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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

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JUDGE ADVOCATE JOURNAL

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Publication Notice

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

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THE REPORT OF TJAG—ARMY

Major General George S. Prugh, Jr., The Judge Advocate General of the Army, reported to the 30th Annual Meeting of Judge Advocates Association in Washington on 6 August 1973 as follows:

As part of the celebration of the one hundred ninety-eighth birthday of our Corps this year, I hosted a birthday party in my office. The focal point of this party, as of any birthday party, was the ceremony of cutting and distributing the birthday cake. Aiding me in performing this pleasant duty was the junior captain of the Corps. At times like that, one cannot help but be reminded that we all look at our worlds through three different sets of lenses, as it were—one which perceives a revered past, another which perceives the cares and concerns of the present, and a third which looks to the future with hope for better things to come. I am enveloped by the same feeling as I recount to you a synopsis of the Corps' activities for the past year.

By any standard, it was an active and busy year. As always, the personnel side of our operation demanded continuing attention. As of the close of Fiscal 1973, we had 1,527 Judge Advocates on active duty; with the strength

of active Army at around 800,000, we are maintaining a fairly good lawyer-client ratio. The recruitment and retention of top-notch personnel remains one of the Corps' primary missions. In the past, our Corps has seen such distinguished men as Frankfurter, Morgan, Wigmore, and Stimson pass through its ranks. The tradition of excellence established by these men must be continued in these times of vastly altered societal concepts. Fortunately, our recruiting effort this past year went well. Nevertheless, the end of the draft has had some predictably deleterious effects upon our recruiting program. Some withdrawals of applications for JAGC commissions last year are undoubtedly attributable to the end of the draft. That same event has contributed to the fact that we no longer enjoy the luxury of the degree of selectivity we were able to maintain when we had twelve applicants for each position; our current application to vacancy ratio is about 1.5 to 1. Despite the fact that we still have more applicants than vacancies, we will not fill our quotas unless we can get the quality lawyer we need to cope with the ever-expanding demands placed upon the Corps. Nevertheless, the need for quality

* This report was written for General Prugh by Captain Fred N. Smalkin, JAGC. General Prugh authors the novel view that the ghost writer should have authorship credit.

personnel is by no means a new requirement, as I discovered recently when I uncovered the following "job description for Judge Advocates" found in the Army Regulations of 1841:

To ensure proper fulfillment of his office, it is necessary that he should, by diligence and study, make himself acquainted with the settled principles of judicial procedure, the military laws and regulations governing the service, and the customs which have been established therein; and without such attention, not only promotive of his own reputation, but of the safety of the particular community with which he is called to act, military jurisprudence can never be established upon a proper foundation.

Once we attract quality personnel, we need to retain them in our career force. In fact, the retention problem is more chronic now than the recruitment problem. Only about 7 percent of our lawyers are being retained on active duty on a career basis. This figure is indeed as bad as it sounds, especially when you consider that even the Medical Corps has a 14 percent retention rate. Although the retention problem is a complex one, it is undeniably clear that a major cause of the low retention rate is the disparity in pay between civilian and military lawyers. Unfortunately, the Pirnie Bill, which we had so hoped would help our retention problem, now is a dead letter. We can, however, take solace

in the proposed Uniformed Services Special Pay Act of 1973 which will provide a bonus of up to \$4000 per year for a six year extension of obligated service, once the initial obligated tour is completed. Although the USSPA, if passed, would help retention of our young lawyers, it will have an unfortunate side effect upon the morale of officers who already have extended service, in that the USSPA is not retroactive. An analysis of our current personnel posture points out the importance of continued efforts in the retention area, for, out of the 1,527 officers in the Corps, approximately 1,100 are performing obligated service and thus are presumptively "just passing through." By far the most significant source of newly-commissioned active duty Army Reserve JAGC officers is the ROTC program—graduates of this program account for approximately 80 percent of our recruits yearly, while most of the remainder come from among freshly graduated law students attracted to the Corps by our expanded recruitment program. Our greatest hope for a continuing career force is the "excess leave program," by which active duty Regular Army officers are put in a leave of absence status to attend law school; at, I might add, some sacrifice to themselves, as they are not authorized pay or allowances during the school year. We now have some 190 excess leave officers in law schools throughout the country. Of these, approximately 80 percent have already fulfilled their

initial military obligations, and approximately 40 percent are West Point graduates. Happily, these officers are presumptively careerists.

The increasing depth of the Corps' activities points up the need for personnel capable of coping with the duties of a military lawyer in today's law-conscious environment. For one thing, the Army is not insulated from the litigious propensity so evident today among the populace at large. We have people suing to get out of the Army (conscientious objectors and involuntarily activated reservists), and we have an increasing number of people suing to stay in the Army (RIF'd Reserve officers and persons denied the opportunity to re-enlist). We no longer enjoy the benefits of a "hands-off" doctrine in the U.S. District Courts; instead, Federal judges are inserting themselves with increasing frequency in what in the past has been the sole domain of the Armed Forces. Just a list of some representative law suits handled recently in our Litigation Division will illustrate my point—we have had an increasing number of collateral attacks on courts-martial; we have had a number of dissent cases challenging the traditional authority of the military commander to govern his installation; and we have had cases attacking the concept and implementation of purely in-house programs, especially the drug abuse program in Europe. We also have our share of the litigative headaches plagu-

ing other Governmental agencies, namely, environmental and release-of-information cases.

In the military justice field, there were over 190,000 Article 15's in the Army in Fiscal 1973, and JAGs gave advice to the recipients in a large percentage of these. We also experienced an increasing level of JAG participation in the 7,326 summary courts-martial tried last year. The increased JAG participation in these cases stems from Army implementation of the Supreme Court's decision in the *Argersinger* case (*Argersinger v. Hamlin*, 407 U.S. 25 (1972)) which prohibited confinement of defendants not represented by counsel. Rounding out the military justice picture were the 15,472 special and general courts-martial tried in Fiscal 1973. Of course, the trial of these cases occupied the time of many JAG officers. In this regard, we continue to take pride in the fine work of the U.S. Army Judiciary. We now have a trial judiciary consisting of 27 full time general court-martial judges and 32 full time special court-martial judges. The appellate judiciary numbers 13, headed by MG Hodson, Chief Judge and my predecessor as The Judge Advocate General.

Turning to other Corps activities, we find that, due to the pressure of the statutory duties imposed on the Corps, extension of the legal assistance program has been deferred for the time being, although DoD has approved the incorporation of the Pilot Program into the traditional Legal Assist-

ance Program of the Army. For those of you who might not be familiar with the Pilot Program, it involved the utilization of JAG lawyers to represent low-income service members in civilian court matters. We are currently offering the program in eight jurisdictions, and we will expand as time and resources permit. In the jurisdictions where the program is operating, it has proved to be a tangible benefit to the lower-ranking soldier. We are grateful to the local bar in those jurisdictions for their cooperation in this worthwhile endeavor.

We are, as always, extremely proud of the fine program at the JAG school in Charlottesville, Virginia. The publications people at the JAG School have recently published a number of excellent volumes which have had a favorable impact on both "professional" and "lay" audiences. I speak particularly of the "Crisis in Credibility" materials which were particularly well received; *"The Army Lawyer,"* which is the Corps' house organ and an invaluable tool for dissemination of the professional nitty-gritty to the field; and three other publications, the *"ROTC Handbook on Fundamentals of Military Law,"* the *"Legal Guide for Soldiers,"* and *"Procurement Manual for Clubs and Construction by Certain Nonappropriated Funds."* By the way, it is with great joy that

I announce the recent groundbreaking for a beautiful new JAG School building on the campus of the University of Virginia. This new facility will help us fulfill our continuing desire to maintain the world's finest center for the study of military law.

During the past year, we have intensified our efforts to build up an "enlisted corps" to support JAG functions. We need a group of highly trained and competent enlisted men and women to function as legal clerks, paralegals, and court reporters. We are getting co-operation in our endeavors from The Adjutant General, who is conducting a course in his school at Fort Benjamin Harrison for the training of court reporters. As of the close of Fiscal 1973, I am happy to report, almost 90 percent of existing legal clerk vacancies were filled. The wise use of these specially trained enlisted people allows maximum utilization of precious lawyer-hours in those tasks which can only be performed by a qualified attorney.

It has been my pleasure to report to the Association on some of the highlights of the Corps' past year. As always, we appreciate the enthusiastic support and recommendations of the Association in our endeavors to render the best possible legal service to our client—the U.S. Army.

THE REPORT OF TJAG—NAVY

Rear Admiral Merlin H. Staring, The Judge Advocate General of the Navy, gave a synopsis report at the Association's annual meeting on 6 August. His written report on which his oral remarks were based is set forth in full.

Personnel

The experience level of the Navy Judge Advocate General's Corps continues to be the problem of primary concern to us in the personnel field. In FY-73, less than 4% of those officers completing their obligated service chose augmentation. This low retention figure reflects a continuing downward trend which has resulted in a serious lack of experienced JAG Corps officers.

The FY-74 JAG Corps requirements, against our anticipated on-board count, are as follows:

	<u>FY-74</u> <u>Requirement</u>	<u>On board</u>
08	2	2
06	84	61
05	117	80
04	172	154
03/02	440	515
Total	<u>815</u>	<u>812</u>

One bright area is in the field of recruitment. With the assistance of the Naval Recruiting Command, considerable effort has been expended on selling the Navy JAG Corps to law school and senior-year college students. This pro-

gram has in its initial phase been most successful, resulting in a substantial increase in the number of applicants for both the JAG Corps student program and the direct-commission program.

The continued failure of the Congress to pass some type of special-pay legislation for military lawyers has of course been a prime factor in the poor retention rate. Our first-tour judge advocates are highly sought after by various Government agencies—at salaries far exceeding those paid by the services. Continued failure to pass special-pay legislation can only exacerbate the problem.

Our new paralegal rating—legalman—has been in existence for about one year. Its purpose is to provide the overall legal administrative assistance necessary to free our judge advocates for performance of work requiring the professional competence of a lawyer. Legalmen act as court reporters, office managers and administrators, librarians, claims and investigations supervisors, secretaries, typists, and clerks, and perform the other myriad duties so necessary to keep a law office operating efficiently. The authorized strength for this new rating is 426. By April 1974, 275 billets will be filled. It is anticipated that another 100 billets will be filled during the year as more legalmen become available for assignment.

Naval Reserve Law Program

The assigned mission of the Naval Reserve Law Program is to provide an adequate force of Reserve judge advocates to meet mobilization requirements and to provide contributory support to the active Navy. There are more than 800 Reserve judge advocates in 40 law companies—located throughout the United States. Our Reserve judge advocates enable us to draw from a wide range of experience in local law. They participate in legal assistance and many other helpful programs throughout the country, particularly in remote locations where there are no active-duty judge advocates.

The Navy has recently concluded a review of mobilization-day-increment requirements for the Judge Advocate General's Corps. The results of this review indicated an immediate mobilization requirement for 131 Navy Judge Advocate General's Corps officer billets. Drill-pay billets are being increased to meet these new requirements, and the added billets are being distributed among our 40 law companies.

During the past year, Congress created the first Inactive Reserve Judge Advocate General's Corps flag billet. Captain Hugh H. Howell, Jr., JAGC, USNR, was selected to fill this billet from a field of highly qualified candidates. His selection was approved by the President on 23 January 1973, and he was sworn in on August 2, 1973. Rear Admiral Howell has been assigned to the mobilization

billet of Assistant Judge Advocate General (Civil Law).

The loyalty and dedication of all of our Reserve judge advocates provide the Navy with a truly viable and a highly valuable Naval Reserve Law Program. One of our principal current goals in this area is the development of additional means and channels by which our vast reservoir of Naval Reserve legal talent can be brought to bear effectively in even greater support to the active naval establishment.

International Law

In view of the worldwide commitments of the Navy and the Marine Corps, our International Law Division is constantly called upon to provide legal guidance and advice in the application of international law as it may relate to this worldwide presence. Since international law consists of a body of rules governing the relations between States, the Division must measure naval action, proposed or consummated, against recognized principles of international law.

The interpretation of the law of the sea is one of the major functions of the Division. As the date for the upcoming Law of the Sea Conference draws nearer, the Office of the Judge Advocate General is actively participating in the formulation of the negotiating position of the United States Government on all law-of-the-sea issues. The negotiations cover a wide range of interests, which can be grouped under six major topics:

(1) the breadth of the territorial sea, (2) the regime governing straits transit, (3) the limits of national jurisdiction over living and nonliving resources, (4) the seabed regime which operates beyond the limits of national jurisdiction, (5) the regime for preventing marine pollution, and (6) the regime governing the conservation of fisheries. As a concomitant to these negotiations, our International Law Division prepared a comprehensive summary of the law-of-the-sea attitudes of the nations expected to participate at the Law of the Sea Conference. This continuously updated study has served as a basis for determining appropriate U.S. positions which would best accommodate the interests of other nations while protecting our own.

Other noteworthy law-of-the-sea matters calling for advice from the International Law Division during the past year were: national legislation on liability for incidents involving nuclear-powered warships and the recently signed Protocols to the Incidents at Sea Agreement with the Soviet Union.

With increased national and international concern over the deterioration of the world's environment and its effect on the earth's ecosystem, there continues to be a proliferation of environmental regulations, both domestic and international, aimed at pollution control and abatement. The growth and development of an environmental-law system through international agreements and domestic legisla-

tion has such an inherent impact on the daily operations of the Navy and the Marine Corps that greater vigilance must be maintained in respect to the increased challenge to naval mobility posed by environmental regulations. The Navy is fully committed to the protection of the environment—but the inherent nature of our operations sometimes brings us into conflict with the goals of the environmentalist. This aspect of the activities of the International Law Division will increasingly center on responding to proposed environmental controls by providing legal analysis and solutions which will accommodate the legitimate goals of environmental proposals without jeopardizing the strategic or operational mobility of the Navy and the Marine Corps.

In respect to environmental litigation brought against the Navy under the Clean Air Act Amendments of 1970 and the Environmental Policy Act of 1969, it is pointed out that the principal briefs for these cases have been prepared by the International Law Division. To date, the Navy has not lost a lawsuit brought under environmental legislation.

Of great interest to the Office of the Judge Advocate General is the international-negotiations process, particularly as it affects overseas homeporting of ships, base rights, and the status of servicemen assigned overseas. Preserving base rights and status-of-forces rights in the Trust Territory of the Pacific Islands, in the event

of independence, and in the Bahamas, since its independence, are cases in which the Division has been very active in the preparation of draft agreements and Government positions.

The International Law Division is active in every area of air and space law that is of interest to the Navy. The Division participates actively in negotiating agreements relating to the rendering of foreign military assistance to promote peace and security, particularly as they relate to the transfer of ships to friendly foreign countries.

In cases which result in the exercise of foreign criminal jurisdiction over individual servicemen and dependents, the Division ensures, through the monitoring of all reported cases, that the individual is accorded the safeguards guaranteed by various status-of-forces agreements and other fair-trial principles secured by international law. Where violations occur, it is the responsibility of the Division to initiate the remedial action required. This often requires diplomatic intervention.

Immigration and naturalization law is an area of great concern to the International Law Division in that the quick, efficient, and considerate resolution of legal problems related thereto bears directly on the morale of the naval community.

Additionally, the Division is active in reviewing proposed legislation dealing with the naturalization of alien servicemen and in

promoting amendments which will treat alien servicemen in a fair and equitable manner.

In summary, our International Law Division has provided advice and practical solutions to numerous problems affecting the needs of the service and the security interests of the United States. In this mission, there has been provided assistance which has not only been consistent with applicable rules of international law but has also contributed to the peaceful and useful development of international law.

Admiralty

During Fiscal Year 1973, our Admiralty Division closed 412 cases—of a running docket of approximately 630. Approximately two-thirds of these cases (235 of the 412) were disposed of under the Navy's admiralty-settlement authority or through the conclusion of admiralty litigation conducted by the Department of Justice with close cooperation and assistance from our Admiralty Division.

Public Law No. 92-917, enacted on 29 August 1972, amended title 10, *U. S. Code*, and broadened the authority of the Secretaries of the military departments to settle certain admiralty claims administratively. The Secretary of the Navy now has authority to settle admiralty claims against the Navy for damage caused by other property of the Navy, in addition to damage caused by vessels in the naval service, and for damage caused by maritime torts committed by an agent or employee of the Depart-

ment of the Navy. Thus, claims for damage caused, for example, by improper fendering, free-floating camels, unlit or improperly placed buoys, lost or sunken ordnance, neglect pilotage by Navy pilots, or negligence of Navy civil service longshoremen are now within the Secretary's admiralty-settlement authority. Also included are claims for damage caused by aircraft, helicopters, and drones, or by negligent operation of gantry or shoreside cranes if occurring on navigable waters. About 12 claims involving this expanded scope of authority have been received in Fiscal Year 1973.

Promotions and Retirements

During Fiscal Year 1973, the Office of the Judge Advocate General reviewed the legality of 293 precepts and selection board reports; 2,464 naval examining boards; 3,736 nondisability retirements; and 12,353 disability evaluation cases. The comparable figures for the preceding fiscal year were 297 precepts and selection board reports; 2,104 naval examining boards; 3,632 nondisability retirements; and 13,174 disability evaluation cases.

Administrative Law

During Fiscal Year 1973, the Administrative Law Division has been particularly occupied with legal problems arising from the prohibitions of 10 U.S.C. § 973(b) against the holding of civil offices by Regular military officers; the Missing Persons Act; the projected termination of the state of national

emergency and its effect upon the Navy; and the proposed Equal Rights for Women Amendment to the United States Constitution. The Division has also provided advice on the subject of political and dissent activities, personnel and manpower problems, and problems pertaining to Federal versus State or municipal jurisdiction.

Opinions pertaining to civilian employees, nonappropriated-fund activities, and the acceptance or transfer of gifts or donations, including determinations regarding the eligibility of donees for salvage materials from USS CONSTITUTION, have been furnished by the Division.

The Division has reviewed numerous regulations of commands, bureaus, and offices of the Department of the Navy to ensure legality and conformance with controlling regulations. This included the 1973-74 revision of the *U. S. Government Organization Manual* (Navy section), publication of Changes III and IV to the *Manual of the Judge Advocate General*, and publication of *U. S. Navy Regulations, 1973*.

Numerous determinations regarding relief from liability of disbursing officers, determinations regarding the origin of disability of retired members, as well as many cases involving counseling of naval personnel concerning the Department of Defense directive on "Standards of Conduct" have been completed.

The Division has also furnished legal counsel to the Department of

Defense Transportation and Per Diem Committee and the Military Pay and Allowances Entitlements Committee on a continuing basis.

The Division has been responsible for developing, coordinating, and processing action for the Judge Advocate General on proposed legislation affecting the Department of the Navy. These items include legislative proposals pertaining to military justice, admiralty law, claims, international law, and other matters of a general military interest. Proposed legislative matters which are of a civilian nature—such as taxation, immigration, nationality, shipping, and environment—were also reviewed by the Judge Advocate General for legal and policy considerations when such legislative proposals may affect or have a direct impact upon the personnel, facilities, or operations over which the Navy has cognizance or jurisdiction.

Litigation and Claims

Litigation challenging our administrative decisions and actions, mostly on constitutional grounds, has increased both in scope and in sheer volume. The number of these cases pending at the end of FY 1973 was 356, up from 155 at the end of FY 1972.

The most important series of cases affecting the national security are those expanding the *Flowers* doctrine. In *Flowers*, the Army had deeded an easement to the public to cross a particular military base on a certain street. Although the easement was limited to the

right of travel across the base, the Supreme Court ruled that this gave a right to *Flowers* to hand out antiwar literature on the sidewalk. When weighing the commanding officer's interest in the security of his base against the constitutional free-speech rights of *Flowers*, the Supreme Court simply determined that the latter prevailed because of public access. Federal courts have since expanded this doctrine to allow anyone claiming a constitutional right to have unlimited access to areas where the general public has access.

A case brought during the presidential campaign by Dr. Spock and Linda Jenness against the Commanding Officer, Naval Air Station, Quonset Point, was determined, originally, on the basis of *Flowers*, granting access to unfenced areas. The case was later reopened when the Court noted that the Vice President had been allowed to make a political comment inside the fence. A subsequent ruling allowed plaintiffs to campaign both inside and outside the fenced areas.

Last year it was reported that the District Court for the District of Columbia ruled favorably to the Government on the issue of constitutionality of mandatory chapel attendance at the military academies. This decision was overturned on appeal by the Circuit Court, and certification has been denied by the Supreme Court. Several attacks on the demerit system at the service academies, brought on due-process grounds, have resulted in a moderate rewrite of the rules of the

Naval Academy to conform to court decisions.

The Federal courts have recognized the strong Navy effort to protect the environment by dismissing three suits based on failure to prepare environmental-impact statements and by denying the right of a State pollution-control board to fine the Navy under the Clean Air Act.

A major lawsuit, with congressional interest, attempted to forestall a major reduction of the Newport naval complex and closing of the Boston naval complex. Following the issuance of a temporary restraining order, the Military Subcommittee of the Senate Armed Forces Committee met to hear the plaintiff's grievances. Now, however, the Navy is going ahead with the closings.

In the matter of prohibition against Reservists wearing wigs to cover their long hair, the Marine Corps and the Navy have been subject to a barrage of continuing litigation, the majority of which has resulted in unfavorable decisions.

Although antiwar activity is now virtually a thing of the past, some servicemen still seek conscientious-objector status. Most of these servicemen are physicians under the Berry plan or officers who have received free education at Navy expense.

The voidability of enlistment contracts on technical contract-law issues and alleged misrepresentations made by recruiters have been the subject of litigation. Plaintiffs,

however, have generally failed to succeed on the merits in this area.

As to constitutional rights, the right to petition Congress en masse about a ship's movement; sex discrimination for twice-passed-over regular male lieutenants; and review of unfavorable discharges for lesbians and homosexuals—all have been the subject of judicial review.

The size of tort and military claims presented last year increased dramatically, due mostly to a similar increase in reported judgments. Over 250 million dollars in claims, with an approximate 12-to 15-million-dollar settlement value, were presented as the result of one mid-air collision between a commercial airliner and a Marine jet fighter. Two other air crashes resulted in large claims—one when a Navy jet crashed into an apartment house in Alameda and another when a Navy P-3 collided with a NASA plane (with civilian scientists on board) while both were landing at Moffet Field. An explosion in Roseville, California, of Navy-made bombs being transported on a Southern Pacific Railroad train resulted in a 23-million-dollar claim submitted by the Southern Pacific for their own loss and indemnification. Medical-malpractice claims continued to increase both in numbers and amounts. To meet these inflationary trends, Navy law centers were granted additional authority to adjudicate Federal tort claims in the field up to \$20,000, or to deny such claims up to \$40,000.

During the last year the Navy was once again number one in recoveries under the Medical Care Recovery Act. In 1972 the Navy collected \$3,111,633.03 — \$762,708.36 more than in 1971.

United States v. Moore, 469 F. 2d 788 (3rd Cir. 1972), was the most significant Medical Care Recovery Act decision of the past year. In brief, the Third Circuit held, over a vigorous dissent, that interfamily immunity laws do not defeat the right of the United States to recover from tortfeasors who are immune from suit by the injured party because of a State's interfamily immunity law.

Personnel claims are being processed and paid more quickly in the field than ever before. Change 4 to the JAG Manual provides all naval districts and law centers with \$10,000 adjudicating authority in order to expedite further claims settlements. At a recent meeting between the military services and carriers it was concluded that all branches of the service and carriers are working so closely with depreciation schedules that settlement of carrier recovery claims can now be made in half the time it took before. Because of this increased expertise in the field, acknowledged by industry, final action before set-off has been delegated to the naval districts and law centers.

Legal Assistance and Taxes

The Navy Pilot Legal Assistance Program, launched in 1970, was successfully continued through the

past year. This program permits Navy judge advocates to deliver full legal services—including representation in civil court actions—to naval personnel and their dependents who are unable to pay a fee to a civilian lawyer without financial hardship. Twenty-four Pilot Program sites are presently authorized, of which 17 are in active operation.

In February of this year, the Secretary of the Navy asked the Secretary of Defense for authority to make expanded legal services a permanent program. We recently received a favorable reply to this request from DOD. The Defense Department has encouraged us to extend the availability of expanded services to additional locations, and to incorporate the expanded legal services program into the traditional legal assistance program as a permanent element thereof. We intend to do both.

The traditional legal assistance program, which has seen few basic changes since its inception 30 years ago, is also in the news. Previously, as you know, the legal assistance officer's role was limited essentially to office advice. He could draft certain documents (e.g., wills, powers of attorney, residential leases, etc.), but he was not permitted to correspond or negotiate with adverse parties as an attorney for the servicemen. The most he could do was ghost-write letters for his client to sign. The Secretary of the Navy has recently approved a change to the traditional legal assistance pro-

gram, permitting the legal assistance officer to deal openly with the general public as a spokesman for his client. What this means is that Navy judge advocates are now authorized to sign correspondence over the title "Legal Assistance Attorney," on specially prepared "legal assistance office" letterhead. (Use of official Department of the Navy letterhead is not authorized, for obvious reasons.) A legal assistance attorney may negotiate an out-of-court settlement with adverse parties in the case. He may draft pleadings or other documents for use by the client in court—provided the client is able and willing to handle an *in propria persona* appearance. The judge advocate may not be a counsel of record in the court proceeding, however, unless the client and the case are within the "pilot program" guidelines.

An annual operation known as the Navy Legal Checkup Program was implemented last year. While the preventive law concept may not be new, the scope and magnitude of this program is, as far as I know, unprecedented in the Armed Forces. Last October, every officer and enlisted man on active duty was given a questionnaire designed to spot potential or existing personal legal problems. Obviously, we could not apply a legal X-ray to every potential problem area; but we did focus on those subjects which tend to affect a broad cross-section of the naval community—such matters as the review of wills and powers of attorney, life insur-

ance, motor vehicle registration, Federal and State income tax liability, local tangible property taxes, changes in legal residence, domestic relations matters, etc. If problems were revealed by the questionnaire, the service member was encouraged to visit a legal assistance officer. The result of last year's effort were gratifying, and we intend to continue the legal checkup as a permanent annual program.

In the taxation area, there were also some new developments last year.

Section 514 of the Soldiers' and Sailors' Civil Relief Act, which exempts the nonresident serviceman from income and tangible personal property taxes of the military host state, continues to generate disputes. We win some, and we lose some.

We have been in contest with Puerto Rico for several years over the application of their no-fault auto accident compensation plan. Puerto Rico's system is unusual in that commercial insurers are out of the picture. Claims and compensation are handled directly by a government agency. The plan is funded with annual fees paid by motor vehicle owners. Nonresident servicemen were asked to pay this fee, even though they maintained conventional policies with their companies back home—and in spite of the fact that those companies would not adjust the premium to reflect the Puerto Rican coverage. We contended that the annual fee was in effect a tax on the service-

man's vehicle. The First Circuit Court of Appeals, however, held that it is not a tax, but a true insurance premium which the non-resident serviceman must pay.

In Pennsylvania we won, by consent decree, a case on the issue whether nonresident servicemen must pay annual capitation taxes to school districts in which they reside. The tax, though neither an income nor a tangible property tax, was found to fall within the prohibition of the Soldiers' and Sailors' Civil Relief Act.

As the cost of conventional housing skyrockets, more and more military families must resort to mobile-home living. And, as Americans in general tend more and more to use mobile homes as permanent dwellings, the States are responding by classifying them for tax purposes as real-estate improvements, rather than tangible personal property. For the non-resident serviceman, this spells the difference between tax immunity and a tax burden, because the Soldiers' and Sailors' Civil Relief Act only exempts him from taxes on personalty. Tennessee recently amended its constitution to tax mobile homes as realty, and we are apparently headed for a court battle over whether this can be applied to nonresident servicemen. We have previously fought this same issue with Pennsylvania and South Carolina, and we prevailed both times.

A case involving the cost of liquor to Navy clubs and messes went to the U. S. Supreme Court

this past year. Mississippi, which is one of the 18 so-called "monopoly states," told Navy and Air Force clubs some years ago that we would not have to purchase liquor from state stores—but, if we did procure direct from out-of-state sources, we would have to pay Mississippi a 17% markup which nullified the savings from out-of-state procurement. We went to court, and we lost before a three-judge panel in Jackson. This March, the U. S. Supreme Court reversed. It held that the power of the State under the 21st Amendment—to control traffic in beverages—did not permit Mississippi to interfere with consignments of liquor directly into bases with exclusive Federal legislative jurisdiction. As to bases having concurrent jurisdiction, however, the issue was remanded to district court. This issue might very well come back to the Supreme Court again.

Federal income taxes produced some issues last year, too. The new Survivor Benefit Plan, which was enacted into law late in 1972, caused an uproar in the Navy retired community. The Treasury Department initially announced that the new plan would be treated for income tax and estate purposes the same as the civil service survivor annuity plan. We succeeded in getting this reversed, so that the new plan will be the same, tax-wise, as its predecessor, the RSFPP. Thus, the dollars taken from the retired members' pay to fund the annuity will not be taxable income to him, and the com-

mutated value of the annuity to the widow will not be an asset in his gross estate; but the annuity, when received by the widow, will be income in her hands.

The 1969 Tax Reform Act brought changes to the law concerning gross income as to reimbursements received, and deductions for expenses incurred, when a taxpayer moves from one place of employment to another. We are still in the process of trying to resolve this area as it pertains to the serviceman. Certain major problems—such as whether the dollar value of shipping household goods is income to the serviceman—would be resolved through proposed legislation. Other areas of controversy—such as whether servicemen overseas must pay taxes on the temporary lodging allowances they receive—are being dealt with by the revenue ruling route.

The Legal Assistance and Taxes Division continued to serve the Navy—and all of the Armed Forces—with the publication of its popular Armed Forces Federal Income Tax Pamphlet. This publication presents in a convenient, condensed form most of the tax rules of particular application to the military man. Some 56,000 copies of the pamphlet were distributed this year.

Military Justice

As predicted in last year's report, the total number of general and BCD special courts-martial for Fiscal Year 1973 remained relatively the same as the total num-

ber of such courts-martial in Fiscal Year 1972. Reports from field activities indicate that general courts-martial totaled 788 in Fiscal Year 1973, as compared with 873 for Fiscal Year 1972—a decrease of 10%. BCD special courts-martial increased from 1,993 in Fiscal Year 1972 to 2,004 in Fiscal Year 1973, an increase of less than 1%.

Complaints filed under article 138, Uniform Code of Military Justice, whereby a member of the Armed Forces who believes himself wronged may seek redress, have substantially increased during Fiscal Year 1973.

There has been substantial litigation in Federal courts during Fiscal Year 1973 on issues of vital importance to military justice. Many of these issues presently are before our appellate Federal courts and will be finally resolved during Fiscal Year 1974. Some of the issues to be decided are: whether the Supreme Court decision in *Argersinger v. Hamlin* applies to summary courts-martial, thus requiring a knowing and intelligent waiver of the right to representation by counsel before confinement may be adjudged; whether the District of Columbia Circuit Court of Appeals decision in *Avrech v. The Secretary of the Navy* is correct in its determination that the first two clauses of article 134 of the Uniform Code of Military Justice are unconstitutional; and whether the U. S. Court of Military Appeals decision of *United States v. Greenwell* is to be applied retroactively, thereby rendering void substantial

numbers of courts-martial convened by authorities not personally endowed with convening authority by the Secretary of the Navy.

The Department of Defense Task Force on the Administration of Military Justice submitted its report with recommendations to the Secretary of Defense on 30 November 1972. Although the Task Force was primarily concerned with problems of racial and ethnic discrimination, inquiry was made into all facets of military justice. On 11 January 1973, the Secretary of Defense directed all services to implement certain recommendations of the Task Force. While many of the recommendations still are being studied with a view toward implementation, regulations have been issued effecting changes in nonjudicial-punishment procedures throughout the Navy.

The Judge Advocate General's representative presently serves as Chairman of the Joint-Service Committee on Military Justice. This Committee has as its primary goal the preparation and evaluation of proposed amendments and changes to the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States, 1969 (Revised edition)*. During Fiscal Year 1973, the Committee considered various recommendations, which included recommendations of the Department of Defense Task Force on the Administration of Military Justice and, also, the Code Committee. The Committee prepared legislation to effect four amendments to the Uniform Code

of Military Justice. The proposed amendments would:

- a. specify the extent to which the Court of Military Appeals, the Courts of Military Review, and military judges may entertain petitions for extraordinary relief;
- b. provide for the timely execution of court-martial sentences;
- c. relieve the convening authority of the responsibility of making a posttrial review of the findings of a court-martial, but retain his power to mitigate a sentence;
- d. restrict the scope of article 134 by limiting the maximum punishment for offenses charged as violations thereof.

The Committee also staffed and prepared six proposed changes to the *Manual for Courts-Martial, United States, 1969 (Revised edition)*.

JAG Corps Reorganization

The JAG has proposed a reorganization of the Corps which contemplates a basic restructuring of the command lines to law centers and a reorganization of the Office of the Judge Advocate General.

The proposal we are advancing contemplates no change in the status or functions of the staff judge advocates at commands or activities—except that directors of law centers would no longer be double-hatted as staff judge advocates. A law center director would

have one job—to direct and supervise the operation of his law center, and the law center would continue to be charged with rendering a wide variety of legal services to naval commands and personnel in the geographic area of its cognizance.

Under the proposed reorganization, the command line of a law center would no longer run to a local commander such as a district commandant or other local area coordinator. Instead, the command lines of all law centers would run directly to a single common point for law center support and administration immediately under and answerable to the Chief of Naval Operations. Law centers under this proposal are tentatively titled as Naval Legal Service Offices under an officer-in-charge reporting directly to the JAG, who would be ordered ADDU to CNO for purposes of support and administration. JAG's present command line directly to SECNAV would remain as it is now. The JAG would be newly injected into the command line of only those lawyers assigned to law centers.

The advantages of this proposal are:

- a. It creates a single management focus for allocation of financial and personnel support to and among the Naval Legal Service Offices (law centers)—dollars and billets.
- b. It gives added flexibility in such allocations and reallocations, to enable us to meet changing and shifting needs for legal support in various geographic areas.
- c. It ensures JAG a voice in such decisions—a voice he does not now have as a matter of right, and which he is not always accorded in timely fashion as a matter of courtesy.
- d. It places all court-martial defense counsel under the direction of the JAG as contemplated by the SECDEF in implementation of one of the recommendations of the DoD Task Force on the Administration of Military Justice in the Armed Forces.
- e. It provides standard organization and service from Naval Legal Service Offices throughout the Navy.

The proposal will be forwarded to the SECNAV via the CNO for comment. As this item progresses, we will keep you advised.



THE REPORT OF TJAG—AIR FORCE

Major General James S. Cheney, The Judge Advocate of the Air Force, in his report to the Association at its Annual Meeting in Washington on 6 August 1973, announced that he would be retiring from active duty on 30 September and that this would be his last report as TJAG to JAA.

He stated that there had been a slight increase in the rate of courts-martial in the past year. In 1971 there were 3.2 per thousand men for a total of 2,448 GCM's whereas in 1972 the rate was 3.6 per thousand men for a total of 2,687. The increase continues notwithstanding the reduction in Air Force strength. The number of SCM's has also noticeably increased from 126 to 177 giving punitive discharges and from 1,840 to 2,276 non-punitive discharge cases. The number of Summary Courts, however, during 1972 decreased from 266 to 165, reflecting continued application of the policy of not using Summary Courts as an original action. Article 15 actions have increased. The number of cases reviewed by the Air Force Court of Military Review has increased from 343 to 445. Gen. Cheney stated that he felt the increase was due to the end of the draft and the resultant lower quality of personnel. The number of high school graduates among new recruits has been reduced. The number of AWOL's is up. Of

course, the Air Force is still engaged in war in Southeast Asia which is a continuing factor of instability. The number of special courts with BCD's may be due to the professional improvement of the department, also, with expansion of the trial judiciary.

The Air Force expanded its trial judiciary last October. All Special court judges are now assigned to TJAG and not under command. The Air Force has eleven GCM judges and 26 special court judges. With regard to GCM's, the Air Force now has the defense counsel and trial counsel, as well as the judge assigned to TJAG, notwithstanding their being stationed all over the world. Article 32 investigations are now conducted by special court judges producing a much better result.

The DOD Task Force on Military Justice resulted in DOD's request for a plan under which defense counsel will be independent of command in all cases. The Air Force plan contemplates a "Public Defender" system. It is not yet approved but the increased authorizations necessary have been approved and a trial program will be started soon.

The expanded legal assistance program has been approved by DOD, but appropriations and authorizations of personnel have not been increased to cover. In some states, the bar has not been en-

tirely cooperative and in some cases the court has made independent inquiry into the indigence of the soldier litigant and has refused to permit the appearance of JA counsel. In the field of litigation, the Air Force has been, reluctantly, in the forefront of women's rights cases. One case in which the Air Force was enjoined from discharging a WAF on the ground of pregnancy was affirmed by the circuit court and, after certiorari was granted, the Solicitor General was not interested in arguing the issue, so the Air Force mooted the case. In the *Frontiero* case, it was held that women in the service with dependents shall be treated exactly the same as males with respect to allowances. In an Air Force case the Supreme Court held that the *O'Callaghan* decision is not retroactive. There is a rash of personnel litigation. Many medical school and law school students are trying to escape the obligation of service. And there are also a number of conscientious objector cases. Many actions arise under the freedom of information act, but particularly with regard to reports of air crashes, and there is a new wave of litigation involving conflict of interests. In the international law field the Air Force is now providing each man charged in a foreign country with a violation of foreign

law with a base lawyer as well as a local lawyer. Also pending are conferences on the revision of the Geneva Conventions of 1949. These conventions will certainly be revised but there are many perils in the revision.

With regard to personnel retention, the Air Force is now short of field grade officers, even including colonels. The JAG Department is over strength in Captains and General officers—at this time having eight General officers and two Reserve General officers. As far as junior officers are concerned there is, as yet, an adequate input from the ROTC program but the Air Force is again starting a program of direct appointment in anticipation of shortages. Some new developments: Air Force law libraries are now computerized with centralized procurement; court reporting equipment is being tested with the view of standardization and central procurement; enlisted personnel are being trained for para-legal functions and the Air University at Maxwell has a course for commanders which acquaints them with legal problems and services in the Armed Forces with good results. Brig. Gen. Harold R. Vague will be the new TJAG and Brig. Gen. Walter D. Reed will be his new deputy.



THE EDWARD H. YOUNG CHAIR OF MILITARY LEGAL EDUCATION

The Board of Directors of the Judge Advocates Association, by individual contributions but in the name of the Association, has funded the establishment of the Edward H. Young Chair of Military Legal Education at The Judge Advocate General's School, U. S. Army. On August 31, 1972, in academic ceremonies at the School, Colonel Richard H. Love, the Executive Secretary of the Association presented the Chair to Major General George S. Prugh, The Judge Advocate General of the Army, who accepted the Chair in behalf of the School and then formally installed Colonel John Jay Douglass, the Commandant of the School as the first occupant of the Chair.

This is the second Academic Chair established at the School. It honors Colonel Edward H. "Ham" Young who served as the School's first Commandant when the School was first organized and located on the campus of the University of Michigan at Ann Arbor during World War II. The first such Chair, the Kenneth J. Hodson Chair of Criminal Law was established in 1971 to honor the former Judge Advocate General.

In conjunction with the formal ceremonies establishing the Chair, the first Edward H. "Ham" Young

Lecture in Military Legal Education was presented by Professor Delmar Karlen, Director of the Institute of Judicial Administration and Professor of Law at New York University.

Professor Karlen praised Colonel Young for his outstanding contributions to the education of military lawyers and emphasized the aspects of military justice which, in his opinion, differentiate it from and make it superior to its civilian counterpart.

Professor Karlen stressed that civilianization of military justice is neither a necessary nor a desired goal. The slow motion justice and, at the same time, the undue haste resulting from a desire to clear crowded court dockets results in unequal injustice under the civilian system.

He emphasized that in stark contrast the military accused is treated as a person, rather than a number, whose rights are respected and carefully guarded through representation by meaningful counsel. Other aspects of military justice, such as automatic appellate review, were singled out as indicative of the superiority of the military justice system.

The main reason for this superiority, Professor Karlen emphasized, lies in the high quality of

personnel who man the military courts—the military judge and the prosecution and defense counsel. Their quality depends in turn upon the education they receive at the School which is concentrated, demanding, coherent, specialized and practical.

Although apprenticeship sometimes works well, the programs of continuing legal education are essential for when it does not. Elaborate, carefully planned and well executed, these programs are instru-

mental to military lawyers and to the continuing success of military justice. These programs cover every aspect of military law and, in conjunction with the Basic and Advanced Classes as well as the extensive research program, serve to make The Judge Advocate General's School one of the nation's finest law centers.

The full text of Professor Karlen's lecture follows in this issue of the Journal.



ANNUAL MEETING—1974

The thirty first annual meeting of the Judge Advocates Association will be held in Honolulu on 12 August 1974 coincident with the annual convention of the American Bar Association.

Brigadier General Frank O. House, USAF, has been named chairman of the committee on arrangements. The facilities of the Cannon Club on Diamond Head have already been reserved by General House for this event. All members planning on the meeting in Hawaii are urged to make their travel and hotel reservations early. And by all means, reserve the date—12 August 1974—for the annual meeting and dinner of the Judge Advocates Association.

CIVILIANIZATION OF MILITARY JUSTICE—GOOD OR BAD?

By Delmar Karlen

It is a very great honor to be allowed to pay tribute to the father of military legal education. Colonel Young commanded the first Judge Advocate General's School during World War II and so trained most of the officers who have been administering the army's legal system ever since. The school was disbanded in 1946, but when it was reactivated in 1950 at the time of the Korean conflict, Colonel Young was again in command. His work laid the foundation for the army's present system of legal education, centered here at Charlottesville. This system, in my opinion, is one of the brightest ornaments of the Judge Advocate General's Corps, one of its soundest achievements, and one of the main reasons why military justice can and should light the way to a better quality of civilian justice.

Colonel Young, I was a member of your first Officer's Candidate class, convened at Ann Arbor in the summer of 1943. Under your tutelage and that of the excellent staff and faculty you had assembled, I developed an interest in military justice which still remains with me

today, 29 years after I sat at your feet, and even now after my mandatory retirement from the active reserve.

While at Ann Arbor, I realized that I was studying an inferior brand of justice. Why? Because it was different from civilian justice, of course! That's all I knew, or needed to know, to come to the conclusion that military justice was a second-class product. I knew almost nothing about criminal justice in civilian life, having come to the army after five and one-half years of practice on Wall Street; but I knew that it was different from military justice and therefore better. That was enough.

I am ashamed now of my callow reasoning then, but suppose that I should derive some consolation from the fact that it was not much different from the reasoning of some members of the Supreme Court of the United States years later when they decided cases like **Reid v. Convert**,¹ and **O'Callahan v. Parker**.² Nor was it greatly different from the reasoning that underlies much of the hostile criticism still being directed against

¹ 354 U.S. 1 (1957).

² 395 U.S. 258 (1969).

military justice. It sprang from a profound well of ignorance of both military justice and civilian criminal justice.

We hear talk today about the need for further "civilianization" of military justice, as if that were an end in itself, a goal to be sought without regard to a fair appraisal of the strengths and weaknesses of both systems.

But who believes that criminal justice in civilian life is perfect?

Do we want to import into military justice the almost interminable delays that characterize civilian justice throughout most of the nation? Do we want to wait weeks or months before a grand jury can be convened to rubber stamp a prosecutor's decision to proceed, without telling the accused the evidence against him? Do we want more weeks or months to intervene before trial can be reached? Do we want in the meantime to have lawyers engage in every sort of pretrial maneuver that can further delay the trial without coming an inch closer to the really important question of guilt or innocence? Do we want continuances to be granted right and left because of the engagements of counsel and a recurring inability to get the accused, the witnesses, the lawyers, the jury and the judge all together in one courtroom at one time? Do we want men accused of crime to be released on

bail or on their own recognizance for months on end so that they can commit further crimes or engage in wild attacks on the judiciary and the rest of the "establishment" to the delight of college audiences and the enrichment of the speakers? Do we want to spend months picking juries and in the process brainwashing them? Do we want hung juries and retrials? Do we want weeks, months or even years to elapse before an appeal or a succession of appeals can be heard and decided, sometimes on the basis of specious arguments a lawyer is forced to put forward against his own professional judgment and his conviction that there is no merit in them?^{2a} Do we want to spend ten or twelve years more in collateral attacks and post-conviction remedies?^{2b}

I think the answer to all these questions must be "No". We do not want blindly to copy civilian justice. Its shockingly bad record of delay does not justify the naive faith held by some that civilian justice is necessarily and inevitably superior to military justice.

Military justice is speedy, as even its most severe critics admit. The Sixth Amendment guarantee of a speedy trial means something in the military system of justice, but up to now it has meant almost nothing in civilian systems. Civilian courts have refused to dismiss

^{2a} *Anders v. California*, 386 U.S. 738 (1967); see also A.B.A. Standards for Criminal Justice Relating to Criminal Appeals, p. 74 et seq.

^{2b} On post conviction and other delays, see generally Karlen, *Judicial Administration: The American Experience*, p. 60 et seq.

prosecutions that had been pending for as long as eight years before trial was reached.^{2c} Only recently have some civilian courts begun to try to make the guarantee of a speedy trial meaningful by mandatory, specific timetables. How mild these timetables are is shown by the fact that the ones recently promulgated both by the United States Court of Appeals for the Second Circuit³ and the New York Court of Appeals⁴ require only that a case be brought to trial within six months from the time of arrest. Whether such rules will succeed in their limited objective remains to be seen. As of today, the recommendation of a four month timetable from arrest to trial made by the President's Commission on Law Enforcement and the Administration of Justice⁵ expresses remote ideal, not a reality for most civilian jurisdictions. In short, as the leaders of the bench and bar at the National Conference on the Judiciary concluded in March 1971, our present system of civilian criminal justice "fails to guarantee either speedy trials or safe communi-

ties."⁶ That conference was addressed by the President of the United States, who had this to say:

"Everyone is for a "speedy trial" as a constitutional principle, but there is a good deal of resistance to a speedy trial in practice. * * *

"It is not an impossible goal. In criminal cases in Great Britain today, most accused persons are brought to trial within 60 days after arrest. Most appeals are decided within three months after they are filed.

"But here in the United States, this is what we see: In case after case, the delay between arrest and trial is far too long. In New York and Philadelphia the delay is over five months; in the State of Ohio, over six months; in Chicago, an accused man waits six to nine months before his case comes up.

"In case after case, the appeal process is misused—to obstruct rather than advance the cause of justice. Throughout the

^{2c} United States v. Cohen, 37 F.R.D.26 (1965); United States v. Dillon, 183 F.Supp. 451 (S.D.N.Y. 1960).

³ U.S. Court of Appeals Rules Regarding Prompt Disposition of Criminal Cases, effective July 5, 1971.

⁴ Now in a modified, watered-down version in Ch. 184 of Laws of New York 1972 (Sec. 30.20 of Criminal Procedure Law).

⁵ *The Challenge of Crime in a Free Society*, a report by the President's Commission on Law Enforcement and the Administration of Justice (1967), at pp. 155-6.

⁶ *Justice in the States*, addresses and papers of the National Conference on the Judiciary (1971) at p. 267.

State systems, the average time it takes to process an appeal is estimated to be as long as 18 months. The greater the delay in commencing a trial, or retrial resulting from an appeal, the greater the likelihood that witnesses will be unavailable and other evidence difficult to preserve and present. This means the failure of the process of justice.

"The law's delay creates bail problems, as well as overcrowded jails; it forces judges to accept pleas of guilty to lesser offenses just to process the caseload—to "give away the courthouse for the sake of the calendar." Without proper safeguards, this can turn a court of justice into a mill of injustice."⁷

The Chief Justice also addressed the Conference and said:

"Today the American system of criminal justice in every phase—the police function, the prosecution and defense, the courts and the correctional machinery—is suffering from a severe case of deferred maintenance. By and large, this is true at the state, local and federal levels. The failure of our machinery is now a matter of common knowledge,

fully documented by innumerable studies and surveys.

"As a consequence of this deferred maintenance we see

First, that the perpetrators of most criminal acts are not detected, arrested and brought to trial;

Second, those who are apprehended, arrested and charged are not tried promptly because we allow unconscionable delays that pervert both the right of the defendant and the public to a speedy trial of every criminal charge; and

Third, the convicted persons are not punished promptly after conviction because of delay in the appellate process."⁸ * * *

Such sober conclusions from such sources should give pause to those who would make military justice a carbon copy of civilian criminal justice. Justice delayed is indeed justice denied, not only for the accused, but also for the victims and potential victims of crime and the general public. Without promptness in the disposition of charges, the goals of criminal justice are frustrated. What good does it do to punish man when he and the community at large have almost forgotten what crime he committed? Very little, I submit, at least in the ordinary case.⁹ Long-de-

⁷ Id. at pp. 5-6.

⁸ Id. at pp. 10-11.

⁹ Of course, if the crime is so serious that the offender must be put out of circulation, either permanently or for a long period of time to prevent him from committing further crimes, incarceration helps, even if late.

layed punishment, instead of accomplishing the rehabilitation of the offender is more likely to breed resentment on his part. Instead of deterring others, it is likely to invoke their sympathy for the offender. As Chief Justice Burger said in his address on the State of the Judiciary to the American Bar Association in 1970:

"If ever the law is to have genuine deterrent effect on the criminal conduct giving us immediate concern, we must make some drastic changes. The most simple and obvious remedy is to give the courts the manpower and tools—including the prosecutors and defense lawyers—to try criminal cases within 60 days after indictment and let us see what happens. I predict it would sharply reduce the crime rate."¹⁰

Thus far I have been speaking of only one characteristic of civilian criminal justice which should not be emulated by the military—its delays. There are others.

Paradoxically, while some criminal proceedings in the civilian courts move far too slowly, others move far too quickly. This is the phenomenon of assembly line justice, which can be observed in almost every metropolitan court in the land. Because of inadequate personnel, both in numbers and quality, and because of the cumbersome and dilatory procedures fol-

lowed in some cases, the civilian machinery of criminal justice is overburdened to such an extent that judges and lawyers are forced to resort to shortcuts in other cases. Courtrooms in which minor cases are heard are crowded to capacity, with defendants, police officers, witnesses, bailiffs, clerks and spectators milling around in wild confusion, jostling each other and spilling out into the corridors. The din is so loud that few persons present can hear what is going on in the front of the courtroom. Pleas of guilty are received and sentences imposed at the rate of about one case a minute. A few cases are dismissed and a few others tried, but still dozens, scores, or even hundreds of cases may be disposed of in a single day in a single courtroom. As one experienced observer of civilian justice has said:

"For most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way."¹¹

The same thought is echoed by the President's Commission on Law Enforcement and the Administration of Justice:

"The Commission has been shocked by what it has seen in some lower courts. It has seen

¹⁰ Burger, "The State of the Judiciary—1970", 56 A.B.A.J. 929 (1970).

¹¹ E. Barrett, Jr., Criminal Justice, "The Problem of Mass Production" in *The Courts, the Public and the Law Explosion*, 85, 87 (Ed. W. H. Jones 1965).

cramped and noisy courtrooms, undignified and perfunctory procedures, and badly trained personnel. It has seen dedicated people who are frustrated by huge caseloads, by the lack of opportunity to examine cases carefully, and by the impossibility of devising constructive solutions to the problems of offenders. It has seen assembly line justice."¹²

Even in courts handling more serious cases, the picture is not much different. Arraignments are handled on a mass production basis. The judge spends 3 or 4 minutes on each case, more often than not accepting a plea of guilty—not to the offense initially charged, but to a lesser offense carrying a lighter penalty. The reason, of course, is plea bargaining between defense counsel and the District Attorney's office. Charges of felonies like armed robbery or aggravated assault are in some jurisdictions routinely reduced to misdemeanors. Most plea bargaining is not based on considerations of community safety or on rehabilitation of the offenders, but on crowded calendars and the necessity of disposing of vast numbers of cases without trial.¹³ Yet it is taken for granted by most judges and lawyers, even when its effect is to divest the courts of much of their responsi-

bility. Not only are men allowed to plead guilty to less serious offenses than they have in fact committed; some are released outright without arraignment because prosecutors know that their cases will never be reached; and many men who should be arrested are not, because the police know that the courts cannot process their cases.

The result of slow motion justice in some cases and undue haste in others is not equal justice under law, but too often unequal injustice.

The military scene presents a refreshing contrast to the civilian scene. A soldier in a court-martial is treated as a person, not a number. His rights are respected. He is provided with meaningful counsel, not pro forma representation. He is not kept in the dark, but advised well in advance of trial what witnesses will testify against him and the substance of their expected testimony, and he is made aware of what is happening at every stage of the proceedings. His trial is an individualized affair, separately scheduled and distinct from every other trial. It is a deliberative, thoughtful, unhurried proceeding, not a frantic ritual. This is true even when a plea of guilty is received. There is no assembly line justice in the army.¹⁴ That being so, we must ask ourselves again: Why try to convert

¹² *The Challenge of Crime in a Free Society*, supra note 5, at p. 128.

¹³ R. H. Kuh, "Plea Copping", 24 N.Y. County B. Bull. 160 (1967).

¹⁴ McGovern, "Guilty Plea-Military Version", 31 Fed. B. J. 88 (1972).

military justice into a carbon copy of civilian criminal justice?

There are other respects in which military justice, in my opinion, is superior to civilian military justice, but I have time to deal with them only briefly.

One is the matter of courtroom conduct. In recent years, we have witnessed shocking episodes in civilian courtrooms. In one case a judge was kidnapped from the bench and murdered. In many others, deliberate and determined efforts have been made to disrupt the proceedings, often with the connivance and encouragement of the lawyers involved, and sometimes aided by the over-reactions of the judges being baited. Too often such efforts have been successful, making a mockery of the judicial process and converting courtrooms into political soapboxes. Too often those responsible escape unscathed, thumbing their noses at the law.¹⁵

As President Nixon said at the Williamsburg Conference on the Judiciary mentioned before:

"Society must be protected from the exploitation of the courts by publicity-seekers. Neither the rights of society nor the rights of the individual are being protected when a court tolerates anyone's abuse of the judicial process. When a court be-

comes a stage, or the center ring of a circus, it ceases to be a court."¹⁶

Happily, military courts, while sanctioning, encouraging, and protecting vigorous and zealous representation by qualified counsel, have avoided the excesses found in civilian courts today. Again, why try to convert military justice into a carbon copy of civilian justice?

Finally, there are some respects in which military justice has been affording greater protections to those accused of crime than even now are afforded them in most civilian courts—full pretrial disclosure of the prosecution's cases, for example; automatic appellate review, including the review of the propriety of sentences; and full legal representation regardless of indigency. The civilian courts, under the prodding of the Supreme Court of the United States, are catching up with the military courts, but they still have a long distance to go. The superior protections provided the rights of the accused in military courts have been much discussed and well documented in law review articles,¹⁷ and I need not discuss them further. All I should like to do is ask my usual question: why, if military justice is in advance of civilian justice, should it step back-

¹⁵ Karlen, "Disorder in the Courtroom", 44 So. Calif. L. Rev. 996 (1971).

¹⁶ *Justice in the States*, *supra* note 6, at p. 7.

¹⁷ See generally, Moyer, "Procedural Rights of the Military Accused: Advantages over a Civilian Defendant", 22 Maine L. R. 105 (1970).

ward? I am not suggesting, of course, that military courts are perfect, or that they have nothing to learn from civilian courts, but only that those who would improve military justice should stop romanticizing civilian justice and find out how it works in practice before clamoring for further "civilianization".

Now, having expressed my conviction that civilian courts have more to learn from the military courts than vice versa, I come to the question of why that is so. And here we come back to the reason we are honoring Colonel Young today.

The key to the high quality of justice in courts-martial today lies in the high quality of the personnel who man those courts—the military judges, in other words, and the prosecution and defense counsel. Their quality, in turn, depends mainly upon the kind of training they have received. Most of them have been here at Charlottesville or in the predecessor schools that were run by Colonel Young. All military judges, and the overwhelming majority of the lawyers who act as prosecutors, defense counsel and appellate counsel in court-martial cases, have been through this mill. The only exceptions worth mentioning are lawyers who on relatively rare occasions are retained as defense counsel, military or civilian, by the accused. Even some of these men are former military lawyers or judges who have had the benefit

of the same course or courses of instruction.

To be eligible for this training, a man must have credentials beyond admission to the bar. He must first become a member of the Judge Advocate General's Corps, surviving competition with others and a careful screening both as to his character and ability. Then, newly commissioned and briefly acclimated to military life, he undergoes a 13-week period of intensive training in his future duties, including a heavy concentration on military justice.

The basic course at the Judge Advocate General's School is rigorous and demanding, involving as much homework and as many examinations as the most demanding of civilian law schools. What makes the study of military justice different from anything the lawyer-student has experienced before is the fact that it is so concentrated, so coherent, so specialized, and so practical. It deals with a single judicial system, not flitting from one to another among 51 different systems, comparing majority rules and minority rules, and reconciling cases that do not need reconciliation. It treats substantive law and procedure as what they really are—different sides of a single coin—without any attempt artificially to divide them into separate compartments. It analyzes every step in the process of military justice from the preferring of charges to their ultimate disposition on appeal. It reveals what each person does at

each stage and precisely how he goes about it.

This is a far cry from the way law is taught in civilian law schools, which are notoriously long on theory and short on practice. The wide gap between law school and practice has long been recognized, and most law schools do not attempt to bridge it. They say, with justification, that they have a big enough job to do in teaching theory, and that practical training is better left to apprenticeship or to post-graduate programs of continuing legal education.

Apprenticeship sometimes works well, but more often it does not. For this reason, programs of continuing legal education have become increasingly popular since World War II. Some are quite elaborate, carefully planned and well-executed, but typically they are short, one-shot affairs, seldom lasting more than a few days on a full time basis or a few weeks on a part-time basis. No program of continuing legal education in civilian life approaches 13 weeks of full-time instruction.

Little, if any, recognition has been given to the fact that the army launched the first and probably the most successful program of continuing legal education in the nation. It was motivated by the same reason that led to the creation of civilian programs—dissatisfaction with apprenticeship and on-

the-job training. Its goal was and is more ambitious than that of the civilian programs—nothing less than to equip the trainee to function with high efficiency immediately upon being assigned to duty. As stated by Colonel Douglass:

“The most rapid and most efficient method of bridging the gap between law school and full-scale military legal practice is military legal schooling. The young judge advocate has little chance to move quietly and easily into practice. When he reports at his first duty station, he must be prepared to assume the speed, accuracy, and professionalism of a more experienced practitioner. There is no “break-in” period.”¹⁸

The Judge Advocate General's School has been achieving its ambitious goal. In 1955 Major General Charles L. Decker, then Judge Advocate General of the Army, stated that the operation of the war-time school—the one commanded by Colonel Young—

“. . . was so successful that many of us responsible for legal advice to major commanders would offer to accept one school-trained man in lieu of two lawyers without this schooling. Both in accuracy and output, it was a most profitable venture to accept one such young lawyer officer rather than two lawyers called into headquarters on tem-

¹⁸ Douglass and Workman, “The Educational Program for the Service Lawyer”, 31 Fed. B. J. 7 at p. 23 (1972).

porary duty from batteries and companies.”¹⁹

If all the Judge Advocate General's School did was to give its basic course to new officers four times a year, it would amply justify its position as a leading institution of legal education. But it does far more. It offers each year a 36-weeks Advanced course for more senior officers, the men who are destined to become the military judges of general courts-martial and staff judges advocates, and to occupy other key positions in military law. It offers, in addition, a wide variety of specialized courses running from one to three weeks in duration, including one designed to qualify men to become military judges, especially in special courts-martial.

The fact that military judges are given specialized formal training is another matter that has escaped public notice. The various civilian programs for judicial education are rightly hailed as one of the most significant developments in judicial administration in this century.²⁰ The first such program of significance was the Appellate Judges Seminar held under the aus-

pices of the Institute of Judicial Administration at the New York University Law School. Many other programs for trial as well as appellate judges have been patterned upon it and are now in operation. But the Appellate Judges Seminar, granddaddy of them all, was started in 1956, 13 years after the Army's Judge Advocate School was started. True, that school in its original form was not for military judges alone, but it included them as well as others who had important roles to play in military justice. The Judge Advocate General's School therefore deserves recognition for one of the pioneering efforts in judicial education as well as for its pioneering effort in continuing legal education of the bar.

Finally, the Judge Advocate General's School engages in a broad program of research to help improve military justice, and an extensive program of publications to keep military judges and lawyers up to date on recent developments.

All in all, it is a great law center—one developed out of the school commanded by the man whom we are honoring today—Colonel Young.

¹⁹ Quoted in Douglass article, preceding footnote at p. 9.

²⁰ Karlen, "Judicial Education" 52 A.B.A.J. 1049 (1966).

Bishop Delivers Second “Ham” Young Lecture

The second Edward H. “Ham” Young Lecture in Military Legal Education, presented 30 August 1973 at the Judge Advocate General’s School, Charlottesville, Virginia, was given by Joseph Warren Bishop, Jr., Professor of Law, Yale Law School.

The lecture was the second in a continuing series named in honor of Colonel Edward H. “Ham” Young who served as the first Commandant of The Judge Advocate General’s School when the School was located at the University of Michigan, Ann Arbor, Michigan, during World War II. Colonel Young also served as the Commandant of the School when it was located at Fort Meyer, Virginia from 1950 to 1951.

Professor Bishop’s lecture entitled “The Case for Military Justice” concerned reasons why there should be a separate system of criminal justice for members of the armed forces and how the present system could be improved. Professor Bishop suggested that decisions of the Court of Military Appeals be made appealable to the Supreme Court and that permanent military courts, consisting of a single judge for the trial of such minor offenses as are now tried by

special courts-martial, and of three or five judges for the more serious offenses which are now tried by general courts, be created. He further stated that he believed the Bad Conduct Discharge should be abolished and that Article 88 of the Uniform Code of Military Justice, denouncing commissioned officers’ use of contemptuous words against the President, the Vice President, and the Congress should be repealed.

Professor Bishop served as a Major in the United States Army during World War II and retired from the Army Reserve in 1964 with the rank of Colonel in the Judge Advocate General’s Corps. Professor Bishop has served as Deputy General Counsel and Acting General Counsel with the Department of the Army, as Assistant to the General Counsel with the United States High Commission in Germany, and as special Assistant to the Attorney General, Office of the Solicitor General, Department of Justice.

Future lectures in the “Ham” Young Military Legal Education Lecture Series will be held annually and will be given by distinguished experts in the field of legal education.

Decision Making And The Court Martial Cases *

By Major James A. Endicott, Jr.**

One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility . . . Out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.

— Cardozo, *The Nature of the Judicial Process* 177 (1921)

Introduction

On June 10, 1957, the Supreme Court of the United States reversed the murder convictions of Mrs. Clarice Covert and Mrs. Dorothy Smith,¹ which it had only twelve months before affirmed.² Mr. Justice Clark, in a dissent sharply critical of his brothers chastised the Court for its erratic reversal:

. . . the Court reverses, sets aside, and overrules two majority opinions and judgments of this Court . . . entered on June 11, 1956, less than 12 months ago. In substitution therefor it enters no opinion whatever for the court. . . Mr. Justice Burton and I remain convinced that the former opinions of the Court are correct and that they set forth valid constitutional doctrine under the long-recognized cases of this court. The opinions were neither written nor agreed to in haste and they reflect the consensus of the majority of the court reached after thorough discussion at many conferences. In fact, the cases were here longer both before and after argument

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the view of the Judge Advocate General's School, the Department of the Army, or any other Governmental agency.

** U. S. Army; B.S. 1960, *The Citadel*; J. D. 1968, George Washington University; Director, Plans and Publications Department, The Judge Advocate General's School, U. S. Army.

¹ *Reid v. Covert*, 354 U.S. 1 (1957); hereafter referred to as the 2d Krueger case. (Included was companion case *Kinsella v. Krueger*, 354 U.S. 1).

² *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956), hereafter referred to as the 1st Krueger case.

than many of the cases we decide.³

Is this the "constancy and uniformity" that the late Mr. Justice Cardozo suggests emanates from the minds of the Justices of our supreme tribunal?

Had these cases come from the normal civil channels of judicial processing, this complete reversal in less than a year may have had little significance; but these were cases wherein civilians were tried by military general courts martial in times of peace. Each woman had killed her serviceman husband in the foreign land to which she had accompanied him with the armed forces. It appeared that the cases fell outside the jurisdiction of the U. S. Federal Courts, and therefore each military commander convened appropriate courts martial as directed by Congress in Article 2(11), The Uniform Code of Military Justice⁴ (hereafter referred to as the Uniform Code) to try these women for their crimes.

And Mrs. Smith was not an ordinary "Mrs. Smith". She was Dorothy Krueger Smith, the daughter of highly decorated World War II hero, General Walter Krueger. It was the General himself, a longtime friend of the President, who sought to free his

daughter from her conviction, and his name even appeared on the petition seeking reversal when it reached the Supreme Court. The General's personal fame did precipitate the unusually large amount of publicity that surrounded these cases; however it is impossible to determine accurately the effect of this publicity on the eventual decisions.⁵

The Law Prior to Krueger

The problem of constitutional authority to subject civilian dependents of members of the armed forces to trial by court martial did not appear until after World War II. Such dependents were prior to World War II as today subject to ordinary civil jurisdiction; and overseas installations before World War II were generally U. S. territories⁶ subject to U. S. territorial courts. Dependents of military attaché personnel sent to foreign countries were carefully selected and the problem either did not arise or was settled administratively.

After World War II when it became necessary for the United States to station large numbers of combat forces in foreign lands during times of peace, it was thus also necessary to permit large numbers of dependents to accompany the

³ 354 U.S. at 78.

⁴ 64 Stat. 108, 50 U.S.C. 551-736 (1950).

⁵ See e.g. N.Y. Times, May 2, 1956, p. 36.

⁶ Hawaii, Puerto Rico, the Canal Zone, Alaska, the Phillipines.

servicemen to their duty stations. Anticipating possible judicial problems from the dependents, the Judge Advocate General of Army in 1947 issued a policy directive that military court martial jurisdiction would not be exercised over dependents who had accompanied the armed forces outside the territorial limits of the United States. He failed, however, to suggest or direct any alternative form of judicial action if the need did arise.

On May 31, 1951, the Uniform Code of Military Justice became "the law of the land", and Article 2(11) provided the solution to the dilemma created by this lack of a policy concerning the dependents:

Persons subject to the code . . .

Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *all persons serving with, employed by, or accompanying the armed forces* without the continental limits of the United States and without the following territories: (the code here lists all U. S. territories) (Emphasis supplied)

However prior to the enactment of the Code, the case of *Madsen v. Kinsella* was pending hearing before the Supreme Court. Mrs. Mad-

sen, an armed forces dependent, killed her Air Force lieutenant husband in their governmental furnished quarters in Frankfurt, Germany. She was thereafter tried and convicted of murder by a United States Military Commission in Germany. After affirmance by the Court of Appeals for the military commission, the defendant was confined in the Federal Reformatory in Alderson, West Virginia to serve her fifteen year sentence. Upon her petition for a writ of habeus corpus, the Supreme Court granted certiorari and upheld the conviction. The opinion of the Court held that:

. . . her status was that of civilian dependent wife of a member of the United States Armed Forces which were occupying . . . Germany. . . . Article of War 2(d)¹⁰ defined "any person subject to military law" as including "all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States . . .". This included petitioner.

It seemed clear, from the new Code and the *Madsen* decision, that as of 1952, dependents accompanying the armed forces outside the territorial limits of the United States were subject to trial by courts martial.

⁷ Aycock and Wurfel, *Military Law* 60 (1955).

⁹ 343 U.S. 341 (1952).

¹⁰ Predecessor to Article 2(11), Uniform Code of Military Justice.

In 1952 in occupied Japan, Mrs. Dorothy Krueger Smith killed her Army colonel husband in their government furnished home in Tokyo. An Army court martial, under jurisdiction granted by Article 2(11), convicted her of premeditated murder and imposed a life sentence. The sentence and conviction was affirmed by a military Board of Review and the U. S. Court of Military Appeals.¹¹ On a petition initiated by General Krueger, the Supreme Court granted certiorari. It seemed likely however, that in view Madsen and the new Code, that the court martial of Mrs. Smith was a valid exercise of power by the armed forces commander as delegated to him by Congress.

The Problem at Hand

The problem considered herein transcends the unusual publicity aspect of the court martial cases, and the fundamental significance of their decisions. The problem finds its origin in a rather insignificant phrase in Mr. Justice Frankfurter's concurring opinion in the 2d Krueger case. In his typical dogmatic style, he reminds his brothers:

. . . this Court, *applying appropriate methods of constitutional interpretation*, has long held . . .

that in the exercise of power specifically granted to it, Congress may sweep in what may be necessary to make effective the explicitly worded power.¹²

What are these "appropriate methods"? As is so often the case, the Justice fails to explain an important phrase in an opinion. However by analyzing the court martial cases that have arisen since the adoption of the Uniform Code of Military Justice in 1950, with particular emphasis on the two Krueger cases, an insight is revealed as to what is "appropriate", and how the Court arrives at a decision in a given case. These cases, do not, of course, reveal every source of raw material used by the Justices, and do not reveal explicitly the decision making process; however they do offer basic, representative, and illustrative examples of each. Because of the somewhat constant factors of each case, together they are particularly ripe for analysis:

1. The cases challenge the constitutionality of portions of a recent, well researched, and well drafted statute—the Uniform Code of Military Justice.

2. All the cases center around the question: Can Congress subject a civilian associated with the armed forces to a trial by court

¹¹ United States v. Smith, 10 C.M.R. 350 (1953). The Court of Military Appeals was authorized by the Uniform Code of Military Justice. It is considered a part of the Department of Defense, however the Judges receive appointment from the President in the manner prescribed for Federal judges. In function, the Court equates to a U.S. Court of Appeals.

¹² 354 U.S. at 43. Emphasis supplied.

martial for an offense committed in time of peace, and outside the territorial limits of the United States?

- a. Former servicemen (Toth).¹²
- b. Dependents in capital cases (Krueger).¹³
- c. Dependents in noncapital cases (Singleton).¹⁴
- d. Employees in capital cases (Grisham).¹⁵
- e. Employees in noncapital cases (Guagliardo).¹⁶

3. The basic constitutional question results from a contemporary development i.e. large numbers of civilians accompanying the armed forces to foreign lands after World War II.

4. There are relatively few cases, all decided within a period of ten years.

5. A majority of the Court remained constant during the period. (Warren, Black, Frankfurter, Douglas, Clark, Harlan).

6. The cases, particularly Krueger, reveal with clarity the complexities and bearing of the court's voting process on decision making and predicability.

Three questions are posed throughout this analysis:

1. What materials do and should the Justices use in their decision making?

2. What mental analysis process (method) do the Justices use to reach a decision?

3. Is it possible to predict the result of a given case at the bar of the Supreme Court, based on past decisions of the Court?

The questions will be answered progressively and collectively by evaluating three broad aspects of the decision making process: the vote, the opinion, and the mental analysis.

I. The Vote

The Justices give two outward signs as to how they decide a case: the vote, and the opinion. While the opinion frequently belies the true premise for a decision, the vote is clear and distinct. The Justice must say on a given issue either "yes" or "no". The vote gives no room for disguising the actual premise for a decision with a logically penned opinion built on a solid foundation of constitutional interpretation, precedent, history, or horrendous alternatives. It would seem then that by rendering the issues in a case to a "yes" or "no" form, and then adding the decision of the Justices, a rule of constitutional law would result. Thus on a subsequent presentation of the same issue, the result would be easily

¹² United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

¹³ See notes 1 and 2 supra.

¹⁴ Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960).

¹⁵ Grisham v. Hagan, 361 U.S. 278 (1960).

¹⁶ McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

predicable by looking to the past decisions.

It might appear that members of the Court cast their votes according to a particular judicial philosophy that they might follow (i.e. "activist", "self-restraint"), or according to a particular method of mental analysis they might use (i.e. "interest-balancing", "absolutism"). Once we have neatly classified a Justice, it might then be possible to "predict" the result in a given case.

In the court martial cases, the issue presented was basically: Can Congress subject a civilian overseas with the armed forces to trial by court martial in time of peace? Based on the 1st Krueger case, it would seem "predictable" that future cases would have answered this question "yes". As we see however, in less than a year after the 1st Krueger decision, the answer to that question changed to "no".

In the Krueger cases, the court made three crucial votes: one on the 1st decision, one on the petition for rehearing, and one on the 2d decision. The first vote resulted in a 5-3 decision affirming conviction; the decision was announced by the Court on June 11, 1956, only a month after the hearing. Mr. Justice Clark wrote and delivered the opinion of the Court which was joined in by Mr. Justices Burton, Minton, Reed, and Harlan. Mr. Chief Justice Warren and Mr. Justices Black and Douglas dissented

saying only "we need more time than is available in these closing days of the Term in which to write our dissenting views. We will file our dissents during the next Term of Court".¹⁷ Mr. Justice Frankfurter "reserved" his vote saying time "is required for adequate reflection upon the meaning of these materials and their bearing on the issues now before the Court".¹⁸ Thus the case seemed closed, and the "rule of law" pronounced, with the exception of the filing of a dissent in the next term, and a possible opinion from Mr. Justice Frankfurter.

When the petition for rehearing was filed in the summer of 1956, it seemed doomed to denial since it faced the same five vote majority that had affirmed the case. However prior to the rehearing vote, the majority was reduced to four when Mr. Justice Minton retired. Mr. Justice Brennan who replaced Mr. Justice Minton was not eligible to vote on the rehearing petition since he had not participated in the original hearing. But the petition still faced at best a 4-4 vote which would still have defeated rehearing under the Courts rules. However when the vote was cast, it resulted in a 5-3 decision in favor of rehearing. Mr. Justice Frankfurter had sided with the "activists", and Mr. Justice Harlan had switched his previous position and also sided with the "activists".

¹⁷ 351 U.S. at 485.

¹⁸ 351 U.S. at 485.

Thus when the court faced the vote on the rehearing itself, it was divided by previous votes as follows:

Previous Vote	Predictable Result	
	Reversal	Affirm
1. Warren, Black, Douglas for reversal	3	
2. Clark, Burton for affirmance		2
3. Harlan for affirmance (but supported rehearing) ²⁰		1
4. Frankfurter with a reserved vote (but supported rehearing) ²⁰		1
5. Brennan with no previous vote ²¹	1	
6. Whitaker—not eligible to vote ²²		
	4	4

Based on the previous decision in the Krueger case, it was thus predictable that the rehearing would also affirm conviction, the result of a 4-4 tie vote. Mr. Justice Black entered an opinion denouncing the military court martial of civilians as expected, and was joined by the Chief Justice, and Mr. Justices Douglas and Brennan. But Mr. Justice Frankfurter, and Mr. Justice Harlan also voted to reverse the conviction with each filing a

concurring opinion limiting the decision to capital cases. Thus of the original majority that had voted for affirmance only one year before, only Mr. Justice Clark and Burton remained to file their sharply critical dissent and vote for affirmance.

A further anomaly seen in the voting in the court martial cases is Mr. Justice Clark's switch voting. In the Toth case, he joined the "activists" to denounce the court martial of Toth, an exserviceman. In Krueger, he switches to support Congress is upholding the right of Congress to subject civilians to courts martial. And in 1960, we again find Mr. Justice Clark with the "activists", and in fact writing the opinions in the reversal of the civilian employee cases. In less than four year after Krueger, Mr. Justice Clark completely acquiesced to the "activists" with only a passing affinity to the position he had once strongly advocated.

This analysis of the voting in Krueger certainly does not deny to a Justice the right to change his vote; any system of adjudication would wither away if held to an absolute and unchangeable vote once cast. To the contrary, such switch voting indicates that thought

¹⁹ 352 U.S. 901.

²⁰ Both Frankfurter and Harlan were "predictable" advocates of "self restraint", a philosophy that would favor affirmance.

²¹ Brennan had a reputation as a liberal judge, and thus was likely to side with the "activists". He participated in the rehearing, and was thus now eligible to vote.

²² Whitaker had been appointed vice Mr. Justice Reed, after the rehearing, and was not eligible to vote.

and much consideration is being applied to the decisions, and that they are not the result of rote process. This voting pattern does however belie "predictability based on past voting" as a truism.

II. The Opinion

The written opinion of the Justices would seem to reveal the exact reasons why they cast that particular vote either "yes" or "no". However as seen by a recent commentator on the Court:

The opinions the Supreme Court Justices write usually do not reveal the reasons why a certain premise is chosen . . . In a like manner, the choice a given Justice makes as to the method to be employed—interest-balancing, etc.—is not explained in the opinion of the Justices. And this is true even though the method that is chosen may have a major influence in shaping the result.²³

This no doubt true. However this specific avoidance of revealing the real reason or method for reaching a certain decision sometimes unwittingly exposes the Justice's true premise or basis for decision. By attempting to construct a convincing facade of history, case precedent, and logical analysis purporting to justify their position, they frequently tangle in their own web, contradicting and nullifying their position in print. In many

cases this results in them in fact revealing their true premise.

In the memorandum granting rehearing in the Krueger case, the Justices give some insight as to what they might consider important in reaching their decision. In their instructions to counsel for rehearing, they ask that:

. . . On reargument counsel are invited to include among the issues to be discussed by them the following matters:

1. The specific practical necessities in the government and regulation of the land and naval forces which justify court martial jurisdiction over civilian dependents overseas; . . .

2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court martial jurisdiction authorized under Art. I, 8, cl. 14, . . .

3. . . . distinctions between civilian employed by the armed forces and civilian dependents.

4. . . . distinctions between major crimes and petty offenses. . . .²⁴

As will be seen later in this analysis, these areas on which comment was requested by the Justices probably would not constitute good legal authority; however they probably did play a major role in the decision making process, particularly when the "interests were balanced".

²³ Miller, "On The Choice of Major Premises in Supreme Court Opinions", 14 J. Pub. L. 251, 264 (1966).

²⁴ 352 U.S. 901 (1956).

In a further analysis of the written opinions of the Justices, we will consider three broad areas:

1. The written constitution.
2. The case precedents.
3. Histories (to include treatises and law reviews).

1. The Written Constitution

The first step that is evident in the decision making process is the determination of what the words of the written constitution say about a given issue facing the Court. In the court martial cases, several different methods are used to render the words of the constitution to a useful meaning or command that may be applied to a case at bar.

In the 2d Krueger case, several divergent viewpoints comprise the judgment of the court. Mr. Justice Black begins his opinion by throwing down the gauntlet that "the United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all limitations imposed by the Constitution".²⁵ He then follows with the premise that the court has consistently given the plain meaning to the words of the Constitution when the words were in fact clear and unambiguous.

The Constitution was written to be understood by the voters;

its words and phrases were used in their normal and ordinary as distinguished from their technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.²⁶

If this premise is followed, it would seem logical that when the words of the Constitution on their face answer a constitutional question, the issue would thus be resolved. Application of this plain meaning rule to the 2d Krueger case would first require that we examine the clauses of the Constitution that would seem to apply to the issue presented.

First the powers of Congress concerning trial by jury, and over crimes committed outside the limits of a state:

The Trial of All Crimes, except in the Cases of Impeachment shall be by Jury: and such Trial shall be held in the State in which the said crimes shall have been committed; but when not committed within any State, The Trial shall be at such Place or Places as the Congress may by Law have directed.²⁷

This clause specifically commands without exception that the trial for "all Crimes shall be by Jury". The only power given to Congress is simply an administrative duty of specifying a place for trial when the

²⁵ 354 U.S. at 5.

²⁶ Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1828) cited at 354 U.S. at 7.

²⁷ U.S. Const. art III, § 2.

crime is committed outside of a state.

Second, the powers of Congress to authorize trials by court martials:

The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.²⁸

The plain meaning of this clause does not expressly authorize Congress to subject members of the "land and naval forces" to trials by court martial for their crimes. Are not the members of the armed forces also citizens? Are they denied the rights of a citizen to trial by jury under this clause? There is certainly a difference between government and regulation of the armed forces, and a complete disregard for basic constitutional guarantees of liberty. Case precedent²⁹, military custom, and the Fifth Amendment exclusion of the Grand Jury right "in cases arising in the land and naval forces" have formed the implied right of Congress to authorize court martial of members of the armed forces, instead of trial by jury.

However looking at clause 14 from Mr. Justice Black's premise that the plain meaning words are absolute and un rebuttable authority, the only conclusion that can be drawn is that all citizens (including members of the armed services)

are entitled to a trial by jury. To extend this conclusion merely to exclude members of the armed services from a trial by jury is to color the plain meaning of the words of the written constitution. Even Mr. Justice Black concedes that the Congress may deny this right to servicemen, as seen in his opinions in the court martial cases.

Did the Framers of the Constitution intend that the court in 1957 be bound by the strict meaning of the 1787 document? I think not. The prospect of American armies on foreign soil was not likely in 1787, but such an idea was not inconceivable. European armies had for centuries been stationed in foreign lands, and of course at the time the constitution was being drafted, armies of the British Empire were quartered on what was to become United States soil. Were our fore-fathers so naive' as to think that the United States would never have its troops stationed in a foreign land? George Washington's perennial Farewell Address certainly suggests that foreign entanglements with the implied stationing of our armies on foreign soil was not desirable in the late 18th Century United States. But the possibility did exist. Why then did the Framers omit any reference to such foreign occupation and related court martial problems? They could certainly have specifically authorized

²⁸ U.S. Const. art I, § 8, cl. 14. The National Security Act of 1947 (61 Stat. 495) created the air forces as a separate armed service. It can be logically inferred that the air force is subject to the power of Congress in cl. 14.

²⁹ *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

Congress to subject servicemen to court martial, and likewise could have excluded this power in relation to civilians. Why did they then fail to include such provisions? Although it is debatable, it appears that the Framers favored a broad, liberal interpretation of the Constitution. Even Mr. Justice Black suggests that such an approach is necessary when he said later in his 2d Krueger opinion:

. . . constitutional provisions for the security of person and property should be liberally construed. *A close and literal construction deprives them of half their efficacy*, and leads to gradual depreciation of the right. . . .³⁰

However when read as a complete opinion, it seems clear that Mr. Justice Black indeed *does not* favor a liberal construction of the constitution.

Mr. Justice Frankfurter, on the other hand, takes a definite and unchanging position on the interpretation of the constitution in his concurring opinion in the 2d Krueger case:

The court's function in constitutional adjudication is not exhausted by a literal reading of words. It may be tiresome, but nonetheless vital, to keep our judicial minds fixed on the injunction that it is a constitution we are expounding. *M'Cullock v. Maryland* (US) 4 Wheat 316,

407, . . . this court, applying appropriate methods of constitutional interpretation, has long held, and in a variety of situations, that in the exercise of a power specifically granted to it, Congress may sweep in what may be necessary to make effective the explicitly worded power. . . .³¹

He then concluded that only thus may be court avoid a "strangling literalness in construing a document that is not an enumeration of static rules but the living framework of government designed for an undefined future".

The Frankfurter approach is patently more realistic. The approach advocated by Mr. Justice Black would narrow the focus of each issue to the past, to the specific clauses that would seem to apply. The court would be bound to the 18th Century, except where to modern amendments apply. Using a plain meaning approach to constitutional interpretation would no doubt be simpler and more readily understood. But the result would be a constitutional "code", a prospect that would be in direct opposition with our common law heritage.

While dealing with the contents of a document as an entirety is no doubt basic to the common law, to liberally construe a document is not. Present day and future problems require a flexible system of law for survival; the Constitution must be liberally construed to give

³⁰ *Boyd v. United States*, 116 U.S. 616 cited at 354 U.S. at 40.

³¹ 354 U.S. at 43.

it the latitude it needs. As some of the cases suggest, it was indeed the intention of the Framers that the Constitution be liberally interpreted;³² They could have specifically directed this as have done the compilers of some of the present day uniform law codes.³³ While it can be shown that Mr. Justice Black's plain meaning approach may in fact have been historically what the Framers intended, it has been the Court itself that has recognized the need for the liberal approach advocated by Mr. Justice Frankfurter.

The late Mr. Justice Cardozo succinctly summed up the necessity for this liberal approach when he said:

. . . In countries where statutes are confined to the announcement of general principles, . . . legislation has less tendency to limit the freedom of the judge. . . in our own law there is often greater freedom of choice in the construction of constitutions than in that of ordinary statutes. Constitutions are more likely to enunciate general principles, *which must be worked out and applied thereafter to particular conditions.*^{33a}

Regardless of the interpretation approach followed or advocated,

every decision of the court must be grounded on the written constitution.

2. Case Precedents

The case precedents would rank only below the words of the written constitution as an authority in the decision making process. In fact in many instances the Justices are more reluctant to challenge the authority of a case precedent, than to challenge the constitution itself. As seen in his dissent in the 1960 court martial cases, Mr. Justice Whitaker says he is "bound by the decision in Krueger"; yet it is apparent from his opinion that he does not approve of the decision.³⁴ Certainly the 1956 dissenters did not feel bound by the 1st Krueger decision in 1957. We see them sweep it aside without remorse or honors. Yet Mr. Justice Whitaker is able in the same dissent to in fact challenge words of the constitution by supporting court martial power over civilians merely because they are employed by the armed forces.

Several cases decided by the Supreme Court appear to have been given the status of "amendments" to the Constitution. Several Justices rely on the classic *M'Cullock v. Maryland* to support their position when in reality *M'Cullock* did

³² See e.g. *M'Cullock v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³³ See e.g. Uniform Commercial Code 1-106(1) "The remedies provided by this act shall be liberally administered".

^{33a} Cardozo, *The Nature of the Judicial Process*, 71 (1920). Emphasis supplied.

³⁴ 361 U.S. at 263.

not apply.³⁵ Mr. Justice Frankfurter for example would have us blindly obey Marshall's command that it is "a Constitution we are expounding". As seen above, such a position may have been in direct opposition to the intent of the Framers; yet this case has been placed in an honored position, accepted without question as a rule of law which is implied in the Constitution.

Another case accorded this honor is *Ex parte Milligan*.³⁶ Both Mr. Justices Black and Clark allude to Milligan's absolute command that no civilian shall be tried by court martial when civil courts are functioning. While most would agree that this is what Milligan implies, it in fact does not face the issue raised in the court martial cases of civilians associated with the armed forces. It only considers civilians who are in an area threatened by invasion, but where civil courts are still in operation.

Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes civil administration.

Yet Milligan is used in these cases as an absolute command, much more

than a case precedent, and yet not taken from the Constitution.

Another example of the use of these "amendment" cases is seen in Mr. Justice Black's opinion in the 2d Krueger case where he relies on the venerable *Marbury v. Madison*³⁷ for the premise that Congress can act only within the limits imposed by the Constitution. The Justices place these selected cases on "higher ground" than the other cases that emanate from the court. It appears to be their prerogative to select the cases that will be so honored.

Case precedents are the most frequently cited authority in the opinions. It is generally easy to see why a particular case is cited as authority. But why are certain cases avoided? A true sense of searching for truth would require that all sides of an issue be commented on by the Justices. The most striking omission of a case is in the 1st Krueger opinion by Mr. Justice Clark. He relies on two remote cases³⁸ to sustain his position that civilians may be subjected to court martial, but overlooks a recent case that upheld his position, *Madsen v. Kinsella*.³⁹ Madsen not only upheld his position by *decis*, but appeared on all fours in the fact situation.

³⁵ See e.g. 354 U.S. at 43.

³⁶ 71 U.S. (4 Wall) 2 (1866) cited at 354 U.S. at 5; 361 U.S. at 281.

³⁷ 3 U.S. (1 Cranch) 137 (1803).

³⁸ *Balzac v. Puerto Rico*, 258 U.S. 298; *Re Ross*, 140 U.S. 453.

³⁹ 343 U.S. 341 (1952).

Mr. Justice Clark, in retrospect, saw his error in the 2d Krueger case. His reliance on Madsen was too late to be of value by 1957. The only conclusion that can be drawn from the Justice's omission is either he failed to properly research the cases (which is unlike since he participated in Madsen), or that he was relying on the "practical necessity" aspect of needing the court martial power over civilians accompanying the military. The "activists" rejected this necessity in favor of the command of the Constitution.

Mr. Justice Frankfurter was aware that Mr. Justice Clark had in fact avoided the constitutional problem and relied on necessity. He challenged the opinion of the court by saying:

The plain inference from this is that the Court is not prepared to support the constitutional basis upon which the . . . court martial convictions were secured.⁴⁰

Mr. Justice Black also omits discussing several cases that might have challenged his position. He summarily dismissed *Kahn v. Anderson*⁴¹ as not pertinent and pushed forward his premise that civilians may not be tried by court martial in time of peace. However *Kahn* was a civilian also and was court martialled in time of peace.

The only justification that the court found for upholding this conviction was that *Kahn* was a dishonorably discharged soldier serving a sentence from a previous court martial. But *Kahn* was a civilian, even though he might have been considered by the court an undesirable citizen. Yet to the Justice it seems almost unimportant to discuss why it was justified to deny that particular citizen his rights.

While some cases do attain the status of "authority", most seem to be in fact disregarded by the court. The Justices may pick and choose those cases they want to use, but are not bound to discuss all cases that are in point. It would seem that all cases should be considered when they apply; to allow this arbitrary selection of those cases which fit in to the Justices opinion to uphold his premise seems to invite a disregard for precedent.

As seen in the court marital cases, the 2d Krueger decision becomes the "authority" case for the later decisions.^{41a} Justice Clark justifies all the 1960 cases on the authority of Krueger alone with only finishing touches of other authority. A student of the court must be alert to determine when the court places the "authority" accolade on a case. Once a case is so honored, it becomes a good measure of the outcome of future decisions.

⁴⁰ 351 U.S. at 481.

⁴¹ 255 U.S. 1 cited at 350 U.S. at 14.

^{41a} See e.g. *Grisham v. Hagan*, 361 U.S. 280 (1960).

3. History

History as analyzed herein will refer to all recorded events, with the exception of the case precedents, that occur prior to the decision in a case. History can be divided for analysis into factual history, opinion history, and a combination of each. These are not however absolute value definitions, but used primarily as a tool for analysis.

The Justices cite numerous examples of factual history, the first of which is the numerical statistic. In *Toth*, Mr. Justice Black emphasizes the magnitude of the problem that would be created by affirming the court martial conviction of exservicemen, by revealing a Census Bureau Report that showed that 3,000,000 persons were in the exservicemen class and thus would be subject to such jurisdiction.⁴²

In the 1st *Krueger* case, Mr. Justice Clark uses similar army court martial statistics to justify the affirmance of the court martial conviction of the two civilian dependants.

Figures relating to the Army alone show that in the 6 fiscal years from July 1, 1949, to June 30, 1955, a total of 2,280 civilians were tried by courts martial . . . the volume alone shows the serious problem that would be pre-

sented by the administration of a dual system of courts.⁴³

Commenting on the same statistics in the 2d *Krueger* case, Mr. Justice Harlan in his concurring opinion supporting reversal said;

The number of such cases would appear to so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems.⁴⁴

Such statistics can support a position by presenting the problems that may result from a certain decision. But the statistics alone are not a sufficient legal authority. They do however play a major role in the decision making process by influencing the balancing of interests as will discussed in detail below.

A second example of these factual histories are the records of Congressional hearings, the so called legislative histories. Mr. Justice Black used an impressive excerpt from the record of the committee considering the new Uniform Code to support his position in *Toth*:

. . . The Judge Advocate General of the Army made a strong statement against the passage of the law. He asked Congress "to confer jurisdiction upon Federal Courts to try any persons for an offense denounced by the (military) code if he is no longer sub-

⁴² Current Population Reports, Series P-25 (Dept. of Commerce 1954) cited at 350 U.S. at 19.

⁴³ 351 U.S. at 477.

⁴⁴ 354 U.S. at 78.

ject thereto . . . you preserve the constitutional separation of military and civilian courts . . ." ⁴⁵

A third example of the use of factual history is Mr. Justice Whitaker's use of an published Opinion of the Judge Advocate General of the Army to support his historical position in support of courts martial of civilian employees of the armed forces:

It has been the custom and is held to be adviseable, that civil employees . . . when guilty of crimes known to civil law, to turn the parties over to the courts in the vicinity in which the crimes were committed . . . for crimes committed at a post where there are no civil courts before which they can be tried, it is held that they can be brought to trial before a General Court Martial.⁴⁶

A fourth example of such history is the use of a contemporary statement by General Palmer, the Commander of the Army Forces in Japan at the time of the Krueger cases. Mr. Justice Harlan cites this statement to support his position that civilian dependents should be amendable to court martial except in capital cases.

Jurisdiction by courts martial over all civilians accompanying

the Army overseas is essential . . . In the absence of supporting judicial systems responsive to the same government as the military . . . it is essential that the commander of a military force be vested with the law enforcement authority commensurate with his responsibilities.⁴⁷

Factual histories are good sources of material for use in the decision making process. They tend to reveal an existing problem, or those problems that might result from a particular decision. They are first hand accounts which the Justices can evaluate at face value without having to compensate for the erosion caused by a historical commentator.

The opinion history tends to add some ideas of the reporter, but still is based on historical fact. Where the factual history is recorded verbatim without selection or elimination, the opinion history reveals only what the reporter wishes to tell us. Since it is removed from the true source, its factual correctness may be more suspect than the factual history.

The opinion histories used in these cases were essays, collections of papers and writings, and historical commentaries. Mr. Justice Clark cites a recent historical work Blumenthal, *Women Camp Follow-*

⁴⁵ Hearings before the Subcommittee of Senate Committee on Armed Services on S857 and HR 4080, 81st Congress, 1st Sess., 256-257 cited at 350 U.S. at 21.

⁴⁶ Op. J.A.G. of the Army (1866) cited at 361 U.S. at 274.

⁴⁷ 354 U.S. at 72.

ers of the American Revolution (1952)⁴⁸ in his dissent in the 2d Krueger case to support a historical basis for court martial of civilians. He attempts to equate this work with Winthrop, a renowned expert on military law, and to thus forge an authority. No doubt Blumenthal's work is useful, but it is not a commentary on the legal issues presented, but only a record of the subject matter. As will be seen below Winthrop in his treatise provides a better authority by the vary nature of the work i.e. a legal commentary. Such books as cited by Mr. Justice Clark are no doubt useful in determining the general background of a problem, but are of questionable authority to support a decision.

Mr. Justice Whitaker makes a scholarly exposition of the history of courts martial of civilians in the United States by the use of numerous and respected historical collections.⁴⁹ While these accounts are no doubt true, they of course do not justify rendering a constitutional decision solely on what they show to be the past history of a problem. The Justice fails to present his case on why the courts martial are constitutional, but merely shows that in the past such actions were commonplace whether constitutional or not.

⁴⁸ Cited at 354 U.S. at 80.

⁴⁹ See e.g. 3 *Adams Works* 83; 10 *Washington's Writings* 507; Prescott, *Drafting of the Federal Constitution* 525 (1949) at 361 U.S. at 268.

⁵⁰ Cited at 361 U.S. 269.

^{50a} McCloskey, *The American Supreme Court* 237 (1960).

Mr. Justice Whitaker does however make one effective point by the use of such histories by quoting Hamilton in XXIII "The Federalist" 11:

These (court martial) powers ought to exist without limitation; because it is impossible to foresee or to define the extent and varieties of the means which may be necessary to satisfy them.⁵⁰

Robert McCloskey, a noted commentator on the court, would rank "The Federalist" second only to the case reports as a constitutional authority; however he qualifies his position by suggesting that:

. . . The Federalist Papers, written by Madison, Hamilton, and Jay . . . were explaining what the Constitution would be if ratified, and their explanations were sometimes . . . colored by the zeal of the authors to gain acceptance for a document two of them had helped to compose. . . the Federalist was much used as a guide by early judges, especially Marshall, when they pronounced the doctrines that have made our Constitutional system what it is.^{50a}

As suggested, the author's motive in writing may tend to weaken the "authority" of his work.

One final use of history is seen when Mr. Justice Black cites a quotation attributed to Lord Coke:

God send me never to live under the Law of conveniency or discreption. Shall the Souldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in Westminster Hall.⁵¹

What value such a quotation might have is diminished by its source, the historical collection. The compiler is free to cull and choose as he wishes. Thus the resultant work loses some of its authenticity and reliability, and it is not therefore qualified to speak with "authority" as the law would or should require.

Treatises and Law Reviews

The treatise, while bearing the tinge of history, is basically an exposition of what the author thinks the state of the law is and/or should be at the time of his writing. The author is a commentator on the law, not simply a recorder of fact. The treatise then seems to fall between the fact and opinion histories.

Several noted treatises are referred to in these cases, but the only one used to sound "authority" is the classic of military law, Winthrop, *Military Law and Precedents* (1886). The author, Colonel Wil-

liam Winthrop, was an army judge advocate from 1863 to 1895.⁵² He served much of his career in Washington and was the leading commentator on military law of the late 19th century both in the United States and abroad. He also had first hand knowledge of the landmark case in the field of military law, *Ex parte Milligan*. Mr. Justice Black cites him several times in his opinions and refers to him as "the Blackstone of Military Law".⁵³

Mr. Justice Black first refers to Winthrop in the *Toth* case when he was considering the question of whether an exserviceman could be subjected to court martial for his service connected crimes. Commenting on at 1863 statute which subjected former servicemen to court martial for wartime fraud against the government, Winthrop took the position that:

. . . this class of statutes, which in terms or inferentially subject persons formerly in the Army, but become finally and legally separated from it, to trial by court martial are unnecessary and alike unconstitutional . . .⁵⁴

In the 2d *Krueger* case, both Mr. Justices Black and Frankfurter cite Winthrop to establish that:

. . . The fifth amendment clearly distinguishes the military from

⁵¹ Rushworth, 3 *Historical Collections*, app. 81 cited at 354 U.S. at 41.

⁵² 28 Mil. L. Rev. iv (1965).

⁵³ 354 U.S. at 19.

⁵⁴ Winthrop, *Military Law and Precedents*, 146 (1886) cited at 350 U.S. at 14.

the civil class as separate communities. It recognizes no third class which is part civil and part military . . .⁵⁵

Again we see Mr. Justice Black referring to Winthrop in a very effective way by quoting:

A statute cannot be made by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.⁵⁶

Mr. Justice Whitaker also relies on Winthrop in his dissent in the 1960 cases to support his historical premise that the military may, and has subjected civilian employees to court martial in times of peace. Winthrop records the first articles of war in effect in the United States, those of the Massachusetts Bay in 1775, and comments on the fact that they were applicable to:

All Officers, Soldiers, and others concerned . . . all persons whatsoever serving with the Massachusetts army in the field though not enlisted soldiers are to be subject to the Articles . . .⁵⁷

However in context with the entire treatise, Mr. Justice Whitaker seems to have misinterpreted Winthrop's true feeling on civilian

amenability to court martial as seen by the quotations used by the other Justices. Out of context this passage loses its "authority". To establish a treatise as an "authority", it is necessary to first qualify the author as one who is qualified to comment on the state of the law. While Winthrop is obviously highly regarded by some of the Justices as an expert commentator on military law, several authorities question this. As suggested by several comments in the court martial cases, and by Professor Morgan, the "author" of the Uniform Code⁵⁸, the ideas Winthrop advanced were not always a true indication of what the real state of the law was. In fact the military establishment leaders during the late 19th century believed that such court martial jurisdiction over civilians was legal and proper.⁵⁹

A treatise may present a ripe field from which to pluck good ideas, but it is always important to consider the historical background of the treatise. But even more critical is an analysis of how the ideas presented might have changed when faced with the later developments in the law, and society. As the author of the treatise

⁵⁵ Id. at 106 cited in 354 U.S. at 20, 43.

⁵⁶ Id. at 107 cited in 354 U.S. at 35.

⁵⁷ Id. at 947 cited at 361 U.S. at 266.

⁵⁸ Royall Professor of Law Emeritus, Harvard University; Chairman, Defense Department Committee on the Drafting of a Uniform Code of Military Justice.

⁵⁹ Morgan, "The Background of the Uniform Code of Military Justice", 6 Vand. L. Rev. 169 (1953) (by implication).

drew on the past as tempered with the contemporary setting, so must the Justice today draw on the treatise, but tempered with the present. The Justice must not blindly follow the commands of the treatise, as did Mr. Justice Whitaker, but must ask himself "How would the author decide that question today, as opposed to when he penned his work"? So qualified, the treatise is most useful to the decision making process.

Law review articles are similar to the treatise, and are generally of great value in researching a constitutional problem. Unlike the treatise, they are usually current, and reveal the currents trends in the law of a given field. Unfortunately there are no worthy uses of the law review in the court martial cases, with the exception of several vague references to several articles in Mr. Justice Reed's dissent in the Toth case. The Justice pits several contemporary writers⁶⁰ against Winthrop⁶¹ to add weight to his position that exservicemen are amenable to court martial for service crimes.

A quick perusal of the law reviews in fact reveals several useful and revealing articles⁶² with excellent commentaries on the cases subsequent to Toth. These articles were either not considered as ap-

propriate authority, or were simply not even sought out. In view of the thorough search of the other areas of material available, the latter was no doubt the case.

These articles may lack the mel-low flavor of authority of the respected treatise, but they do present, in general, valid, timely, and thought provoking material on a specific field of law in a present day atmosphere. It seems patently clear that the Justices could have drawn some useful ideas and trends from the neglected articles.

III. Mental Analysis

The most elusive and no doubt most important part of the decision making process is the mental analysis or method that each Justice uses in arriving at a decision. While most Justices are candid in their opinions, most carefully avoid exposing the actual mental analysis that results in a decision. Such things as personal prejudice, personal standards of conduct, personal judicial philosophies, and personal theories of right and wrong no doubt inwardly effect each decision. However several discernable patterns of analysis are seen in the court martial cases: the mechanical analysis, the alternatives analysis, interest balancing, and absolutism.

⁶⁰ Morgan, "Court Martial Jurisdiction", 4 Minn. L. Rev. 79 (1920); Myers and Kaplan, "Crime without Punishment", 35 Geo. L. J. 303 (1947) cited at 350 U.S. at 32.

⁶¹ See note 54 supra.

⁶² See e.g. 33 Tex. L. Rev. 932 (1955); 17 U. Pitt. L. Rev. 454 (1956).

The most apparent pattern is the mechanical approach as typified by Mr. Justice Clark's majority opinion in the 1st Krueger opinion. He begins with the implication (with no attempt at proof) that Article III would authorize a court martial of a person in Mrs. Smith's status as an accompanying dependent, and follows with the premise that the Ross and Insular cases⁶³ sustain this implication. Then based on these unproved premises, he concludes that:

. . . we have no need to examine the power of Congress "To make rules for the Government and Regulation of the land and naval forces".⁶⁴

If the two premises used were in fact valid, such a conclusion might follow mechanically. However Mr. Justice Frankfurter validly challenged these premises and conclusions when he said:

The plain inference from this is that the Court is not prepared to support the constitutional basis upon which the Covert and Smith courts martial were instituted . . .⁶⁵

This type of "if x is true and y is true, then xy results" is obviously

dangerous unless x and y are carefully and accurately selected. This approach is similar to the "search, comparison and little more" process denounced by the late Mr. Justice Cardozo:

It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the color of the case at hand against the colors of many sample cases spread out upon their desk. . . . But, of course, no system of living law can be evolved by such a process . . .⁶⁶

Another caveat of this mechanical approach is set out by McCloskey when he warns that we must select judges "who can resist the natural human tendency to push an idea to what seems its logical extreme".⁶⁷

After his challenge to Mr. Justice Clark's approach, Mr. Justice Frankfurter suggests two ways to guard against this mechanical extension of an issue to an artificial result:

. . . one, never anticipate a question of constitutional law in advance . . . never formulate a rule of constitutional law broader than is required by the precise

⁶³ See note 38 supra.

⁶⁴ 351 U.S. at 476.

⁶⁵ 351 U.S. at 481.

⁶⁶ Cardozo, *The Nature of the Judicial Process*, 20 (1921).

⁶⁷ McCloskey, *The American Supreme Court*, 230 (1960).

facts to which it is to be applied.⁶⁸

Another discernable pattern is that of alternative analysis, or more specifically—comparison of horrendous or constructive alternatives. In the first instance, a decision is justified because all alternatives are horrendous and contrary to the demands of justice. Conversely, the second system reasons that the action proscribed in the decision is not as acceptable as these constructive or practical alternatives suggested.

Mr. Justice Clark reasons in the 1st Krueger case that first:

... a double standard of justice might well create sufficient unrest and confusion to result in the destruction of effective law enforcement. In the armed forces⁶⁹

and secondly that:

... the essential choice here is between an American and a foreign trial . . . an American court martial in which the fundamentals of due process are assured . . .⁷⁰

He then proclaims that these alternatives to court martial are obvi-

ously unacceptable, and that the Court logically must uphold the action of Congress. After this position is rebuked in the 2d Krueger decision by "the activists", he prophesies in a final burst of doom that:

... overseas crime between civilian and military personnel will flourish and that amongst the civilians will thrive unabated and untouched.⁷¹

Four years later Mr. Justice Clark now joining the "activists" to denounce the same courts martial that he had so strongly supported, uses several constructive alternatives to justify his new position. He first suggests that:

one solution might be that provided for paymasters' clerks as approved in *Ex Parte Reed* . . . the civilian paymasters' clerk was required to agree in writing "to submit to the laws and regulations for the government and discipline of the navy".⁷²

He follows with:

another would be to incorporate those civilian employees who are stationed outside the United States directly into the armed

⁶⁸ 354 U.S. at 45.

⁶⁹ 351 U.S. at 478.

⁷⁰ 351 U.S. at 479.

⁷¹ *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956) cited at 354 U.S. at 84.

⁷² *Ex Parte Reed*, 100 U.S. 13 (1879) cited at 361 U.S. at 286 and 361. Such authority over civilians aboard ships would seem to be derived from the law of the sea, the case seems to affirm the law, not create it.

services, either by compulsory induction or by voluntary enlistment . . . although some workers might hesitate to give up their civilian status for government employment overseas, . . .⁷³

He then deduces that since such alternatives are available, court martial jurisdiction is not desirable.

Mr. Justice Whitaker also used this alternative analysis in his 1960 dissent. However he seems to have been wandering the penumbra of Mr. Justice Clark's divergent and shifting opinions when he says:

Both the practical necessities and the lack of alternatives *so clearly demonstrated by Mr. Justice Clark in the Covert case . . .* strongly buttress this conclusion.⁷⁴

The comparison of alternatives obviously does reveal existing or potential problems resulting from a decision. This method however tends to beg the question of whether or not a given decision falls within the bounds allowed by the Constitution in the decision process. This process must be neither a selection of the lesser of evils, nor a pronouncement of there is a better or other ways.

A refinement in the alternative analysis is that of "balancing the interests". In the former pattern,

random alternatives are compared; in the latter, specific interests are pitted against each other. These selected interests are usually not revealed in the opinions, but one example does surface in Mr. Justice Frankfurter's opinion in the 2d Krueger case:

It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of procedural safeguards of the Bill of Rights.⁷⁵

Mr. Justice Clark explains what these "conflicting interests" might be when he says:

The death penalty is so irreversible that a dependent charged with a capital crime must have the benefit of jury.⁷⁶

Mr. Justice Harlan also "balances the interests", but chooses to do so on a more abstract plane i.e. judicial self restraint v. judicial activism. He concludes in his dissent in the 1960 cases that:

I think it unfortunate that this Court should have found the Constitution lacking in enabling Congress to cope effectively with matters which are so intertwined with broader problems . . . fraught with many factors that this Court is ill-equipped to assess, and involve important national concerns into which we

⁷³ 361 U.S. at 286.

⁷⁴ 361 U.S. at 277.

⁷⁵ 354 U.S. at 45.

⁷⁶ 361 U.S. at 278.

should be reluctant to enter except under the clearest sort of constitutional compulsion.⁷⁷

The balancing of interests approach eliminates some of the sporadic tendency of the alternative analysis. While it also tends to beg the question of constitutionality, it does narrow the issues to within some ascertainable limits. If the interests are exposed, and the balancing done in print, this system will produce somewhat predictable and stable result.

A final pattern seen frequently in the opinions is that of absolutism. This method of analysis is almost synonymous with the strict interpretation or plain meaning approach used by Mr. Justice Black in the Krueger cases.⁷⁸ Absolutism would hold that the Constitution issues absolute commands from which no variance is allowed. Mr. Justice Black espouses this position at the out set of his Krueger opinion with the premise that:

We reject the idea that when the United States acts against its citizens abroad, it can do so free of the Bill of Rights.⁷⁹

He then attacked head on any suggestion that necessity demanded that court martial jurisdiction be sustained, and solidly held that no

conflicting interests could defeat the guarantees of the Bill of Rights. The merits of this system of analysis are discussed in detail supra in section I "The Written Constitution".

In Conclusion

What materials or methods are appropriate for the Justices to use in their decision making process? If we resign ourselves to the philosophy espoused by the late Chief Justice Hughes that:

We are under a constitution, but the constitution is what the Judges say it is.⁸⁰

then this question is openly void. But we have not resigned ourselves to such a system of adjudication, and must never do so. We must allow the Justices leeway, but must in the main insist on adherence to the case precedents and the commands of the Constitution.

It is not the province of the Justices to change, but to interpret; yet we must remember Cardozo's clarion:

A constitution states . . . not rules for the passing hour, but principles for an expanding future.⁸¹

The change proscribed is of principle, not of details of execution.

While it would be an unfair

⁷⁷ 361 U.S. at 258.

⁷⁸ See page 15 supra.

⁷⁹ 354 U.S. at 5.

⁸⁰ Statement by the then Governor Hughes of New York (1907) quoted in Corwin, *The Constitution and What it Means Today* (12th Ed. 1958) at iv.

⁸¹ Cardozo, *The Nature of the Judicial Process* 83 (1921).

burden to specify the exact materials and tools a Justice must use in his work, it is appropriate and necessary that the finished work must candidly reveal the true premises of decision, all the materials considered, and the methods of analysis used. While it is essential in reaching a decision to "balance the interests", it is equally essential to openly expose these selected interests to public view. We must hold our Justices to consider only works of uniform accessibility and of respected acceptance as "authorities". The new and the untried might well weather substantial storms before it becomes qualified for the Court's reliance. This we must ask in deference to precedent over expediency. The valid "authority" will surface when its weight is settled.

In retrospect, this analysis brings to mind an old standard hymn of the Protestant churches which refrains:

REFRAIN

On Christ, the sol - id Rock, I stand; All oth - er ground is

sink - ing sand, All oth - er ground is sink - ing sand. A - MEN.

Outer Space Can Help The Peace

By Edward R. Finch and Amanda L. Moore *

I. INTRODUCTION

In recent decades, science and technology have come to form an increasingly vital element of the fabric of society in all nations. The resulting effect on international affairs has been summarized by President Nixon in his February 25, 1971 message to Congress:

"The problems—and the opportunities—created by science and technology dominate an increasing share of our international activity. The greatest importance attaches to our performance in this new dimension, for upon it rests much of the hope for a better future."¹

Space programs are the latest and the most dynamic of what are sometimes called the "global" technologies. Space law is the most dynamic field in international law for meeting the new needs of mankind. Aspects of outer space law have developed into norms of international law. The following statements may be said to be the most important "principles" governing outer space activities:

1. The exploration and use of outer space and celestial bodies shall be carried out for the benefit of all mankind.
2. There shall be freedom of exploration and use of outer space for all States on a basis of equality irrespective of their degree of economic or scientific development.
3. Man's activities in outer space are subject to international law including the United Nations Charter, in the interest of maintaining international peace and security; and promoting international cooperation and understanding.
4. Claims of sovereignty and national appropriation to outer space and celestial bodies are barred.
5. There shall be an unconditional obligation to help and to return astronauts promptly and safely if they land elsewhere than planned and to exchange information relating to astronaut safety.
6. Activities in outer space and on celestial bodies are to be

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¹ President Nixon, "Building For Peace," Report to Congress, February 25, 1971, at 224.

reported to the Secretary General of the United Nations to the greatest extent feasible.

7. Harmful contamination of the environment must be avoided and international consultation made in connection with potentially harmful space experiments.
8. A launching State shall be internationally liable for damages caused by its space vehicles.
9. The State on whose registry an object launched into outer space is carried retains jurisdiction over the object and over any personnel thereof.
10. No weapons of mass destruction may be placed in orbit or on celestial bodies.
11. Military activity is permitted in space for "peaceful purposes" and installations on celestial bodies may be inspected by any other State.
12. States are to conduct their outer space activities with due regard to the corresponding interests of all other States.

These principles are incorporated in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (hereinafter the 1967 Outer Space Treaty);² the 1968 Agreement on the Rescue of

Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space;³ and the 1972 Convention on International Liability for Damage Caused by Space Objects.⁴ These treaties and their principles are observed by the majority of the nations of the world. They have been adopted to govern space activities and agreements between and among nations and their philosophy has even been extended to other areas of international activity.

Man's adventure into space continues the century-long tradition of international cooperation in scientific endeavors of all kinds. The dominating motivation has been the search for understanding and the truth, a search relatively uncluttered by the rivalries between nations in pursuit of their own economic, commercial, and security interests—rivalries which have so frequently led to major obstacles in the path of joint efforts in applying the results of science to human betterment.

The hope of the world to better itself is by using space technology and law in promoting world peace. President Nixon sees America's space program as augmenting the basis of U. S. foreign policy: partnership among friends and allies, strength, and the willingness to negotiate with the Communist na-

² 18 U.S.T. 2410 (1967), T.I.A.S. No. 6347.

³ 19 U.S.T. 7570 (1968), T.I.A.S. No. 6599.

⁴ G.A. Res. 2777, 26 U.N. GAOR Supp. 29, Annex, U.N. Doc. A/8429 (1971). This treaty awaiting U.S. Senate approval.

tions. On the global scale, experts have defined objectives paramount for keeping world peace and enabling man to devote time and resources to his greater problems.⁵ These objectives have in part been achieved through application of outer space principles and technology. For the future, outer space presents the hope to achieve all of the following objectives:

1. Prevention of a general nuclear war.
 - a. Maintenance of deterrence to major aggression.
 - b. Moderation of the strategic arms race.
2. Prevention, containment, termination of "local conflicts".
3. Finding a more durable basis for U.S.-U.S.S.R. relations.
4. Bringing the People's Republic of China further into the world community and into existing international treaties.
5. Finding new strategies for modernization of the less developed countries.
6. Progress toward transformation of international society into a true community through improved global communications.
7. Capturing the technological revolution before it captures us.

II. OUTER SPACE HELPS THE PEACE

A. With Multinational Agreement on International Legal Principles—The Vienna Convention on the Law of Treaties

Progressing in time parallel to the basic space treaties is the Vienna Convention on the Law of Treaties. It is a most important vehicle to encourage all nations to join in treaties for their own benefit and for world peace and the prevention of conflicts and wars. In 1949 the International Law Commission of the United Nations agreed that one of its first studies should concern itself with an effort to codify the law of treaties. Finally in 1966 the Commission adopted 75 draft articles on the law of treaties and recommended that the General Assembly of the United Nations commence an international conference of plenipotentiaries to study the draft articles and endeavor to conclude a convention on the subject.⁶

The International Law Commission draft articles at the 1968 Conference in Vienna were found to be internationally impractical.⁷ *Jus cogens* was one of the three most controversial issues at the Conference. The second was conciliation

⁵ R. H. Dickie, Chairman, Department of Physics, Princeton University, 1969 Alumni Seminar.

⁶ E. Deutsch, "Vienna Convention on the Law of Treaties," 47 NOTRE DAME LAWYER 297 (1971).

⁷ The first session of the International Conference of Plenipotentiaries in Vienna in the spring of 1968 was attended by delegations from 103 countries.

and arbitration procedures. The third was the insistence of the Soviet bloc on an "all states" formula that would enable any country to sign any treaty of general applicability. The Soviets emphatically desired to enable East Germany, which was recognized by few countries outside the Soviet bloc, to be treated as a sovereign State qualified to sign general treaties. The opposition of West Germany and its allies to such a status for East Germany was equally emphatic. International law was thus entwined quite directly with international politics and the negotiating positions of the various countries reflected this reality.⁸ The 1968 Conference produced its own draft convention. It was a considerable improvement over the International Law Commission text, but serious problems remained, particularly in the area of conciliation and arbitration procedures and retroactivity.

During the year that followed a great deal of work was done. Most important was the formation of a new bloc of Asian and African countries which supported the 1966

International Law Commission text throughout the conferences. They had met in Delhi in 1968 and in Karachi in 1969 and decided to vote as a bloc. The bloc did not always hold together. It was, however, a strong moving force, dedicated primarily to adoption of the International Law Commission text with as few changes as possible.⁹

The Convention, as ultimately worked out in the spring of 1969, was finally adopted on May 23, 1969, by 79 votes for, 1 against, and 19 abstentions.¹⁰ France cast the one dissenting vote because she would not accept *jus cogens* in any form. The abstentions were all of the Communist countries except Yugoslavia, having failed to block conciliation and arbitration and having failed to incorporate an "all-states" formula in the Convention.

The Convention on the Law of Treaties is an agreement among nations on the law governing the formation and operation of treaties, how they should be interpreted, amended and terminated, and the rules governing their validity.¹¹ It is not retroactive and will govern only those treaties signed after its

⁸ F. Wozencraft, "United Nations Arithmetic and the Vienna Conference on the Law of Treaties," 6 INT'L LAW. 210-211 (1972).

⁹ *Id.* at 214.

¹⁰ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, 23 May 1969. The second and final session met in the same city in April and May of 1969 with representatives from 110 nations.

¹¹ The Convention will enter into force following ratification or accession by 35 countries. As of 1 September 1972, 47 countries have signed and 13 have now completed ratification or accession. Experts believe that the Convention's eventual entry into force seems assured.

entry into force. That the contemporary international community could reach agreement on the basic international legal issues involved is of paramount significance. The Convention follows the outer space tradition of successful efforts for multinational agreement of international legal problems.

Satisfactory disposition was made in the Convention of the problem of dispute settlement. The procedures in Articles 33 of the United Nations Charter and the International Court of Justice are the vehicles to settle disputes of international law under specific treaties. The Convention has strengthened the United Nations and its Charter as the backbone of international law and the full utilization of the International Court of Justice with adherence thereto.

The Treaty on Treaties does not approach perfection. It does, however, take a giant step toward a world in which the rule of law which guarantees peace and justice will not be a dream but a reality.

B. With Application Technology Satellites—Educational TV for India

Many aspects of space programs are inherently global in character. The challenge and excitement of exploring and finding practical uses for outer space have provided a rich field for such joint enterprises where the United States and many of the nations of the free world

have been able to share in the work and in the rewards. The developing nations have been quick to recognize the potential benefits they can acquire through applying satellites to such critical problems as the need for television dissemination of public health, agricultural and basic educational materials as well as for providing greatly improved information on natural resources and weather.

Countries of the less-advantaged world commonly confront severe educational crises. Illiteracy is widespread. There are some 800 million illiterates today—100 million more than two decades ago.¹² Badly needed medical, technical, and agricultural skills are scarce and often must be imported for want of sufficiently trained manpower at home. The demands for expanded training opportunities—at all levels—far exceed the capabilities of traditional educational systems. Beyond these quantitative demands are the qualitative requirements for better teachers and new curricula that offer more scientific and technical instruction. The education problem directly affects the general level of economic productivity and social progress and requires priority attention and resources in finding adequate solutions.

Modern media are now regarded by many low-income countries as basic tools in any educational offensive. Television and radio can reach the entire population—includ-

¹² Robert S. McNamara, "Address to the Board of Governors of the World Bank Group," Copenhagen, September 2, 1970, at 20.

ing the illiterate. Being able to communicate with the entire population is vital to nationbuilding. For unless governments possess the means whereby they can inform the people of their social and economic development objectives and enlist their support, the rural population, which accounts for most of the persons in less developed countries, can become a major obstacle to growth and a source of instability.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) was among the first to study the educational programming and cost aspects connected with the use of space communications in a developing country. At the request of the Indian government, UNESCO sent a team of experts to that country in late 1967 to compare the relative benefits of three different types of television systems: an airborne system, a terrestrial network, and a synchronous satellite system. Satellites were declared the most economically advantageous for India. The airborne system was quickly ruled out because of its high operative costs and continued dependence on imported aircraft and equipment. The UNESCO team estimated that the projected terrestrial network would reach no more than 25 percent of the popu-

lation by 1981, while a communications satellite could cover the entire country, including the remote areas, from the moment it began operation—a decade earlier. UNESCO's experts saw great potential in the satellite as a means for rapidly improving the educational system of India, a country where 70 percent of the population is illiterate and 40 percent is under 15 years of age.¹³

The UNESCO mission's report generated a fair amount of enthusiasm when it first appeared. But the first concrete step toward its implementation did not come until 1969 when the United States offered to loan an experimental distribution satellite to India for a one-year period. According to the bilateral agreement signed by the two governments, the National Aeronautics and Space Administration (NASA) will launch an Application Technology Satellite (ATS) into a 22,300-mile-high orbit over the Equator within range of India in 1973.¹⁴ During this initial phase, the emphasis will be on broadcasting programs of instruction on practical subjects to the people at large. Millions of Indians will be able to sit down before community television sets and watch Indian programs on topics such as the

¹³ *Space Communications: Increasing UN Responsiveness to the Problems of Mankind*, UNA-USE, May 1971, at 41-44 (hereinafter *Space Communications*).

¹⁴ *Memorandum of Understanding Between the Department of Atomic Energy of the Government of India and the United States Aeronautics and Space Administration*, 18 September 1969, at 1. The experiment is to be known, and referred to, as the India/US ITV Satellite Experiment Project.

planting and cultivating of crops, the use of pesticides, and the methods of family planning.

At the conclusion of the one-year NASA pilot project, India hopes to introduce a nationwide educational television satellite system. While Indian officials have determined that such a system would be economic in light of the country's particular needs, this by no means implies that total educational costs will decline when the changeover to satellite occurs. Rather the economic justification for satellites is that they raise the quality and vastly enlarge the availability of education quickly. In those regions where traditional communications facilities are very scarce, the time-saving aspect of satellites is especially important.

The India pilot project, now slated to begin in 1974, will be watched carefully by other large developing nations (especially Brazil, Indonesia, and Pakistan) with widely dispersed populations. The United Nations has formed a Working Group to study and make recommendations on all the aspects of this technology.¹⁵ Direct efforts are now being made by the Soviets in the U.N. to prevent the use of direct television broadcasting by satellites from (1) impinging on

the sovereignty of States from any external interference, and (2) becoming a source of international conflict and aggravation of the relations between States.¹⁶ Large and small nations alike, however, regard broadcast satellites, a "spin-off" from space technology, as an important development tool. Broadcast satellites can help to give practical instruction to illiterate adults, strengthen a country's formal education system, and at the same time serve the interests of national cohesion and international peace.

C. With Space Communications—The International Telecommunications Satellite Consortium

On addition to formulating general principles on the use of outer space, the United Nations General Assembly has addressed itself to the use of communications satellites, declaring that "communications by satellite should be available to the nations of the world as soon as practical on a global and non-discriminatory basis."¹⁷ In 1964, the International Telecommunications Satellite Consortium, better known as INTEISAT, was created by the entry into force of two interrelated international

¹⁵ The United Nations Working Group on Direct Broadcast Satellites is under Scientific and Technical Subcommittee of the Committee for Peaceful Uses of Outer Space.

¹⁶ U.N. Doc. A/8771 (1972), "Request for the Inclusion of a Supplementary Item in the Agenda of the General Assembly Twenty-Seventh Session."

¹⁷ G.A. Res. 1721 (XVI).

agreements constituting interim international arrangements.¹⁸ Reflecting the General Assembly declaration, INTELSAT's facilities have always been available to any nation—the only requirement being membership in the International Telecommunication Union (ITU).¹⁹

INTELSAT may be described as a multinational partnership which the various participants have joined in order to establish and operate collectively satellite facilities which each partner intends to use to provide telecommunications services within its own defined service area. The partnership consists of governments and telecommunications entities, public or private, e.g., The Communications Satellite Corpora-

tion (COMSAT) is the American entity. Within the spectrum of "international organizations" INTELSAT is unique, if only because it is an operating organization providing extensive global services. Thus, it obviously differs from other organizations of a broad international character such as the United Nations, ITU, and others.

The interim arrangements are about to be superseded by definitive arrangements which were negotiated from 1969 to May 1970.²⁰ Several new organs have been established, significant internationalization of the management has been agreed upon, and an entirely new voting procedure has been established.²¹ The settlement of disputes

¹⁸ Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System with Special Agreement and Supplementary Agreement on Arbitration, 20 August 1964 and 4 June 1965, 15 U.S.T. 1705, T.I.A.S. No. 5646. The name INTELSAT was adopted on 28 October 1965 and appears on copies of T.I.A.S. No. 5646 reprinted in January 1967. The Supplementary Agreement on Arbitration which came into effect on 21 November 1966 is reprinted after T.I.A.S. No. 5646 at 77-106. These agreements are referred to collectively as the "interim arrangements."

¹⁹ With respect to the work of the ITU and its structure, see WHITEMAN, 9 *Digest of International Law* 693 (1968).

²⁰ The definitive arrangements consist of two separate but related agreements: Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT" with 3 Annexes and the Operating Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT" with Annex. The new agreements will probably enter into force by the end of 1972 or early 1973. See R. Mizrack, "The Impact of Communication Satellites Upon the Law," Inter-American Bar Association XVI Conference, April 24-28, 1972.

²¹ Structurally, INTELSAT will have a four-tiered arrangement: an Assembly of Parties to the intergovernmental agreement; a Meeting of Signatories to the operating agreement; a Board of Governors (composed of signatories); and a Secretariat responsible to the Board of Governors which will be under a Secretary General during a transitional period and a Directorate which will be under a Director General thereafter. For an analysis of the functions these new organs have, see *id.* at 2-7.

continues in an expanded tribunal whose decisions are binding on all the parties to the dispute.

INTELSAT has shown that there can be successful international cooperation in the development of new modes and concepts for the management and the practical application of space technology. The concept of a synchronous communications satellite network was advanced in 1945 by a young British science writer named Arthur Clarke. His dream was realized in 1967 with the successful launching of Early Bird, the first commercial communications satellite.

Satellite communication technology has progressed rapidly in the intervening years. Capacity has increased and costs have declined. Early Bird, for 18 months, was able to provide 240 telephone circuits between North America and Europe at a per circuit cost of \$15,300 per year. The global satellite system now has three more powerful satellites over the Pacific, four over the Atlantic, and one over the Indian Ocean. INTELSAT IV, launched in 1971, has 6,000 circuits and has a life expectancy of seven years. The cost of a single circuit is now down to \$500 per year and is expected to be cut in half in the next five years.²²

Also to be introduced with INTELSAT IV satellite system is special equipment which can allow

earth stations to communicate with all participants in a special pool on a completely demand-assigned basis. This equipment known as SPADE will eventually allow developing countries to communicate with other participants entirely in accord with their own traffic needs.²³

INTELSAT's original members, except for Japan and Australia, were all industrialized countries from Western Europe and North America. Since 1964, more than 60 countries have been added to the original membership and almost all of them are located in Latin America, Africa, the Middle East, and Asia. Developing, non-industrial nations now make up three-fourths of the INTELSAT membership. Virtually none of these had any prior access to intercontinental telephone cables, nor did they have any industrial interests directly related to space technology. Not only has INTELSAT provided them with top quality international telecommunications circuits but it has also freed them from dependence on the traditional transmitting points of New York, London, and Paris by giving them immediate and direct access via satellite to every other country utilizing the INTELSAT system.

In economic terms, satellite telecommunications offer an unusual opportunity for the developing country. The Latin American coun-

²² *Space Communications*, *supra* note 13, at 12.

²³ Richard R. Colino, "The United Nations Organization and the Legal Problems of Outer Space," *International Institute of Space Law XIII Colloquium on the Law of Outer Space*, October 1970, at 10.

tries generally seem convinced that satellites will offer the latest and cheapest medium of international communication. Mexico and Spain have agreed to the joint establishment of a full-time television channel. Brazil will use INTELSAT IV for distributing education television to the Brazilian hinterland and for domestic telephone requirements.²⁴

Other telecommunications, especially the radio, are additional primary links to the outside world. They communicate information and new ideas, thereby widening the horizons of those in the lower socioeconomic classes. Moreover, radio awakens these people to new opportunities and in so doing is a major force motivating them to acquire education and know-how that will enable them to improve their condition.

There is increasing recognition of the vast potential of communication satellites to expand substantially the scope of present communications services and to accommodate the particular needs of individual users. The United States used INTELSAT facilities for the space communications needs of the Apollo Project. President Nixon's historic trip to the People's Republic of China was broadcast via INTEL-

SAT satellite. Now a member of the world community, the People's Republic of China may seek membership in the INTELSAT system.²⁵

INTELSAT is playing a most important farsighted role in coordinating technology between INTELSAT and other potential regional satellite systems. It has met with the European Space Research Organization (ESRO) to discuss joint programs to establish a European Communications Satellite System. For Project Symphonie, a joint satellite project by France and Germany, INTELSAT adopted a procedure for frequency coordination which systemized the information required for the proper coordination of the systems and provided standards for determining what should be considered harmful interference.²⁶ The procedures and criteria thus adopted were first formally applied to the proposed Canadian domestic satellite system. This coordinative role of INTELSAT will undoubtedly increase both as its own system advances and as other satellite systems are established.

Numerous organizations related to the United Nations have expressed interest in the development

²⁴ John A. Johnson, "Opportunities for US-European Cooperation In Application Satellite Programs," 5th Eurospace US-European Conference, May 22-25, 1972, at 24.

²⁵ A satellite earth station supplied by the Radio Corporation of America (RCA) is in the People's Republic of China and works with the INTELSAT system.

²⁶ Colino, *supra* note 23, at 11.

of the communications satellite: UNESCO, the World Bank, and International Civil Aviation Organization. The United Nations Development Program, together with various U. N. specialized agencies, has assisted developing countries to prepare for the use of the communications satellite. Together with the ITU, it has established a Center for Research and Training in the Use of Satellite Communications at Ahmedabad, India. To increase the United Nation's effectiveness in peacekeeping and emergency relief, it has been recommended that the United Nations be given cost-free access to the INTELSAT communications system.

The growth of global satellite communications in the hands of INTELSAT is solidly based on the universal need for improved and expanded telecommunications services. It does not depend on the fluctuating popularity and fluctuating funding of space programs and the shifting priorities which governments give to them. INTELSAT has shown that international cooperation in the development and establishment of a global satellite system is both practical and profit-

able. Though its interim and definitive arrangements are unique in approach, they are well grounded in international practice, law and U.N. resolutions. It is the extensive and immediate communications which increase man's awareness of the global village in which he lives. Space communications and INTEL-SAT have and will become even greater tools in achieving better international understanding, thereby promoting world peace, day-to-day, in a fast-shrinking world.

III. OUTER SPACE WILL KEEP THE PEACE

A. Though Control of the Atom

1. *Mutual Deterrence*

Experts believe that it has only been the "balance of power" between the United States and the U.S.S.R. which has given the world peace from a nuclear World War III. For the future, they see the maintenance of this balance, at whatever costs, to be the only means to ensure that peace. A majority of the world, however, dislikes living in the nuclear shadow cast by the U.S. and the U.S.S.R. Peace bought

²⁷ This issue has been hotly debated in *Space Communications, supra* note 13; "Utilization of the INTELSAT System by the UN," paper submitted on behalf of the Secretary-General of the UN to the Plenipotentiary Conference on Definitive Arrangements for INTELSAT, March 1969; "Use of the INTEL-SAT System by the United Nations," Intersessional Working Group of the Resumed INTELSAT Plenipotentiary Conference, IWG (III)/Doc. 106, December 3, 1970; "Summary of INTELSAT Conference, 1969-70 Concerning Space Segment;" and "Resolution on the UN Request for Utilization of the INTELSAT System," Resumed Plenipotentiary Conference on Definitive Arrangements for INTELSAT, Doc. 207 (Adopted as Amended), May 21, 1971.

by mutual distrust and fear is a tenuous one at best. Nuclear forms of mutual deterrence are costly in terms of national economics, international politics, and the social benefits for all mankind. The more recent and saner strategy between the United States and the U.S.S.R. is to wind down the arms race—to mutually limit nuclear weapon deployment, research, and development.

For many years, agreements to limit and to reduce the numbers of offensive and defensive strategic weapons have been sought in vain. Various issues prevented success, particularly the problem of verification, in view of the unwillingness of the Soviet Union to permit on-site inspection, and the absence of substantial parity between the two nuclear superpowers. Extraneous reasons for hostility between them have also hindered agreement. Article IV of the 1967 Space Treaty prohibited the placing of weapons of mass destruction in orbit. It was therefore to the world's delight that the United States and the U.S.S.R. signed on May 26, 1972 the Treaty on the Limitation of Anti-Ballistic Missile Systems (hereinafter ABM Treaty)²⁸ and the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms

(hereinafter Interim Agreement).²⁹ For the first time, the two major nuclear powers have agreed to restrict strategic weapons in one area of the nuclear arms race by limiting the deployment of ABM systems to two designated areas and at a low level.

The Interim Agreement limits the number of offensive missiles both nations may deploy over the next five years while they seek to work out a treaty controlling offensive weapons. Together the two agreements provide for a more stable strategic balance in the next several years than would be possible if all strategic arms competition continued unchecked. This benefits not only the United States and the U.S.S.R. but all the nations of the world.

The opinions are limitless as to why the Soviets agreed to these pacts. Like any other nation it still has serious resource-allocation problems, complicated by requirements to prepare for the contingency of an eventual nuclear threat from China. One must not, however, discount the role of outer space. A pattern of bilateral agreements on outer space has successfully promoted cooperation between the United States and the U.S.S.R. The Agreement on Cooperation in Space Exploration was signed the

²⁸ *The ABM Treaty and Interim Agreement and Associated Protocol*, Message from the President, Executive L, 92 Cong., 2d Sess. (1972), at 1-6. It was ratified by the U.S. Senate on August 3, 1972 and has entered into force.

²⁹ *Id.* at 5-7. The Interim Agreement is an executive agreement which was submitted by the President and approved by the Senate and the House of Representatives.

day before the ABM Treaty. Indeed, space law is an area where the U.S.S.R. has kept her promises and adhered to her obligations. Such efforts have kept outer space for peaceful purposes. Space law may now come back down to do the same for the earth.

2. *The Nuclear Umbrella*

Deterrence has not been confined to the homelands of Russia and America. Through various defense pacts, organizations, bases abroad, and their nuclear submarine fleets, both countries have spread a nuclear umbrella over the majority of the world. As no nation wishes a holocaust, conflicts are fought by conventional warfare. But with the threat of escalation and confrontation between the superpowers, this is just as deadly.

Five nations of the world possess nuclear weapons: The United States, the U.S.S.R., the United Kingdom, France and the People's Republic of China. At least eight non-nuclear weapon states now possess the fissionable materials and technology needed to indigenously manufacture nuclear weapons if they decide to do so: Canada, India, Israel, Italy, Japan, West Germany, Sweden, and Switzerland.³⁰ In

terms of irrevocable destruction to the world and its environment, it would take only one nuclear incident from any one of these countries. The "balance" in the future will be more than two sided.

Various efforts have been made to abolish or at least to curtail these weapons and their use. Treaties have established nuclear free zones in the Antarctic, Latin America and in all Outer Space.³¹ The Limited Test Ban Treaty of 1963 (hereinafter 1963 Treaty) obligates the parties not to test nuclear weapons in the atmosphere, outer space, and underwater.³² The Non-Proliferation Treaty of 1968 seeks to freeze the number of countries possessing nuclear weapons to the current five (hereinafter 1968 Treaty).³³ It prohibits parties either to turn weapons and know-how over to other countries or to receive them from other countries. In addition, it sets in motion a single and uniform system of international safeguards applied by the International Atomic Energy Agency (IAEA). U.N. Security Council Resolution 255 provides a full guarantee that the Security Council and its nuclear-weapon State permanent members are under obligation to act immediately in accordance with the

³⁰ *Safeguarding the Atom: A Soviet-American Exchange*, UNA-USA, July 1972, at 14.

³¹ Antarctic Treaty, 12 U.S.T. 794 (1959), T.I.A.S. No. 4780; Treaty of Tlatelolco, signed February 4, 1967, text in U.N. Doc. A/8653 (XXVII); and 1967 Outer Space Treaty, *supra* note 2.

³² 14 U.S.T. 1313 (1963), T.I.A.S. No. 5433.

³³ 21 U.S.T. 483 (1970), T.I.A.S. No. 6839.

U.N. Charter in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear weapon State party to the 1968 Treaty.³⁴

Russia and America are adherents to both the 1963 and 1968 Treaties. However, two members of the nuclear-developing countries have not signed the 1968 Treaty: Israel and India. More significant is the refusal to sign by the People's Republic of China, and France. In all, 31 nations have declined to sign.³⁵

The absence of France from the 1968 Treaty has clearly caused some difficulty. It has complicated the commencement of negotiating IAEA safeguards agreements with some non-European signatory countries. Additionally, there is probably a relationship between French non-adherence and the non-adherence of its two former colonies, Niger and Gabon, which mine minerals containing uranium deposits. Thus, in order that the 1968 Treaty may be fully effective, maximum efforts should be made at the highest levels by the United States and the U.S.S.R., the International Bar, and international opinion to persuade France to ratify the 1968 Treaty and to take its place as a participant in the 26-nation Geneva Conference of the Committee on Disarmament (hereinafter Disarmament Conference).

Now that the People's Republic of China sits in the United Nations, active steps should be taken promptly to ensure the assumption of its international obligations: participation in the Disarmament Conference arms control negotiations, ratification of the 1968 Treaty, and adherence to the 1967 Outer Space Treaty. Representation in the IAEA should also be offered, including membership on the Agency's Board of Governors. Arms control talks among the five permanent members of the Security Council would be worth considering, since for the first time they comprise the world's nuclear weapons countries.

While the People's Republic of China has refrained in recent years from making statements in support of selected nuclear proliferation as it once did in the early 1960s, it still seems to take a dim view of the 1968 Treaty itself. China's policy toward the 1968 Treaty will assume greater importance not only as its nuclear weapons capability increases, but also as Peking develops peaceful nuclear facilities to the level where it can export fissionable materials and special equipment to countries which might want to avoid international safeguards. China's expanding nuclear capability will make it increasingly difficult for the United States and the U.S.S.R. both to curb their arms

³⁴ S.C. Res. 255, U.N. Doc. S/RES/255 (1968).

³⁵ "Nuclear-Arms Race Spreads Despite Superpower Pacts," *U.S. News and World Report*, July 31, 1972, at 56.

race and at the same time provide security assurances to Asian non-weapon countries. It is for this reason that the People's Republic of China must be included in serious arms control negotiations. Only then will the 1968 Treaty have its best chance to give the world the increased security it craves.

In the present time frame, bilateral superpower strategic arms limitations talks do make practical sense. It is now, if ever, the time to find a safe, workable, bilateral basis for mutual strategic arms limitations, which other nations may adopt later within the United Nations and later by multinational treaty. The United Nations views the delicate relationship of the two superpowers as overriding in keeping nuclear peace in the 1970s.³⁶ It believes that neither superpower can afford to see any small power conflict escalate into superpower involvement. A crisis escalation—not a nuclear “mistake” or deliberate attack—is the most probable cause of strategic nuclear World War III. It will be the United Nations' role to prevent, localize, and stop such conflicts. The U.N.'s peacekeeping activity should have greater support from the superpowers. With a strengthened U.N. force the economic, political, and guerilla warfare of the future will be mitigated. If international laws of disarmament can be agreed upon,

as they have for outer space, then even conventional warfare will be abolished.

B. Through Control of Technological Surprise

The pressure of ecopolitics and geoeconomics from every nation's “home front” has been said to have brought about the arms limitation talks which are so mutually beneficial to world peace. But technological surprise and innovations can quickly put an end to this “pressure.” A “break-through” in strategic nuclear defense or offense can give more strategic defense or offense for the dollar or the ruble—“more bang for the buck.” Scientists on both sides of the Iron Curtain have said in substance that there is no surer way to bring about World War III than to fall behind in weapons technology.³⁷

The ABM Treaty limits development and testing of certain components of the ABM system but qualified modernization and replacement is allowed. Internal, nationalistic, economic pressure from the people of each nation for domestic needs in their national spending accelerates research and technology in each nation to produce and maintain more efficient strategic arms at less cost. If a system costs less, however, more countries can afford one, be it offensive or defensive.

³⁶ *Controlling Conflicts in the 1970's*, UNA-USA, April 1969, at 7-8.

³⁷ E. Finch, “Arms Control Is Not Disarmament,” 4 INT'L LAWYER 765 (1970).

The advance in technology need not be only for weaponry. During the decade of the 1970s, the number of nuclear power reactors operating in industrial non-nuclear weapon countries, and in some developing ones as well, will increase substantially. The 1968 Treaty specifically does not affect a nation's right to develop research, production and use of nuclear energy for peaceful purposes. However, the result of this expansion is the wholesale availability of fissionable material around the world which must be safeguarded.

The problem of containing or controlling nuclear energy has been complicated moreover by the dual purposes to which this revolutionary material force can be put. Peaceful applications involve not only controlled nuclear reaction for the release of energy for power and the use of isotopes for medical, agricultural, and industrial research, but also the potential use of nuclear explosions for major construction projects involving the moving of large masses of earth: canal building, the changing of river courses, and the release of fossil fuel from underground sources.³⁸ Electrical power especial-

ly is needed by all nations as the fuel shortages become worldwide.

The problem of controlling the atom for peaceful purposes involves not only putting restraints on the diversion of this energy for military purposes, including the testing of nuclear weapons, but also providing for its peaceful applications under adequate international controls. As in outer space, conventions were negotiated holding the operator of a nuclear installation exclusively liable for any nuclear incident. The Paris Convention, which set the limit of liability at \$15 million, entered into force on April 1, 1968.³⁹ The IAEA sponsored another convention closely following the Paris Convention but with a limitation of \$5 million.⁴⁰ This Convention is expected to attract very broad support among nations. The United States is not party to either Treaty but its domestic law codifies the principles.⁴¹

Technology need not be a destabilizing element. It is harmful only when used exclusively for weapons. For each new mechanism invented, a counter-balancing defense will eventually be developed and a new offense discovered. If uncontrolled, a new arms race is born.

³⁸ G. Ignatieff, "How Much Is Enough? A Report on Nuclear Testing," VISTA, Jan.-Feb. 1972, at 16.

³⁹ Paris Convention of July 29, 1960 on Third Party Liability in the Field of Nuclear Energy, 55 *American Journal of International Law* 1082 (1961).

⁴⁰ Vienna Convention of April 29, 1963 on Civil Liability for Nuclear Damage, 2 INT'L LEGAL MATERIALS 727 (1963).

⁴¹ See the Price-Anderson Act, P.L. 85-256, 71 STAT. 576 (1957), 42 U.S.C. 2210, and its amendment P.L. 89-645, 80 STAT. 891 (1966), 42 U.S.C. 2210n.

Technology can also benefit. Normal technological developments improve the world community in their use for peaceful products. Space technology has brought new ideas for medicine, building materials, and transportation. It has increased and bettered all communications among nations significantly lessening the chance of misunderstanding. Discovery and invention force the world "to reach out for international agreement, to build international institutions, to do things in accordance with an expanding international and transnational law."⁴²

C. Through a Global Monitoring System

The significant progress in science and technology resulting from increased international cooperation could develop a complex surveillance satellite system and related internationally available facilities.⁴³ For peace in the world of today and for the future, such a system would be ideal.

An earth resources technology satellite (ERTS) is now circling the globe, testing for the first time the feasibility of such a system.⁴⁴ ERTS-A by remote sensing is sur-

veying crops including types and state of health, tracing the movements of fish in schools, and even locating deposits of ore and oil. The impact of this new technology is yet to be fully measured. It does, however, present the means for the discovery, development, and allocation of resources—vegetable and mineral—in the world for man's benefit. It can help hasten the closing of the gap between the per capita income of the have and have-not countries as developing countries can recognize their potential more rapidly and economically. Worldwide, the environment can be controlled as can potentially destructive weather conditions.

Equally important will be the system's ability to enforce international agreements. The technique which can sense fish in depths of 200 feet can also trace the movements of submarines. Military installations will be monitored as a means of inspecting and supplying verification for adherence to a disarmament pact. The U.S.-U.S.S.R. agreement on arms control specifically allows verification by national, technical means and prohibits interference with a satellite in orbit used

⁴² Dean Rusk, "The Unseen Search for Peace," DEP'T OF STATE PUBL. 7985, November 1965, at 10.

⁴³ B. Lundholm, "The Uses of Earth Survey Systems in Monitoring the Changes in the Global Environment," U.N. Doc. A/AC.105/C.1/VIII/C.R.P. 1, at 36-48.

⁴⁴ A full analysis of ERTS and its international legal implications may be found in the authors' "The United Nations and Earth Resources Satellites," to be published in the January 1973 INT'L LAWYER.

for verification of the Treaty.⁴⁵ Such a system would be a deterrent—much more extensive and inexpensive than any present ones—to a surprise attack even by conventional means. The movements of troops or the launch of a missile would be instantly detected.

These systems will enable global organizations, perhaps the United Nations, to successfully enforce international agreements and realize the earth's resources. The tension level or potentiality of such between nations would be reduced. For without hunger or the fear of violence the world population will be on the road to peace.

IV. CONCLUSIONS

The success and character of outer space ventures have had important and highly beneficial effects on national and international relations. International security has been augmented and new channels have been provided for significant enhancement of efforts between nations and for the successful negotiation of international agreements. Outer space today influences the lives of a considerable portion of mankind and stands in the vanguard of the new global technologies. It is an unparalleled field for cooperation among nations.⁴⁶

Bilateral and multinational space efforts are purveyors of peace. They need international cooperation and a tranquil environment. Political

and economic instability spell uncertainty and increased risk. Conflict introduces barriers to mobility of men and resources and threatens the vital lines of communication between and among nations. Although an enterprise such as INTELSAT cannot be expected to prevent armed conflict among nations, it is a growing force for discouragement of hostilities in an increasingly interdependent world. It has already erased many old semantic problems and misunderstandings that formerly plagued diplomacy and international law.

Over the past decade arrangements between the United States government and NASA, on the one hand, and their Soviet counterparts on the other, have enlarged the measure of useful contact between the two scientific communities. The scientists of each country are becoming more convinced that deeper contact and working cooperation would serve both their interests—technical and political.

The basic economic and political contest between the United States and the Soviet and Chinese Communists is being widened by technology and by the increased competition in an ever-shrinking world of high-speed transportation and communications. If we can in fact operate jointly in space, we will have built mutual confidence and trust. There will be improvement in world communications for the

⁴⁵ ABM Treaty, *supra* note 28, Art. XII.

⁴⁶ President Nixon, "The Emerging Structure of Peace," Report to Congress, February 9, 1972, at 203.

better understanding of all nation's environmental, trade, and security problems. The symbol of the American and Soviet Spacemen meeting in orbit before the eyes of the entire world cannot help but ameliorate attitudes, viewpoints, and expectations throughout the world—results which President Nixon's good will missions to both Moscow and Peking have only started to produce.

If man wants to continue to project peace and harmonious cooperation from space to earth, it will be necessary to vastly increase the scope and fields of international law and treaties into the terrestrial problems of international trade, geo-economics, politics and social problems towards the goal of world peace through law. It is necessary to obtain acceptance of arms control proposals by all nations as soon as possible. Limiting the weapons for future wars permitted on earth and in space is only a start. The international areas of mutual trust and confidence found in the 1967 Outer Space Treaty, in the Limited

Test Ban Treaty of 1963, and in the Non-Proliferation Treaty of 1968 for the benefit of all mankind are a good beginning. If it foreshadows the true internationalization of nations into an agglomerate of States of the World governed by law for the benefit of the people of the world, then space has shown the first small step toward world peace through law. It may take many decades to get down to specifics in all areas of international law and understanding. But a start has been made in international space law. Let us hope that many years hence it will be possible to look back historically and see space as a bellweather to this man's earth in terms of world peace and progress, in fact and in law, in practice and in theory.⁴⁷ It is so evolving, for space has opened the way!

“. . .As man steps into the void of outer space he will depend for his survival not only on his amazing technology but also on this other gift which is no less precious: The rule of law among nations.”⁴⁸

⁴⁷ “The Belgrade Spaceship Trial,” World Peace Through Law Center, Lib. Cong. Card No. 72-86669.

⁴⁸ Remark by Ambassador Arthur Goldberg made at the United Nations on December 17, 1966 in commenting on the 1967 Outer Space Treaty.

In Memoriam

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

Captain Jean DeBenville Bertolet, AUS-Hon.-Ret.

Reading, Pennsylvania

Commander Frederick R. Bolton, USNR-Ret., Detroit, Michigan

Colonel Arthur I. Burgess, USAR-Ret., Quincy, Massachusetts

Brig. General Louis H. Charboneau, USAR-Ret.

Grosse Points, Michigan

Captain Donald J. Drew, AUS-Hon.-Ret., Los Angeles, California

Major Frederick H. Evans, AUS-Hon.-Ret., Washington, D.C.

Colonel Thomas H. Goodman, USAR-Ret., Knoxville, Tennessee

Lt. Colonel Ely R. Katz, USAFR-Ret., Miami, Florida

Lieutenant Sheldon A. Key, AUS-Hon.-Ret., Indianapolis, Indiana

Captain Myron N. Lane, AUS-Hon.-Ret., Braintree, Massachusetts

Captain Lyman B. Lewis, AUS-Hon.-Ret., Geneva, New York

Lt. Colonel Richard F. Logan, USAR-Ret., St. Petersburg, Florida

Major Penrose C. Martindale, USAFR, St. Louis, Missouri

Major Keith Masters, AUS-Hon.-Ret., Chicago, Illinois

Lieutenant Anthony L. Mezzacca, AUS-Hon.-Ret.,

New Providence, New Jersey

Lt. Col. Plato Durham Muse, Jr., USAFR, Richmond, Virginia

Major Ronald S. Reed, USAR-Ret., St. Joseph, Missouri

Colonel William J. Rooney, USAR-Ret., Mamaroneck, New York

Colonel Joseph Sachter, USAF-Ret., Scarsdale, New York

Major John G. Stephenson III, USAR-Ret., Rosemont, Pennsylvania

Colonel Frank C. Stetson, USAR-Ret., Washington, D.C.

Colonel Goodrich M. Sullivan, AUS-Hon.-Ret.,

Mahtomedi, Minnesota

Brig. General Marvel M. Taylor, USAFR, San Leandro, California

Colonel Thomas L. Thistle, USAR-Ret., Melrose, Massachusetts

Colonel Fulton C. Underhay, AUS-Hon.-Ret., Boston, Massachusetts

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



Major General Harold R. Vague

—The Judge Advocate General of the Air Force, 1973—

VAGUE NAMED TJAG—AIR FORCE

Major General Harold R. Vague was appointed The Judge Advocate General of the Air Force and promoted to Major General on 1 October 1973 succeeding Major General James S. Cheney who retired from active military service that date.

General Vague, a native of Kansas, graduated from the University of Colorado in 1942 with a BA degree and entered active military service in March of that year. He received his navigator wings and commission as second lieutenant in June 1943. During World War II he served as a B-17 crew member on combat missions in the ETO and later served in staff and flying positions in England and France until June 1946.

In 1947 he returned to the University of Colorado and graduated from its Law School in 1949 with the LLB degree. Thereafter he continued in successive navigator-bombardier assignments until 1951 when he attended the Air Com-

mand and Staff School. He was next assigned to the Military Justice Division of the Office of the SJA, Eighth Air Force, SAC. In 1955 he was designated a legal staff officer at the US Air Force Academy where he also served as associate professor of law until 1959. From then on he served as SJA of an Air Division and of an Air Force with a stint of duty between those two assignments as Chief of Legislative Division OTJAG. In 1969 he was named SJA of the Pacific Air Forces and in 1971 he became The Assistant Judge Advocate General. He had been promoted to Brigadier General in June 1969.

His decorations include the Legion of Merit the Distinguished Flying Cross, the Air Medal and the Air Force Commendation Medal.

General and Mrs. Vague and their children, Russell and Michele, live in Arlington, Virginia during the present tour of duty.

What The Members Are Doing . . .

CALIFORNIA:

The John P. Oliver Chapter of the Judge Advocate Association held its annual meeting in conjunction with the California State Bar Convention on 11 September 1973 at Disneyland. Judge Robert M. Duncan of the Court of Military Appeals was the speaker.

DISTRICT OF COLUMBIA:

Cdr. Donald H. Dalton, USAR-Ret., recently announced the formation of the firm of Dalton, Matthews and Smiley for the general practice of law with offices at 1819 H Street, N. W., Washington.

Mr. Neil B. Kabatchnick recently announced the relocation of his

office for the practice of law specializing in military causes to 1225 Connecticut Avenue, N. W., Washington.

GEORGIA:

Rear Admiral Hugh H. Howell, Jr., USNR, of Atlanta, past president of this Association was recently appointed to fill the first flag, billet in the Judge Advocate General's Corps, of the U. S. Navy Reserve.

Admiral Howell is Chairman of ABA's standing Committee on Military Law.

ILLINOIS:

Major Gerald L. Sbarboro USAR, of the Chicago bar wrote a stimulating article entitled "Law is the Elementary School" for the July issue of the Illinois Bar Journal. In the article Major Sbarboro describes the joint effort of The Chicago Bar Association and the Chicago Board of Education in the project they launched in 1966 designated as Law in American Society to train teachers and implement courses for junior and senior high students. He points with pride and satisfaction to the effort this project has had on the young people who have taken the courses in generating in them a greater awareness of law and law related subjects.

NEW YORK:

Captain Edward F. Huber AUS-Hon.-Ret., of New York recently announced the change of name of his firm to Huber, Magill,

Lawrence & Farrell. The firm's offices are located at 99 Park Avenue.

Major Edward Ross Aranow, AUS-Hon.-Ret., of New York City has recently authored a work entitled *Tender Offers for Corporate Control*. This work and Aranow's *Proxy Contests for Corporate Control* was published by the Columbia University Press. Major Aranow's law firm has offices at 469 Fifth Avenue.

Lt. Colonel Sidney A. Wolff, AUS-Hon.-Ret., of New York City is Chairman of the Military Justice Committee of the New York County Lawyers' Association.

OHIO:

Brig. Gen. Clio E. Straight, USA-Ret., formerly Secretary of Champion International is now of counsel to the firm of Frost & Jacobs, Dubois Tower, Cincinnati.

VERMONT:

Lt. Col. Osmer C. Fitts, AUS-Hon.-Ret., of Brattleton, recently announced the addition of a new partner and a new associate to his firm. The firm continues under style Fitts & Olson with offices at 16 High Street.

WASHINGTON:

Major Wheeler Grey, AUS-Hon.-Ret., of Seattle recently announced the addition of a new partner and two new associates to his firm. The firm continues under the style Jones, Grey, Bayley & Olsen with offices at 1000 Norton Building.

JUDGE ADVOCATES ASSOCIATION

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Executive Secretary and Editor

RICHARD H. LOVE
Washington, D.C.

