

# The Judge Advocate JOURNAL

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**JUDGE ADVOCATES ASSOCIATION**

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

# JUDGE ADVOCATES ASSOCIATION

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## Executive Secretary and Editor

RICHARD H. LOVE  
Washington, D. C.

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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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# REPORT OF NOMINATING COMMITTEE - 1960

In accordance with the provisions of Section 1, Article IX of the By-laws of the Association, the following members in good standing were appointed to serve upon the 1960 Nominating Committee:

Colonel Alan B. Todd, USA,  
Chairman

Captain Mack Greenberg, USN

Colonel James S. Cheney, USAF

Lt. Colonel Kenneth J. Hodson,  
USA

Commander Anthony J. Caliendo,  
USCGR

Major Sherman S. Cohen, USAFR

Captain William B. Hanback,  
USAR

The By-Laws provide that the Board of Directors shall be composed of twenty members, all subject to annual election. It is provided that there be a minimum representation on the Board of Directors of three members for each of the Armed Forces: Army, Navy and Air Force. Accordingly, the slate of nominees is divided into three sections; and, the three nominees from each section who receive the highest plurality of votes within the section shall be considered elected at the annual election as the minimum representation on the Board of that armed force; the remaining eleven positions on the Board will be filled from the nominees receiving the highest number of votes irrespective of their arm of service.

Members of the Board not subject to annual election are the three

most recent past presidents of the Association. These will be: Captain Robert G. Burke, USNR, Colonel Franklin H. Berry, USAR and Colonel Thomas H. King, USAFR.

The Nominating Committee has met and has filed with the Secretary, the following report as provided by Section 2, Article VI of the By-laws:

## Slate of Nominees for Offices

President: Maj. Gen. Reginald C. Harmon, USA-Ret., Va. (Formerly TJAG, A.F.)

First Vice President: Maj. Gen. E. M. Brannon, USA-Ret., D.C. (Formerly TJAG, Army)

Second Vice President: Cdr. Frederick R. Bolton, USNR, Mich. (Private practice)

Secretary: Lt. Cdr. Penrose L. Albright, USNR, Va. (Private practice)

Treasurer: Col. Clifford A. Sheldon, USAFR-Ret., D.C. (Private practice)

Delegate to the House of Delegates, ABA: Col. John Ritchie, III, USAR, Ill. (Dean, Northwestern U., Law School)

## Slate of Nominees for the Twenty Positions on the Board of Directors

### Army Nominees:

Col. Joseph A. Avery, USAR-Ret., Va. (Board of Contract Appeals, D.O.D.)

Brig. Gen. Charles L. Decker,  
USA, D.C. (Ass't. JAG, Army)

Col. Shelden D. Elliott, USAR,  
N.Y. (Professor of Law, N.Y.U.)

Col. John H. Finger, USAR, Cal.  
(Private practice)

Col. Osmer C. Fitts, USAR, Vt.  
(Private practice)

Lt. Col. Edward F. Gallagher,  
USAR, D.C. (Private practice)

Col. James Garnett, USA, Va.  
(S&F, TJAG School)

Maj. Gen. George W. Hickman,  
USA, D.C. (TJAG, Army)

Maj. Gen. Stanley W. Jones, USA,  
Va. (The Ass't. JAG, Army)

Lt. Col. Albert G. Kulp, USAR,  
Okla. (Private practice)

Lt. Col. Charles P. Light, Jr.,  
USAR, Va. (Professor of Law,  
W&L U.)

Col. Joseph F. O'Connell, Jr.,  
USAR, Mass. (Private practice)

Col. Alexander Pirnie, USAR, N.Y.  
(U.S. Congressman)

Col. Gordon Simpson, USAR, Texas  
(Private practice)

Brig. Gen. Clio E. Straight, USA,  
Va. (Ass't JAG, Army)

Col. Alan B. Todd, USA, Va.  
(Executive, OTJAG, Army)

Col. Birney M. Van Benschoten,  
USAR, N.Y. (Private practice)

Col. Ralph W. Yarborough, USAR,  
Texas (U.S. Senator)

#### Navy Nominees:

Cdr. Anthony Caliendo, USCGR,  
D.C. (Legal officer, Hq. USCG)

Capt. Robert A. Fitch, USN, Va.  
(Legal officer, Navy R&D)

Capt. Mack K. Greenberg, USN,  
D.C. (Ass't JAG, Navy)

Cdr. Hugh H. Howell, Jr., USNR,  
Ga. (Private practice)

Col. J. Fielding Jones, USMCR,  
Va. (B/R, Navy)

Capt. William C. Mott, USN, Md.  
(The Ass't TJAG, Navy—to be  
TJAG)

Capt. George A. Sullivan, USN,  
N.Y. (Legal officer, Third Naval  
Dist.)

#### Air Force Nominees:

Col. Samuel C. Borzilleri, USAFR,  
Md. (Private practice)

Lt. Col. Perry H. Burnham, USAF,  
Hawaii (JA, Pac. A.F.)

Lt. Col. Gerald T. Hayes, USAFR,  
Wisc. (Private practice)

Brig. Gen. Herbert M. Kidner,  
USAF-Ret., Va.

Maj. Gen. Albert M. Kuhfeld,  
USAF, Va. (TJAG, A.F.)

Col. Martin Menter, USAF, D.C.  
(JA assigned to F.A.A.)

Col. Allen G. Miller, USAFR, N.Y.  
(Private practice)

Col. Frank E. Moss, USAFR, Utah  
(U.S. Senator)

Maj. Benoni Reynolds, USAF, D.C.  
(JAGO, Hq. A.F.)

Col. Abraham Robinson, USAFR,  
N.Y. (Private practice)

Maj. Gen. Moody R. Tidwell,  
USAF, D.C. (The Ass't JAG, A.F.)

Col. Fred Wade, USAFR-Ret., Pa.  
(Civ. Atty. Middletown AMC)

Under the provisions of Section 2,  
Article VI of the By-laws, the mem-  
bers in good standing other than  
those proposed by the Committee  
shall be eligible for election and will  
have their names included on the

printed ballots to be distributed by mail to the membership on or about August 1, 1960, provided they are nominated on written petition endorsed by 25 or more members of the Association in good standing; provided further, that such petition be filed with the Secretary at the

offices of the Association on or before 20 July 1960.

Balloting will be by mail upon official printed ballots. Ballots will be counted through 29 August 1960. Only ballots submitted by members in good standing as of 29 August 1960 will be counted.



### J.A. WIVES—COFFEE TIME

The Army Judge Advocates Wives' Club will hostess a coffee honoring the wives of Army Judge Advocates, reserve and retired, attending the annual meeting of the American Bar Association, and other invited guests on August 30 at Patton Hall, the officers' club at Fort Myer, Virginia, from 10 AM until Noon. It would be appreciated if wives of reserve and retired Army Judge Advocates who wish to attend would contact Mrs. William H. Churchwell, 4715 North Dittmar Street, Arlington 7, Virginia, telephone KE 6-6852.

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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.

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

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

## "PERRY MASON" WILL ADDRESS 1960 JAA MEETING

Raymond Burr, TV's Perry Mason, will be the guest speaker at the Judge Advocates Association's annual banquet on August thirtieth. Mr. Burr, who is not a lawyer, has done a great deal of research and study to prepare himself to act like a lawyer, and he has eminently filled the role of the celebrated "defense attorney", created by Erle Stanley Gardner. Since acting like a lawyer has become an important part of Mr. Burr's business, he has something in common with all lawyers, who too must be showmen; and, it can be expected that his address will be most interesting and entertaining.

It is estimated that about thirty million followers of Perry Mason see Mr. Burr in that role every week; and, if this be not sufficient evidence of Mr. Burr's success as a make-believe lawyer, it can be noted that Mr. Gardner is so satisfied with Mr. Burr's portrayal of his famous character that he has said: "It's got to a point where people don't think they're watching an actor portraying Perry Mason; they think they're looking at a bit of real drama—that the television's glass is not a screen, that it's a window."<sup>1</sup> Within the limits of programming time and considering the primary purpose of entertainment, it is apparent that Mr. Burr and his com-

pany make a remarkable effort to be authentic in the portrayal of court room procedures. No one can deny that the Perry Mason series on television is great entertainment by a conscientious and talented actor.

From the point of view of the members of this Association, and quite apart from the entertainment value of the TV series, we as lawyers are vitally concerned with the collateral effects on the legal profession of Mr. Burr's performances. Through Perry Mason, he is generating public interest in the administration of justice. He is giving lots of people an understanding of the function of the attorney in a criminal case. People are learning something about courts and judicial procedures; and, most importantly, in every Perry Mason "trial", justice is done and the audience is satisfied with the result. As a part of the whole problem of the position of the lawyer in our society, this Association has worked long and hard at enhancing the prestige of the lawyer in the Armed Forces. Mr. Burr has said on this general problem: "Ninety-nine per cent of the attorneys are decent, God-fearing, hard-working, intelligent, helpful people; but I don't think there's enough known about them. Now we have

<sup>1</sup> *The Saturday Evening Post*, 3 October 1959 Vol. 232 No. 14 Page 26 "TV's Make-Believe 'Lawyer'" by Robert Johnson at page 171.

opened up a public relations situation for these people—what they do, how they fit into our society. And thank goodness we have the opportunity to do it.”<sup>2</sup> Our guest speaker has not only seized this opportunity through the vehicle of Perry Mason, but by his other public ap-

pearances and utterances. We are pleased that he has taken this opportunity to be in Washington during ABA week at our invitation; and, especially are we pleased, that he has agreed so graciously to be our guest speaker on the night of August thirtieth.

<sup>2</sup> The Saturday Evening Post, *supra*.



## 1960 ANNUAL MEETING, JAA

The fourteenth Annual Meeting of the Judge Advocates Association will be held at Washington, D.C., on August 30, 1960 during the week of the American Bar Association Convention. Colonel Hugh Fullerton heads the committee on arrangements. The Annual Business Meeting will convene at 3:30 p.m., on Tuesday, 30 August in the Court Room of the United States Court of Military Appeals located at 5th and E Streets, N.W.

The Annual Banquet of the Association will be held at the Officers Club, Bolling Air Force Base in Washington, with reception and cocktails beginning at 7:00 p.m. The tariff will be \$7 per person which will include pre-prandial liquid refreshments, hors d'oeuvres and an

excellent dinner complemented by a good vintage wine. There will be musical entertainment during the cocktail hour and dinner. Captain J. J. Brandlin, of the Los Angeles Bar, has secured Mr. Raymond Burr, TV's Perry Mason, as the guest speaker. Dress will be informal. Further details will be distributed to all members of the Association at a later date with formal reservation blanks, but to insure your places at this outstanding event, you may make your reservations now by writing to the offices of the Association.

The committee has planned for the largest and finest meeting of JAGs in the history of the Association and it looks forward to welcoming you to Washington in August.

# PRESIDENTIAL POWER TO REGULATE MILITARY JUSTICE

By Zeigel W. Neff<sup>1</sup>

The May, 1959, issue of the New York University Law Review contained an article by William F. Fratcher,<sup>2</sup> which discussed the "Presidential Power to Regulate Military Justice."

Professor Fratcher's major premise was that the President had plenary power to regulate Military Justice, unless expressly circumscribed by statute, purportedly derived from the historical "Royal prerogative" of English kings. From this premise, the article proceeded to criticize decisions of the United States Court of Military Appeals for arbitrarily invading the prerogative of the President by overruling certain sections of Executive Order 10214, the Manual for Courts-Martial, United States, 1951, which holdings, according to Professor Fratcher, were detrimental to discipline and morale in the Armed Forces.

No one questions the unqualified right of Professor Fratcher to express his feelings as to the Court of Military Appeals and its deci-

sions. No court is, or should be, immune from criticism, and the Court of Military Appeals is no exception. Like all mankind, the Judges who compose the Court are human, and some of their decisions are doubtlessly open to legitimate criticism. But a dissent must be recorded from the claim of Presidential "Royal prerogative" and the plenary power to regulate in the area of military justice which, one gathers, somehow bypassed the American Revolution and descended directly from British monarchs to American Presidents.<sup>3</sup>

The article begins by explaining the royal prerogative of English kings to control military justice. The conclusion is then drawn that the intent of the Founding Fathers in writing our Constitution "was to reproduce exactly, so far as it was possible the English situation. In England the King had plenary power to regulate the armed forces, including military justice, except to the extent that such power was cur-

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<sup>1</sup> B. A., Southwest Missouri State College, 1939; LLB, University of Missouri, 1948; LLM, Georgetown University, 1958; Commander, USNR; former Commissioner, United States Court of Military Appeals; Member, Board of Review, Office of The Judge Advocate General, United States Navy. The views expressed herein represent those of the author and do not necessarily reflect those of The Judge Advocate General or the Department of the Navy.

<sup>2</sup> Colonel, JAGC, USAR; Professor of Law, University of Missouri.

<sup>3</sup> Emphasis supplied herein is that of the author, unless otherwise specifically indicated.

tailed by express statute; in this country the President was to have like power." An examination of the Constitution reveals no support for the broad position thus stated. The Constitution is most assuredly silent with respect to conferring a "Royal prerogative," and when its history is studied, that silence can hardly be interpreted as a grant of such powers, directly or impliedly.

Article 1, Section 8, Clause 14, United States Constitution grants to Congress, rather than the President, the power "to make Rules for the Government and Regulation of the land and naval Forces." And this power was exercised by the Continental Congress before we had either a Constitution or a President. Accordingly, the legislature has been writing articles and rules—including definitions and judicial procedures—for the military services since this country's separation from England.

A study of executive powers generally, shows that neither the President, nor a department head at the President's direction or with his ap-

proval, has the authority to act at variance with a valid statute, and whether or not the President is acting at variance with a statute is a matter which must be determined by the courts. Moreover, this restriction on the powers of the President is present, even though he has a special Constitutional status as Commander-in-Chief. In *United States v. Symonds*<sup>4</sup> the validity of an order issued by the Secretary of the Navy was challenged. The order was held invalid as contravening a statute. The Supreme Court pointed out that the Secretary's authority to issue regulations with the President's approval was subject to the implied condition that they "be consistent with the statutes which have been enacted by Congress" and "he [the Secretary] may, with the approval of the President, establish regulations in execution of, or supplemental to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court."<sup>5</sup>

<sup>4</sup> 120 US 46, 7 S. Ct. 411, 30 L ed 557 (1887).

<sup>5</sup> 120 US 46, at page 49. See also *Little v. Barreme*, 2 Cranch 170 (1804) wherein Chief Justice Marshall stated: "The instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would be a plain trespass." President Taft expressed his views on Executive powers thus: "a President can exercise no power which cannot fairly and reasonably be traced to some specific grant of power, as justly implied and included within such grant of power necessary to its exercise. Such specific grants must be either in the Federal Constitution, or in any act of Congress passed in pursuance thereof. *There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.*" Executive Orders & Proclamations, A Study of a Use of Presidential Powers, Committee on Government Operations, 85th Congress. It is recognized that other presidents have expressed a less restricted point of view.

The Youngstown Steel seizure<sup>6</sup> afforded the Supreme Court an opportunity to review the theory of "inherent" Presidential powers. Certain steel mills were seized by the Secretary of Commerce on the basis of a Presidential directive. The Executive Order, however, was not based upon statutory authority but upon the emergency powers of the President as Commander-in-Chief (the Korean hostilities were in progress at the time). Six members of the Court rejected the idea that the President had or could exercise authority implied from emergency circumstances. The Government's position was that, in seizing the steel mills, the President was acting within the "aggregate" of his constitutional powers as the Nation's Chief Executive and as the Commander-in-Chief of the Armed Forces. Refusing to accept that argument, the Supreme Court pointed out that the Founding Fathers of this Nation entrusted the lawmaking power to the Congress *alone*—in both good times and bad; that "it would do no good to recall the historical events, the fears of power and the hopes of freedom that lay behind their choice. Such a review would but confirm our holding that his seizure order

cannot stand." The Court cited Mr. Justice Holmes' opinion in *Meyers v. United States*.<sup>7</sup> There it was said: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."<sup>8</sup> Mr. Justice Douglas, concurring in the same case, stated: "If we sanctioned the present exercise of power by the President, we would be expanding Article 2 of the Constitution and rewriting it to suit the political conveniences of the present emergency. . . . The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. . . . But as Mr. Justice Black and Mr. Justice Frankfurter point out the power to execute the laws starts and ends with the laws Congress has enacted. . . ."<sup>9</sup>

With respect to the plenary powers of the President to regulate military justice, suffice it to say that, from our earliest days as a nation, the courts have held that Congressional power rather than Executive power is plenary—military or other-

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<sup>6</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 US 579, 72 S. Ct. 863, 96 L ed 1153 (1952).

<sup>7</sup> 272 US 52, 47 S. Ct. 21, 71 L ed 160 (1926).

<sup>8</sup> 272 US 52, at page 177.

<sup>9</sup> 343 US 579, at page 632.

wise.<sup>10</sup> Of course, the argument over the limitations of Executive powers is an old one. For example, "in President Washington's administration Alexander Hamilton argued that the Executive-power clause of Article II of the Constitution was a grant of power in itself. James Madison's opposing position was that the Executive-power clause was not a grant of power since ours is not a government *involving royal prerogatives.*"<sup>11</sup> But not even Hamilton, with his insistence upon a powerful Chief Executive, ever envisioned that the President would possess monarchial powers over the military forces. That fact is borne out by his essay on the Presidential powers.<sup>12</sup> According to Hamilton, the authority of the President as Commander-in-Chief:

" . . . would be nominally the same as that of the king of

Great Britain, *but in substance much inferior to it.* It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; *while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.*"<sup>13</sup>

Furthermore, to re-emphasize the difference between the Crown and the President, and to make doubly sure that no one misunderstood that difference, Hamilton ended the essay by declaring:

". . . The one (the President) has no particle of spiritual jurisdiction; the other (the King

<sup>10</sup> Among the powers assigned to Congress—rather than to the State Governments—is the power to make rules for the government and regulations of the land and naval forces, and ". . . the execution of these powers falls within the lines of its duties, and its control over the subject is plenary and exclusive . . ." *Tarble's Case*, 13 Wall. 397, 408, 20 L ed 597, 600 (1872). The power of Congress to make regulations for the government of the land and naval forces ". . . is as plenary and specific as that given for organization of civil affairs . . ." *Brown v. Sanford* (DC Ga.) (1948), 79 F. Supp. 146, affmd 170 F 2d 344 (CA 5th Cir) (1948). ". . . The question who shall act on courts-martial for the trial of offenders belonging to various branches of the Army of the United States is one entirely for Congress to determine . . ." *McClaghry v. Deming*, 186 US 49, 69, 22 S. Ct. 786, 49 L ed 1049 (1902). ". . . The constitutional power of the President to command the Army and Navy, and of Congress 'to make rules for the Government and regulation of the land [and] naval forces; are distinct; the President cannot by military orders evade the legislative regulations . . ." *Swain v. United States*, 28 Ct. Claims 173 (1893), affd 185 US 553, 17 S. Ct. 448, 41 L ed 823 (1897).

<sup>11</sup> *Executive Orders and Proclamations, A Study of A Use of Presidential Powers*, Committee on Government Operations, 85th Congress.

<sup>12</sup> *The Federalist*, LXIX.

<sup>13</sup> *Ibid.*

of Great Britain) is the supreme head and governor of the national church! *What answer shall we give to those who would persuade us that things so unlike resemble each other?* The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism."<sup>14</sup>

In a government limited like ours, it is unsafe to draw from the Constitutional provision making the President Commander-in-Chief of the Armed Forces, plenary powers by a forced analogy to the governmental structure of foreign nations. This contention was advanced in *Fleming v. Page*.<sup>15</sup> Of it, Chief Justice Taney, speaking for the Supreme Court, said:

"In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They . . . do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several states, and they act

through their representatives, according to the delegation and distribution of powers contained in the Constitution. . . .

"Neither is it necessary to examine the English decisions which have been referred to by counsel . . . in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belongs to the English Crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide. . . ." <sup>16</sup>

It is significant to note that the draftsmen of the Declaration of Independence placed prominently on their "long train of abuses and usurpations" the English king's attempt to "render the military independent of and superior to the civil power." It seems unlikely, therefore, that the Founding Fathers

<sup>14</sup> *Ibid.*

<sup>15</sup> 9 Howard 603, 13 L ed 276 (1850).

<sup>16</sup> 9 Howard 603, at page 618; Cf. *Oachoa v. Hernandez*, 230 US 139, 33 S. Ct. 1033, 59 L ed 1427 (1913); *Downes v. Bidwell*, 182 US 244, 337, 21 S. Ct. 795, 45 L ed 1088 (1901); *Dooley v. United States*, 182 US 322, 21 S. Ct. 751, 45 L ed 1074 (1901).

would have immediately reversed themselves in order to "reproduce exactly" the English royal prerogative.

Moving to another ground on which to support his thesis of the President's plenary power, absence Congressional restraint, Professor Fratcher discusses *In re Yamashita*,<sup>17</sup> described as a "most striking example" of the reluctance of the Supreme Court to find conflict between a statute and the Presidential regulatory powers. We are informed that "the 1920 Articles of War provided that a deposition 'may be read in evidence before any military . . . commission in any case not capital . . . provided, that testimony by deposition may be adduced for the defense in capital cases.' Normal canons of statutory construction would make this provision mean that depositions may not be used as evidence for the prosecution in capital cases. Nevertheless, the Court held that regulations for the procedure of a military commission for a violation of the laws of war punishable by death could, *without conflicting with the statute*, permit the use of depositions by the prosecution. *This decision suggests that, in view of the Supreme Court, the power of the President to make regulations governing the administration of military justice with the force of law cannot be and is not curtailed by statute unless the making of such a regulation is expressly prohibited by (in Blackstone's phrase) 'special and*

*particular words.'*" Professor Fratcher's contention is all very well as a suggestion, but it is unsupported by the Supreme Court decision cited, which did not hold that the procedure of the Yamashita's military commission conflicted with the Articles of War. Actually, the Court pointed out only that the Article of War 25 had no bearing on the problem, as the petitioner was an enemy combatant, and

" . . . is therefore *not* a person made subject to the Articles of War . . . and the military commission before which he was tried . . . *was not* convened by virtue of the Articles of War, but pursuant to the common law of war. *It follows that the Articles of War . . . were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed.* . . ." <sup>18</sup>

The argument is advanced that Congress, by failing in the past to legislate in various areas of military practice, placed a stamp of official approval upon the Manual's predecessors. In some past instances, this argument of statutory ratification of existing regulations (which argument overlooks a cardinal rule of statutory construction—namely that penal statutes must be narrowly construed) could have been reasonably made, but the Uniform Code of Military Justice is a distinct exception. It is seriously to be doubt-

<sup>17</sup> 327 US 1, 66 S Ct 340, 90 L ed 499 (1946).

<sup>18</sup> 327 US 1, at page 20.

ed if legislation has ever been passed with a greater determination to change existing conditions than the Uniform Code of Military Justice with its avowed purpose to abolish prior summary practices and methods in the courts-martial system. One of the principal claims made at the time of the Code's passage was the supremacy of the President in the field of military justice, and that courts-martial were merely executive instrumentalities to enforce discipline. In this regard, Professor Morgan, one of the original drafters of the Code, stated that he was instructed by Mr. Forrestal, the then Secretary of Defense, "to frame a code that . . . meant complete repudiation of a system of military justice conceived of only as an instrumentality of command."<sup>19</sup>

In his summary, Professor Fratcher reiterated that "except to the extent that such power is curtailed by express statute, the Constitution confers upon the President plenary powers to regulate military justice." We have seen that there is no such grant of plenary power to the President by the Constitution; nor, in my opinion, can any such power be implied. At the very least, if the President possesses such broad powers, down through history he ap-

pears to have been unaware of it. As a matter of fact, when President Truman promulgated the Manual, supra, by signing Executive Order 10214,<sup>20</sup> he affirmatively recognized the source of his authority when he stated: "By virtue of the authority vested in my by the Act of Congress entitled 'An Act . . . to enact and establish a Uniform Code of Military Justice.'"<sup>21</sup> Stated differently, the President has only that power over military justice granted to him by Congress (and authority reasonably to be implied therefrom). He possesses no power—under the Constitution—to issue regulations defining offenses within the Armed Forces, prescribing the punishment for them, constituting tribunals to try such offenses, and fixing the mode of procedure and methods of review of the proceedings of such tribunals. He only has the power to issue such regulations when expressly authorized by Congress to do so.

The Uniform Code spells out the scope of the President's authority with respect to the Manual in Article 36:

"(a) The procedure, including modes of proof . . . may be prescribed by the President by regulations which shall, so far

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<sup>19</sup> 6 Vanderbilt Law Review (1953) 169. See also Professor Morgan's statement before the Senate Armed Services Committee in which he remarked that, prior to the Code, a court-martial ". . . was nothing more than a committee to advise the commanding officer." Hearings before Senate Armed Services Committee on S. 857 and H. R. 4080, 81st Congress, 1st Session, p. 49.

<sup>20</sup> February 8, 1951, 16 Federal Register 1303.

<sup>21</sup> Ibid.

as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts, *but which shall not be contrary to or inconsistent with this code.*

"(b) All rules and regulations . . . shall be uniform insofar as practicable and shall be reported to the Congress."<sup>22</sup>

In other words, the President is granted the authority to regulate procedure and modes of proof, but even these shall "not be contrary to or inconsistent with this code" and must be reported to Congress for scrutiny. The next question is: Who determines whether Presidential regulations are contrary to or inconsistent with the Code? The answer must be: Initially, the United States Court of Military Appeals, and ultimately Congress.<sup>23</sup>

<sup>22</sup> 10 USC § 836.

<sup>23</sup> UCMJ, Article 67(b), 10 USC § 867, requires the Judges of the Court to meet annually with The Judge Advocates General "to make a comprehensive survey of the operation of this code and report to the Committees on Armed Services . . . the number and status of pending cases and any matters relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate."

Professor Morgan, one of the drafters of the Code, testified before the House Armed Services Committee that ". . . it [the Court of Military Appeals] is really a supreme judicial military court . . ." Hearings Before House Armed Services Committee on H. R. 2498, 81st Congress, 1st Session, p. 609.

Frederick Bryan, Chairman, Special Committee on Military Justice, Bar Association of the City of New York, testified with respect to Article 67:

" . . . It seems to me to have what is in essence a supreme court of military justice . . . composed of men of judicial caliber . . . [which] give them the position for all practical purposes of United States circuit court of appeals judges. . . ."

and

" . . . [W]ith such a body you gradually evolve a system of case law for the Military Establishment. . . ."

\* \* \* \* \*

"In other words, no code is the complete answer to a legal picture. You cannot try cases by a code. You have to develop in all law a body of precedents which will govern the various situations that arise in the administration of military justice . . . Then there is the . . . provision that the . . . [Court] meeting with the . . . judge advocates of the armed services will make continuous observation of the system . . ."

"Now that again is an excellent thing because you gentlemen . . . know very well that any new code requires ironing out of . . . things which arise through its practical experience . . ." Hearings Before House Armed Services Committee, supra, pp. 624, 625.

Congressman Elston stated before the same Committee: "[W]e want to

Congress was unwilling to leave modes of proof or rules of evidence to the uninhibited regulations of the Executive. As stated by a witness during the House Hearing on the Code,<sup>24</sup> "As to Article 36 . . . we believe that the modes of proof should be included as a part of this code and not left to the discretion of the Secretary concerned. Modes of proof are as much a part of the administration of justice as the articles that denounce offenses." And Congressman Rivers made this observation: "As a result of this [Article 36],

neither the President nor any of the three services could have any authority to agree on any rules of procedure contrary to the decision before this committee or the intent of Congress." To which Mr. Larkin replied: "I think that is provided . . . 'shall not be contrary to or inconsistent with this code.' Further . . . [for purposes of information] these rules and regulations are to be submitted to Congress and the Congress will have an opportunity to scan them and see if they . . . feel that they conform."<sup>25</sup>

(Footnote 23—Continued)

give the accused in the trial of a military case the same rights that a man has in the civil courts. In the civil courts he is tried before the United States District Court . . . He appeals to the United States circuit court of appeals . . ." Hearings Before House Armed Services Committee, *supra*, p. 758.

Mr. Brooks, Subcommittee Chairman, declared: ". . . But it ought to be a strong court, *because it is going to have control of the whole system and is going to make recommendations to the Congress from time to time . . .*" And in submitting the House Report, he commented: "Article 67 contains the most revolutionary changes which have ever been incorporated in our military law . . . [This Article] establishes a civilian court, completely removed from all military influence or persuasion.

Mr. Larkin, General Counsel, Department of Defense, remarked: ". . . Under this, *the review for the legality of a case stops at the Court of Military Appeals. They are the final arbiters on the law, and neither the Secretary of the Department nor the President becomes a supreme court over them on the law.*" (Emphasis supplied.) Hearings Before Senate Armed Services Committee, *supra*, pp. 54, 55.

<sup>24</sup> After hearings before the House and Senate Armed Services Committees, the Senate Report spelled out clearly the legislative intent regarding the Court of Military Appeals:

"Article 67 of the Uniform Code provides for a court of military appeals, which is an entirely new concept in the field of military law. *This court, composed of three civilians, appointed by the President and confirmed by and with the advice and consent of the Senate, will be the supreme authority on the law and assure uniform interpretation of substantive and procedural law.*" Senate Report No. 486, 81st Congress, 1st Session, p. 6.

<sup>25</sup> In discussing rules of evidence, the committee members were even more explicit in their determination not to give the President *carte blanche*

With the foregoing in mind, let us examine some of the criticized decisions of the Court of Military Appeals. Parenthetically, it should be noted that Professor Fratcher's criticism of the decisions mentioned in his article proceeded from his original premise of "the Presidential (royal and plenary) prerogatives involved." Initially found detrimental to military justice was the holding that members of a court-martial should not—except the president of a special court in open session—have access to the Manual for Courts-Martial, *supra*, during a trial. The practice heretofore followed permitted the members of the court to browse through the Manual during the trial and closed sessions in an effort to locate support for their own ideas concerning the law. This practice detracted from the stature of the *law officer* of a general court-martial and the president of a special court-martial, both charged by the Code with pronouncing the law of the case. Certainly, no lawyer can

legitimately complain against a requirement, whether imposed by law, regulation or court decision, that any statement of the law by which the court-martial is bound should be made a matter of official record. An intelligent review of a conviction cannot be had by any other method. Returning to the *law officer*, it should be observed that Professor Fratcher complained that the Court "was misled by a superficial appearance of similarity into assuming that the *law officer* of a general court-martial corresponds to a common law judge. . . ." From this and other statements, one gathers a basic preference for the old days when the *law officer*, merely an advisory member of the court-martial, discussed the law in closed sessions with the members of the court. The same preference was urged on Congress when the Code was under consideration. Congress rejected the proposal out of hand and insisted that the *law officer* act "as an outright judge on questions of law and [that] his

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(Footnote 25—Continued)

(plenary) powers to regulate military justice, but rather to retain those powers in Congress.

"Mr. Elston . . . But what I am talking about is a rule made by the President, after we have enacted this code. Can you conceive of any case where he might by regulation change the rules of evidence as they generally apply in a criminal case?"

\* \* \* \* \*

"Mr. Elston . . . The President, of course, does not himself make rules of evidence. *What I think we want to get away from is somebody in the Secretary's office sitting down and writing the rules of evidence to govern trials of courts-martial cases.*"

The Committee resolved this difficulty by insisting that the rules of evidence generally recognized in Federal courts apply, plus the fact that in any event "the rules have to be reported to Congress." House Hearings, *supra*, pp. 1017-1063.

rulings . . . [be] final and binding."<sup>26</sup>

Another decision - criticized was *United States v. Drain*,<sup>27</sup> wherein the Court insisted on the right of an accused to have qualified counsel represent him at the taking of a deposition intended for use in a general court-martial. The taking of such depositions is an integral part of the general court-martial procedure. Congress directed (Article 27) that qualified counsel be appointed for the accused in every general court-martial, and, accordingly, "officer" as used in Article 49 should be interpreted in light of Article 27. The Manual detracted from this requirement<sup>28</sup> by proclaiming that qualified counsel was not required in the taking of depositions. The Court held this provision of the Manual invalid as being inconsistent with the Code.

The article reports concern in the Armed Forces over two Court decisions involving charges of desertion. Ordinarily, desertion is an unauthorized absence coupled with the intent to remain away permanently. Unit-

ed States v. Rushlow,<sup>29</sup> wherein the Court held invalid a statement in the Manual<sup>30</sup> to the effect that an intent to return to one's duty station based on the happening of an uncertain event in the future may be considered an intent to remain away permanently, was initially made the basis of adverse comment. It seems strange indeed that anyone should complain about invalidating such an erroneous principle of law, particularly when, as noted in the Court's opinion, "The government concedes the sentence does not state accurately the law on this subject. . . ."

The other decision on desertion, wherein the Court is accused of making a "drastic change" in the law of that offense, was *United States v. Cothorn*.<sup>31</sup> The "change" wrought there was the Court's disapproval of the Manual's provision<sup>32</sup> (MCM-51, Par 164a) that an unsatisfactorily explained and prolonged unauthorized absence *alone* is sufficient to prove the element of intent to remain away permanently. The important word here is "alone." The argument against this decision was

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<sup>26</sup> "The idea principally was to make the law officer more similar to a judge in a civilian court and to act as pure judicial officer . . ." House Hearings, supra, pp. 1153-1154. Cf. Miller, *Who Made The Law Officer A Federal Judge?* 4 Military Law Review 39 (Department of the Army Pamphlet 27-100-4, April 1959).

<sup>27</sup> 4 USCMA 646, 16 CMR 220.

<sup>28</sup> Manual for Courts-Martial, United States, 1951, paragraph 117a.

<sup>29</sup> 2 USCMA 641, 10 CMR 139.

<sup>30</sup> Manual for Courts-Martial, United States, 1951, paragraph 164a.

<sup>31</sup> 8 USCMA 158, 23 CMR 382.

<sup>32</sup> Paragraph 164a.

bolstered by citing Colonel Winthrop's declaration that the longer the unauthorized absence, the stronger the case for desertion.<sup>33</sup> No one disagrees with that proposition, least of all, the Court of Military Appeals.<sup>34</sup> Professor Fratcher, however, apparently overlooked Colonel Winthrop's comment, appearing in the same paragraph, to the same end as held in *United States v. Cothorn*:

"The mere fact of an unauthorized absence [i.e., absence "alone"] for a certain period is not, in our law, either conclusive or *prima facie* evidence of the requisite intent."<sup>35</sup>

It is also said that the Court acted unreasonably by refusing to allow the military to introduce into the trial policy directives which attempted to influence the nature and severity of sentences in certain type cases. This seems to overlook the fact that

imposition of sentence is exclusively the prerogative of the court-martial,<sup>36</sup> and the Congress has specifically so provided in all fifty-six punitive articles of the Code—excepting Article 106, which provides the mandatory death penalty for spies convicted during wartime.<sup>37</sup>

Professor Fratcher quarrels with the Court's holdings on self-incrimination as apparently conflicting with the President's prerogative or plenary power as implemented by the Manual.<sup>38</sup> He prefers the Manual's explanation that self-incrimination is limited to "communications" from an accused, who can, therefore, be ordered (i.e., forced) to prepare handwriting exemplars and other evidence to be used against him at his trial.<sup>39</sup> The compulsion to incriminate oneself is particularly compelling in the military, for if an accused refuses to comply, he can be charged with the willful violation of a lawful command of a superior

<sup>33</sup> Winthrop, *Military Law and Precedents*, 2d Ed., 1920 Reprint, p. 638.

<sup>34</sup> *United States v. Cothorn*, *supra*; *United States v. Krause*, 8 USCMA 746, 25 CMR 250.

<sup>35</sup> Winthrop, *supra*, p. 638.

<sup>36</sup> *Ex Parte Reed*, 100 US 13, 25 L ed 538 (1879); *United States v. Olson*, 11 USCMA 286, 29 CMR 102.

<sup>37</sup> *United States v. Fowle*, 7 USCMA 349, 22 CMR 139; *United States v. Estrada*, 7 USCMA 635, 23 CMR 99; *United States v. Holmes*, 7 USCMA 642, 23 CMR 107. It can also be argued that such directives violate at least the spirit of Article 37 of the Code, 10 USC §837, which provides in part that, "No person subject to this chapter may attempt to . . . influence the action of a court-martial . . . in reaching the findings or sentence in any case . . ."

<sup>38</sup> *United States v. Rosato*, 3 USCMA 143, 11 CMR 143; *United States v. Eggers*, 3 USCMA 191, 11 CMR 191; *United States v. Greer*, 3 USCMA 576, 13 CMR 132; *United States v. Gordon*, 7 USCMA 452, 22 CMR 242.

<sup>39</sup> *Manual for Courts-Martial, United States*, 1951, paragraph 284.

officer—punishable by death in time of war. All the Court has done by these decisions is to protect the Constitutional and statutory rights of the accused against self-incrimination by refusing to sanction an order that the accused incriminate himself. It is significant to note in this regard how broad the drafters of the Code intended Article 31 to be:

"Mr. Larkin . . . (section) (b) incidentally, covers a wider scope in that you can't force a man to incriminate himself beforehand—not just on the trial. . . . And this in addition, since it prohibits any person trying to *force* a person accused or one suspected, would make it a crime for any officer or any person who tries to *force* a person to do that. So not only do we retain the Constitutional protections against self-incrimination and this evidentiary protection against degrading yourself if it is material, but it goes further and provides that if anyone tries to *force you* to incriminate yourself then he has committed an offense. . . ." <sup>40</sup>

Finally to return to an old cliché, "the proof of the pudding is in the

eating." Military justice since enactment of the Code has been fashioned as Congress intended by the decisions of the Court of Military Appeals. With that preface, we approach the gravamen of Professor Fratcher's article that the Court's decisions have hampered justice, prevented proper punishment, taken away lawful authority, and:

"weakened the good order, morale or discipline of the armed forces."

This paper is not intended to convince anyone that the Uniform Code is perfect. Some amendments—such as increased authority of a commanding officer to administer non-judicial punishment—are probably needed and are now being considered by Congress. This sweeping indictment of the United States Court of Military Appeals as a "sapper of discipline" in the Armed Forces, however, is not warranted, and, of course, being merely a matter of opinion, is easy to make and difficult to disprove. The reader can only be asked to examine the source of the indictment and determine personally whether the detachment of the author entitles his opinion to greater weight than that of General

<sup>40</sup> Hearings Before House Armed Services Committee, *supra*, page 988. In addition, little consideration appears to have been given in the article to the fact that the Federal Constitution would, in any event, be controlling. Under Amendment V thereto, no person can be compelled to produce or authenticate any self-incriminatory evidence. *Davis v. United States*, 328 US 582, 66 S. Ct. 1256, 90 L ed 1453 (1946); *United States v. White*, 322 US 694, 64 S. Ct. 1248, 88 L ed 1542 (1946). In this connection, attention is invited to *United States v. Hiatt*, 141 F 2d 664 (CA 3d Cir) (1944), wherein Judge Maris pointed out, "An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces . . ." *United States v. Hiatt*, *supra*, at p. 666.

Lyman L. Lemnitzer, Army Chief of Staff, who, at the 1959 Worldwide Judge Advocates' Conference, made the following public statement:

"I believe that the Army and the American people can take pride in the positive strides that

have been made in the administration and application of military law under the Uniform Code of Military Justice. *The Army today has achieved the highest state of discipline and good order in its history.*"<sup>41</sup>

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<sup>41</sup> Speech delivered at The Judge Advocate General's School, United States Army, Charlottesville, Virginia, September 28, 1959.



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## In Memoriam

The members of the Judge Advocates Association profoundly regret the passing of Colonel George N. Guttman of Minneapolis, Minnesota and extend to his surviving family, relatives and friends, deepest sympathy.

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# KIDNAPPING - THE CRIME AND ITS PUNISHMENT IN MILITARY LAW

Major Irvin M. Kent, JAGC-USA \*

On a Sunday afternoon, eight-years old Mary Doakes was playing on the lawn of her home with several youngsters from the neighborhood, a few of whom were in their early teens. A man passed in a car, saw the children and waved to them. They waved back. He turned his car around and drove back to them, and several of them came to the car. He chatted amicably with them, and opened the right front door of his automobile. Little Mary climbed half onto the seat to talk to the nice man, who asked her to go for a ride with him. Her older playmates told her not to go. Mary was undecided. Suddenly, the man grasped her by the arm, pulled her into the car against the force of one of the older children who was trying to pull Mary out, slammed the door shut and left the scene at high speed with Mary.

They rode for about twenty minutes on the outskirts of town, during which time the man made some indecent advances toward the child. He had been drinking a bit, but was not drunk. While riding around, they were seen by some people who knew him. A few minutes later, he brought Mary close to her home, let her out of the car, and drove off again at high speed. Mary's parents, who had been alerted by the

other children, saw him and noted the license number of his car.

After being released from the car, Mary ran to her mother and tearfully related what the man had done to her. Her parents reported this to the Military Police who had come to the scene. They immediately took the child to the station hospital where the Medical Officer of the Day examined Mary and found her in a nervous, distraught state, but with no physical injury.

The CID Agent on duty called the hospital and instructed the patrol to bring Mary and her mother to the office of the Provost Marshall. Mary, when questioned by the Doctor, vaguely repeated part of what she had told her mother and told the same story to the CID agent, who, upon the advice of the Medical Officer of the Day, limited his questioning to just a few minutes.

The following day, the CID agent in charge was unable to get Mary to tell her story again. She now remembered only having gone for a ride with a stranger, but remembered nothing of what took place during the time they were gone.

Let us assume that this incident occurred in a foreign country, or in a state of the United States that has an anti-kidnapping statute limited to those offenses involving intent to hold for ransom, similar to

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that of the District of Columbia Code.<sup>1</sup> No state or national boundaries were crossed during this incident.

Mary was the daughter of Sergeant and Mrs. John Doakes. The man was later identified as Private Tank. Both the Sergeant and Private Tank were members of units under the command of the same General Officer, who called in his Staff Judge Advocate for advice on the disposition of the case. The General did not wish to turn the matter over to the civil authorities, and after hearing that those authorities could probably not prosecute Private Tank for kidnapping under their statute, the General ordered that the case be disposed of under Military Law. As he said, "This is kidnapping." And by a layman's definition, he was right.<sup>2</sup>

Legally, kidnapping has been defined as: "At common law the forcible abduction or stealing away of a man, woman or child from his own country and sending him into another. \* \* \* In American law,

this word is most often applied to abduction of children, and the intent to send the kidnapped person out of the country does not constitute a necessary part of the offense. The term includes false imprisonment plus the removal of the person to some other place."<sup>3</sup> But surprising as it may appear at first blush, the offense of kidnapping is nowhere specifically denounced in the punitive articles of the Uniform Code of Military Justice.<sup>4</sup> Even more surprising, this offense is not listed in the Table of Maximum Punishments<sup>5</sup> under the provisions of the general article—Article 134 of that Code.<sup>6</sup> This, despite the fact that the Table sets forth punishment for some sixty-seven offenses of varying degrees of gravity.<sup>7</sup>

The General was dissatisfied and wanted to know why Private Tank could not be charged, at least, with committing an indecent act upon a child, which carries a maximum punishment of Dishonorable Discharge, Total forfeitures and confinement for seven years.<sup>8</sup> He was more than

<sup>1</sup> 22 D. C. Code 2101.

<sup>2</sup> "Kidnap \* \* \* to steal, carry away, or abduct and restrain forcibly (a human being, especially a child)" The Winston Dictionary, John C. Winston Co., Philadelphia, 1954, p. 538.

<sup>3</sup> Black's Law Dictionary, 3d ed., West Publishing Co., St. Paul, Minn., 1933, pp. 1055-1056.

<sup>4</sup> 10 USC 877-934.

<sup>5</sup> MCM, 1951, par. 127 c, pp. 224-227.

<sup>6</sup> 10 USC 934.

<sup>7</sup> Aycock and Wurfel, Military Law Under the Uniform Code of Military Justice, 80, (1955).

<sup>8</sup> Manual, supra, Form specification 146, app. 6 c, p. 491; par. 127 c, p. 226.

a bit shocked when informed that Mary's statements to her mother, the Doctor, and the CID agent, were not admissible as proof of the truth of the occurrence of the indecent acts, and were of doubtful value even to corroborate a confession if Private Tank should make one.<sup>9</sup>

The General then wanted to know, albeit that he considered the maximum punishment of two years confinement and the usual accessories<sup>10</sup> seriously insufficient for the facts of this case, why we cannot charge Tank with an assault consummated by a battery upon the child under the age of sixteen.<sup>11</sup> We have witnesses who have seen this and there is no question about it! The General was again shocked to learn that notwithstanding the fact that the form specification makes no mention of bodily harm, the law officer will have to instruct the court-martial that they may not convict of this offense unless they find that

the accused did bodily harm to little Mary.<sup>12</sup>

After some mutterings about lawyers in general and those who write handbooks for the Department of the Army in particular, the General started thumbing through Appendix 2 of his Manual and pointed to Article 97 on page 443.<sup>13</sup> "Judge," he said, "you've just told me that kidnapping is legally defined as false imprisonment plus the removal of the victim to some other place. We have those facts, why not use Article 97, even though the maximum punishment is only three years confinement and the usual punitive discharge and loss of pay and allowances?"<sup>14</sup> "It seems to me that in the old army, false imprisonment was considered a lesser included offense of kidnapping." The General was, of course, right on the last point, as that was the law under the old Articles of War.<sup>15</sup> But the old Articles of War had no specific coverage of false imprisonment.<sup>16</sup>

<sup>9</sup> United States v. Mounts, 1 USCMA 114, 2 CMR 274 (1952); United States v. Anderson, 10 USCMA 200, 27 CMR 274 (1959).

<sup>10</sup> Manual, supra, par. 127 c, p. 225.

<sup>11</sup> Manual, supra, Form specification 125, app. 6 c, p. 489.

<sup>12</sup> DA Pamphlet No. 27-9, Military Justice Handbook, The Law Officer, Form Instruction No. 125, p. 110.

<sup>13</sup> 10 USC 897.

<sup>14</sup> Manual, supra, par. 127 c, p. 221, app. 6 c, Form specification 40, p. 447.

<sup>15</sup> CM 328876, Mullarkey, 77 BR 247, 253 (1948).

<sup>16</sup> The first appearance of this crime in either the military statutory law or in a Manual was in the Manual for Courts-Martial, United States Army, 1949, par. 117 c, p. 139, The Table of Maximum Punishments, which listed this crime under the 96th Article of War and provided a maximum punishment of dishonorable discharge, total forfeitures, and confinement at hard

Article 97 is new and the words it uses: "Arrests, apprehends or confines" are words of art in the Code and are defined in Articles 7 and 9.<sup>17</sup> As thus defined, these words have no application to kidnapping and were intended to apply only to a misuse of the police powers given to officers, non-commissioned officers, military policemen and those in a like status under the Code.<sup>18</sup>

The type of false imprisonment denounced by Article 97 just does not apply here and is not even a closely related offense. Under some factual situations, Article 97 type false imprisonment could, of course, be a lesser included offense of kidnapping, but not under these facts, where there was no arrest, apprehension or confinement as those words are defined by the Code.

The Staff Judge Advocate told the General that certainly there was at least an ordinary assault and battery or a simple disorder provable here, but both agreed that neither of these was a serious enough allegation to fit the crime which had been committed. The General then

said, "Judge, think this one over very carefully, research the question, and come up with a legally sustainable specification alleging this offense in its most serious possible aspect."

This conversation, as might be expected, took place on the Friday afternoon following the incident. On Monday morning, after a pleasant weekend spent on the green fairways and rippling brooks of the Judge Advocate section library by the Staff Judge Advocate and most of his assistants, this Charge and Specification was submitted to the General:

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Private Joseph Tank, Army Service Unit, Camp Dust, did, on or about 12 July 1959, at or near Shady Avenue, Dustville, wrongfully and unlawfully without the consent of her parents, seize Mary Doakes, a female child, eight years of age, who was not his offspring, by grasping her on the arm, pulling her into his automobile, and transporting her from the vicinity

(Footnote 16—Continued)

labor for five years. However, this offense was mentioned nowhere else in that Manual, not even a form specification being provided therefor, which makes it difficult to determine the exact elements of the offense. This provision was used only in one reported case and from that case it is apparent that the elements were the same as those pronounced by the Board of Review in the *Mullarky* case, *supra*. ACM S-502, Griffiths, 3 CMR (AF) 235, 240 (1950).

<sup>17</sup> 10 USC 807, 809.

<sup>18</sup> "Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-First Congress, First Session on H. R. 2498" and at pages 1224, 1228 and "Hearings Before a Subcommittee on Armed Services, United States Senate, Eighty-First Congress, First Session on S. 857 and H. R. 4080" at pages 274 and 275; but *c.f.* CM 402628, *Hardy*, 28 CMR — (1959).

of Shady Avenue, Dustville, to the vicinity of Oak Grove, Dustville, a distance of about two miles, and did thereafter return the said Mary Doakes to the vicinity of Shady Avenue, Dustville, and did there release her unharmed.<sup>19</sup>

At the same time the Staff Judge Advocate advised the General that the maximum possible punishment for this offense would be life imprisonment, dishonorable discharge and total forfeitures.

The results of the combined research effort (less those principles of law set forth above) when reduced to a memorandum for the record to support the advice of the Staff Judge Advocate read as follows:

"The omission of the offense of "kidnapping" from the crimes spe-

cifically denounced by the Code and the Manual does not exempt this offense from the jurisdiction of military tribunals, for the Manual specifically provides for the punishment of offenses other than those listed<sup>20</sup> and Article 134, *supra*, itself starts out with the words "Though not specifically mentioned in this code \* \* \*". Article 134, the general article, covers practically all of the offenses cognizable under either military or civilian law,<sup>21</sup> which have not been specifically preempted by other articles of the code.<sup>22</sup>

"Using the term kidnap in its ordinary and modern sense, we find that crimes either described as "kidnapping" or having the same elements, have been tried by military tribunals under the current general

<sup>19</sup> The specification as written above is intended to avoid possible motions to make more definite and certain. In the opinion of this writer, it would be legally sufficient to merely say "unlawfully seize Mary Doakes, a female child, eight years of age, and transport her, etc." The word "unlawfully" connotes the fact that this act was done without the consent of the parents or anyone legally entitled to give such consent, and that Mary Doakes was not the offspring of the accused. *United States v. Gohagen*, 2 USCMA 175, 7 CMR 51 (1953); see also: *CM 389610, Morris*, 21 CMR 477, 479 (1956); 51 CJS, Kidnapping, secs. 1 b (2), p. 443, 1 b (6), pp. 436, 437, 5 a, p. 442 (1947). A child of tender years is incapable of giving legal consent to such an act: *Chatwin v. United States*, 326 U. S. 455, 90 L. Ed. 198 (1946); 1 Wharton, *Criminal Law*, sec. 778, p. 1062, 12th ed. (1932). The word "seize" means "\* \* \* to take hold of forcibly or suddenly; grasp; snatch; \* \* \*" *Winston Dictionary, supra*, p. 891. Therefore, these two words "unlawfully" and "seize" actually fully describe the offense as a matter of law.

<sup>20</sup> *United States v. Holt*, 7 USCMA 616, 23 CMR 80, 85 (1957); *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953); *Manual, supra*, par. 127 c, p. 214.

<sup>21</sup> *United States v. Frantz*, 2 USCMA 161, 7 CMR 37 (1953); *Aycock and Wurfel, supra*, pp. 71-78.

<sup>22</sup> See e. g. *United States v. Norris*, 2 USCMA 236, 8 CMR 36 (1953); but cf. *United States v. Holt, supra*.

article and its predecessors under the Articles of War.<sup>23</sup>

"While many of these attempted prosecutions failed in whole or in part because of technical errors in pleading or confusion with the old common law crime, they have firmly established that the offense of wrongfully taking a person by force and holding and/or transporting him against his will is prejudicial to good order and discipline and conduct of a service discrediting nature in violation of the general article,<sup>24</sup> and this view has been adopted by at least one of the better known contemporary analysts of military law.<sup>25</sup>

"Had this offense been done for the purpose of obtaining ransom or reward, it could have been easily alleged under Article 134 in the language of the District of Columbia Code, *supra*.<sup>26</sup> If a state line or international border had been crossed,

all of the elements of the old common law offense would have been present and in most cases a violation of the United States Code would also have occurred<sup>27</sup> and these offenses could have been also alleged under the third clause of the general article as well.<sup>28</sup>

"The only real problem which might be encountered here arises from the fact that the federal anti-kidnapping law has a provision for the death penalty if the victim is not released unharmed.<sup>29</sup> Article 134 is limited to "crimes and offenses not capital," and an allegation thereunder which could theoretically call for the death penalty cannot be sustained.<sup>30</sup> This problem can be avoided by not alleging harm to the victim, since in military law "A sentence is limited by the facts alleged in the specification \* \* \* \*:"<sup>31</sup>

An analysis of the specification submitted to the commanding gen-

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<sup>23</sup> E. g. CM 324802, O'Brien, 73 BR 367, 370 (1947); Mullarkey, *supra*; CM 328884, Hale, et al., 77 BR 269, 280 (1948); CM POA 068, IV Bull JAG 134, 135 (1944); Morris, *supra*; Griffiths, *supra*; and cases cited therein.

<sup>24</sup> Hale, et al., *supra*.

<sup>25</sup> Philos, Handbook of Court-Martial Law, Revised Edition, (1951), p. 541.

<sup>26</sup> Cf. Morris, *supra*.

<sup>27</sup> 18 USC 1201; Morris, *supra*; O'Brien, *supra*.

<sup>28</sup> Manual, *supra*, par. 213 c, pp. 383, 384; United States v. Long, et al., 2 USCMA 60, 6 CMR 60 (1953); Aycock and Wurfel, *supra*, p. 72.

<sup>29</sup> 18 USC 1201: see: Smith v. United States, 238 F. 2d 925 (1956); Robinson v. United States, 144 F. 2d 392 (1944), cert. den. 323 U. S. 789.

<sup>30</sup> United States v. French, 10 USCMA 171, 27 CMR 245 (1959).

<sup>31</sup> United States v. Grossman, 2 USCMA 406, 9 CMR 36, p. 41 (1953); cf. Smith v. United States, 360 U.S. 1, 3 L.ed. 2nd 1041 (1959).

eral in this case (or of the shorter specification as given in the footnote thereto) shows that in addition to the unlawful seizure of the victim without consent,<sup>32</sup> the transportation of the victim for some distance,<sup>33</sup> and the holding of the victim for some time.<sup>34</sup> Thus, we have all of the elements of the crime of kidnapping as it is understood generally in our law today, an aggravated false imprisonment,<sup>35</sup> or the combination of the elements of "assault"<sup>36</sup> and false imprisonment.

It will be noted that there is not included here in the elements of this offense any allegation of purpose or intent despite the rule that an indictment for this crime must allege all the material elements of the offense.<sup>37</sup> The reason is simple—the crime described above is not a spe-

cific intent offense, only the general criminal intent is involved. Even if one follows the format of 18 USC 1201 the words therein "for ransom, reward or otherwise" have been very broadly interpreted. There need be no pecuniary object on the part of the accused. Any thing or any reason sufficient to induce him to commit the offense is sufficient.<sup>38</sup> The doctrine of *eiusdem generis* is not applicable to the words "reward or ransom."<sup>39</sup> The intent of the accused is immaterial save that it may be a matter in aggravation,<sup>40</sup> and intent is not applicable to this offense unless specifically made so by statute in which case it does become a material element of the crime.<sup>41</sup> Thus, since the statutory crime is not involved here, neither is specific intent.

<sup>32</sup> Footnote 19, *supra*.

<sup>33</sup> The distance is not material. 51 CJS, Kidnapping, sec. 1 b (8), pp. 437, 438. Indeed, the mere false imprisonment of the victim at any spot or unlawful restraint of his freedom is sufficient for this element of the offense. *Mullarkey*, *supra*, p. 253; 1 Wharton, *supra*, sec. 779, p. 1063.

<sup>34</sup> The length of time of such detention is immaterial. 51 CJS, Kidnapping, *supra*, sec. 1 b (9), pp. 438, 439.

<sup>35</sup> 1 Wharton, Criminal Law, *supra*, sec. 773, p. 1056, sec. 779, p. 1063.

<sup>36</sup> Actually, inveiglement of fraud equals force for this purpose. *United States v. Ancarola*, 1 Fed. 676 (1880); *In re Kelly*, 46 Fed. 653 (1890); 51 CJS, Kidnapping, sec. 1, pp. 435, 443, (1947).

<sup>37</sup> 51 CJS, Kidnapping, *supra*, sec. 1 b (5), p. 441; Manual, *supra*, par. 28 a (3), p. 31.

<sup>38</sup> *Gooch v. United States*, 297 U. S. 124, 80 L. ed. 522, 56 S.Ct. 395 (1935); *United States v. Parker*, 103 F. 2d 857, 860, 861 (1939), cert. den. 307 U. S. 642; *United States v. McGrady*, 191 F. 2d 829 (1952); *Hess v. United States*, 254 F. 2d 578 (1958).

<sup>39</sup> *Gooch v. United States*, *supra*.

<sup>40</sup> 51 CJS, Kidnapping, *supra*, sec. 1b (3), p. 433.

<sup>41</sup> 1 Wharton, Criminal Law, *supra*, sec. 781, P. 1067.

Is such a "kidnapping" as the facts show here an offense in Military Law today? The cases of *Hale et al. supra*, and *O'Brien, supra*, are sufficient for an affirmative answer (provided we avoid the use of the word "kidnap" itself, which the Boards of Review have persisted in limiting to its common law meaning), unless the interpretation of Article 134 of the Code by the Court of Military Appeals negates these prior interpretations of Article of War 96, which was its predecessor as the general article.<sup>42</sup>

We are met at the outset by two seemingly inconsistent declarations of the United States Court of Military Appeals. In a case where the offense of wrongful taking was alleged (without a specific intent to deprive either permanently or temporarily the owner of his property) under Article 134, *supra*, the Court in striking down this alleged offense said: "We cannot grant to the services *unlimited* authority to eliminate vital elements from common law crimes and offense expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134."<sup>43</sup>

This would seem to negatively dispose of the matter except for the very next two sentences of the same opinion on the same page which appear to limit the doctrine thus announced to those situations where a

specific article of the Code covers the field, for the Court then said:

"We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law. We are not disposed to add a third conversion offense to those specifically defined."<sup>44</sup>

In addition to the last *caveat* it is worthy of note that in reaching this decision in the *Norris* case, the Court did not find it necessary to distinguish or even mention its earlier decision in *Long et al., supra*. The analysis of the three clauses of Article 134 (Disorders and neglects, conduct prejudicial, and crimes not capital) of the Court is vital here:

"We are of the opinion that crimes and offenses not capital, as defined by Federal Statutes, may be properly tried as offenses under clause 3 of Article 134, but that if the facts do not prove every element of the crime set out in the criminal statutes, yet meet the requirements of clause (1) or (2), they may be alleged, prosecuted and established under one of those. Clearly, if the acts and conduct complained of are disorders to the prejudice of good order and discipline in the armed forces, the fact that they do not establish a

<sup>42</sup> House Hearings, *supra*, p. 1235.

<sup>43</sup> United States v. Norris, *supra*, 8 CMR 39. (Emphasis supplied.)

<sup>44</sup> *Idem*.

civilian offense does not prevent prosecution by the military."<sup>45</sup>

This view (that the doctrine of the Norris case is limited to those situations where the type of offense alleged under Article 134 is covered by other specific articles of the Code) is reinforced by an examination of the handful of other cases in which the Court of Military Appeals has reached a result similar to the Norris case.<sup>46</sup>

Thus, a thorough examination of the specific punitive articles must be made to assure that this field is not so preempted. The only possibility which asserts itself is that of Article 97 (discussed above in the colloquy between the General and the Staff Judge Advocate.) But false imprisonment as compared to kidnapping is the exact reverse of the Norris situation, since we are concerned here with a crime under the general article which is more, rather than less, serious than that specifically denounced. A much closer analogy may properly be drawn from the many types of assaults which are denounced under Article 134,<sup>47</sup> all

of which have as lesser included offenses simple assault and battery<sup>48</sup> under Article 128 of the Code,<sup>49</sup> notwithstanding the fact that Article 128 itself also denounces certain types of aggravated assaults.<sup>50</sup>

Having thus determined that non-statutory (and non-common law) kidnapping is an offense cognizable under the first two clauses of Article 134, there remains the question of the maximum punishment which may be imposed. Kidnapping is not lesser included within any offense listed in the Table of Maximum Punishment and is not closely related to any (it being a greater offense than false imprisonment.) In such situations the Manual says that such offense remains punishable by the United States Code or the Code of the District of Columbia, whichever prescribes the lesser punishment, or as authorized by the custom of the service.<sup>51</sup> If we have the kidnapping offense as denounced by either the U. S. Code (which has all the elements of old common law kidnapping) or the D. C. Code, there is obviously no problem and life imprisonment is the maximum penalty

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<sup>45</sup> United States v. Long, et al., supra, 6 CMR 65; see also United States v. Alexander, supra.

<sup>46</sup> E. g. United States v. Deller, 3 USCMA 409, 12 CMR 165 (1953); United States v. Johnson, 3 USCMA 174, 11 CMR 174 (1953); United States v. Hallett, 4 USCMA 378, 15 CMR 378 (1954); see also Aycocock and Wurfel, supra, p. 313 for a discussion of this point.

<sup>47</sup> Manual, supra, par. 213 d, pp. 384-386.

<sup>48</sup> Manual, supra, app. 12, p. 540.

<sup>49</sup> 10 USC 928.

<sup>50</sup> Manual, supra, par. 128 b, pp. 371-373.

<sup>51</sup> MCM, 1951, supra, par. 127 c, p. 214.

under the Manual provision cited above without further ado. The fact that the old common law offense is equal to the U. S. Code offense knocks out of consideration the "general article" of the D. C. Code<sup>52</sup> which provides a maximum penalty of five years imprisonment for anyone convicted of any criminal offense *not* otherwise covered by the D. C. or U. S. Codes. Boards of Review have in some instances looked to that provision,<sup>53</sup> but it is not of help here.

There is, of course, a maximum punishment provided in military law for a simple disorder—four months confinement and forfeiture of two-thirds pay per month for a like period and reduction to the lowest enlisted grade.<sup>54</sup> But it would be absurd to equate this crime to a simple disorder when it can have in some factual situations (e. g., if Private Tank had been a military policeman on duty and had purported to "arrest" Mary Doakes for playing in the street) a lesser included offense calling for imprisonment for three years. The Court of Military Appeals has held that where a crime alleged is much more serious than

a minor offense listed in the Table of Maximum Punishments,<sup>55</sup> the limitation in that table will not apply even though there might be a superficial similarity between the offenses, and the Court reached this decision quite frankly upon grounds of public policy.<sup>56</sup>

Having eliminated the other possibilities, reference must be had to the statute itself and to the customs of the service. Article 134 of the Code provides that offenses thereunder shall be punished at the discretion of and within the limitations of the court-martial (general, special, or summary) and therefore, a General Court-Martial, in the absence of a curtailment of its power by the Table of Maximum Punishments, is limited only by the fact that it cannot impose the death penalty.<sup>57</sup> "If neither Code prescribes a punishment, the court-martial must be guided by the customs of the service."<sup>58</sup>

There are two customs of the service in this field. The first is to look to the U. S. or D. C. Codes for a closely related offense even though that offense is not applicable because of territorial limitations<sup>59</sup> or for reasons of jurisdiction, and we can

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<sup>52</sup> 22 D. C. Code 107.

<sup>53</sup> See e. g. CM 319095, Fischer, 69 BR 1, 6 (1947); Philos, *supra*, p. 227.

<sup>54</sup> Manual, *supra*, par. 127 c, p. 225.

<sup>55</sup> United States v. Alexander, *supra*; Manual, *supra*, par. 127 c.

<sup>56</sup> United States v. Yunque-Burgos, 3 USCMA 498, 13 CMR 54 (1953).

<sup>57</sup> Art. 18, 56 UCMJ, 856; Aycock and Wurfel, *supra*, pp. 79, 80.

<sup>58</sup> Aycock and Wurfel, *supra*, p. 229; see also, Philos, *supra*, p. 227.

<sup>59</sup> MCM, 1951, *supra*, par. 213, c (2), pp. 383, 384.

then apply a penalty within the maximum provided by such Code.<sup>60</sup>

The other custom of the service is simply that where no maximum is otherwise to be found, the punishment is as a court may direct (i. e. maximum of life imprisonment).<sup>61</sup> This was the only limitation announced by the Judge Advocate General of the Army in a case where an accused forced an officer of an allied army to walk down the road at gunpoint a distance of about fifty yards—which allegation contains all of the elements of non-statutory kidnapping as described above.<sup>62</sup> In a case of an assault upon an officer of the United States Naval Reserve, alleged under the general article of the Articles of War, which offense was not covered by any specific article nor closely related thereto, it was held that the maximum punishment was at “the discretion of the court-martial.”<sup>63</sup> This same rule was also applied to a case of “unlawful assembly” which was found to be a

violation of the general article but not encompassed within any crime specifically denounced by the Manual for Courts-Martial, the United States or District of Columbia Codes.<sup>64</sup>

Regardless then, of the type of kidnapping involved, or the source to which we look, the maximum punishment for this offense, (be it common law, statutory (of the U. S. Code, of the D. C. Code), or of the type punishable under the first two clauses of Article 134, as here), is life imprisonment, with its military accessories of punitive discharge, reduction to the lowest enlisted grade, and total forfeitures.

The object of all law against kidnapping is to secure the personal liberty of the citizen from unlawful acts,<sup>65</sup> and in the military we have available the means to deter by conviction and adequate punishment those who would be tempted unlawfully to infringe upon that personal liberty of another.

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<sup>60</sup> CM 211420, McDonald, 10 BR 61, 63, 64 (1939), cited with approval in *United States v. Long, et al.*, supra, 6 CMR 66; Tillotson, *The Articles of War*, Annotated, 2d ed., p. 96 (1943); Philos, supra 1953 supp., p. 217.

<sup>61</sup> ACM 9602, Rubenstein, 19 CMR 709, 796 (1955); ACM 11584, Adams, 21 CMR 733, 744 (1956). Tillotson, *The Articles of War*, Annotated, 5th ed., pp. 139-140 (1949); Aycock and Wurfel, supra, pp. 79, 80.

<sup>62</sup> CM POA 068, supra.

<sup>63</sup> CM 277017, IV Bull JAG 181 (1945).

<sup>64</sup> CM ETO 2566, *Turner, et al.*, 2 Dig. Ops. ETO 713 (1944).

<sup>65</sup> *State v. Brown*, 181 Kans. 375, 312 P. 2d 832 (1957).

## THE NEW TJAG OF THE AIR FORCE

Major General Albert M. Kuhfeld was born at Hillyard, Washington, 25 January 1905. He was graduated from Central High School in St. Paul, Minnesota, and thereafter from the University of Minnesota with a Bachelor of Laws degree in 1926. He was appointed a Second Lieutenant in the Infantry Reserve in the same year. After receiving his law degree, General Kuhfeld worked as a law editor on a reissue of Girard's "New York Real Property Law," and during that time was admitted to the bar in the State of Minnesota. After practicing law in St. Paul, Minnesota, for six months, he went to North Dakota, where he was admitted to the bar in 1927. The following three years he practiced law in North Dakota and did appellate work in the North Dakota Supreme Court.

In 1930 he was elected State's Attorney, Golden Valley County, North Dakota, in which office he served for two terms. He became an Assistant Attorney General for the State of North Dakota in 1934 and served in that capacity under three Attorneys General. In 1939 the Legislative Assembly of the State of North Dakota passed a Code Revision Bill providing for the complete revision of the North Dakota Code by a commission consisting of three lawyers from the state, selected by the North Dakota Supreme Court. General Kuhfeld was selected as Chairman of the Code Commission and given a leave of absence from the Attorney General's Office. He

was engaged in this work until he entered active military service in March 1942.

General Kuhfeld's military assignments have included: The Army Judge Advocate General's School, Ann Arbor, Michigan; Claims Division, Headquarters USAF; Judge Advocate, Fifth Air Force; Staff Judge Advocate, Ninth Air Force; Chairman, Board of Review and Member of the Judicial Council, Headquarters USAF. He was appointed as The Assistant Judge Advocate General, United States Air Force, 20 February 1953 and served in that capacity until he succeeded Major General Reginald C. Harmon as The Judge Advocate General, United States Air Force on 1 April 1960.

General Kuhfeld was integrated into the Regular Army as a Judge Advocate in August 1946. In August 1947, he was transferred to the Army Air Corps which, shortly thereafter, became the United States Air Force. He has received many military awards and decorations including the Legion of Merit with Oak Leaf Cluster; the Bronze Star; the Philippine Liberation Ribbon; the Army of Occupation Medal (Japan); and the Asiatic Pacific Theater Campaign Medal with 5 battle stars.

The new Judge Advocate General is an ardent sports enthusiast and an active member of professional, social and civic organizations. He and his wife Olive Peterson Kuhfeld reside in Arlington, Virginia.



Major General Albert M. Kuhfeld



Major General Moody R. Tidwell, Jr.

## THE NEW ASSISTANT JAG OF THE AIR FORCE

Major General Moody R. Tidwell, Jr., The Assistant Judge Advocate General of the Air Force, was born 9 April 1903 at Miami, Oklahoma. He was educated in the public schools of Miami; Western Military Academy, Alton, Illinois; and the University of Oklahoma from which he was graduated with a Bachelor of Laws degree in 1923. In 1924 he was commissioned a Second Lieutenant in the United States Army Finance Department and remained an active member of the Officers Reserve Corps until his integration as a Judge Advocate in the Regular Air Force in 1948.

After his graduation from law school General Tidwell was associated in the banking business with his father in Miami, Oklahoma until 1928 when he opened an office there to engage in the general practice of law. He practiced law in Oklahoma until October 1940 when he was called into active military service. During this period he was well known and prominent in civic affairs throughout Oklahoma. He occupied the office of State President of the Oklahoma Junior Chamber of Commerce, and participated extensively in many varied activities.

General Tidwell's active duty assignments have included the following: Chief of the Claims Division,

Office of the Chief of Finance, Washington, D. C., 1940-1943; Office of the Under Secretary of War as a member of the Board of Contract Appeals, Washington, D. C., 1943-1948; and Staff Judge Advocate, Far East Air Forces, Tokyo, Japan, 1949-1952. In 1952 he was assigned as Staff Judge Advocate, Air Materiel Command, Wright-Patterson Air Force Base, where he participated in a program designed to simplify the Air Force's materiel system for the world's largest procurement organization. This program resulted in improved materiel support for the using commands, within the space-age concept of flexibility and mobility. He assumed his present office as The Assistant Judge Advocate General on 1 May 1960.

Among General Tidwell's military decorations are the Legion of Merit with Oak Leaf Cluster, the Bronze Star, and the Commendation Ribbon. He is a member of the bar of the District of Columbia, State of Oklahoma, and the Supreme Court, belongs to the American Bar Association, and is one of the Board of Directors for the Judge Advocates Association. General Tidwell resides with his wife Dorothy Thompson Tidwell at 4224 Columbia Pike, Arlington, Virginia. Their son is presently attending Ohio Wesleyan University.

## BOOK REVIEW

**A TREATISE ON THE LAW OF CONTRACTS.** By Samuel Williston, Third Edition by Walter H. E. Jaeger. Vols. 1 and 2. Mount Kosco, N.Y. Baker, Voorhis and Co. 1959. pp. xxii, 826; pp. xv, 1095. \$20 each.

Actively practising lawyers will welcome this new edition of Williston on Contracts to their libraries, not merely for the up-to-date treatment of what is usually regarded as pertaining to contract law, namely, the essential elements, offer and acceptance, consideration, the seal, and the capacity of parties, but because this massive treatise deals with all other areas of contractual relations, such as: bailments, sales, insurance, negotiable instruments, suretyship and guaranty, and transportation.

Perhaps the most significant feature in the third edition is the emphasis placed on the statutory modifications introduced into the law of contracts by the various state legislatures. This is the only treatise on the law of contracts which presents these developments in tabulated form. Thus, for example, there is an excellent table on seals, and another dealing with the contractual capacity of married women; each state is listed, the status is given followed by the appropriate code or statutory citation. Other tables deal with statutes authorizing executors or administrators to continue a decedent's business. and with Veterans' Guardianship statutes.

Volume 1 is completed in eight chapters covering the fundamental concepts of the law of contracts. Here we find various definitions of the contract and discussion of the essential elements of contracts, offer and acceptance, consideration, estoppel and instruments under seal.

Volume 2, containing six chapters, begins with a discussion of the contractual capacity of infants, insane persons, married women, corporations, spendthrifts, aged persons and Indians.

Not only has the author brought the treatise down to date, he has simplified the style, he has charted trends, and he has included a number of entirely new sections. Among these new sections should be mentioned the sections on options, acceptance by telephone or teletype, carriage of goods by land, sea and air, silent acceptance and family relationship, and silence as assent—all to be found in chapters four and five. The greatest change comes in chapter six which deals with consideration. The revision here is so comprehensive that it is virtually a new chapter. While the classic cases have been retained, some of the historical material has been relegated to footnotes as in section 103

"Definition of Consideration in Bilateral Contracts" where eight subsections have been condensed into one. The new section contains a very practical discussion of consideration in bilateral contracts and contains a number of excellent quotations from the leading cases, such as *Miami Coca-Cola Bottling Company v. Orange Crush Company* and *Otis F. Wood v. Lucy, Lady Duff-Gordon*. Also, a much more detailed discussion of "requirement and output contracts" in keeping with modern conditions is presented. Likewise, promises of payment or the actual payment of an existing and matured debt as not being consideration are given detailed treatment. New sections include "Mutuality of Obligation," "Bonus, Pension and Other Benefits," "Is Defendant Liable if Consideration Beneficial?" "Lack of and Failure of Consideration Distinguished," "Undertakings to Create Benefits by Will," and "Forbearance."

In chapters seven and eight, which conclude the first volume, the author deals with promises without mutual assent or consideration, and with the formation of formal contracts, respectively. Here, significant new sections include one dealing with promissory estoppel, another with stipulations, and two others discuss various types of bonds, such as bail, governmental and private.

In volume 2, as has been noted, the first three chapters are devoted to an examination of the capacity of the parties to a contract. These have been thoroughly renovated; and, here again, many sections have

been added as, for example, the expansion of the treatment of the status of Indians, and the extensive discussion of contracts between husband and wife, including partnership and agency, the making of joint or mutual wills, and, separation agreements. There is also an excellent section, entirely new, entitled "Antenuptial Contracts."

The greatest change occurs in chapters 12 and 13, "Contracts of Agents and Fiduciaries," and "Joint Duties and Rights Under Contract". Chapter 12 has grown from 135 pages in the previous edition to a formidable 362 pages! It bids fair to vie with Mechem's Outline of Agency. Obviously, with an increase of 227 pages, Jaeger had ample opportunity for the expanded discussion of the new sections on apparent authority, ostensible authority and estoppel. These sections alone account for fifty pages.

Chapter 13 has undergone a most radical revision. Many sections have been combined, others have been deleted, and some added. This makes for greater simplicity and, in turn, for greater usefulness to the practitioner. In spite of deletions and consolidations, this chapter has increased from 101 to 252 pages. This increase is the result of the addition of no less than ten new sections, most of them devoted to the analysis of joint venture agreements. In some 105 pages, Jaeger demonstrates that the joint venture has, in the space of some 65 years, achieved a legal niche of its own. Favored over the partnership for certain large scale operations, such as oil and gas ex-

ploitation, the discovery and development of uranium and other fissionable materials, the construction of highways, toll roads, tunnels and dams, as well as the building of subdivisions and shopping centers, the joint venture has developed a very substantial body of case law. As Jaeger points out, most jurisdictions refuse to permit a corporation to join a partnership; they may join in a joint venture. There is also a new section entitled "Table of Statutory Changes in Joint Obligations."

The final chapter of the second volume deals with contracts for the benefit of third parties. Here, too, there has been a substantial increase in size and value. Outstanding is the discussion of a matter that has assumed enormous significance in the well-nigh quarter of a century since the last edition appeared: Collective Labor Agreements (Sec. 379A). Labor and its contracts are dealt with by Jaeger (who has been active in this field for many years, having introduced the first seminar on this subject in Washington at the Georgetown Law School) in sections 39A, 308A, 309A, and 379A. The status of these contracts, the parties thereto, and the beneficiaries thereunder are fully covered both at common law and under the statutes.

The author enters upon a rather controversial topic when he discusses recoveries by undetermined beneficiaries on warranties covering food products, drugs and cosmetics. His thesis may best be presented in his own words: "It seems curious that where third party beneficiaries have

been recognized for so many decades in so many fields, there should be so much reluctance to recognize them in their most important aspect; oftentimes, in a matter of life or death". And he concludes:

"A growing impatience on the part of the judiciary with the strictures and legal niceties of privity of contract or of 'uttering' food in hotels, inns, or restaurants, is clearly discernible in the cases. The courts tend to adopt the view that under modern conditions, these distinctions have been artificial and unrealistic and should be discarded in the public interest."

This third edition of Williston's final word on contracts is an integral part of the practising lawyer's library.

Although this work is not peculiarly associated with military law, the author, a charter member of this Association, has been a reserve J.A. officer for over thirty years. Colonel Jaeger has taught several generations of students at Georgetown Law School. As a matter of fact, this reviewer came to know Doc Jaeger as a teacher at the University of Maryland twenty-eight years ago when he was a "back bencher" in a course in English History. The intervening years have not been hard on Dr. Jaeger so he will probably live long enough to complete this monumental work. If Williston's longevity is contagious perhaps Jaeger will enjoy some royalties for his labors over many years ahead. We hope so, sincerely.

RICHARD H. LOVE

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