tax under a clause allowing "any disbursement required by laws, regulations or ordinances . . . including . . . taxes". The Judge Advocate General of the Army, concluding that the tax was not legally due, held that the contractor was not precluded from reimbursement, giving the word "required" a more liberal meaning than "legally obliged". In JAGT 1952/9182, 5 Jan. 53, The Judge Advocate General stated that the contractor might be reimbursed where he reasonably believed the tax to be due and was not affirmatively advised of the contrary opinion of the Department of the Army and its intention to litigate the issue and if the failure to recover the tax was not due to the fault or neglect of the contractor. Defining this opinion, The Judge Advocate General in an opinion dated 29 June 53 (JAGT 1953/5212) stated that the former opinion applied only to those cost-type contracts which provide: (1) for reimbursement of contractors for taxes required to be paid, (2) that all discounts and bonifications lost through the fault or neglect of the contractor are to be deducted from the gross cost of the contract, and (3) the Government may require the contractor to initiate litigation with a view to resisting imposition of taxes considered to be imposed illegally. The test in determining whether the contractor "reasonably believed a tax to be due" or took "reasonable measures to determine the applicability of the tax" or

in determining the fault or neglect in the failure to recover tax improperly paid is the standard of conduct of a reasonably prudent business man in the conduct of his own affairs.

#### New Wage Classifications May Not Be Made Retroactive

Under the Davis-Bacon Act (40 USC 276a) contracts for the construction or repair of public buildings must contain a provision requiring the contractor to pay "all mechanics and laborers" at "wage rates not less than those stated in the advertised specifications". These wage rates are based on the rates found by the Secretary of Labor to have been the prevailing wages for the various classifications enumerated in the specifications. After completion of a contract subject to the Act an investigation resulted in a recommendation that two groups of workers be given new classifications and be given back pay based thereon. The Judge Advocate General of the Army in an opinion (JAGT 1954/1592, 8 Feb. 1954) held the contract having been completed, no new classifications could be made and any amount due the workers in question must be based upon an allocation of their time among the most appropriate of the classifications originally established. This opinion seems to suggest that a new classification applicable to future wage payments could be created during the course of the contract. The Comptroller General has held that a contractor ordered to increase his minimum wages is entitled to a compensating increase in his contract price (Ms. Comp. Gen. B 105644, 5 Oct. 1951), and that would seem to

be equally true in the case of a new classification at a higher wage rate.

#### **Contractor Not Entitled to Reimbursement for Wage Payments in Excess of Minimum Wage Schedule**

A fixed-price contractor found it necessary to pay union wages in excess of the minimum wages specified in the wage schedule incorporated into the contract pursuant to the Davis-Bacon Act. The Court of Claims granted him additional compensation on the ground that he was entitled to rely on the wage schedule as a representation of the prevailing wages in the area. The Supreme Court in *United States v. Binghamton Constr. Co.*, 347 US, 74 S. Ct. 438 (1954), held that although the schedule was to be based upon the Secretary of Labor's determination of prevailing wages, its purpose was solely to prescribe the minimum wages to be paid and not to assure the contractor that he would have to pay no more. The Court said the very fact that the contract required the payment of wages "not less" than those specified presupposes that the contractor might have to pay higher rates.

#### **Recording of Government Title to Facilities Considered Unnecessary**

The Judge Advocate General of the Army has expressed the opinion that the recording of instruments of title to Government facilities installed or constructed on the property of others is not necessary for the adequate protection of the Government's interest, notwithstanding the fact that in some states a purchaser of real property without notice that title to improve-

ments is in another than the owner of the land would acquire title to the improvements. It is indicated, however, that such instruments of title may be recorded where the business reputation or financial responsibility of the land owner is in doubt or where the Government property cannot be appropriately marked (JAGT 1954/2423, 9 Mar. 1954).

#### **Installment Agreements for Payment of Amounts Due United States Unacceptable**

As a result of price redetermination, a contractor was obliged to repay \$40,000 to the Government and being in financial difficulties, proposed to pay the debt in installments. The Judge Advocate General of the Army in an opinion (JAGT 1954/7521, 17 Mar. 1954) held that under the existing policy, amounts owing to the Government must be paid in a lump sum and proposals for installment payments are unacceptable. It was noted, however, that in the absence of a specific policy, such an agreement would be appropriate without the necessity of approval by higher authority and further observed that the policy is now under active consideration.

#### **Withholding of Payment for Partial Delivery Is Breach Excusing Contractor From Performance**

A service contract for the reconditioning of unserviceable pallets contained a standard payments article which provided that "when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed—\$1,000".

After timely completion of a part of a delivery order, the contractor submitted an invoice for \$2,732.61, but the contracting officer, learning that the contractor company was financially unstable, directed the finance officer to withhold payment of the initial invoice, but to pay succeeding ones. The contractor continued work on the contract for about five months and then notified the Government that it considered its refusal to pay the original invoice, although subsequent billings had been paid, a material breach of the contract which relieved it of further obligation. The contracting officer then terminated the contract for failure to perform and notified the contractor that it would be held liable for any excess costs of procurement. The contractor appealed. The Armed Services Board of Contract Appeals (Paint & Pack Corp., No. 1341, 30 Oct. 1953) held the payments clause required payment within a reasonable time after the submission of vouchers; the Government's continued refusal to make the payment due was a material breach of the contract which excused the contractor from further performance.

#### **Application of Buy American Act**

A delivery of jam made from raspberries grown in Canada but frozen in the United States was rejected on the ground that the contractor had not satisfied the requirements of the Buy American Act which provides that there "shall be acquired for public use" only such manufactured products "as have been manufactured in the United States substantially all from articles, materials, or supplies

mined, produced, or manufactured—in the United States" (41 USC 10a). Thus a raw material originally produced outside of the United States may be incorporated into products sold the Government only if it goes through at least two stages of manufacturing in the United States. The Judge Advocate General of the Army held in an opinion on 26 March 1954 (JAGT 1954/2897) that the term "manufacturing" as used in the Buy American Act must be strictly defined and the freezing of the raspberries could not be considered to be manufacture of a subproduct to be used in the manufacture of the final product.

#### **Reliance on Specifications in Contract in Lieu of Making Required Investigation**

An Air Force contract for cleaning and resealing the joints in the concrete aprons of an airfield contained a "site investigation" clause whereby the contractor acknowledged that he had satisfied himself as to the nature and location of the work, etc. The contractor did not in fact inspect the work to be done, but relied upon the drawings in the contract which indicated the width of the joints to be resealed. Discovering upon commencement of the work that the joints were more than twice the indicated width, the contractor sought an increase in compensation to cover the additional cost. The Armed Services Board of Contract Appeals in Townsco Contracting Co. (1169, 26 Oct. 1953), held the contractor entitled to a price adjustment for the increased costs. Even assuming that the site investigation clause was broad

enough to include the removal of the old filler and the measurement of the joints, the contractor was nevertheless entitled to rely on the representations in the drawings under the principle announced in *Hollerback v. United States*, 233 U. S. 165. The Board held that the drawings in the contract constituted a representation upon which the contractor had a right to rely without an investigation to prove its falsity.

#### Progress Payments Available Without Demonstration of Need or Nonavailability of Private Financing

Under Department of Defense Directive No. 7800.1, 30 October 1953, Government financing was to be provided contractors only to the extent reasonably required for performance and the order of preference of forms of financing was stated to be (1) private financing, (2) guaranteed loans, (3) progress payments, and (4) advance payments. To clarify its policy on the use of progress payments, the Department of Defense has issued Directive No. 7840.1, 22 April 1954, which sets forth the standards to be followed in utilizing progress payments based on costs in production or research and development contracts. These are: (1) Customary progress payments. Certain types of contracts involve a long "lead time" or pre-delivery period and may require pre-delivery expenditures that will have a material impact on the contractor's working funds. In this class of contracts, progress payments have been traditional and customary. When requested by a reliable contractor, prog-

ress payments are to be regarded as reasonably necessary without demonstration of the actual reasonable need therefor. (2) Unusual progress payments. Provisions for progress payments in other types of contracts will be regarded as unusual, and must be approved by the head of the procuring activity. An approval will be given only under exceptional circumstances. The contract must involve a preparatory period requiring pre-delivery expenditures large in relation to the contractor's working capital and credit, and the contractor must demonstrate fully his actual need for progress payments, which if approved, will be made in the minimum amount necessary for contract performance. (3) High-rate progress payments. All provisions for progress payments at rates exceeding 90 per cent of direct labor and material costs or 75 per cent of total costs will be regarded as "unusual" and must be approved at departmental level.

#### Tax Escalation Provision in Lease Valid

A provision in a lease of certain buildings obligated the Government, as lessee, to pay the lessor an increase in rent equal in amount to any increase in taxes levied against the leased property. The lessor seeking an agreement for an increase in rent under this provision was met with the argument that the provision was of no effect since it provides for payment by the United States under a contract of an indefinite sum of money contrary to the provisions of 31 USC 665. The Judge Advocate General of the Army in an opinion (JAGT 1954/2921, 14 April 1954) held

the provision valid and the Government obligated to enter into a supplemental agreement increasing the rent to compensate for additional taxes assessed. The opinion refers to 20 Comp. Gen. 695 as authority and concluded that the escalation being limited to property taxes, the maximum increase could be approximated with reasonable certainty.

### **Liability of Government for Negligence May Not Be Extended By Contract**

In a recent opinion, The Judge Advocate General of the Army (JAGT 1954/3914, 23 April 1954) stated that except as provided by statute "the United States is not responsible for the negligence of its officers, employees, or agents and such liability cannot be imposed upon it by an attempt on the part of the contracting officer to make it a part of the consideration of a contract" (16 Comp. Gen. 803, 804). The only remedy available against the Government under such circumstances is by proper action under the Federal Tort Claims Act (28 USC 2671-80).

### **Contract May Not Provide for Direct Payment of Employees By Government**

Because the Army has experienced difficulty in inducing contractors in Okinawa to keep their employees paid up to date and because on a number of occasions, contractors have defaulted owing substantial amounts in back wages causing political unrest and criticism of the United States, it was suggested that a pro-

vision be included in contracts authorizing contracting officers to withhold from the contractor so much of the accrued payment or advance as may be considered necessary for the contracting officer to pay employees the full amount of wages due them. The Judge Advocate General expressed the opinion that the proposed direct payment clause was improper (JAGT 1954/4015, 5 May 1954). The opinion states that direct payments to employees may not be made except where authorized by statute citing Ms. Comp. Gen. B 117954, 20 April 1954. The opinion suggests, however, as a matter of contract and contract administration, amounts may be withheld as a means of insuring or inducing the contractor itself to fulfill its obligation to employees.

### **Fixed Price Contractor Entitled to Reimbursement Only for Actual Expenses**

In its claim for reimbursement under the standard tax clause, a contractor added to the amount of the tax a percentage for profit and for general and administrative expense, presumably to cover expenses incurred in resisting the tax at the direction of the Government. The Judge Advocate General of the Army in an opinion (JAGT 1954/4877, 2 June 1954) stated that the contractor is entitled to be reimbursed only for the actual expenses, legal and administrative, incurred at the Government's direction and is not entitled to payment of a profit on the transaction or a calculation of expenses based on a percentage of the tax paid.

### Price Revision Unjustified Where Cost Estimates Accurate

A partnership engaged in the development and production of specialized equipment entered into a negotiated fixed price contract subject to price redetermination for the production of specialized equipment for the Air Force. The negotiated price was based on an arbitrary cost breakdown and was equal to the estimated material cost plus approximately \$15 per hour for the estimated direct labor. After completion of the contract, the contractor submitted a statement of cost, including allowance for the two partners' personal contributions. Including the allowance for the partners, the price requested, less material cost, represented an hourly charge of \$15 for direct labor. The contracting officer reduced the allowance for the partners and redetermined the price for the entire contract at a figure about \$7,000 less than the negotiated price. The Armed Services Board of Contract Appeals held the negotiated price a fair and reasonable contract price and a revision of the price neither required or justified (Optron Laboratory, ASBCA No. 1455, 2 Dec. 1953). This decision seems to indicate that price revision is to be used only to compensate for variations in the actual cost of performance from the estimated cost at least in the absence of such factors as overreaching by the contractor. If the actual costs do not deviate substantially from the estimates, the contract price negotiated on the basis of those estimates should be allowed to stand. The fact that the profit allowed in the original

price is thought to have been too great is not in itself a sufficient reason for revising the price downward.

### Incorporation By Reference Authorized in Invitations, Not in Final Contracts

The Judge Advocate General of the Army has expressed the opinion (JAGT 1954/5391, 18 June 1954) that there is no legal objection to incorporating standard clauses by reference in contracts in appropriate cases, but the extent to which such practice should be employed is a policy matter. Normally, it would appear appropriately in order to assure mutuality of understanding and avoid disputes to include in the contractual instrument all the terms of the contract, current policies tending to permit such incorporation only in invitations for bids and requests for proposals and not in definitive contracts.

### Contract May Be Transferred With Consent of Government

Pursuant to the Assignment of Claims Act of 1940, a Government contractor assigned to a bank moneys due or to become due under its contract, and thereafter agreed to lease all of its facilities to a new company and to assign to it its rights and duties under the contract. A supplemental contract was executed by the original contractor, the assignee company, and the United States. A question of the validity of the transfer of the contract was raised when the assignee company presented a voucher for payment under the contract (41 USC 15). The Judge Advocate General of the Army (JAGT 1954/273, 18 June 1954) expressed the opinion that

by executing the tripartite agreement, the Government effectively waived the prohibition of 41 USC 15 and that the transfer was valid and that the voucher should be paid.

#### **Government Not Required to Collect State Sales Tax Assessed on Sales of Surplus Property**

In answer to the questions involving the applicability of state sales tax on the sales by the Government of surplus property and the obligation of the Government to collect such tax for the state, The Judge Advocate

General of the Army expressed the opinion (JAGT 1954/6328, 22 July 1954) that the purchaser is not exempt from such taxes by reason of the sale being by the United States. But while the state may thus be able to assess such a tax, the United States or its agencies may not serve as collecting agents for state sales taxes on sales of surplus property to private persons. The opinion suggests that state officials be informed as to the time of such sales so that they may take effective action to collect state taxes on such sales.

**EDITOR'S NOTE:** The foregoing notes have been extracted from the Procurement Legal Service of the Department of the Army, Circulars No. 1 to 12. The Procurement Legal Service contains digests of opinions of The Judge Advocate General, decisions of non-judicial agencies, decisions of courts, and general procurement information.



### **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.

# Recent Decisions of the Court of Military Appeals

## EXTRAJUDICIAL CONSIDERATIONS BY AND CONTACT WITH COURTS-MARTIAL

Adamiak, 4 USCMA 412, 11 June 1954

The accused was charged with uttering worthless checks under Article 132. At the trial, the manager of a local bank testified as a witness for the Government. During a recess, the bank manager engaged in a conversation with several members of the court and upon the court's being reconvened, defense counsel challenged those members, who, upon the challenge, testified that their conversation concerned general hypothetical questions in banking procedures not specifically related to the accused and that the conversation would not influence their individual decisions in any way. Upon conviction, the accused petitioned CMA for review, which was granted. The Court affirmed the conviction in part. The rule of the Federal courts that the presumption of prejudice arising from communications between jurors and witnesses is a rebuttable one, but, that burden rests heavily with the Government to show that such contact with the juror was harmless to the defendant was adopted by CMA. As to those specifications clearly not related to the extrajudicial conversation, the Court affirmed; as to those specifications covered by the witness' testimony in Court and to which the extrajudicial conversation may have

touched, the Court found prejudice and reversed the conviction.

Walters, 4 USCMA, 13 August 1954

The accused was found guilty of conspiracy to defraud the Republic of West Germany (AW 96) among other violations. During a recess, the law officer over the complaint of the defense counsel retired with the members of the court to relax in the anteroom of the court. During another recess, the law officer indicated to counsel that he wished to discuss with the court the time of adjournment and, therefore, counsel without the accused entered the private chambers of court. The discussion that followed not only considered the hours of sitting for the court, but also matters relating to the calling of additional witnesses and the force and effect of German law relevant to the conspiracy charge. In this discussion, the law officer in response to a question by a member of the court asked the defense counsel, a civilian attorney, an opinion based on his civilian experience concerning the German law, which the defense counsel declined to give, whereupon the law officer stated his own opinion on the subject, which was later included in his instructions in open court. CMA held that the law officer's behavior during the two recesses constituted error inasmuch as the Uniform Code purports to set the law officer apart from the court members, much as a

judge is set apart from a jury. The Court found no prejudice in the first incident, but in the second incident, found that the error was prejudicial and on the Court's doctrine of cumulative error, found it necessary to disapprove the finding as to conspiracy.

#### Lowry, 4 USCMA 448, 25 June 1954

Accused was charged with and convicted of maiming (Article 124), aggravated assault (Article 128) and housebreaking (Article 130). The law officer after instructing the court gave the court certain citations to authorities. After the court had closed to deliberate on its findings, it reopened and the president of the court requested counsel to agree to a recess so that the individual members of the court could think over the instructions that they had heard and consult with the citations quoted by the law officer. No objections were made and the court recessed for the day. On reconvening, the following day, the conviction was announced. CMA reversed holding the procedure prejudicial, in that the court-martial members were referred to outside sources, the record of trial did not contain the citations given by the law officer, and there was no indication that the citations had been presented to the defense counsel. The Court looked upon the procedure as a dangerous one, held that the error was reversible and that the defense counsel's failure to object did not constitute a waiver.

#### INSANITY AS A DEFENSE

#### Lopez-Malave, 4 USCMA 341, 21 May 1954

In this case, the defense counsel moved to dismiss on the ground that

the accused could not intelligently conduct or cooperate in his defense, as he was unable to remember the events giving rise to the charges against him. The motion was supported by a stipulation of a psychiatrist's expected testimony. The law officer denied the motion to dismiss. There was no evidence tending to indicate that the accused lacked mental responsibility at the time of the offense. Thereafter, in instructing the court, the law officer included an instruction to the effect that the court-martial must be satisfied beyond a reasonable doubt that accused had sufficient mental capacity to stand trial. On petition of the accused, CMA affirmed, but pointed out the procedural errors committed. "If the accused was sane at the time he committed the offense, (a motion to dismiss) is not an acceptable motion as he is not entitled to have his case dismissed by a court-martial. If at the time of trial he is unable to participate properly in his defense, the most he is entitled to is a continuance until the mental deficiency can be treated or corrected, if that is reasonably possible. If it is established that the condition is permanent, then appropriate authorities might dismiss the prosecution but that type of administrative proceeding should not be mingled with a trial on the merits. The former requires consideration by a convening authority, while the latter is the responsibility of the court-martial."

#### Marriott, 4 USCMA 390, 28 May 1954

Accused was convicted of larceny (Article 121). The morning following an evening of drinking and cards, one

of the accused's tentmates discovered that a sum of money was missing from his wallet. Circumstantial evidence pointed toward the accused. The accused asserted that he could not remember having taken the wallet, stating that he had a history of blackouts during which he acted in an improper manner. The law officer instructed the court fully on the issue of voluntary intoxication with respect to specific intent. On appeal, the accused asserted that the evidence reasonably raised the defense of alcoholic amnesia and that the law officer erred in failing to give an instruction thereon. CMA in affirming the conviction held that assuming the evidence was sufficient to establish that accused was suffering from alcoholic amnesia at the time of the taking, he could not rely on this circumstance as a defense since alcoholic amnesia is not a "mental defect, disease, or derangement which will excuse the commission of a crime".

#### LAW OFFICER'S INSTRUCTIONS —LESSER INCLUDED OFFENSE

Duggan et al, 4 USCMA 396, 11 June 1954

Four accused men were charged with mutiny by violence. Undisputed evidence disclosed that the accused, disciplinary barracks prisoners, for some thirty minutes proceeded to destroy windows, rip plumbing from the walls, tear down doors and door frames in complete defiance of commands or orders of officers and non-commissioned officers. The orders of two captains who appeared on the scene were ignored and flaunted, and they and enlisted personnel who accompanied them were violently as-

saulted. The general defense theory at the time of trial was alibi. Review having been granted on the petition of the accused, it was argued before CMA that the law officer erred in failing to instruct on the lesser offense of riot. The convictions were affirmed, the Court holding that the only offense placed in issue by the evidence was mutiny by violence. The offense of riot was not raised as an issue and the law officer was under no duty to instruct thereon. Furthermore, since the sole defense theory was abili and the defense counsel made no request for instruction on the lesser offense of riot, it was not error for the law officer to fail to give an instruction upon a theory which might have been unwanted by the defense.

Jackson, 4 USCMA 294, 14 May 1954

The accused was convicted of willful disobedience of lawful command of a superior officer (Article 90). The prosecution evidence showed that the officer of the day had given the accused a direct order to go to bed and that the accused did not obey the order. The accused testified that he did not hear the order given. The law officer denied a defense request for an instruction on the lesser offense of failure to obey (Article 92). On petition of the accused, CMA affirmed the conviction, holding that the evidence raised but one alternative, either the accused heard the order and was guilty of deliberate and intentional disobedience or that he did not hear the order, and, therefore, was not guilty. Accordingly, the refusal to instruct on the lesser included offense of failure to obey was not error.

## LAW OFFICER'S INSTRUCTIONS —MISTAKE OF FACT

Rowan, 4 USCMA 430, 25 June 1954

The accused was convicted of a number of specifications of larceny by check (Article 121). All of the checks were drawn during a six day period and returned unpaid, but ultimately made good by the accused's wife. The defense sought to establish that the checks were drawn as the result of an honest mistake of fact. The law officer instructed the court-martial in part "that if the accused was laboring under such ignorance or mistake and this ignorance or mistake was honest and *reasonable under the circumstances*, he cannot be found guilty of larceny—*However, it is essential to this defense that his ignorance or mistake—be both honest and reasonable under the circumstances. If the accused's ignorance or mistake was not reasonable under the circumstances, that is, if it was the result of carelessness or fault on his part, it is not a defense.*" On appeal, CMA reversed the conviction holding the law officer erred in instructing the court-martial that the defense of ignorance or mistake of fact requires that the mistake be *reasonable*. The Court stated that as a necessary predicate for a conviction of larceny, the court-martial must find that the accused intended, at or after the time of the taking, permanently to deprive the owner of the property in question—there is no such thing as negligent larceny. An honest ignorance or mistake of fact may be a defense even though either was due to carelessness. An additional error was considered by the Court in that the law officer in-

structed the court "if you are satisfied beyond a reasonable doubt that the accused was honestly—you must acquit the accused." The Court held that the law officer thereby erroneously shifted the burden of proof from the Government to the accused and that even though other instructions may have cured the error where instructions are mutually inconsistent, CMA said it could not determine which one was followed by the court-martial.

## LAW OFFICER'S INSTRUCTIONS

Henderson, 4 USCMA 268, 14 May 1954

Accused was convicted of rape (Article 120). The evidence tended to establish that the accused approached the victim on the pretext of securing road information, struck her, thrust her to the ground, stifled her screams, overpowered her, and accomplished his evil purpose. The law officer included in his instruction the following sentence: "Force and want of consent are indispensable to the offense, but the force involved in the act of penetration will suffice if there is no consent." On appeal, the accused asserted that this sentence was prejudicial being only applicable in a situation where the victim is unconscious, stuporous, or so mentally deficient as to be legally unable to consent. CMA affirmed the conviction holding that the argument ignores the remainder of the law officer's instructions. The court members were explicitly informed that "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent." They were expressly warned

that a victim of an alleged rape must have taken such measures to frustrate the execution of her assailant's design as she is able to take under the circumstances. The Court held that the instruction was not prejudicial since it bore no sufficient relation to the facts of the case.

**Decaney, 4 USCMA 263, 14 May 1954**

Accused was convicted of unpremeditated murder (Article 118). The homicide occurred while the accused was alone in the home of the female member of a love triangle. Accused asserted that the victim advanced toward him and he, fearing an assault, loaded and cocked a pistol he had brought with him and the weapon was discharged killing the victim. The law officer instructed the court-martial in part to the effect that the court must be satisfied that at the time of the killing, the accused intended to kill or inflict great bodily harm or was engaged in an act inherently dangerous to others and evincing a wanton disregard of human life. On appeal, the accused contended that the instruction was prejudicial and that there was no evidence of an act inherently dangerous to others. CMA ordered a rehearing stating that since the law officer and the trial counsel did not detect the inapplicability of the instruction, the members of the court-martial could not be expected to have detected it.

**Short, 4 USCMA 437, 25 June 1954**

Accused was charged with and convicted of assault with intent to commit rape (Article 134) upon a Japanese girl. The accused testified, admitting that he fondled the victim as

alleged, but asserted that he thought the girl was a prostitute and had consented to his proposition. The law officer in instructing the court described the degree of force necessary for a rape, but did not give an explanation of what constitutes the force necessary to complete the act under various conditions and degrees of resistance. On appeal, the accused objected to this instruction and CMA held that it was not error since the offense charged was an assault aggravated by an attempt to have unlawful sexual intercourse by force and without consent and that offense was established even if the woman had abandoned her initial resistance and agreed to the connection. The Court held that the instruction presented no fair risk of prejudice to the accused and affirmed the conviction.

#### RES JUDICATA

**Smith, 4 USCMA 369, 28 May 1954**

Accused was convicted of larceny of a package from the mail (Article 134). Earlier, accused had been tried for larceny of two letters from the mail, and in that trial a confession was introduced wherein accused admitted the larceny of the two letters and the earlier larceny of the package which was the object of the larceny charge in the second trial. The law officer at the first trial excluded the confession on the ground that the accused had not been warned of his rights under Article 31 by the person who obtained the confession although he had in fact been advised of his rights by another person at a prior time. A motion for a finding of not guilty was granted. In the trial of the second case, the same confession

was admitted in evidence over objection that its admissibility was res judicata. On petition of the accused, CMA reversed the conviction holding that it was immaterial whether the issues determined at the first trial were decided rightly or wrongly. The doctrine of res judicata as enunciated in the Manual for Courts Martial is broad and sweeping and covers any fact or law in issue and finally determined, whether directly or collaterally involved, and even though the separate offenses involved in each trial did not arise out of the same transaction.

#### LIMITATIONS ON ARTICLE 134

Hallett, 4 USCMA 378, 28 May 1954

Accused was charged with misbehavior before the enemy under a specification that "before the enemy, he was guilty of cowardly conduct in that he wrongfully failed to accompany his platoon on a combat ambush patrol, as it was his duty to do" (Article 99 (5)). By exceptions and substitutions, the CM found that "before the enemy, he wrongfully failed to accompany his platoon —" (Article 134). On petition of the accused, CMA held in Article 99 Congress proposed to cover the entire range of offenses which are assimilable to misbehavior before the enemy. No room is left in this area for the application of Article 134. Accordingly, conduct which does not fall within Article 99 may not be punished through an invocation of Article 134.

Holiday, 4 USCMA 454, 2 July 1954

Accused was convicted of communicating a threat (Article 134). While

being escorted to a cell in his stockade by an Air policeman the accused said in remonstrating about the pace being set "I'll knock your — teeth down your throat". On the appeal, the accused asserted that the specification alleging the wrongful communication failed to allege an offense under Article 134 on the ground that communicating a threat is only an offense when in violation of Articles 89, 91, 127, or 128. The Court in affirming the conviction said "— in the communication of a threat to any person in the military establishment, direct and palpable prejudice to good order and discipline of the armed forces" is found. A principal purpose of punishment for communicating a threat is to maintain order in the military community and to prevent the outbreak of violence. Since communicating a threat is not otherwise provided for in the Uniform Code, it is properly alleged as a violation of Article 134.

#### USE OF DEPOSITIONS IN CAPITAL CASES

Anderten, 4 USCMA 354, 28 May 1954

The accused was charged with desertion (Article 85), but was convicted of AWOL (Article 86). Depositions were introduced by the prosecution concerning the charge of desertion. The record of trial revealed that in the SJA's pretrial advice there was a recommendation to the convening authority that the charge be treated as not capital (desertion in time of war). The convening authority approved the recommendation in writing but in the endorsement on the charge sheet referring the case to

trial, failed to provide that the case be treated as not capital. On appeal, the accused asserted that the admission of the depositions was error because of the convening authority's failure to direct that the charge be treated as not capital. In affirming the conviction, CMA held even though there was a variance from normal procedure, the error, if any, was one of form and not of substance. Objection was also made on appeal that morning reports introduced in evidence were conflicting and not prepared in accordance with regulations. CMA as to this assertion found that there was ample evidence to sustain the finding of the court aside from the morning report entries and that the objection to the morning reports went only to their weight as evidence and not to their admissibility.

#### QUALIFICATIONS OF COUNSEL TAKING DEPOSITIONS

**Drain, 4 USCMA 646, 13 August 1954**

The accused was convicted of assault with intent to influence the victim's testimony in a pending court-martial trial (Article 134). At the trial by general court-martial, a deposition taken prior to reference of the charge for trial was introduced in evidence. Neither of the counsel who represented the parties in taking the deposition on oral interrogatories had been certified under Article 27b (2). The accused assigned this as error on appeal. CMA held that the taking of the deposition without the provision of certified attorneys to represent both the Government and the accused violated the Congressional intent expressed in Article 27 and that

the failure to object to the deposition at the trial did not constitute a waiver, however, the conviction was affirmed upon the Court's finding that no specific prejudice resulted from the illegal introduction of the deposition since the matter contained in it was admitted by the defendant at the trial.

#### DISQUALIFICATION OF COUNSEL

**Stringer, 4 USCMA 494, 9 July 1954**

Four accused were convicted of conspiracy to sell military property (Article 81), sale of military property (Article 108), and larceny (Article 121). All the charges arose from the same transaction. The same officer acted as assistant trial counsel in the trial of each accused. At the trial of one of them, an objection was made to the assistant trial counsel's appearance on the ground that he had acted for the defense in the same case in violation of Article 27a. This officer, the assistant trial counsel, had acted for two alleged co-conspirators who were not among the accused and had induced them to accept immunity and thereafter testify against each of the accused. The same officer also represented the officer in charge of all the men involved in the transaction at a pretrial hearing and later in a general court-martial of that officer, had represented him and secured his acquittal on a charge of dereliction of duty. On appeal, it was contended that the assistant trial counsel was disqualified to act. In affirming the convictions, CMA held that the assistant trial counsel was not disqualified as he had not acted for the defense *in the same case*.

## DISTINCTION BETWEEN LARCENY AND MISAPPROPRIATION

McCarthy and Wilkinson, 4 USCMA 385, 28 May 1954

Two accused men were convicted of breach of parole (Article 134), wrongful appropriation of a motor vehicle (Article 121), and the transportation of that vehicle in violation of the Dyer Act (18 USC 2311 et seq.) (Article 134). On appeal, accused asserted that an automobile which was merely the object of wrongful appropriation was not a stolen vehicle under the Dyer Act. In setting aside the conviction of that specification, CMA held that the history and Federal judicial interpretation of the Dyer Act show that the act requires a taking with an intent permanently to deprive the owner or possessor of his property. Since the accused was found guilty of appropriation with the intent temporarily to deprive, there was no violation of the Dyer Act.

## PROOF OF DESERTION

Salter, 4 USCMA 338, 21 May 1954

Accused was convicted of desertion terminated by apprehension. It was stipulated that the accused was apprehended by civil authorities. The board of review affirmed only so much of the findings as found the accused guilty of desertion terminated in a manner unknown. The case was certified to CMA, which affirmed the board of review, holding that there was a hiatus of proof of involuntary return to military control as the apprehension may have been for a civil offense for which the accused may have been released and then voluntarily returned to military control.

## ADMISSIBILITY OF CONFESSION

Hernandez, 4 USCMA 415, 2 July 1954

Accused was convicted of rape (Article 120). The prosecution offered in evidence a confession admitted over objection together with other evidence. The defense was that the accused was inadequately advised of his rights under Article 131 and did not understand the statement. The board of review reversed the conviction determining that the accused did not understand his rights and that he might not have understood the confession and further that the other evidence was barely sufficient to establish a prima facie case. Upon certification, the Government argued that the board of review should have reviewed the record of trial to determine if the other evidence would have supported the conviction without the improperly admitted confession. The Court in affirming the board of review held it was reversible error to admit over the accused's objection a confession which, as determined by the board of review, was obtained without compliance with Article 31. Appellate tribunals may reverse a conviction because of improper admissibility in evidence of a confession. The Court also on another assigned error stated with respect to the law officer's limiting defense counsel in cross-examination that "the right of cross-examination is a fundamental right and an invaluable means for determination of the truth; it should not be unnecessarily curtailed."

## NO RIGHT OF COUNSEL BEFORE CHARGES

Moore, 4 USCMA 482, 2 July 1954

Accused was convicted of murder (Article 118 (4)) and sentenced to death. At the trial his confession was admitted in evidence over objection. On appeal, the accused asserted that the confession was inadmissible in that it was obtained during confinement prior to the charges being preferred and that he was denied counsel during the investigation prior to the preferring of charges. CMA held that the rule in *McNabb v. United States*, 318 US 332 and Rule 5, Federal Rules of Criminal Procedure, have no application in the military judicial system and could not operate as an instruction on the admissibility of confessions in trials by courts-martial and held further that nowhere in the Code or in the Manual is there any provision according a person suspected of crime the right to counsel prior to the preferring of charges.

## CONVENING AUTHORITY WITHOUT POWER TO REVIEW INTERLOCUTORY RULINGS

Knudson, 4 USCMA 587, 6 August 1954

The accused had been apprehended by state authorities for an alleged act of sodomy (Article 125), released on bond and returned to the Navy. Thereafter charges were preferred and trial by general court-martial recommended and the case referred to a general court-martial for trial. The accused was then returned to the state authorities, tried in the state court for the offense, and acquitted.

Subsequently, at the trial by general court-martial, the accused applied for a continuance on the ground that he was awaiting reply to a letter sent through channels to the Secretary of Navy to ascertain if it was contrary to Navy policy to be tried by a court-martial after having been acquitted by a state court. The law officer granted the continuance, but the convening authority in writing directed that the trial proceed. CMA ordering a rehearing stated that the law officer's ruling was not subject to review until the trial had been completed and then only if the ruling was prejudicial to the accused. The convening authority had no power to review interlocutory rulings and this action constituted illegal interference with the law officer in the exercise of his judicial functions. This interference was held to be prejudicial to the accused and affected a substantial right.

## SUFFICIENCY OF EVIDENCE

Rutherford, 4 USCMA 461, 2 July 1954

Accused was charged and convicted under two specifications alleging the communication of a threat to kill his commanding officer. Two soldiers came to the guard house to return the accused to his organization when the accused begged to be left in confinement expressing the fear that if he returned to his unit, he would kill the commanding officer. On the next day before a summary court, accused again requested that he be confined so that he wouldn't kill the commanding officer. CMA reversed the conviction stating the evidence to be insufficient

and saying "Rather than demonstrating an avowed present determination or intent to injure presently or in the future, the accused's words and actions reveal a fixed purpose to avert such a result".

#### OPINION EVIDENCE ON SCIENTIFIC TESTS

Ford, 4 USCMA 611, 6 August 1954

The accused was convicted of wrongfully using a habit-forming drug (Article 134). A Government expert testified by deposition that in his opinion, based on certain color reaction tests, a specimen of the accused's urine contained morphine. The accused testified denying the use of

morphine. On appeal, he asserted that the opinion was inadmissible being based on tests lacking in scientific reliability and even if admissible, was insufficient to sustain the conviction. The Court in affirming the conviction held that the opinion evidenced in the case was proper in that it was a proper subject for expert testimony and the expert witness was qualified. The Court concluded that the validity of the tests was sufficiently well established to merit general acceptance in the particular field. The Court went on to find that under the circumstances, the accused's denial raised a question of fact which the court resolved adversely to him upon sufficient evidence.



## COL. RIGSBY NAMED PROFESSOR OF LAW AT USAFA

Col. Allen W. Rigsby, a Director of the Association and heretofore SJA of the Strategic Air Command, has been nominated Professor of Law at the new U. S. Air Force Academy and the head of the Academy's legal department.

Col. Rigsby is a graduate of the University of Oklahoma Law School and formerly was a member of the firm of Garret, Goodson, and Rigsby with offices in Oklahoma City. For the past fourteen years, Col. Rigsby has been in the military service during which time, in addition to assignments as staff judge advocate, he was an instructor at The Judge Advocate General's School at Michigan during World War II and at the JAG School of the Air University, Maxwell Air Force Base, Alabama.

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

# BOOK REVIEW

## THE ART OF ADVOCACY

By Lloyd Paul Stryker

Simon and Schuster; (1954) pp. 305; \$5.00

Whatever else may be said, "The Art of Advocacy" is an eloquent plea for lawyers to undertake courtroom careers. Mr. Stryker's argument is founded on both the public need for this service and the ethics of our profession. From his own as well as the experiences of other distinguished trial and appellate lawyers, the present need for this kind of public service is made to appear urgent. In recounting these experiences, Mr. Stryker permits the nobility of this service to speak for itself. To many, Mr. Stryker's appeal will be convincing. Even those, however, who doubt the need or deny the duty, or who denounce Mr. Stryker's recommendations, will not fail to appreciate Mr. Stryker's great talent for persuasion.

Indeed, each lawyer who reads "The Art of Advocacy" will recognize in this book a masterful exercise in the "science" as well as the "art" of persuasion. For this reason, the young lawyer, especially, will enjoy and respect its wisdom. He is certain to learn much on matters of interviews and investigation, opening and closing

addresses, cross-examination, and appellate argument. He will not, of course, find an omniscient formula, for advocacy is an art. He is certain, however, to find useful guides for both trial and appellate practice, since advocacy is also a science. Moreover, he will find, although only through occasional references, helpful advice on matters of negotiation, since the techniques of advocacy are those of persuasion anywhere.

In the main, through example and wit, Mr. Stryker achieves what he intended, an effective "plea for the renaissance of the trial lawyer." In doing so, he pleads for men not only of competence but also of courage, sincerity, and integrity. It is an extraordinary plea for extraordinary men. To Mr. Stryker, the advocate's strength of character and mastery of language are the basic tools of his trade. Is he out of keeping with the times in urging the specialized use of these tools in the court room? This is one of the important questions each reader must answer for himself.

SHERMAN S. COHEN.

# WHAT THE MEMBERS ARE DOING

## Alabama

Maj. William E. Davis (ETO Claims) of Birmingham is Clerk of the United States District Court for the District of Alabama. He recently attended a conference in the Administrative Office of the United States Courts in Washington, D. C. While on a two-week tour of duty at Ft. McClellan this summer, he saw Col. Raymond A. Egner, who, during World War II, was assigned to ETO Claims.

## Arkansas

Col. Paul L. Anderson, former X Corps Judge Advocate, who was retired in 1952 for disabilities incurred in Korea, recently announced the opening of law offices for the general practice of law at Rogers.

## California

Los Angeles Judge Advocates received their summer training at Ft. Lewis, Washington, during the summer. Among those present at Ft. Lewis were Col. John P. Oliver, Superior Court Commissioner, Lt. Col. John Davenport, Lt. Col. Robert Walker, Lt. Col. David I. Lippert, Maj. Edward McLarty, Capt. Herschel Champlin, Capt. LaVerne Baack, Capt. Jess Whitehill, Lt. Col. M. D. Brakemeyer, 1st Lt. Harold Williams, 1st Lt. Cherry Nutter. These officers are students of the Judge Advocate Branch of the ORC School at Fort MacArthur. Col. Lippert is the Director of the Judge Advocate Branch of the School.

## Connecticut

Capt. Harvey A. Katz, having recently completed a tour of duty in The Judge Advocate General's Office of the Army, has resumed the practice of law with offices at 2683 Main Street, Glastonbury.

Capt. Stanley L. Kaufman (7th OTS) recently announced the opening of offices for the general practice of law at 58 East State Street, Westport. Capt. Kaufman is a member of the firm of Kaufman, Imberman & Taylor with offices at 511 Fifth Avenue, New York City.

## District of Columbia

Col. Archibald King recently retired from active duty for the third time. Col. King, who was commissioned in 1917, was retired on August 31, 1942, and then immediately recalled to active duty and remained on active duty until 1946. He was again recalled to duty in 1948 and assigned the task of revising and bringing up to date the Federal Code as it applies to the Armed Services, a job which had last been done in 1870. Col. King is a member of the firm of King and King with offices in the District of Columbia.

Murray A. Kivitz recently announced the opening of offices for the general practice of law in the Denrike Building, Washington, D. C.

Col. Doane F. Kiechel was recently transferred from Fort MacArthur, California, and assigned to the Office of the Under Secretary of the Army

for duty with the Armed Services Board of Contract Appeals.

At the regular meeting of the Washington area members of the Judge Advocates Association held at the Dodge Hotel on the evening of October 4th, Col. Frederick Bernays Wiener, who had been the Reporter to the Rules Revision Committee of the Supreme Court of the United States, gave a brief summary of the changes in the rules of practice before the high court.

### Florida

Col. R. E. Kunkel of Miami recently announced the dissolution of the firm of Kunkel and White and the continuance of his practice of law with offices at 1022 Seybold Building, Miami 32.

### Maryland

Capt. David H. R. Loughrie was recently assigned as Staff Judge Advocate of the Research and Development Command, USAF, at Baltimore.

### Massachusetts

Myron Lane of Quincy was recently elected District Attorney of Norfolk County where he has been Assistant District Attorney since World War II.

### Minnesota

Clarence Tormoen of Duluth was recently appointed Assistant to the Secretary of the Treasury.

Thomas Lawler of Rochester recently announced the reopening of offices for the general practice of law in the First National Bank Building, Rochester.

### New York

Capt. Edward F. Huber recently announced that his law firm, Dean, Magill & Huber, has merged with the firm of Naylor, Foster, Shepard & Aronson. Mr. Huber continues the general practice of law as a member of the firm of Naylor, Foster, Dean, Shepard & Aronson with offices at 61 Broadway, New York City 6.

Lt. Col. Theodore L. White, having recently completed a tour of extended active duty in the Office of the Army Staff Judge Advocate, First Army, has resumed the practice of law with offices at 280 Madison Avenue, New York City 16.

Col. Arthur Levitt of New York City, President of the New York City Board of Education, was recently nominated for the office of state comptroller on the Democratic ticket.

### Ohio

Col. James Arthur Gleason of Cleveland recently announced the association of Judge William J. McDermott with his firm for the general practice of law with offices in the Williamson Building, Cleveland. Col. Gleason is a member of the firm of Gleason, Haner and Mazanec.

### Texas

Col. Robert E. Joseph, USA-Ret., was recently admitted to the bar of the State of Texas. Col. Joseph is Counsel for United Services Automobile Association at San Antonio.

Coincident with the Texas State Bar Association annual meeting, Col. Gordon Simpson held a breakfast meeting of Judge Advocates at which

Major General Eugene M. Caffey, The Judge Advocate General of the Army, made a brief address. Those attending the breakfast meeting of JAG's at San Antonio included: Col. Charles Cheever, San Antonio; Col. Clarence E. Brand, San Antonio; Col. Robert E. Joseph, San Antonio; Col. Louis E. Marshall, San Antonio; Col. Robert M. Springer, SJA Section, Fourth Army, FSHT; Col. C. G. Schenken, SJA Section, Fourth Army, FSHT; Lt. Col. Samuel S. Wolf, SJA Section, Fourth Army, FSHT; Lt. Col. Francis R. Boyles, SJA Section, Fourth Army, FSHT; Lt. Col. Thomas O. Mitchell, SJA Section, Fourth Army, FSHT; Maj. Roy I. Tennant, Jr., SJA Section, Fourth Army, FSHT; Col. Thomas R. Taggart, SJA Section, Crew Training Air Force, Randolph Field; Lt. Col. Luther G. Strange, SJA Section, Crew Training Air Force, Randolph Field; 1st Lt. Ed Finck, SJA Section, Crew Training Air Force, Randolph Field; Lt. Col. Alfred K. Lee, SJA Section, San Antonio Air Materiel Area, Kelly Field; Lt. Col. John M. Flatten, SJA Section, USAF, Security Services, Kelly Field; 1st Lt. Robert H. Gooch, SJA Section, USAF, Security Services, Kelly Field; Lt. Col. Arthur J. Shaw, Jr., SJA Section, Lackland AFB; Capt. Julius E. Slover, SJA Section, Lackland AFB; 1st Lt. Patrick D. Sullivan, SJA Section, Lackland AFB; 2nd Lt. Jacob Jennings, SJA Section, Lackland AFB; Airman 3d Class Harry N. D. Fischer, SJA Section, Lackland AFB; Forrest Markward, Ft. Worth; Emmett L. Whitsett, Jr., San Antonio; Lynn B. Griffith, Waxahachie; Edward Kliewer, Jr., Dallas; Chas. L. Williams, Henderson.

## Virginia

Capt. Walter W. Regirer of Richmond advises the Richmond United States Army Reserve School is the first Pilot Model School for law students in the history of the Army. Law students will study military law for three years with the prospect upon their graduation from school of being commissioned in The Judge Advocate General's Corps.

In conducting Judge Advocate summer training for eleven USAR Schools of the Second Army and one USAR School of the First Army, Virginians topped all other Armies in the number of participating Reserve Personnel. It is significant to note that whereas in prior years the student body at these USAR Schools consisted largely of field grade officers, this year junior grade officers were predominant. Also, thirty enlisted law students from Washington and Lee Law School, Dickinson Law School and Ohio State Law School attended the courses. Two courses were conducted: A basic course taken by sixteen officers and thirty enlisted men, and an advanced course conducted for forty-eight officers.

The School is commanded by Col. M. G. Ramey assisted by Col. J. H. B. Peay, Jr., both of Richmond.

## Korea

About a year ago, because of concentration of Judge Advocates of the Army and Air Force at Taegu, an informal social organization was established called the "Taegu Bar Association" which served as a medium of periodic professional and social contact between Judge Advocates and

other lawyers in Korea. More recently, because of the relocation of Headquarters, the organization changed its name to "Taeguk" Bar Association, the word, "Taeguk" signifying universality under the Confucian cosmology. Meetings are held by this group about once monthly and attendance usually runs to forty or fifty lawyers. On July 3, 1954, Col. Alfred C. Bowman acted as host to the group among which were General E. J. McGraw, General Bert

Johnson, General Kim Wang Wong, Colonels Charles R. Bard, Claude E. Reitzel, and Harold Sullivan, Dean Robert G. Storey and Dr. Jerome Hall.

Many Judge Advocates are becoming members of the Korean Bar during the period of their service there, but it is not expected that many will wish to remain for the private practice of law in the Republic of Korea after their military tours are completed.



## REGULAR ARMY PROMOTIONS

The following members of the Association were among those promoted in the Regular Army during the past summer:

To be colonels: Robert McD. Gray; Edward J. Kotrich; Noah L. Lord; Robert H. McCaw; Palmer W. McGrew; and Clio E. Straight.

To be lieutenant colonels: Maurice Levin and John M. Pitzer.



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

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