

The Judge Advocate JOURNAL



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JUDGE ADVOCATES ASSOCIATION

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Executive Secretary and Editor

RICHARD H. LOVE
Washington, D. C.

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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—1962

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 1962 Nominating Committee:

Vice-Admiral Oswald S. Colclough, USN-Ret., Chairman
Major General Claude B. Mickelwait, USA-Ret.
Brigadier General Nicholas E. Allen, USAFR
Colonel William A. Lumpkin, USAF
Colonel William T. Rogers, USA
Colonel Paul A. Rose, USAR
Lieutenant Commander Frank J. Flynn, USN

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. They will be: Major General E. M. Brannon, USA-Ret., Major General Reginald C. Harmon, USAF, Ret. and Captain Robert G. Burke, USNR.

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: Cdr. Frederick R. Bolton, USNR-Ret., Mich. (1)
First Vice President: Col. Allen G. Miller, USAFR, N. Y. (1)
Second Vice President: Col. John H. Finger, USAR, Calif. (1)
Secretary: Cdr. Penrose L. Albright, USNR, Va. (1)
Treasurer: Col. Clifford A. Sheldon, USAF-Ret., D. C. (1)
Delegate to House of Delegates, A.B.A.:
Col. John Ritchie, III, USAR, Ill. (2)

SLATE OF NOMINEES FOR THE TWENTY POSITIONS ON THE
BOARD OF DIRECTORS

Navy Nominees:

- Capt. Mitchell K. Disney, USN, So. Car. (3)
- Capt. Mack K. Greenberg, USN, D. C. (3)
- Lt. James J. McHugh, USN, Va. (3)
- Rear Adm. William C. Mott, USN, Md. (3)
- Capt. George S. H. Sharratt, Jr., USN, So. Car. (3)

Army Nominees:

- Col. John F. Aiso, USAR, Calif. (4)
- Col. Vincent C. Allred, USAR, Md. (5)
- Col. Charles Frank Brockus, USAR, Mo. (1)
- Col. Francis J. Burkart, USAR, D. C. (6)
- Lt. Col. Henry C. Clausen, USAR, Calif. (1)
- Maj. Gen. Charles L. Decker, USA, D. C. (3)
- Brig. Gen. Shelden D. Elliott, USAR, N. Y. (2)
- Lt. Col. Osmer C. Fitts, USAR-Ret., Vt. (1)
- Lt. Col. Willard J. Hodges, Jr., USA, Tex. (3)
- Col. Kenneth J. Hodson, USA, Md. (3)
- Col. James S. Lester, USAR, Kans. (1)
- Col. William B. Lott, USAR, La. (6)
- Lt. Col. Edward L. McLarty, USAR, Calif. (4)
- Lt. Col. Joseph F. O'Connell, Jr., USAR, Mass. (1)
- Col. Harry V. Osborne, Jr., USAR, N. J. (1)
- Col. Alexander Pirnie, USAR, N. Y. (7)
- Maj. Walter W. Regirer, USAR, Va. (1)
- Col. Marion Rushton, USAR, Ala. (2)
- Col. Ralph W. Yarborough, USAR, Tex. (8)

Air Force Nominees:

- Col. Daniel J. Andersen, USAFR, D. C. (1)
- Capt. John V. Baus, USAFR, La. (1)
- Col. Maurice F. Biddle, USAF, Md. (3)
- Maj. John W. Fahrney, USAF, Colo. (3)
- Col. Morton J. Gold, USAF, Calif. (3)
- Maj. Alfred M. Goldthwaite, USAFR, Ala. (1)
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- Maj. Frank O. House, USAF, D. C. (3)
- Brig. Gen. Thomas H. King, USAFR, Md. (1)
- Maj. Gen. Albert M. Kuhfeld, USAF, Va. (3)
- Col. Martin Menter, USAF, D. C. (3)

Col. Roger H. Miller, USAF, Fla. (3)
Capt. Douglas W. Metz, USAFR, Mich. (6)
Col. Frank E. Moss, USAFR, Utah (8)
Maj. Sanford M. Swerdlin, USAFR, Fla. (1)
Col. Fred Wade, USAFR-Ret., Pa. (6)

Under provisions of Section 2, Article VI of the By-laws, members in good standing other than those proposed by the Nominating Committee shall be eligible for election and will have their names included on the printed ballot to be distributed by mail to the membership on or about 6 July 1962, provided they are nominated on written petition endorsed by twenty-five, or more, members of the Association in good standing; provided, however, that such petition be filed with the Secretary at the offices of the Association on or before 25 June 1962.

Balloting will be by mail upon official printed ballots. Ballots will be counted through noon, 6 August 1962. Only ballots submitted by members in good standing as of 4 August 1962 will be counted.

NOTE: Number in parenthesis following name of nominee indicates professional occupation followed by nominee at this time: (1) Private law practice; (2) Full-time member of law school faculty; (3) Active military or naval service as Judge Advocate or legal specialist; (4) Trial judge; (5) Lawyer for a non-governmental body; (6) Lawyer for governmental agency or body; (7) Member of U. S. Congress; (8) U. S. Senator.



LEGAL PROBLEMS OF SPACE EXPLORATION AND TRAVEL

By Colonel Martin Menter *

Man today has written rules or laws affecting him before he arrives in his cradle at birth until long after he withers in his grave. Each new activity of man to assure its proper functioning in the order of things looks to the formation of legal principles for its protection. Without order we would have chaos, lawlessness, and the arresting of further progress of man. There is no exception. The rule of law must be applied in future aerospace activities.

What are some of the legal problems that are involved in space exploration and travel? These problems vary from the mundane to high sophistication involving both civil and criminal law. Suppose a space ship blasts off into space and after a few days is not heard from again. When does an astronaut's wife become a widow? When may the astronaut's estate be settled? If a murder is committed aboard a space ship, has a punishable crime been committed? Let's get real hypothetical—suppose a child is born during an interplanetary trip or after arrival on Mars or Venus, what is his citizenship? In view of the Lorenz

contraction of distance theory and Einstein's concept of time scale variations, when would such a child reach his majority with attendant rights of full inheritance and power to personally dispose of his property? Then there are the more nationally significant and thus more important problems that deserve serious consideration by the world family of nations. Included among these are—The perennial question of "How far up does a nation's sovereignty extend?" May a nation lawfully claim sovereignty over a celestial body in space?¹ Who is responsible for damages to life and property sustained on earth as a result of space activities? May a private company be permitted to orbit commercial satellites? If so, what are its rights to world-wide benefits accruing therefrom—vis-a-vis, subjacent nations over which the satellite orbits? The possible legal questions appear infinite.

Because there are so many scientific round pegs and square holes that do not readily lend themselves to the formulation of firm principles of governing law, and especially be-

* The author is a Judge Advocate, USAF; his present assignment is as Chief Attorney, General Law, Office of the General Counsel, Federal Aviation Agency. This article is taken from an address given by the author (introductory preliminaries omitted) at the USAF Aerospace Medical Symposium held at Brooks A.F.B., Texas on 20 January 1961. The views expressed are the author's and are not to be construed as representing the views or policy of any agency of the United States Government.

¹ See, "Jurisdiction over Land Masses in Space" by Colonel Martin Menter in 32 J.A.J. 34 (February 1962).

cause many of these problems are not justiciable, it may be more practicable to review how law in the past has developed, particularly that law which appears to be related or analogous, such as the law of the Sea and Air—and then to consider the application of these concepts to space exploration and travel.

Through the ages and today, the law on any given subject reflects man's sense of what is just and proper, as conditioned by his needs and environment.

As the past is prologue, let us briefly examine the history of man and society and the basic concepts upon which law is premised. There are various estimates as to how many billion years ago this universe was formed. Through successive billions of years amino acids were produced which made up the protein of the protoplasm of the living cell. The continued evolutionary development of life on earth brought forth homo sapiens about a million years ago. The glacial eras forced man to spread about the earth. At the end of the fourth Ice Age—about 8,000 years ago—man began settling down by the shores of lakes and rivers. Tribal villages grew and society which had originally been organized on a familial or tribal basis assumed the character of a territorial, and eventually, a political organization. As villages grew, agriculture and animal husbandry developed. Property lines assumed significance. Villages began trading with one another and alliances were formed. While most villages remained agricultural, some became centers of trade, commerce, and

manufacture, and grew into cities and metropolises.

What rules governed early man's actions? The early hunter respected tribal boundaries on pain of a retaliatory arrow for hunting in another's domain. Social control within these early cultures, as they progressed from family to tribe to city-state, was through their evolved folkways and mores and the mandates of the family and tribal leader or head of state. Unwritten rules evolved that were believed to emanate from concepts of rational behavior prompted by nature. The development of this philosophical conception is attributed to the Stoics in Greece and was adopted by the Romans. It was known as "jus naturale," or "the natural law" and meant in effect the sum of those principles which ought to govern human conduct because founded in the very nature of man as a rational or social being. This concept of "natural law" is an underlying principle frequently forming the basis for legislative and judicial actions. It probably is the premise for our common law jury measuring stick of "the reasonable man."

The late Judge John J. Parker, in discussing his concept of law in an article entitled "The Role of Law in a Free Society," originally appearing in a 1950 issue of the *American Bar Association Journal* and republished in the Association's 1956 anthology *The Lawyer's Treasury*, stated:

"... There is something . . . in the nature of human beings and of society that they compose that

determines how society should act and how the members of society should act toward one another. This is law in its true sense. It must be interpreted in terms of rules and these rules must be enforced by the power of the state. . . ."

An earlier jurist, Hugo Grotius, generally accepted as the father of international law, in his *Commentary on the Law of Prize and Booty*, written in 1604, made reference to the concept of natural law as a basis for the law of nations, or international law. In this work, Grotius wrote at length on the concept that the sea and air were common to all and could not belong to any one nation. He stated:

" . . . all those things which have been so constituted by nature that, even when used by a specific individual, they nevertheless suffice for general use by other persons without discrimination, retain today and should retain for all time that status which characterized them when first they sprang from nature Air falls into this class: first because it is not possible for air to be made subject to occupancy: secondly, because all men have a common right to the use of air. For the same reasons, the sea is an element common to all, since it is so vast that no one could possibly take possession of it, and since it is fitted for use by all"

While Grotius' expressions on freedom of air were then academic, not so were his expressions on freedom

of the seas. In 1580, Spain had complained to England that Sir Francis Drake had violated Spanish sovereignty in sailing in the Pacific without having obtained Spain's permission. The then Queen Elizabeth rejected the protest, stating that vessels of all nations were entitled to use the ocean. This concept of freedom of the high seas is now one of the oldest accepted rules of international law. Grotius in his later work, in 1625, in *Of the Law of War and Peace*, modified his concept of total freedom of the seas by recognizing that a coastal state had jurisdiction over the waters a short distance from its shoreline as dominion could in fact be obtained over such regions of the sea. This was early referred to as the "cannon-shot rule" which was generally interpreted as three nautical miles or one sea league from the shoreline. This is the forerunner to our accepted rule of a coastal state's jurisdiction over its "territorial sea." The United Nations Conference on the Law of the Sea, however, failed to reach agreement upon the breadth of the international sea.

The characterization by Queen Elizabeth and Grotius of air as free to all users no longer concerned an academic matter after German balloons drifted into French territory in the latter part of the 19th century. Further, in 1900, Von Zeppelin demonstrated controlled balloon flying and in 1903 the Wright brothers introduced piloted aircraft. In 1909, Louis Bleriot lent further import to the problem of sovereignty over airspace when he piloted a plane from France and landed in

England. An international convention was called in Paris in 1910 to consider the problem. The conferees were unable to reach agreement between those favoring freedom of flight and those championing full control of the airspace. Many concepts were then presented similar to concepts now presented as to sovereignty in outer space. Concepts of innocent passage were proposed as well as of a division of the atmosphere. As everyone knows, all nations have rejected the concept of airspace being free and not subject to sovereignty. In fact, the concept too of innocent passage—accepted in the Law of the Sea for travel through the territorial sea—has been rejected in Air Law. Article 1 of the Chicago Convention of 1944 reflects the current internationally accepted concept that “. . . every State has complete and exclusive sovereignty over the airspace above its territory.”

Now consider, in relation to what has already been discussed, some of the legal problems incident to space exploration and travel. First, the question that has been most frequently raised concerns whether overflights in outer space violate the sovereignty of the subjacent state? In other words, does a nation's sovereignty extend above the airspace into outer space, and, if so, to what distance? As to this problem, we are in Space Law at about the same place where Air Law was a half century ago. Queen Elizabeth and Grotius, in stating that the air should not belong to any one nation, of course, were speaking philosophically as to what in their views was

the natural law. This was based on the times when neither lighter than air nor heavier than air vehicles were known. As Grotius modified his views on sovereignty over that part of the seas as comprises the territorial sea to recognize sovereignty in the coastal state for reason of its protection, so too would he probably modify his views of sovereignty in the airspace above a nation for its protection from airborne vehicles. Perhaps, in Air Law, the sovereignty that a state asserts in its airspace is analogous to the sovereignty asserted by a coastal state over its territorial seas. Both are for the protection of the state. While both are firmly entrenched principles of international law, neither has yet had international agreement as to the termination of its outer boundary.

The several declarations by various states and in the Chicago Convention, as to sovereignty in the airspace were not intended as a determination of the upward limit of sovereignty. No nation has yet acknowledged any upward limit of its sovereignty. When aerodynamics was the sole media and basis of flight, questions raised of jurisdiction were concerned only with the flights envisioned. The terminology employed was tailored to the question then at hand. It was not necessary then to set an upward limit. Sovereignty in the airspace was then sufficient to the need. Even if it were desired to adopt a rule of law that sovereignty should end at the upper limits of airspace, such a demarcation could not be drawn. The atmosphere varies in density about the earth. There is

no line where it terminates, but molecules of air are found in outer space. One of the findings of the International Geophysical Year was that in the high atmosphere there is a variance in density by as much as a factor of ten, depending upon the geographic position, time of day, and season of the year. Perhaps outer space beyond the airspace—whatever its boundary—is analogous to the high sea beyond the territorial sea—whatever its boundary. However, the real question here involved is not where does airspace end and outer space begin, as that cannot be determined, but where sovereignty should be said to end. This determination is not one that may be made by the bench and bar, although most writers are of the view that outer space is free to all. The rule of law here to be obtained, like the early question in Air Law of sovereignty in airspace, is for political determination by the family of nations. In considering this problem, General Thomas D. White, while the Chief of Staff of the United States Air Force, observed that in space travel “for all practical purposes air and space merge, forming a continuous and indivisible field of operations.”

There have been many proposals to establish the upward limits of sovereignty at varying distances determined by measurement from the earth or other physical phenomenon. These include:

- (a) Height to which airborne vehicles requiring aerodynamic lift can ascend — about 25 miles.

- (b) Height at which aerodynamic lift ceases entirely, and Kepler (i.e., centrifugal force) takes over—about 52 miles.
- (c) Height arbitrarily determined above point where aerodynamic lift ceases but below that at which an unmanned free falling satellite will orbit—between about 52 and 100 miles—the lowest perigee thus far has been about 100 miles.
- (d) Lowest height at which an unmanned free falling satellite will orbit at least once around the earth—between 70 and 100 miles.
- (e) Height to which subjacent state may exercise effective control.
- (f) Height arbitrarily determined above lower orbital limit.
- (g) Height at which the earth loses its gravitational effect.
- (h) Height without limit.

It is the scientist as much as the lawyer who will be looked to, to recommend the best rule to be adopted. If it appears that the determination should be below that necessary for successful free falling orbit, a proposal approaching that of Mr. Andrew Haley's Von Karmon line, i.e., height at which aerodynamic lift ceases and centrifugal force takes over, has considerable merit. In October 1960, delegates to the International Aeronautical Federation meeting in Barcelona, including scientists from the United States and the Soviet Union, agreed on standards for adjudging world space flight records. It was there

determined that manned rocket flights would have to reach an altitude of 62 miles to qualify as space flights. This is a first such accord of significance, and a valuable precedent to resolution of the problem of how far up a nation's sovereignty may extend.

Is it really important to *immediately* determine how far out a nation's sovereignty extends? The arguments for urgency generally contend that such determination would assure greater freedom in space activities in that such flights will not be subject to objection from an overflown subjacent state. However, agreement on the upward limit of sovereignty would not terminate a right of a subjacent sovereign to take action against a hostile satellite above it. For example, the United States and Canada have established zones beyond their territorial sea in which they may lawfully take defensive action against any hostile act toward them. A hostile act in outer space above any subjacent state could be equally as unpalatable as if committed within its airspace. It is the nature of the activity in space above a subjacent state, rather than the upward extent of its sovereignty, that will determine the tolerance of such state to a satellite orbiting above it. As up to the present, all satellite overflights have been governmental, experimental flights for peaceful purposes, no nation has objected. In fact, it has been generally concluded that a rule of international law was evolving that as long as orbiting space objects or vehicles were not equipped to inflict injury or damage, it did not

infringe on the rights of other states overflown. From a security viewpoint, it does not seem that an early determination of the upward extent of sovereignty is necessary.

Rather than security providing the impetus for the early resolution of this problem, a new factor has been introduced which suggests for the first time that early resolution may be desirable. This factor was referred to by Dr. T. Keith Glennan, while the Administrator of the National Aeronautics and Space Administration, that NASA, to the extent of its statutory authority, will make vehicles, launching and tracking facilities and technical services available at cost to private companies. As to his reasons therefor, Dr. Glennan stated:

"Traditionally, communications services in this country have been provided by privately-financed carriers competing with one another to serve the public interest under federal controls and regulations. There seems to be no reason to change that policy with the advent of communications satellites."

In this connection, on December 7, 1960, Mr. Paul Dembling, then the Assistant General Counsel of NASA, presently the Director of Congressional Affairs, NASA, in an address at the American Rocket Society meeting in Washington, D. C., stated:

"The American Telephone and Telegraph Company announced recently that it is willing to spend millions of its own money on launching, ground transmitters, receivers, and spacecraft for an

initial system of 30 communications satellites. These plans contemplate having an experimental satellite in orbit within a year. The band width sought for initial experiments will permit either one-way television or voice . . . communications”

Resolution of the problem of sovereignty in outer space might well remove the basis for a claim by the subjacent state overflow of a right of taxation of the private company owning the satellite or of the application of its laws, such as regarding slander or censorship, to transmissions of the satellite.

Launching of satellites by private concerns also lends impetus to the need for establishing criteria for launching and use of satellites, for fixing the “nationality” thereof and of future spacecraft, perhaps similar to that provided by registration of aircraft under the Chicago Convention. A uniform system of markings and recording of space launchings and for the return to the launching nation of the remains of a downed satellite or spacecraft should be sought. International agreement should be sought to establish uniform rules of liability for damages sustained from satellite activities and perhaps establishing a maximum limit of liability.

There are examples of similar undertakings in Air Law in the Warsaw Convention, The Hague Protocol, The Rome Convention, and others currently under International Civil Aeronautics Organization consideration. The rule of absolute liability should obtain similar to that early

provided in domestic legislation in the “Uniform State Law for Aeronautics” which reads:

“. . . the owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused by the person injured or the owner or bailee of the property injured.”

Persons suffering damages today as a result of United States space activities are not without some remedy. The United States in a series of statutes has waived its sovereign immunity and has provided claims redress procedures for injuries to persons and property. Most of these statutes were enacted prior to satellite launchings, but, nevertheless are sufficiently broad to encompass space operations. For example, under Section 2733 of title 10, United States Code, the Secretary of a military department, or the Judge Advocate General of his department if designated by the Secretary, may settle and pay in an amount not more than \$5,000 for damage to real or personal property or personal injury or death caused by a member of the military department—including civilian officers or employees—“acting within the scope of his employment, or otherwise incident to non-combat activities of that department.” This statute is popularly known as the Military Claims Act. Recovery there-

under need not be based upon negligence. This statute is applicable only to United States citizens, except that recovery may be permitted a non-citizen where the incident giving rise to the claim occurred in the United States.

In Section 2734 of title 10 of the United States Code, authority is given the Secretary of a military department to provide for settlement and payment of any claim for not more than \$15,000 for real or personal property damage or personal injury or death suffered outside the United States, its territories or possessions by an inhabitant of a friendly foreign country. This provision of law is generally referred to as the Foreign Claims Act. Recovery thereunder also need not be based upon negligence but the damage, injury, or death must have been "caused by, or is otherwise incident to noncombat activities of, the armed forces . . . or is caused by a member thereof or a civilian employee of the department concerned." If the amount of the settlement under either section 2733 or 2734 should exceed the statutory authority of the Secretary, he may certify such claim to Congress for payment from appropriations made therefor by the Congress.

Further statutory authority is granted for administrative settlement and for suit against the United States by the so-called Federal Tort Claims provisions of title 28 of the United States Code. Section 2672 gives the head of each Federal agency authority to settle up to \$2500 for loss of property, injury, or death:

" . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Here, the term "employee" is defined to include military personnel. The act causing the damage, injury, or death must have occurred in the United States and not have arisen "out of combatant activities of the military . . . forces . . . during time of war."

Section 2674 of title 28, United States Code, authorizes Federal liability by court suit "in the same manner and to the same extent as a private individual under like circumstances." Thus no maximum limitation of amount of recovery by judgment is imposed. Note is here made, however, of the recent observation of Mr. Spencer Beresford, Special Counsel to the House Committee on Science and Astronautics, of the possibility that a court may not permit recovery under the Federal Tort Claims Act if it finds the Government's space activity concerned constitutes a "discretionary function" exemption, under section 2680(a) of title 28, United States Code.

Section 203 of the National Aeronautics and Space Act of 1958 grants the National Aeronautics and Space Administration authority to "plan, direct, and conduct aeronautical and

space activities" and further "to consider, ascertain, adjust, determine, settle, and pay," in satisfaction of any claim up to \$5,000 "for bodily injury, death or damage to or loss of real or personal property resulting from the conduct of the Administration's functions . . ." A meritorious claim in excess of \$5,000 may be reported by the Administration to the Congress for its consideration.

Where the redress sought is against a foreign country, the avenues for recovery would be (1) in accordance with the law of the foreign country by the claimant acting personally or through a local agent, (2) through diplomatic channels, or (3) by a suit filed by claimant's government on his behalf in the International Court of Justice. Jurisdiction of the International Court of Justice, however, would not obtain unless the respondent country has generally accepted the Court's compulsory jurisdiction or submits thereto in the particular case.

Certainly, space exploration and travel will require allocation of frequencies for communication transmission. Fortunately, this is one area where international agreement is already underway via meetings of the International Telecommunications Union in which both the United States and the Soviet Union are active participants. Early agreement is necessary on allocation of portions of the spectrum for astronomical communication and on termination of radio satellite transmissions where the transmission usefulness has been expended.

One of our major legal problems in future space travel and exploration concerns the vital question whether the moon and other planets in space are validly subject to claims of sovereignty by individual states. Many persons have stated their belief that such celestial bodies are not subject to claims of sovereignty. Unless we have an international agreement to such effect, the rules developed and accepted as international law governing claims of sovereignty over land areas on earth will apply to celestial areas in outer space.

Former President Eisenhower, in an address on September 22, 1960, before the United Nations advocated early agreement among the family of nations that "celestial bodies are not subject to national appropriation by any claims of sovereignty." Of course, some jurisdiction may be necessary on these celestial bodies. Such could be exercised by the United Nations or by a trusteeship on behalf of and under policies prescribed by the General Assembly. Vesting the rights of sovereignty in the United Nations over celestial bodies should give further assurance to the successful growth of such world organization and should tend to more readily assure the fulfillment of the policy of the United States, as expressed by our Congress in the initial section of the National Aeronautics and Space Act of 1958, "that activities in space should be devoted to peaceful purposes for the benefit of all mankind."

While the United States earnestly advocates that activities in outer space be devoted to peaceful purposes for the benefit of all mankind,

it must at all times guarantee the preservation of our national existence. That our military space activities are lawful and in accord with the concept of peaceful uses of outer space may readily be seen from an examination of the recent American Bar Foundation "Report to the National Aeronautics and Space Administration on the Law of Outer Space." A major portion of this report was released by the National Aeronautics and Space Administration to the public on December 5, 1960. The report purports to reflect the consensus of existing writing on the Law of Outer Space. Under the heading "The Problem of 'Peaceful Purposes': Military Uses," the release at page 29, in relation to the word "peaceful," states:

"... In the sense of the [U.N.] Charter and in international law generally, it is employed in contradistinction to 'aggressive'. It seems to have been used in this sense—which we believe to be a proper one—in various Congressional resolutions dealing with space activities. Thus any use of space which did not itself constitute an attack upon, or threat against, the territorial integrity and independence of another state would be permissible; the high seas, for example, can be used for the maintenance of a naval force-in-being without any violation of international law, and may be employed 'peacefully' for manoeuvres and testing of weapons . . ."

Continuing from the NASA release of the report, at page 30:

"... For the time being it seems that the only uses of space that are prohibited are those that fall within the prohibition of the Charter, and that until a disarmament agreement dealing with space activities can be arrived at, the United States is justified in using space for non-aggressive military uses consistent with the terms of the Charter. Such use is clearly in accordance with existing international law, and the United States would have no embarrassment in asserting that it is 'peaceful'..."

The remarks of Major General Albert M. Kunfeld, The Judge Advocate General of the United States Air Force, given at the annual dinner of the Association of General Counsel, on November 18, 1960, are particularly apropos.

He stated:

"As a nation on the threshold of the space age, we advocate that activities in outer space be devoted to peaceful purposes for the benefit of all mankind. In so doing, however, we do not intend to jeopardize our national security. These are not inconsistent objectives. We have entered into international agreements for civil aviation without limiting our military security. In fact we have developed a Strategic Air Command that has assured the maintenance of peace. We cannot let our guard down and I am confident you agree with me that our nation must maintain in the space age the best military posture that our industrial concerns, in partnership with our military forces, can pro-

duce in order to assure peace and deter aggression."

There is no intention to imply that man is without law here on earth to govern our activities in space. Man yet remains an earthman as he extends his activities into space. The development of his missiles and satellites, their commercial or military use, and the legal responsibilities of persons connected therewith—whether as employees, contractors, or passengers—are all presently governed by much law. The rules of contracts, agency, torts, conflicts of law, and international law, among others, will play their role. This body of law was present at the birth of the airplane and applied during the growth of aviation. When new factual situations arose without any precedent in this further evolution of man and society, man's wisdom gained from his past experiences was the "jus naturale" and the base upon which the rule of law was extended to bridge each hiatus. Zeppelin and Bleriot did not defer their flights until the new legal problems were resolved. Their flights presented the ponderous problems of sovereignty within the airspace. These were generally resolved by the makers of policy by statutes and international agreements. Thus far in the space age we have only the same earthman

and countries involved as have been involved in the air age with the development and use of the airplane. Problems of security did not stop those nations that were so inclined to enter into conventions and mutually beneficial agreements as to international aerial activities. Resolution of the new legal problems ushered in with the space age similarly rests on the willingness of the nations of the world to resolve them. As the scientist and attorney agree as to factual sufficiency of scientific data acquired, the problem areas may be presented to representatives of national governments for resolution into mutually acceptable rules to govern space activities. Where additional scientific data are not necessary, problem areas may be currently resolved by mutual accord of the family of nations. The United Nations, which has already undertaken to attempt to identify legal problems incident to the exploration of outer space, is the appropriate agency to seek meaningful international agreements. Such agreements, including, it is hoped, provision for settlement of disputes by recognized international tribunals, will reflect a composite view of man's sense of what is just and proper, as conditioned by his needs and environment and will constitute a major part of Aerospace Law.



1962 ANNUAL MEETING

The Annual Meeting of the Judge Advocates Association will be held in San Francisco at 3:30 p.m. on 6 August 1962 in the Lawyers' Lounge of the San Francisco Bar Association Building.

Col. John H. Finger, of the San Francisco Bar is chairman of the committee on arrangements. He has arranged a different type of program which is sure to be found enjoyable by all the members and their ladies. He has reserved the exclusive use of the Commissioned Officers' Club at Treasure Island which includes the cocktail lounge, main dining room and other reception rooms. The reception and pre-prandial social hour will begin at 6:00 p.m. Liquid refreshments will be served at regular club prices of 35¢ to 45¢ per drink. Dinner will be served at 7:30 p.m. A full course dinner with beef and fish courses and wine will be served. From 8:00 until 12:00 midnight, there will be an orchestra and dancing and the bar will remain

open all evening to serve those who need additional stimulation from time to time. The entire charge for this gala party of Judge Advocates will be only \$5 per person.

Mr. Alfred Proulx, Clerk of the United States Court of Military Appeals advises that arrangements are being made for a ceremonial admissions session of that Court in the Federal Court Building at 11:00 a.m., Tuesday, 7 August. Members of the Bar interested in attending this ceremonial session and being admitted should communicate directly with Mr. Proulx, Clerk, United States Court of Military Appeals, 5th & E Streets, N.W., Washington, D. C.

Members of the Association desiring to attend the Annual Dinner of the Association may make their reservations at this time by sending in their name and address, the number of tickets desired and their check covering the same at \$5 each.



In Memoriam

Since the last issue of the Journal, the Association has been advised of the death of the following members:

Lt. Col. Martin K. Elliott of Washington, D. C.
Col. Fred F. Greenman of New York City
Lt. Col. James I. McCain of New Orleans, Louisiana
Capt. Allen Watkins of Atlanta, Georgia

The members of the Judge Advocates Association profoundly regret the passing of their fellow members and extend to their surviving families, relatives and friends, deepest sympathy.



THE MILITARY JUSTICE BRANCH OF A JUDGE ADVOCATE OFFICE: Pre-Trial Activities*

Lieutenant Colonel Irvin M. Kent **

I. THE FUNCTIONS

Any statement of the functions of a military justice branch of the office of an Army staff judge advocate exercising general courts-martial jurisdiction will include, in addition to mention of review work, training and other staff duties, language very similar to this:

Supervises the administration of military justice in the Command; receives reports of investigation to determine violations of the Uniform Code of Military Justice; renders assistance in the preparation of charges; assists and advises Article 32 investigating officers, and other investigative agencies; assists and advises trial and defense counsel on pre-trial preparation; prepares Staff Judge Advocate's advice to the Commanding General on proposed General Courts-Martial.¹

These few lines cover a multitude of judicial activities and make the military justice branch the very heart of the criminal law activity of

the command. The chief of this branch has an awesome responsibility; on his shoulders falls much of the weight of preserving the good order and discipline, the good name, and the integrity of the command. He must, on a day to day, case by case basis, insure that substantial justice is done to each and every suspect, accused, victim, and to the United States, within the framework of the Uniform Code of Military Justice, the decisions of the United States Court of Military Appeals and the Boards of Review, the Manual for Courts-Martial, the policies of his service, higher agencies and his Commanding General and Staff Judge Advocate.

II. RELATIONS WITH THE STAFF JUDGE ADVOCATE AND OTHER BRANCHES OF THE OFFICE

In very small SJA offices the position of chief of military justice is frequently retained by the staff judge advocate. More frequently, however, it will be filled by a field

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** JAGC, U. S. Army; Office of the Staff Judge Advocate, U. S. Army Communications Zone, Europe; B.A., 1940, Syracuse University; LL.B., 1947, Harvard Law School.

¹Office of Staff Judge Adv., Hq. USAREUR Communications Zone, U. S. Dep't of Army, Circular No. 10-5, p. 16.3 (undated).

grade officer who has had considerable trial experience and preferably some duty with troops as a line officer. In any event the relationship of the staff judge advocate and the chief of the military justice branch is and must be a very special and close one, paralleling the relationship of the Staff Judge Advocate with the Commanding General.²

The truth of this statement becomes apparent when considering the fact that the chief of the military justice branch does a great part of his work independently and without supervision. It is true that each formal pre-trial advice must be approved and adopted by the Staff Judge Advocate before he presents them to the convening authority,³ but this function represents but one of the smaller functions of the military justice branch in the pre-trial field. For, in the process of reviewing reports of investigation, rendering assistance in the preparation of charges, advising and assisting investigative officers and agencies, little or nothing remains in writing, except perhaps a memorandum for the record, to show the amount or type of work accomplished or advice given. Thus the chief of the military justice branch must be capable of acting as an independent *alter ego* for

his staff judge advocate and interpret, advise, and counsel in the spirit of the policies set forth by that official. His position may, therefore, in some respects, be "likened to that of a district attorney."⁴

The military justice branch lawyer must look at each incident report and be able to visualize the problems, both legal and practical in nature posed by the fact situation. Normally he should see copies of all incident reports affecting members of his command. At this point he must consider the nature of the incident; its potential impact upon the command as a whole; and its effect, if any, upon the mission of the command or the relations of the command with the civilian population. Based upon this analysis, he must exercise his own judgment and decide either to initiate affirmative action with unit commanders or investigative agencies to insure that the required investigation is begun or to simply file the report and await normal developments. Certain policies announced by the staff judge advocate may come into play at this point. If the situation occurs in a foreign country in which the NATO Status of Forces Agreement (or a similar treaty) is applicable, immediate liaison with the interna-

² Uniform Code of Military Justice, art. 6(b), 10 U.S.C. § 806 (1958). The Uniform Code of Military Justice (hereinafter referred to as the Code and cited as UCMJ, art.) was enacted into law by the Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). It was reenacted in 1956 as 10 U.S.C. §§ 801-940. Act of Aug. 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36-79 (effective Jan. 1, 1957).

³ UCMJ, art. 34(a).

⁴ United States v. Hayes, 7 USCMA 477, 480, 22 CMR 267, 270 (1957). Cf. United States v. Gunnels, 8 USCMA 130, 134, 23 CMR 354, 358 (1957).

tional law branch will be standard operating procedure. The working relationship between these two branches must be close and cooperative. It may be necessary to monitor a case for some time until the jurisdictional question is decided, at which time the military justice branch must be prepared for action without further delay, assuming jurisdiction has been relinquished to the United States. Normally such agreements do not preclude the completion of an investigation by American authorities pending the determination of jurisdictional questions, although some delays may be caused by reason of real evidence being in the sole possession of foreign agencies during this period. A similar situation may also arise with regard to alleged violations of the United States Atomic Energy Act,⁵ and it may become necessary to wait for a decision of the Attorney General of the United States before criminal prosecution can be initiated in the military system.⁶

In yet another area, administrative eliminations, the military justice branch member must keep himself up to date and maintain close liaison with the military affairs branch and the office of the adjutant general of the command. Inevitably, cases arise where a decision must be made as to whether judicial or ad-

ministrative procedures will be used. To properly advise unit commanders, the military justice lawyer must be fully aware of the administrative procedures available and the policy of the command pertaining thereto. Cases will arise, especially overseas, where recourse to administrative procedures must be had to achieve any type of action. Frequently the United States does not have power to subpoena essential witnesses and the host government, under its own laws, may not force its citizens to appear before foreign tribunals. Nevertheless, in such cases, it is equally possible that written statements of such witnesses are available from American or foreign investigative agencies.

Where children are the victims of criminal acts a peculiarly cruel dilemma results. Action of some type may well be required to eliminate the accused from the military service, where the evidence is clear and convincing, yet the psychiatrists frequently advise very strongly against subjecting the child to the trauma of further interrogations in such cases. Under these circumstances, the military justice branch may attempt to draw charges and specifications which will not require the child as a witness, and this is difficult to do with certainty.⁷ Where this course cannot be pursued for one reason or

⁵ Act of Aug. 1, 1946, § 1, ch. 724, 68 Stat. 921-960, as amended, 42 U.S.C. §§ 2011-2281 (1958).

⁶ 68 Stat. 958 (1946), as amended, 42 U.S.C. § 2271(c). *But compare* United States v. French, 10 USCMA 171, 182-83, 27 CMR 245, 256-57 (1959).

⁷ See the dissenting opinion of Judge Ferguson in United States v. Knight, 12 USCMA 229, 232, 30 CMR 229, 232 (1961).

another, then a decision must be made either to pursue criminal action at the risk of mental injury to the victim or to handle the matter by administrative means. While it is unlikely that the chief of the military justice branch will make the ultimate decision in such a case, his recommendations, if well reasoned, are usually persuasive and frequently determinative.

This pre-trial function of the staff judge advocate, normally exercised through his military justice branch, has perhaps been best summarized by Chief Judge Quinn of the United States Court of Military Appeals:

Since a staff judge advocate is the administrator of military justice and discipline, it would be incongruous in the extreme were we to assume that he is unable to function at all unless and until charges have been preferred and investigated. Because of his position and the knowledge of law he possesses, all members of the armed forces consult him when violations of the Articles of War, or the Uniform Code of Military Justice occur. Especially is this true when a crime of unusual magnitude or one involving serious implications is under investigation. It is obvious that the use of his services minimizes the risk of error arising from faulty pre-trial investigations, and appreciably reduces the preferences of ill-founded charges

against those subject of military law. Nor must a staff judge advocate sit idly by when he perceives a deficiency in the pre-trial report of investigation. Whenever a report of investigation fails to disclose an essential element of the offense charged, the staff judge advocate must direct the attention of the investigating officer to the deficiency. If there is, in fact, no evidence of that element available, a proper reason for dismissing the charges arises. If it is available, it should be obtained and made a part of the report.⁸

Notwithstanding this broad language, many pitfalls remain which must be avoided. While some of the rules laid down by the Court of Military Appeals make the administration of military justice more cumbersome, avoidance of error is required in the interests of justice itself. To some extent, these problems can be avoided by separating the military justice branch into pre-trial and post-trial sections, but this is impractical in all but the largest offices, and, if care is exercised, is not an essential. Of course one who has served as trial counsel or law officer in a companion case may not prepare a staff judge advocate's review.⁹ But even certain types of pre-trial activities may preclude any or all members of a staff judge advocate's office from reviewing a case. As Judge Latimer said:

⁸ United States v. DeAngelis, 3 USCMA 298, 305, 12 CMR 54, 61 (1953).

⁹ United States v. Hill, 6 USCMA 599, 20 CMR 315 (1956); United States v. Hightower, 5 USCMA 385, 18 CMR 9 (1955); United States v. Crunk, 4 USCMA 290, 293, 15 CMR 290, 293 (1954).

A staff judge advocate, or members of his section, and a convening authority must review a record of trial, and in that capacity they should be free to evaluate the proceedings without being required to approve a finding and sentence engineered by their own handiwork.¹⁰

Accordingly, to the maximum extent possible, the pre-trial work should be delegated by the staff judge advocate to his chief of military justice, leaving the staff judge advocate free of taint, and able to review the case.¹¹ As Chief Judge Quinn succinctly stated the matter:

In the exercise of these functions the Staff Judge Advocate must use his intelligence and experience to keep from becoming at one stage of the proceedings so personally involved in the outcome as to preclude him from acting in a later stage.¹²

In this connection, a staff judge advocate, even should he be so inclined, may not rely upon the doctrine of "privileged communication" to prevent disclosure of his role, should he become too deeply involved in the preparation of a case.¹³ In the *McArdle* case the staff judge advocate disqualified himself from the review where he, before trial, per-

sonally discussed a board action involving the accused and exerted pressure on the president of that board to make a finding of fact adverse to the accused on a matter of pecuniary liability.¹⁴

III. RELATIONS WITH SUBORDINATE UNIT COMMANDERS

The chief of military justice is the man to whom unit commanders, particularly at the company level, will bring their disciplinary problems. In the discussion of their problems he must not only be learned in the law, but also have some familiarity with the problems of life, and more particularly, the special problems of military life. The unit commander who has received a steady stream of letters from creditors of one of his men will inevitably find his way to the justice branch. Sometimes the unit commander will be seeking assistance in drafting specifications, but normally will be seeking guidance in the proper disposition of a human problem. The military justice branch which contents itself with pointing out how to draft a specification for dishonorable failure to pay a debt is of only very limited help to the command. This function produces nothing in writing which can be shown to a "program" expert, but, at the same time, it is the most im-

¹⁰ *United States v. Kennedy*, 8 USCMA 251, 254, 24 CMR 61, 64 (1957).

¹¹ *Cf. United States v. King*, 8 USCMA 392, 24 CMR 202 (1957).

¹² *United States v. Gunnels*, *supra* note 4, at 134, 23 CMR at 358.

¹³ ACM 15904, *McArdle*, 27 CMR 1006, 1022 (1959).

¹⁴ *Id.* at 1024.

portant and satisfying part of the job. Every time a unit commander can be assisted in such a way so as to avoid a trial by court-martial, then the military justice program of the command has been aided immeasurably.

After completion of the formal pre-trial investigation, the convening authority who has ordered the investigation, normally the summary court-martial authority,¹⁵ must decide whether to dismiss the charges, to refer them to trial by summary court-martial, or to forward them with recommendations for reference to trial by special or general court-martial.¹⁶ Normally such a convening authority has no judge advocate on his staff and finds himself in a quandary as to proper disposition, particularly where serious problems of a purely legal nature are raised during the investigation. However, he may send the charges and investigations forward to the staff judge advocate of the general court-martial authority to obtain recommendations as to disposition. After reviewing the file, the staff judge advocate will provide such recommendations, although they are not binding upon the convening authority.¹⁷ More frequently, the summary court-martial authority will simply arrange for an informal review of the file by the military justice branch. Recommendations made by the military justice

branch can be most useful, and such informal consultations will save all concerned a great deal of time and effort. For example, if, in a given case, proof of the corpus delicti depends on the admissibility of certain real evidence seized in an illegal manner, the informal advice will probably result in the termination of that case, at least insofar as judicial proceedings are concerned.

IV. RELATIONS WITH INVESTIGATIVE AGENCIES; ARTICLE 32 INVESTIGATING OFFICERS

The lot of a formal pretrial investigating officer in a case involving numerous and complex charges is not an enviable one. This is particularly true if, as is frequently the case, the investigator is not a lawyer. The Manual provisions to which a pretrial investigating officer must turn are designed in substantial part to cover the 'usual' cases. Notoriously absent are detailed instructions designed to guide a formal pretrial investigating officer in the unusual case or in the unusual aspect of an otherwise routine case.¹⁸

The Inspector General, the criminal investigator, the intelligence agent, and the Article 32 investigator must feel at home in the military justice branch and know that this is

¹⁵ U. S. Dep't of Defense, Manual for Courts-Martial, United States, 1951, para. 33c (hereinafter cited as MCM, 1951, para. —).

¹⁶ MCM, 1951, paras. 33f-i.

¹⁷ CM 396947, Green, 24 CMR 369 (1957).

¹⁸ Murphy, *The Formal Pretrial Investigation*, Mil. L. Rev., April 1961, p. 1 at 3.

where he may and should come for guidance, assistance and advice. Here too, mere reliance on the formalities of Article 31 and the rules pertaining to search and seizure are only a part of the problem. The chief of the military justice branch is their lawyer, and will soon find that they seek practical advice as well as purely legal advice. The investigator who comes in with a partly developed case, usually in the form of a group of statements by witnesses and some notes, may well be up against what seems to him a blank wall. He wants and should receive an honest analysis of his investigation to date and some ideas on how to proceed further. Here a lawyer with some trial experience will frequently be able to help by pointing out fresh lines of approach, inconsistencies in statements, and suggestions for further interrogation or additional investigative measures. This effort will be more than paid for in properly completed investigations, which result either in dismissal of unfounded or unprovable charges or in solid cases to be taken to court.

The lawyer who thus advises and assists the investigator may later serve as trial counsel if need be, but, if he has become too closely associated with the preparation for the prosecution of a case, he may be disqualified from assisting the Staff Judge Advocate in the preparation

of the post-trial review.¹⁹ This is consistent with the rule, earlier enunciated by the Court of Military Appeals that one who has conducted an *informal* investigation (that is other than the investigation prescribed by Article 32 of the Code) is not prohibited from serving as trial counsel.²⁰ Nothing said herein is meant to imply that the military justice branch or any member thereof should actually become an investigator. The line must be carefully drawn between advice and assistance to the investigator and conduct of the investigation itself. Actual interrogation of witnesses, searches and seizures, and similar investigative actions must be left to the investigative agency.

While the relationship between the military justice branch and most investigative agencies will generally be informal, the Article 32 investigating officer is frequently required by command directive to consult with the office of the staff judge advocate for a briefing as to his duties prior to the beginning of an investigation. A fairly typical directive of this type states that:

All officers appointed to conduct such an investigation will contact the nearest Judge Advocate office in person or by telephone for a briefing prior to commencing the investigation. This briefing will cover as a minimum, the elements

¹⁹ United States v. Erb, 12 USCMA 524, 30 CMR 938 (1961), CM 401400, Hardy, 29 CMR 554, 560, *rev'd on other grounds*, 11 USCMA 521, 29 CMR 337 (1960).

²⁰ United States v. Lee, 1 USCMA 212, 217, 2 CMR 118, 123 (1952). United States v. Leo, 17 CMR 387 (1954).

of the offense(s) charged, the rights of the accused, provision of legally trained counsel upon request of the accused, the general procedures for the conduct of the investigation.²¹

With such a directive at his disposal the chief of the military justice branch can more effectively prevent errors in pre-trial investigations, and assure the completion of the investigation in accordance with required standards. This preliminary briefing also serves to establish the necessary contact between the Article 32 investigating officer and the military justice branch.

Work on a case by case basis is important and represents the daily task of the military justice branch in its pre-trial functions, but this does not represent the sum total of its activities. The branch chief and his associates must also visualize the potential problems and attempt to avoid them. This may take the form of the preparation of special instructions for the use of the provost marshal as guidance for his military police and criminal investigators. Every new decision of the Court of Military Appeals and the boards of review must be read with this in mind. As the rules pertaining to search and seizure, or of right to counsel change, knowledge of such changes will be of very limited value

to the command if they are retained purely as professional knowledge to be used in reversing cases or throwing pre-trial investigations out without trial. The faster these requirements are made known to those to whom they apply, the fewer the legal problems involved therein will arise.

Occasionally a pronouncement of the Court of Military Appeals will provide a method, if properly used, to simplify work, or to admit hitherto seemingly unavailable evidence. While most experienced judge advocates regard an isolated pronouncement of this nature with a jaundiced eye, when the court voluntarily repeats such hints, then the time has come to use and test the suggested technique. As an example, the Court of Military Appeals announced some eight years ago the doctrine that verbatim testimony taken at Article 32 investigations with full rights of cross examination accorded to the accused and his counsel, was admissible in evidence under certain circumstances²² in a trial by court-martial of that accused if the witness became unavailable for any of the reasons enunciated in Article 49. Yet this decision seemed so hedged with conditions that most judge advocates hesitated to make use of the proffered technique. Now that the court has seemingly gone out of its way to reiterate this doctrine,²³ the proba-

²¹ Office of Staff Judge Adv., Hq. USAREUR Communications Zone, U. S. Dep't of Army, Circular No. 22-5, Military Justice, para. 5a(6) (1961).

²² *United States v. Eggers*, 3 USCMA 191, 192-94, 11 CMR 191, 192-94 (1953).

²³ *United States v. Cunningham*, 12 USCMA 402, 404, 30 CMR 402, 404 (1961).

bilities are that military justice branches, especially in overseas areas where the subpoena powers of the United States are severely limited, will publish changes to their military justice circulars along these lines:

In every case wherein there is reason to believe that a material and necessary witness for either side may not be available for appearance before a court-martial, and in every case involving witnesses not subject to the Uniform Code of Military Justice (all foreign nationals and U. S. civilians), action will be taken by the pre-trial investigating officer to obtain and preserve the testimony of such witnesses by means of actual interrogation under oath, in the presence of the accused and his counsel, who will be accorded full rights of cross examination. All such testimony will be recorded verbatim and enclosed with the report of investigation. If the pre-trial investigating officer uses clerical help to assist him in this regard such clerical help should be sworn in accordance with paragraph 114, Manual for Courts-Martial, United States, 1951, and such clerical help shall be directed to preserve his (her) original notes until such case has been finally completed. If any witness testifies through an interpreter, such interpreter must also be sworn

in accordance with paragraph 114 of the Manual.²⁴

While the recorded testimony from Article 32 investigations is unlikely to be needed too often, the mere existence of the provision detracts from the likelihood of unnecessary harassment of a foreign witness by an unscrupulous counsel during an investigation so as to make such a witness extremely reluctant to appear at the trial itself. Similarly, it removes the temptation of counsel to use delaying tactics so that key witnesses will be rotated prior to trial.

V. REVIEW OF THE ARTICLE 32 INVESTIGATION

The absolute necessity for insistence on proper and complete formal pre-trial investigation cannot be over-emphasized. "There is no question that it is firmly entrenched as an important and substantive ingredient of military due process, the denial of which in any substantial aspect in a particular case can require the reversal of a conviction."²⁵

Of course, neither the staff judge advocate nor the chief of the military justice branch may order a case referred to trial. This may be done only by the convening authority personally and this power is not delegable.²⁶ But while neither the staff judge advocate nor one of his assistants may order a case to trial,

²⁴ Office of Staff Judge Adv., *supra* note 21, Change No. 1, para. 5a(6)(b).

²⁵ Murphy, *op cit.* *supra* note 18, at p. 1.

²⁶ United States v. Roberts, 7 USCMA 322, 326, 22 CMR 112, 116 (1956); United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955).

they may send a pre-trial investigation back with suggestions to add other charges and with a directive to conduct further investigation.²⁷ Not only may the staff judge advocate do so, but if the evidence contained in the report of investigation, or in an independent investigation (perhaps in a CID report) available to the branch shows that other charges might more properly lie or should be included, then he should require further investigation.

The military justice branch, acting for the convening authority and his staff judge advocate, has some power to make certain changes in the charges without ordering a reinvestigation, if the charges as changed "embraced precisely what is at least clearly implied in the original specifications."²⁸ But if the gravamen of the offense is changed, new charges must be signed and sworn to.²⁹ In considering this issue, the Court of Military Appeals has permitted the change, without requiring new charges to be drawn and sworn to, of both the date of the offense and the statute under which the offense was alleged.³⁰ The *Brown* decision appears considerably more liberal than the *Oliveri* rule, which held that a change in the specification of a

regulation alleged to have been violated changed the identity of the offense. It is worthy of note that an Army Board of Review, in a case subsequent to *Brown*, held that the change of a specification from the offense of forging a leave paper in Germany on 18 June to possessing a forged leave paper in England on 17 July was sufficient to change the identity and gravamen of the offense.³¹ In so holding the Board of Review relied upon *Oliveri* and ignored the *Brown* case. Close analysis, however, reveals no real conflict among these cases, as the *Oliveri*, *Brown* and *Kitts* decisions all follow the pattern of the rules of the civilian federal courts³² and of the Manual for Courts-Martial, United States, 1951, paragraph 33. Confusion is more apt to arise in deciding when charges must be reinvestigated rather than re-signed and resworn. Simply stated, the rule appears to be that if the subject matter of the offense, as rewritten, has been fully and fairly investigated in the first instance, then changes in the charges, even changes going to the gravamen and identity of the offense need not be reinvestigated, if "There is no indication that the accused was misled, or that his defense suffered, a

²⁷ United States v. Allen, 5 USCMA 626, 630, 18 CMR 250, 250 (1955).

²⁸ CM 377832, Batchelor, 19 CMR 452, 518 (1953), *aff'd*, 7 USCMA 354, 22 CMR 144 (1956); *accord*, CM 366209, Taylor, 13 CMR 201, 208 (1953).

²⁹ ACM 6055, Oliveri, 10 CMR 644, 648 (1953).

³⁰ United States v. Brown, 4 USCMA 683, 686-87, 16 CMR 257, 260-61 (1954).

³¹ CM 386028, Kitts, 20 CMR 467 (1955).

³² Fed. R. Crim. P. 7e.

because of the change in terminology.”³³

VI. THE FORMAL PRE-TRIAL ADVICE

In fulfilling this function as in all aspects of the pre-trial advice, the work of the military justice branch must be meticulous and accurate, and great care must be taken to avoid inclusion in the file of prejudicial matter, such as a discussion of homosexual tendencies of an accused charged with an offense unrelated to such tendencies. If it can be established that the convening authority did not, in fact, rely upon such prejudicial matter in making his decision as to reference for trial or in approval of the findings and sentence, then reversal will not necessarily follow, but this type of practice must be avoided,³⁴ as must any deliberate multiplication of charges. If specifications are deliberately multiplied to persuade a convening authority to refer a case to a higher level court-martial, then there “might be a grave question of perversion of the court-martial process.”³⁵ Factual error in the pre-

trial advice as to the nature of the prohibited drug in question³⁶ and the recommendations of the investigating officer have been held to be prejudicial,³⁷ as have errors on the nature of the previous service of an accused and recommendations as to disposition of the case by subordinate commanders.³⁸ The accused may not be brought to trial on charges other than those considered in the pre-trial advice,³⁹ since:

A pre-trial investigation conducted under the provision of Code, *supra*, Article 32, is designed to obtain an impartial inquiry into the facts and circumstances surrounding the charges against the accused and to gain a soundly conceived recommendation concerning their disposition.⁴⁰

The work of the military justice branch must be absolutely accurate in all these particulars and the staff judge advocate must make an independent examination of the evidence and submit his advice to the convening authority in compliance with Article 34 of the Code.⁴¹ The board of review will consider this advice

³³ CM 377832, Batchelor, *supra* note 28, at 518.

³⁴ United States v. Shotter, 12 USCMA 283, 30 CMR 283 (1961).

³⁵ United States v. Middleton, 12 USCMA 54, 58, 30 CMR 54, 58 (1960).

³⁶ United States v. Greenwalt, *supra* note 26, at 572, 20 CMR at 288.

³⁷ CM 390577, Miller, 22 CMR 351 (1956).

³⁸ ACM 13076, Matthews, 23 CMR 790 (1956).

³⁹ CM 390577, Miller, *supra* note 37.

⁴⁰ United States v. Cunningham, *supra* note 23, at 404, 30 CMR at 404.

⁴¹ United States v. Greenwalt, *supra* note 26, at 572, 20 CMR at 288; United States v. Schuller, 5 USCMA 101, 105-06, 17 CMR 101, 105-06 (1954).

as part of its review of the entire record to determine whether or not there has been compliance with Article 34.⁴²

VII. RELATIONS WITH TRIAL COUNSEL; PREPARATION OF THE PROSECUTION

The staff judge advocate or chief of the military justice branch may prepare and give the trial counsel a detailed trial brief without making themselves or the convening authority the accuser or disqualifying themselves from review of the case.⁴³ However, once the case has started, both the staff judge advocate and his chief of military justice must refrain from detailed direction of the trial counsel and the measures he should take in such matters as handling recalcitrant witnesses. Likewise, these officials should refrain from advising the law officer, for if they do, they become "the architects of a conviction,"⁴⁴ and may not review the case. The Court of Military Appeals has equated such action

to the actions of the trial counsel himself who, of course, may neither act as staff judge advocate or prepare a review or any portion of one in the same case.⁴⁵

The line would appear to be drawn between impersonal advice to investigators⁴⁶ and personal connections with the witnesses.⁴⁷ Thus a staff judge advocate who personally discusses a case with a witness for the prosecution and enters into an agreement with him to reduce his sentence (in another case) in return for his testimony in a pending case disqualifies himself from reviewing the case.⁴⁸ An arrangement of this type with a witness may be necessary, since an accused in a companion case who is needed by the government as a witness in a current case may, notwithstanding his subsequent conviction, rely upon his right to remain silent under Article 31 of the Code until completion of appellate review.⁴⁹ But if such an arrangement is deemed necessary, then neither the

⁴² United States v. Schuller, *supra* note 41, at 108, 17 CMR at 108.

⁴³ United States v. Blau, 5 USCMA 232, 244-45, 17 CMR 232, 244-45 (1954); United States v. Haimson, 5 USCMA 208, 216-21, 17 CMR 208, 216-21 (1954).

⁴⁴ United States v. Kennedy, *supra* note 10, at 254, 24 CMR at 64.

⁴⁵ UCMJ, art. 6(c); United States v. Clisson, 5 USCMA 277, 17 CMR 277 (1954); United States v. Coulter, 3 USCMA 657, 659, 14 CMR 75, 77 (1954).

⁴⁶ United States v. Hayes, *supra* note 4, at 479, 22 CMR at 269.

⁴⁷ United States v. Turner, 7 USCMA 38, 21 CMR 164 (1956).

⁴⁸ United States v. Albright, 9 USCMA 628, 632-33, 26 CMR 408, 412-13 (1958). Cf. United States v. Gilliland, 10 USCMA 343, 345, 27 CMR 417, 419 (1959).

⁴⁹ CM 400874, Torres, 27 CMR 676 (1959).

staff judge advocate nor the convening authority may thereafter review the case, although the convening authority may refer the case to trial if he had not already done so.⁵⁰

In such cases a decision must be made as to whether to proceed with the grant of immunity, or promise of reduction of sentence, and send the case to higher authority for review, which some commanders are understandably reluctant to do, or to attempt to proceed to trial without such testimony. This decision will depend largely on the analysis by the chief of the military justice branch of all the available evidence, *aliunde* such testimony, and of the potential value of the witness in question.

VIII. PRELIMINARY MOTIONS

Not only may the power to order a case referred to trial not be delegated by the convening authority, but after such referral has taken place and prior to arraignment, the convening authority must personally act upon preliminary motions made by counsel. These decisions are judicial in nature and neither the military justice branch, nor the staff judge advocate, may substitute themselves for the convening authority.⁵¹ While the military justice branch will study such motions and prepare a draft decision, usually in the form of a letter or indorsement for the convening authority, and while the staff judge advocate will approve such

recommendations and submit them to the convening authority, the decision must be that of the convening authority. There would appear to be no particular requirement for a personal signature by the convening authority, but in the event of a verbal decision, a memorandum for the record should be prepared or appropriate notation made on a record copy of the letter or indorsement prepared for his approval indicating the date and content of his decision. This should be preserved with the record of the case in the event of later question.

IX. RELATIONS WITH ACCUSED, SUSPECTED PERSONS AND DEFENSE COUNSEL

The pre-trial military justice functions are not entirely oriented in either a judicial or pre-prosecution pattern. A brief survey of what is done for an accused or suspected person is appropriate at this point.

Upon his request, every suspected person should be furnished such legal advice as is reasonably available. A staff judge advocate should do no more than advise of rights under article 31, UCMJ; the right to defense counsel of accused's own choice and procurement; and (when general court-martial is a possibility) the right to appointed military counsel at an article 32 investigation. For more particularized legal service, the staff judge advocate may refer the individual

⁵⁰ United States v. Moffett, 10 USCMA 169, 27 CMR 243 (1959); United States v. White, 10 USCMA 63, 27 CMR 137 (1958).

⁵¹ United States v. Brady, 8 USCMA 456, 460, 24 CMR 266, 270 (1957).

to another available officer—normally, one who will be a regularly appointed defense counsel during the time reasonably required to dispose of expected charges.⁵²

This directive must be contrasted with earlier practices on this point to be fully appreciated.⁵³ Today, as a practical matter in judge advocate offices of the U. S. Army in Europe, it is standard practice to make a judge advocate officer available to any accused or suspect, upon his request. Usually this is the regularly appointed defense counsel of an existing general court-martial. This officer does not limit himself to formal advice concerning Article 31, but actually counsels the accused in a fully protected attorney-client relationship. This practice was adopted following the decision of the Court of Military Appeals that an accused has a right to consult with counsel during a police interrogation and before charges are filed.⁵⁴ There is, however, no duty laid upon the police to inform an accused of that right.⁵⁵ The accused must assert it on his own and effectively ask for such counsel. If he does, then the in-

terrogation must be suspended and the accused given an opportunity to consult with counsel.⁵⁶ Obviously it follows that if these rights are denied, an extra-judicial statement obtained in the course of such interrogation would be inadmissible, and particularly so if the accused has been misadvised as to his rights to counsel.⁵⁷ Once charges have been preferred and the accused has counsel, however, the *Frye* rule would not apply and it would be error to interrogate such an accused in the absence of his counsel, at least without the express consent of the counsel.⁵⁸

The military justice section is normally charged with the further duty of providing qualified military counsel in the sense of Article 27(b) of the Code to every accused in an Article 32 investigation who asks for such counsel. The accused must be informed of this right, the formal pre-trial investigation may not proceed until such counsel has been provided,⁵⁹ and such counsel must be allowed to operate effectively for his client or the results will be a nullity.⁶⁰ The right of the accused

⁵² Office of Staff Judge Adv., *supra* note 21, para. 8b (1959).

⁵³ See the expressed attitude of the staff judge advocate, as reported in *United States v. Gunnels*, *supra* note 4, at 133, 23 CMR at 357.

⁵⁴ *United States v. Rose*, 8 USCMA 441, 24 CMR 251 (1957).

⁵⁵ ACM 12536, *Frye*, 25 CMR 769, 778 (1957).

⁵⁶ *United States v. Kantner*, 11 USCMA 201, 29 CMR 17 (1960).

⁵⁷ *United States v. Wheaton*, 9 USCMA 257, 26 CMR 37 (1958).

⁵⁸ CM 399759, *Grant*, 26 CMR 692, 695-96 (1958).

⁵⁹ *United States v. Tomaszewski*, 8 USCMA 266, 24 CMR 76 (1957).

⁶⁰ *United States v. DeLauder*, 8 USCMA 656, 25 CMR 160 (1958).

to proper and adequate preparation of his defense must be effectively safeguarded both in terms of adequate time to prepare his defense, and by providing the defense with the evidence and documents available to the Article 32 investigating officer and the prosecution.⁶¹

X. REASONABLE DISPATCH

With the responsibility for all of these activities, and the concomitant administrative details to attend to, it would be nice if the military justice branch could operate at its leisure. If it could operate in an atmosphere of pure academic and philosophic detachment, most errors noted by appellate tribunals would not fill the volumes of the case reports. It is invariably true that no military justice branch will be adequately staffed to meet peak work loads, and it is at such times that the most complicated cases with the most complex legal issues will generally appear for disposition. The branch must not proceed too hastily

and thereby deny an accused the right to adequately prepare his defense.⁶² On the other hand, it must not proceed so slowly that an accused is denied his right to a speedy trial.⁶³ The government must act with "reasonable dispatch."⁶⁴ Since appellate tribunals are less likely to accord to the government the tenderness they have sometimes shown defense counsel with regard to work at night, and on weekends and holidays,⁶⁵ it follows that this branch requires both a willingness to work such hours and times as are needed without regard to clock or calendar, and the moral and civic courage to say "no" to pressures of any type, be they from command, staff judge advocate, or counsel for the defense,⁶⁶ in order to live up to the doctrine of "reasonable dispatch" and to produce effective legal work. As a practical matter, the military justice branch must live within the time limits set down by higher authority⁶⁷ or account for delays in excess thereof both to military superiors and to the tribunals, trial and appellate, of

⁶¹ *United States v. Heinel*, 9 USCMA 259, 26 CMR 39 (1958); MCM, 1951, para. 44; Kent, *The Jencks Case: The Viewpoint of A Military Lawyer*, 45 A.B.A.J. 819 (19).

⁶² See, e.g., *United States v. Parker*, 6 USCMA 75, 85, 19 CMR 201, 211 (1955).

⁶³ See, e.g., *United States v. Brown*, 10 USCMA 498, 503, 28 CMR 64, 69 (1959).

⁶⁴ *United States v. Callahan*, 10 USCMA 156, 158, 27 CMR 230, 232 (1959).

⁶⁵ See *United States v. Heinel*, *supra* note 61, at 262, 265, 26 CMR at 42, 45.

⁶⁶ Cf. Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178, 1180 (19).

⁶⁷ See, e.g., the discussion of the impact of Air Force Reg. No. 111-10 in ACM 11750, Day, 21 CMR 768, 777 (1956).

the court-martial system.⁶⁸ Delays which are absolutely necessary in the interest of public justice and in order to protect the rights of the accused will not result in reversal of an otherwise valid conviction, if it can be shown that there was "reasonable diligence in prosecution" and an absence of "an oppressive design on the part of the government against the accused."⁶⁹

XI. CONCLUSION

In the words of the late Judge Brosman: "The administration of criminal justice * * * is not a fox hunt * * *."⁷⁰ Indeed it is not; it is a very practical, very human problem, and the military justice branch which operated solely on the basis of the legally possible would miss the mark as surely as one which operated without regard for the doctrines of the law. Each case must be considered in the light of the person accused and the military situation of the command. The offense of sleeping on post may well be disposed of by summary or special court-martial in a non-sensitive rear installation and require a general court-martial where the post involves an ammunition dump in Berlin.

Similarly, a set of facts could conceivably and properly give rise to a series of charges of disobedience and disrespect to several officers and non-commissioned officers. But a consideration of the record of the

soldier involved may show that he is a youngster with no previous convictions and very little military service. He should not have to suffer the stigma of a punitive discharge for the aberrations of a single isolated incident. Under such circumstances the consolidation of all the charges into a single specification of disorderly in command and disposition by inferior court-martial may well meet the ends of discipline, justice, and rehabilitation of a salvageable young soldier.

A unit may be on its way to a port of embarkation or to take part in an important maneuver. On its face these facts may have no bearing upon the legal disposition of charges, but in practical terms, they will and must have a very real effect. The function of a unit may well decide the nature of the disposition of a set of charges, unless they are of such magnitude, such as a serious felony, that no other consideration can stand in the way of trial by general court-martial.

In short, each case that comes in is "tried" in advance in the military justice branch prior to recommendations as to disposition. Each legal, administrative, personal, and humanitarian factor must be given its just weight to the end that the recommended disposition will serve the best interests of justice, the needs of the service, and the rehabilitation of the accused.

⁶⁸ See, *e.g.*, United States v. Hounshell, 7 USCMA 3, 6-8, 21 CMR 129, 132-34 (1956).

⁶⁹ United States v. Davis, 11 USCMA 410, 414, 29 CMR 226, 230 (1960).

⁷⁰ United States v. Eggers, *supra* note 22, at 194, 11 CMR at 194.

What The Members Are Doing . . .

California

The firm of Vaughan, Brandlin, Robinson and Roemer, of Los Angeles, recently announced that Walter R. Trinkaus had joined the firm as a partner. The partners, J. J. Brandlin and Walter R. Trinkaus are both former JA Officers and members of the Association. The firm also recently removed its offices to the Eighth Floor, 411 West Fifth Street, Los Angeles.

Colorado

Milton J. Blake, until recently Regional Administrator of the Denver Regional Office of the Securities Exchange Commission, has returned to the firm of Blake and Blake for the general practice of law, specializing in security law matters with offices in the Denver Club Building, Denver 2, Colorado.

District of Columbia

At the call of General "Mike" Brannon, members of the Association in the Washington area met for luncheon at the Army and Navy Club on May 23. The guest speaker was the Honorable Carlisle P. Runge, Assistant Secretary of Defense (Manpower) who spoke on the utilization of reserve forces and plans for future organization and employment of the Reserve and National Guard.

Massachusetts

Lt. Col. Meyer Weker of Winthrop, presently serves as military aide to

Governor John A. Volpe of Massachusetts. Col. Weker engages in the private practice of law with offices at 72 Sewall Avenue, Winthrop, Massachusetts.

Michigan

At the Annual Dinner Meeting of the Detroit Bar Association on May 10, 1962, Commander Frederick R. Bolton, First Vice President of the Judge Advocates Association, presented Rear Admiral William C. Mott, The Judge Advocate General of the Navy, as the principal speaker. Admiral Mott, a member of the Board of Directors of JAA delivered an address entitled "A Lawyer Looks at Communism".

Missouri

The firm of Anderson, Gilbert, Wolfort, Allen and Bierman of St. Louis recently announced the admission of two new partners to the firm, one of whom is William B. Anderson. The partners, Norman Bierman and William B. Anderson, both are former JA officers and members of the Association. The firm's offices are at 705 Olive Street, St. Louis, Missouri.

Virginia

Lt. Col. James C. Davie of Petersburg, was placed on the AUS retired list on April 1, 1962. Col. Davie was commissioned in 1933 and had served almost 12 years on active duty. He is engaged in the private

practice of law with offices in the Union Trust Building at Petersburg.

For the last two years, the Virginia State Bar Association has sponsored an annual conference on legal assistance for servicemen. Much of the impetus and credit for this program is due to Major Walter W. Regirer and Lt. Col. Carl E. Winkler, Chief of the Legal Assistance Division, JAGO, Army. The second annual conference was held at Williamsburg on March 15. Participating prominently in the program were the following members of the Association: Lt. Col. Carl E. Winkler, Col. John F. Murrery, Gen. Alan B. Todd, Lt. Col. Jake L. Abraham, Cdr. A. J. Caliendo, Lt. Col. Owen E. Woodruff, Jr., and Maj. Walter W. Regirer. Others participating were: Col. James F. Bishop, Col. James E. Godwin and Gen. Thomas H. King.

The American Bar Association's Standing Committee on Legal Assistance for Servicemen recently, by formal resolution, commended the legal assistance program of the Virginia State Bar Association.

Washington

Col. Wheeler Grey of Seattle recently announced that his law firm of Jones, Grey, Kehoe, Hooper and Olsen has removed its offices to 1000 Norton Building, Seattle 4. Col. Grey also announced that Russell J. Reid and Maurice E. Sutton have become associates of the firm.

France

Lt. Col. Irving M. Kent, currently stationed in Paris, recently announced a double joyful event in the birth of twins, Rahel Eden and Johnathan Leonard, born 7 February in Paris. Each of the new Kents weighed in at 6 and $\frac{3}{4}$ pounds, and the new additions to the Kent family doubled the strength of the minor members.

The Pacific

Louis A. Otto, Jr. recently resigned as Attorney General of the Territory of Guam and has joined the legal staff of the United States Civil Administration, Ryuku Islands at Naha, Okinawa.



