

# The Judge Advocate JOURNAL



Published By

**JUDGE ADVOCATES ASSOCIATION**

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

# JUDGE ADVOCATES ASSOCIATION

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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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# CUM HONORE OFFICIUM\*

By Robert W. Stayton\*\*

During the year our journals, as though asserting an ideal, have been submitting to the bar what is called *A Hippocratic Oath for Lawyers*. Its authorship is credited to an esteemed justice of New York.

The writer considers that, in principle as well as in detail, the proposed undertaking would be contrary to professional obligation. Stating here the reasons for his opinion, he does not have the idea that any one of them is novel.

The oath would bind the advocate to join with his adversary in conceding undisputed facts; in waiving juries when the course will not sacrifice fundamental rights; in neither offering nor opposing interlocutory motions unless of real, practical importance; in avoiding merely technical objections to testimony; in securing prompt, speedy and complete presentation of the facts; in supporting fair comments and reasonable instructions by the judge on the facts; and in avoiding appeals except in cases of substantial error and reasonable prospect of different outcome on retrial.

To say nothing of the particular engagements involved in the oath, the substance of them is that practitioners should agree to use no tactics of technicality, obstruction or

delay. Thus expressed, the ends desired are surely good ones. Whether under the prevailing American system for trying civil and criminal cases counsel should or could bind himself to the suggested means to the ends, is a different subject. Whether the prevailing system should be materially changed is also different.

The prevailing system is the adversary one. It is based on the right to hearing in open court, with the benefit of counsel, by due process of law. In this era it is being opposed, though not, one would assume, by men like the author of this oath. Those who oppose it seem in prominent instances to be of a somewhat different calling; and seem to be comparing the operation of cases in court with the speedy, accurate and effective administration of constitutional and statutory powers by executive and administrative bodies.

But the view there and here are different. There it is toward needed governmental results, here toward the preservation of liberty. The primary purpose there is to obtain results on the basis of the truth. The primary purpose of the adversary system is to preserve liberty and with that burden to find and act upon the truth as nearly as may

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\*\* The author is a distinguished professor of law at the University of Texas where he has taught since 1925. A member of the bar for more than 50 years, Judge Stayton's career has embraced the practice of law, judicial office and the teaching of law. He is recognized as an authority on civil practice and procedure.

be possible. Results are not to be forced; the privilege of contest is a requisite of liberty. In the constitutions the contest is called a "controversy." That the course of liberty is not smooth here or elsewhere and that liberty is everywhere dearly bought will need no emphasis.

The practitioner in these controversies is not a judge, as one obeying the proposed oath would need to be. He is essentially a soldier. His function is to fight and win battles, which in this day, for all their turbulence, are battles of peace.

Like a soldier he must use the weapons and the practices that are available to him. Agreement with his adversary to the contrary is never open to him unless, as frequently, he considers it to his client's advantage. Such a statement may seem heretical when made, as in the present instance, by one who holds himself out as a professional in judicial administration. But, in his observation, it represents the course, that is regularly followed, and in his opinion, the only one that is consistent with the advocate's obligation.

The advocate is not an officer of the court in the sense that pertains to the judge. But he performs an office. It is to serve his client. The best of the practitioners and most of the least worthy of them stint neither effort nor time in doing that.

The ideals of the professions are variform. For the doctor the ideal seems to center in human life; for the engineer and the accountant, though involving different areas, in cold facts; for the journalist, in news. Basic knowledge is the ideal

of the scholar; love and faith of the clergyman. But for the lawyer, by impelling tradition, the main aspiration is service with honor.

In a litigated case it means service to client alone and not in any part to his government, whether state or nation, unless the government is the client, and then to the government as client only. In litigation he can serve no master but client, and his client employs him with honor as a part of him and with the ethics of his profession as a part of his honor.

But he *does* serve the government, even when the government is not his client. Because, among all men, only the members of his profession can perform the office of advocate, he, with them alone, knows whether the means that are provided for performing it are the best ones in the interest of the government, the best ones that the government may supply for the administration of the law by the courts. Tradition, again, compels him, as though it voiced noblesse oblige, to aid in making the means as perfect for the purpose as may be devised.

The two offices, the particular one to his client and the general one to his government, present no contradiction. For the advocate is bound by his honor to use for his client, during his client's case, all the weapons and practices that are available to win the contest; but after the case is over, if some of the weapons or practices are not for the good of the government, he is bound by an even stronger obligation, because now he is acting in his capacity as favored citizen of high rank, to use all his

available effort to aid in mending, or abolishing the defects.

Every day in all the courts he performs his obligation to client.

History shows that, in this era more than ever, he also performs his obligation to government. In the century now closing, along with the other members of the several branches of his profession, he has answered this other, this public calling, to an extent that outweighs past accomplishments which through the previous ages had slowly moved, for the attainment of what was regarded as justice, from the methods of savagery and armed force through superstitious and irrational substitutes and on to ever-improving controversy in the courts.

But procedure and the betterments of procedure do not enforce themselves, and the advocate does not enforce them. He uses such of them as may lead to victory and avoids such of them as may lead to defeat for his client.

Only a judge can enforce procedure to the laudable ends that underlie the proposed Hippocratic Oath.

And such a judge, to reach those ends and others of like nature must have the requisite power to do so. He must have the power and also the needed resolution that, to give a conceded example, the best of the judges of the federal district courts have, exert and make effective, not only in the conduct of cases but in the establishment of a type of certain, accurate and equal administration of the law which even before it is used and merely because it exists and can be used, prevents civil and

criminal wrongs in vast and immeasurable quantity.

Some of our judges, willing as they surely are to do so, cannot adequately reach those ends, either because they are not given the power or because, though given the power, they are in constant danger of retaliation from the electorate, for real or imagined offenses to lawyers or their clients, in exercising it.

Other successful judges, like many in our federal trial courts, prove the fact, because to the extent of their lives they are in no such danger and have the requisite power and exercise the power with resolution and effect.

But such a benefit to the people is only had at the expense of liberty.

It is liberty from the power of public servants that are to no extent responsible to the electorate, a power under which the highest court of the nation may, without vote of the people, add amendments to the constitution, as, in acknowledged keeping with good conscience, it frequently has added them in every change of political climate since its organization.

The extremes of too much responsibility to the electorate, combined with little power, and of no such responsibility at all, combined with great power, involve a problem which, if American courts are to be appropriate parts of a representative democracy, and which if improvements in their administration are to be enforced, seem inevitably to call upon the service and the honor of lawyers on the public side of their offices, for great and patriotic aid.

# THE ANNUAL MEETING

The Annual Meeting of the Association was held at Los Angeles on 26 August 1958. Of the several hundred members of the Association present in Los Angeles actively participating in the sessions and section meetings of the American Bar Association, over one hundred attended the Judge Advocates Association's business meeting at the University Club and many more attended the reception and annual dinner held later on that same evening.

Colonel Thomas H. King, President, was unable to attend the meeting because of a conflicting engagement taking him to Europe, and accordingly, Colonel Frederick Bernays Wiener, First Vice President and President-elect, presided at the business meeting.

The highlights of the session were the reports of the legal departments of the several services and the report of the Court of Military Appeals. Captain Robert A. Fitch, Assistant TJAG of the Navy, Major General Reginald C. Harmon, TJAG of the Air Force and Major General George W. Hickman, TJAG for the Army, reported for their respective services. Chief Judge Robert E. Quinn made the report for the United States Court of Military Appeals.

Captain Fitch directed his remarks principally to the Navy's very serious personnel problem arising from its failure to fill and retain qualified legal personnel in its law

billets. He stated that much of the mine the desirability and prospects cause of the problem lies in the terrific rate of attrition in legal officer personnel brought about by the fact that the Navy lawyer is on the lineal list for promotion purposes. He stated that of the 400 officers in legal billets, 270 are regular officers and two-thirds of all the lawyers in the Navy are in the grade of Commander. To demonstrate the loss of legal personnel by this system, he stated that 54% of Commanders considered for promotion to Captain were passed over by a recent board and that 73.4% of Lieutenant Commanders were passed over upon consideration for promotion to Commanders. After pointing out that the prospects of recruitment of new officers and the retention of the old experienced hands were dim, he asked that the Association lend its aid to The Judge Advocate General of the Navy in finding a solution to this personnel problem.

General Harmon, reporting for the Air Force, directed his remarks principally to the Air Force program for rehabilitation and restoration of military offenders. He stated that the power of clemency is a very serious responsibility which does not end with the apprehension, trial and conviction of an accused person. For that reason, the Air Force has conducted a very extensive and efficient rehabilitation and restoration program. An integral and essential part of the program has been the

staff judge advocate's post trial investigation of the accused to deter of rehabilitation and restoration efforts for the particular accused. General Harmon stated that this program had been seriously hampered by recent decisions of the Court of Military Appeals which have held that if the staff judge advocate's post trial investigation contains derogatory matter, the accused must be given a right of rebuttal. Such a decision, though doubtless intended to protect the accused, has actually an adverse effect upon him, because staff judge advocates are reluctant to write full reviews when such derogatory matters come to light. The Judge Advocate General not being fully advised for this reason, may deny clemency in many cases where it might otherwise have been granted upon a full and complete review.

General Harmon spoke of the retraining center at Amarillo, which is an integral part of the rehabilitation and restoration program. He said that this retraining center is operated the same as any other Air Force Base and not as a prison. Men are sent there to earn a better discharge. The accused man selected for rehabilitation is sent to Amarillo unescorted. There he goes through three phases of rehabilitation. The first phase is one of orientation. He finds that he is not under guard but enjoys a status, the same as a trainee at any other Air Force Base. He is afforded the benefit of examination, investigation, interview and treatment by psychiatrists, psychologists, sociologists, clergymen and others; and, the

treatment is tailored to suit his needs. The second phase is designed to restore the man's faith in himself and his position in the Service. The final stage is designed to train the man to do a specific job, to restore him to duty and give him the opportunity of earning an honorable discharge. General Harmon said that the program has worked well. Almost half of the prisoners sent to Amarillo have been restored to duty and about 70% of those go on to complete their enlistments and earn honorable discharges. All of this is to the great advantage of the individual concerned, the military services and society generally.

General Harmon assured his audience that he was not soft in matters of clemency. He stated that he feels strongly that in the administration of criminal justice, there is need for more regard for the rights of society; the rights of the accused are already adequately protected in the law. He did point out, however, that in the military society, we are dealing with young offenders who often do foolish things even as all of us may have done in our youth. Therefore, he feels we have a special duty in the military service to afford the opportunity of rehabilitation. He stated that at present, there are only 130 Airmen at Amarillo although the installation can take care of at least 250. The reason for this small population has been a decline in the court-martial rate in the Air Force. But, General Harmon stated, this fact is not a credit to the Military Justice Division of The Judge Advocate General's Department for the reason

lies in the fact that many commanders are using the legally authorized administrative discharge procedures instead of trial by court-martial to take care of and get rid of offenders. They are using administrative separations because they feel that the processes of military justice presently available to them as commanders under the UCMJ are inadequate. There has been a tremendous increase of undesirable discharges by administrative proceedings with a corresponding reduction in court-martial incidence. Commanders are avoiding the technicalities in the administration of the court-martial system by administrative action. The men affected are thereby denied the many protections afforded the accused by UCMJ. They are denied all possibility of clemency action, except possibly the seldom exercised and infrequently granted right of re-enlistment after two years, all with the result that the Services are losing personnel and the country is being cheated out of good citizens by an over-technical administration of military justice by all concerned.

General Harmon pointed out the growing increase in undesirable discharges given by administrative proceedings. In the Air Force, he said, in 1953, the number of administrative discharges was about 2,000. In 1955, the number was about 3,400; in 1956, 5,400; in 1957, 6,500 and at the present rate in 1958, the number will be still higher.

General Harmon stated his often repeated opinion that UCMJ will not work in time of major war, for as he pointed out, it is not working

now with everyone doing his best in time of peace. He suggested that the Code needs amendment. He observed that the recommendations made by The Judge Advocates General and the Judges of the Court of Military Appeals have never been considered by the Congress. There must be some effort to generate interest in the Congress to adopt some of these amendments in order to make the Code more adaptable.

General Harmon expressed his appreciation for the efforts made by the Judge Advocates Association and the American Bar Association during the last session of Congress to secure legislation to bring lawyers in the Armed Forces to the same level as doctors in the matter of promotion and pay. He expressed the feeling that it was unfortunate that Congress could not be persuaded in that direction. However, he announced, the personnel situation is somewhat improved by an increase in applications for JAGD commissions; but, he stated, the personnel situation is still far from good. He asked for the continued assistance and aid of the Association in helping the Air Force to secure and retain the services of qualified lawyers in uniform.

General Hickman stated that the Army, Judge Advocate General's Office, had handled three cases of considerable notoriety during the past year: the Gerard case, the Nickerson case and the Little Rock matter; but, of less notoriety and equal legal importance, was the conclusion by his office of settlements of over \$17,000,000 in claims arising out of the Texas City disaster. Gen-

eral Hickman also expressed pride in the fact that over 80% of Army Judge Advocates have become active members in the American Bar Association; and that although the percentage of the membership of the Judge Advocates Association affiliated with the Army has been diminishing, nevertheless, the officers on active duty, in the reserve or with historical connections with the Army still constitute a majority of J.A.A. membership.

General Hickman then addressed himself to some innovations in the field of military justice made by his office during the past year. During the year, inquiry by the Judges of the Court of Military Appeals directed The Judge Advocate General of the Army's attention to the fact that many accused men were withdrawing their requests for hearings by the Court after having filed petitions for review. An investigation revealed that the reason was that a pending petition in CMA prevented the execution of a punitive discharge which in turn prevented the accused from seeking parole. Therefore, the Army and Air Force initiated a program whereby the accused might be paroled under a command parole without losing his right of continuing his appeal. Also, during the past year, The Judge Advocate General of the Army has developed a program to make law officers full time judges under the general professional supervision of a top echelon and beyond the possible range of command influence. General Hickman stated that this law officer program is being tried out in the U. S. Army in Europe and in

the Sixth Army here at home, except for some small segments of that Sixth Army Command. He reported that the records and reports on the workings of this law officer system have resulted in a preliminary estimate that the caliber of specially selected law officers is better and is reflected in an improvement in the records of trials. General Hickman announced that he has recommended to the Chief of Staff that the Army implement the law officer program on an Army wide basis.

General Hickman stated that the Army JAG School at Charlottesville is offering a continuing legal education program. He expressed pride in the fact that the School is now permanently accredited by the A.B.A. and the Association of American Law Schools as a graduate law school. He announced new courses being given at the School designed for National Guard JAG officers, for law officers and for personnel concerned with the problems of international law and international relations. In this latter field, General Hickman stated that the Army is sending some of its officers to civilian schools such as the Fletcher School of Diplomacy, The Georgetown Foreign Service School and the International Law Conference at The Hague. Also, he stated that six or eight JAG officers are currently attending the Army Language School at Monterey, California, so as to enable them to better perform their duties as legal trial observers at trials of American personnel by NATO powers.

General Hickman stated that his assistant executive for reserve matters, Colonel William Smoak, has during the past year worked diligently with the general staff with the view of establishing TO & E organizations of Judge Advocate officers for reserve training and for full mobilization. Colonel Smoak has had to conduct studies to determine the number of Judge Advocate officers needed for varying stages of mobilization and to determine the type of organization and training best suited to meet the needs of mobilization. General Hickman stated that Colonel Smoak has had considerable success with his program and it is expected that before very long a plan will be put into effect whereby individual reserve Judge Advocates may be assigned to TO & E organizations for training, pay, promotion and other purposes.

Chief Judge Quinn, for the United States Court of Military Appeals, reported that that Court has received to date 12,000 petitions for review, all of which have been acted upon. He stated that as of June 30th, the hearing calendar was current and opinions have been written on all cases that have been heard. He, therefore, expressed his opinion that the UCMJ is working all right now and will be completely adequate in time of war. Judge Quinn stated that he has talked to top commanders of all services all over the world and that they have reported to him nothing in the UCMJ that would impede operations in time of war. Of course, Judge Quinn stated, he and his colleagues recognized that

there is room for improvement and for that reason, they, together with The Judge Advocates General, have recommended to Congress certain amendments.

Judge Quinn stated very vigorously that the Court does not stand on technicalities, that it does not make law, but merely seeks to interpret the law and to administer it. He announced that the Court's intention is to do substantial justice in every case that properly comes before it.

Judge Quinn praised the Association for its election of Colonel Wiener as President, stating that his stature among military lawyers, lawyers generally and the military services will do a great deal of good. He also expressed appreciation for General Hickman's cooperation in the past year on the problem which General Hickman had outlined. Looking to the future, Judge Quinn hoped that senior military lawyers who are now retiring at an early age might be put to some useful work in the administration of military justice in a civilian capacity. He expressed hope that General Hickman's plan to make the law officer a judge, not only in function but in name, could be achieved. He also suggested that boards of review should be designated and appointed as appellate courts by the Secretary of the Army or by the President. He assured The Judge Advocates General that the Court would cooperate and collaborate with them in the interest of improving the administration of justice and expressed the view that the J.A.A. is the one organization

that can help the military lawyer in the performance of his duties and will do so.

Colonel Osmer Fitts announced that the new chairman of the American Bar Association's Committee on the Lawyer in the Armed Forces, succeeding him, was Captain John Bracken, USNR, of Philadelphia. He expressed confidence that the committee would continue to work toward the adjustment of pay for military lawyers. Other members of that committee named by A.B.A. President Ross Malone, are Edward Jones of Des Moines, Henry Shine of Dallas and Cleo Straight of the District of Columbia. Colonel Fitts stated that notwithstanding the compelling results of the survey made by the A.B.A. committee and filed in the form of a brochure with the Congressional committees, the opposition from the administration, the Department of Defense, the Services and the Bureau of the Budget were too strong to overcome. He stated that although legislation of the type proposed by the Thurmond Bill (S. 1165) had not gained legislative sup-

port in the last session; nevertheless, the need for this type legislation was made apparent, and with continued efforts by the A.B.A., the J.A.A. and others upon the groundwork now laid for a new legislative effort, success might be attained in the next session of Congress.

The report of the Board of Tellers was then made and the following persons were announced elected and installed in their respective offices:

Col. Frederick Bernays Weiner,  
JAGC-USAR, District of Columbia—President

Capt. Robert A. Fitch, USN, District of Columbia—First Vice President

Col. Allen G. Miller, USAFR, New York—Second Vice President

Col. J. Fielding Jones, USMCR, Virginia—Secretary

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Col. Sheldon D. Elliott, JAGC-USAR, New York—Delegate to the American Bar Association

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### Statement of Policy

The Judge Advocates Association, an affiliated organization of the American Bar Association, is composed of lawyers of all components of the Army, Navy, and Air Force. Membership is not restricted to those who are or have been serving as judge advocates or law specialists.

The Judge Advocates Association is neither a spokesman for the services nor for particular groups or proposals. It does not advocate any specific dogma or point of view. It is a group which seeks to explain to the organized bar the disciplinary needs of the armed forces, recalling, as the Supreme Court has said, that "An Army is not a deliberative body," and at the same time seeks to explain to the non-lawyers in the armed forces that the American tradition requires, for the citizen in uniform not less than for the citizen out of uniform, at least those minimal guarantees of fairness which go to make up the attainable ideal of "Equal justice under law."

If you are now a lawyer, if you have had service in the Army, Navy, or Air Force or are now connected with them in any capacity, active, inactive, or retired, and if you are interested in the aims herein set forth, the Judge Advocates Association solicits your membership.

# COLONEL WIENER ADDRESSES ANNUAL MEETING

At the annual banquet of the Association held at the University Club, Los Angeles, on the evening of August 26, 1958, Colonel Frederick Bernays Wiener, newly elected President of the Association, delivered the following address:

*Mr. Toastmaster, members of the JAA, distinguished guests—and if there are any undistinguished guests present, I greet them also:*

Tonight I propose to inflict upon you a presidential address. It will not be unduly long, and since this Association rotates office annually, you need not fear another from my lips. I do not propose to discuss the problems of the organized bar in the atomic age, nor even the problems of the individual practitioner at the bifocal age. Instead, I propose to make some remarks on military law. My excuse for selecting that subject is that I have some knowledge of it, having studied it for over 23 years, ever since the late Colonel William Catron Rigby lent me his copy of the hearings on the court-martial controversy

of 1919. To paraphrase the huckster only slightly, not every JAA Annual Banquet Speaker can make that claim.

Now, military law is a very controversial subject. It is controversial basically because the two professions involved, that of arms and that of law, have very different outlooks. I do not know that either can assert greater antiquity than the other. Certainly a wholly different occupation is generally recognized as the oldest profession, one which has always been essentially unorganized. But at least the conflict in outlook between soldiers and lawyers goes back many centuries.

In a very old English case, way back in the Year Book of 5 Edward II, in 1311, the controversy turned on an agreement that was self-contradictory. Counsel said of it, "It was no lawyer who drafted such an agreement, but a man-at-arms." And the Chief Justice agreed, saying, "Men-at-arms are clever hands at making a mess of work of this sort."

## Editor's note:

<sup>1</sup> Colonel Wiener's remarks are based upon his personal opinions and are not necessarily reflective of the views and opinions of the Judge Advocates Association which speaks and acts through its Board of Directors. The content of his address is thought provoking and controversial; and, at this time, serves the useful purpose of directing our members toward an appraisal of policy: reaffirmation of the past thinking on several important matters or a new departure. Progress is not based on static ideas; and, the free exchange of ideas, whether controversial or not, is the hallmark of good legal societies and the outstanding characteristic of the legal profession. Action by the Board of Directors on one phase of this Article is reported at page 36.

In the JAA, we do our best to reconcile the conflict. According to our Statement of Policy—and we do have a policy, we do not make policy by ear, from day to day—according to our Statement of Policy, the JAA

“is a group which seeks to explain to the organized bar the disciplinary needs of the armed forces, recalling, as the Supreme Court has said, that ‘An army is not a deliberative body’, and at the same time seeks to explain to the nonlawyers in the armed forces that the American tradition requires, for the citizen in the uniform not less than for the citizen out of uniform, at least those minimal guarantees of fairness which go to make up the attainable ideal of ‘Equal justice under law.’”

Tonight I should like briefly to touch on a few topics where the JAA can be helpful, and I start with those where the lawyer has some wisdom to impart to the soldier.

The first of these concerns one of the proposed amendments to the UCMJ. You know, the amending process is infinite. Regulations are constantly being changed, statutes are always being amended, periodically some self-appointed statesman suggests tinkering with the Constitution, and now there are those who would rewrite the Declaration of Independence: They would strike out the reference to “Pursuit of Happiness” and substitute for it the Happiness of Pursuit.

The proposal I have in mind con-

cerns item 5 of the current joint report of the Court and the JAGs, “Execution of Sentences,” the effect of which would be to execute all portions of sentences, other than dismissal or discharges, once the convening authority has acted, before the appellate process has even begun, thus—in the language of the report—“thus eliminating the differences between sentenced and unsentenced prisoners.” Here is the full text of the Article 67 Committee’s justification for the proposal:

“5. *Execution of sentences.* Currently, about 407 days elapse between the date an accused is tried by court-martial and the date his sentence is ordered executed after review by the United States Court of Military Appeals. As a result, many prisoners complete confinement before their cases have been completely reviewed. Further, since an unsentenced prisoner is not subject to the same treatment as a sentenced prisoner, the administration of confinement facilities is unduly complicated. In some instances, delays in completion of the required review have led to complex administrative problems and loss of morale. Consequently, the proposed legislation provides that a convening authority may order executed all portions of a sentence except that portion involving dismissal, dishonorable or bad-conduct discharge, or affecting a general or flag officer, thus eliminating the differences between sentenced and unsentenced prisoners. No sentence extending to death may be

executed until approved by the President, although the proposed legislation will remove an anomalous result under the present code by providing that an accused sentenced to death forfeits all pay and allowances, and that the forfeiture may be made effective on the date the sentence is approved by the convening authority."

For reasons which I shall outline briefly, it is my view that there is hidden in this particular woodpile a very large and very dark integrated citizen, and that this proposal badly needs to be reconsidered.

The problem arises most acutely in the case of an officer sentenced to dismissal plus confinement. Prior to the Code, such an individual would be confined, but he was permitted to wear his uniform, and no labor was required of him other than the police of his room. After the completion of appellate review, the GCMO issued, with, at the end, the traditional expression, "Lieut. Jos. Schmaltz ceases to be an officer of the Army at midnight" of the specified date. On the stroke of midnight, Schmaltz's uniform would be taken away, he was given a prisoner suit, he was shipped off to a DB, and he became and was treated as a General Prisoner.

With the coming of the Code, this was changed. Once the convening authority acted, the officer was immediately sent to a DB; he was treated as a general prisoner, his photograph and fingerprints were broadcast, he was brought before parole and restoration boards, and

the only amelioration in his status was that during visiting hours, he could put on his uniform—if he had visitors. In fact, the officer was degraded while still holding a commission, and what made the practice ever more indefensible was that, in numerous instances, the conviction would be set aside on appeal, or on a rehearing, the accused would be acquitted.

As readers of *The Judge Advocate Journal* may recall, I called attention to this matter four years ago as a part of a paper headed "Messy Areas in the Administration of Military Justice." See JAJ, No. 21, Dec. 1955, pp. 20-30. This was one of the few points on which I was supported by the then JAG of the Army, who, however, had to battle TPMG, the policeman who also runs the jails. Finally, last fall, the ARs were amended to distinguish between the treatment of sentenced and unsentenced prisoners—any prisoner awaiting completion of appellate review is unsentenced—and the matter seemed at long last to be back in the satisfactory pre-1951 stage. But now comes this new proposal, which will mess up everything right over again.

I say "mess" advisedly, because if the proposal is adopted, then officers will be utterly and completely degraded while their cases are in appeal and before it is established that they have been properly convicted. In the civil courts, there is bail pending appeal except in capital cases, or except if the appellate question is patently frivolous. But this new proposal, in the military

system where bail is unknown, amounts to undercutting the appellate safeguards that Congress has enacted, because it says to the accused, in substance and effect, "Yes, Captain, you may have been unfairly found guilty; perhaps the entire conviction is improper; but in order to lessen administrative labors we will make you serve time as a prisoner, and we will make sure that you will be degradingly treated as a prisoner, until we get around to looking into your case."

I submit that the JAA should take a foreful stand against this thoroughly iniquitous and vicious proposal; and I am hopeful that some at least of the signers of the report in which it appears will on reconsideration withdraw their present support.

Now I come to a second point, which rather dramatically contrasts the legal and the military outlook. If there is any one single attitude of mind that marks the person with legal training—assuming that the inoculation took effect—it is that he always listens to both sides before he decides. Now this fundamental is frequently strange to the soldier. The latter will say, "Well, the prosecution's witness says the accused did it, so what are we wasting time for sitting here and talking?" Alas, this view that accusation is equivalent to proof has in recent years not been restricted to the military. But it is still extremely disturbing to have it reappear in Army Regulations.

Most of you are doubtless familiar with the so-called "heave-ho" legislation, now 10 U.S.C. §§ 3781-3786,

though you will more easily recognize it if I cite it under its familiar original name, Title I of Public Law 810. Briefly, it provides for the elimination of substandard officers. It was designed to supersede the notably ineffective Section 24(b) of the National Defense Act, and to provide in permanent and adequate form what Public Law 191 did in 1941. In short, it was designed to get rid of the deadwood in the officer corps.

Its great value, as a very wise JA once remarked in my presence, lay not so much in the number of officers actually eliminated, but in the vastly greater number in whom it instilled a healthy fear. Over the years, a good many officers were separated under its provisions. The open-and-shut cases were rarely if ever contested; but the weak cases were, and as some of the weak cases were very weak indeed, those were not only contested but successfully contested. The figures, which of course reflected nothing of the facts, led some of the Pentagonian Indians to think that the obstacles on the course should be raised and made more difficult, so that fewer cases could be won by those concerned.

The present regulations, AR 635-105B, do just that. They tell the hearing boards that great weight is to be attached to the findings of the selection board. Let me explain: The selection board goes over the papers submitted to it by the AGO clerks. It acts *ex parte*. It does not call on the respondent for any rebuttal, it only calls on him to show cause after it has found against him. Its findings are, by fair analogy, the

same as an indictment found by a grand jury. So what the present regulations in effect tell the hearing board is that they are to take the indictment as evidence against the respondent.

Most officers who get the heave-ho from the heave-ho board are not disposed to air their substandard conduct before other tribunals. But if ever one is found who feels strongly enough about the matter and has funds to translate his feelings into action—in this instance an action at law—then some Government lawyer is going to have to explain to a federal judge just how this regulation, under which the indictment-equals-proof, squares with the statutory requirements of “a fair and impartial hearing.” For the effect of the present regulation is not only to change the burden of going forward but also the burden of proof, and that in a situation where the respondent has lost the protection afforded by the rules of evidence.

I know it is very risky for any lawyer to predict the ultimate outcome of litigation. I know how easy it is for the boastful counsellor to have to eat his words and lots of crow besides—even though I can say, for myself, in the words of Sir Winston Churchill, “I have not always been wrong.” But I think I can safely predict that, in the case supposed, regardless of final decision, the lawyer who attempts to square that regulation with the statute is going to have some uncomfortable hours in the courtroom.

So much for what the lawyers should teach the soldiers. Let me

turn now to some lessons that the soldiers can usefully teach the lawyers, and there, by way of preliminary, let me say that even in the situations where the soldiers are right in thinking that the lawyers have gone too far, it does not add anything to the discussion to speak of “criminal lawyers”.

Any lawyer who has anything to do with the trial of a criminal cause is a criminal lawyer, be he prosecutor, defense counsel, judge, or, under the Code, law officer or member of a board of review—because, I need hardly remind you, a court-martial has no non-criminal jurisdiction. All are equally criminal lawyers. It is true that some are able, some are necessarily unable, and some few can be described only as lamentable. But they are all of them, regardless of quality, criminal lawyers.

Nor does it help to sneer at “defendants’ criminal lawyers”. I always recall what my first chief said about defense lawyers—and I hasten to add that this was in an office of undoubted respectability that would not touch any kind of criminal case even with an eleven foot pole. (Eleven foot pole? That’s for the cases one can’t touch with a ten foot pole.) This is what he said: “Anyone can be a plaintiff’s lawyer. You have to decide you have a case before you take it to court, and if it hasn’t at least a 51% chance, you don’t sue. So, if you’re a plaintiff’s lawyer, you have a case to start with; and that’s why it takes real brains and character to be a defendant’s lawyer.”

Now with those preliminaries out of the way, is there good ground for the widespread if largely inarticulate military view that in the enactment of the UCMJ the lawyers went too far? As I shall show, I think there is. But my doubts about the Code are far more fundamental than most of the criticisms made up to now.

First, we are always going to have a civilian court of ultimate appeal. To begin with, every English-speaking country after WWII—the British and the Canadians as well as ourselves—provided for ultimate civilian review of military cases. In the second place, a civilian court of appeals takes the heat off individual members of Congress and takes them out of court-martial practice. All 531 of them—I am not yet including the Senators from Alaska—all 531 of them can pass the buck up to the CMA without having to write, telephone, or visit the service Secretary. They are not willingly going to return to their old chores in that field. I can understand why it may be distasteful to the old line JAs, who previously were immune to anything but a habeas corpus for lack of jurisdiction, to have civilians looking over their shoulders in connection with what was once a private preserve whose mistakes if any could be neatly buried under old AW 50-1/2.

Under that provision, the older members among you will recall, a case in which execution of the DD was suspended did not require review by a board of review. Then if any Indian in the section thought there were errors, but his superiors were convinced that substantial jus-

tice had been done, the case would simply be filed. Hence the comment that under AW 50-1/2 the unpleasant mistakes could be and were quietly interred.

But I suggest that to think that Congress will some day abolish the CMA is as realistic as the hopes of those unreconstructed Confederates who would like to have the XIII and XIV Amendments quietly repealed as a cure for their school problems.

Not only will we always have a civilian court, but, affirmatively, we need one. In the last few years there have been a series of cases there that were literally shocking, and all of them had been passed by boards of review. I mean cases like *Deain* (5 USCMA 44) and *Whitley* (5:786) from the Navy, *Sears* (6:661) from the Air Force, *Parker* (6:75), *McMahan* (6,709), and *Kennedy* (8:251) from the Army. All of those cases all involved fundamental unfairness. None of them turned on particular provisions of the Code. All should have been promptly reversed by the boards; none were. I say to you in all candor that, quite apart from the convenience to Congress in having a civilian court, those cases stand as an insuperable and indeed conclusive argument against any attempt to abolish the CMA on the ground that it is unnecessary. We are simply not going back to any system lacking that safeguard.

And I think that fact is becoming more generally recognized, however much anyone may disagree with particular lines of decision. In this connection it seems clear that the Army's law officer program, under

which legal rulings are going to be free from any influence, conscious or unconscious, from the SJA office, is therefore a very helpful and progressive development. I think it is also inevitable that the law officer will have more power and stature over the years. The next steps will be to have him sit at the head of the courtroom in a high judge's chair, wearing a robe, with the rest of the court in a sort of jury box. The former president, by that title or otherwise, will become a mere foreman, and while this final change will cause the old-line iron-pants JAs to weep sadly into their beer once more, I think it is bound to come sooner or later, most probably sooner.

My real doubts are far more fundamental. I thought in 1950, and despite some forensic success under its provisions since then, I still think in 1958 that the basic misconception of the Code is that it sought to set up a system of military justice that paralleled the system of civilian justice, in utter disregard of the fundamental fact that a military society differs from a civilian one, and that the objects of military law are therefore different from those of civilian criminal law.

Here is what General Sherman said in 1879—and bear in mind that he was a practising lawyer long before he became a general:

“The object of the civil law is to secure to every human being in a community all the liberty, security and happiness possible, consistent with the safety of all. The object of military law is to govern

armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

“These objects are as wide apart as the poles, and each requires its own separate system of laws—statute and common. ‘An army is a collection of armed men obliged to obey one man.’ Every enactment, every change of rule which impairs this principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civilian lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice. \* \* \*”

The drafters of the Uniform Code ignored, no doubt because they were ignorant of, these fundamentals. I have said that they did well to provide an ultimate civilian court and to protect against gross unfairness. I think their basic mistakes were first, to extend the jurisdiction of military courts even more widely than had ever been done before; second, to institute the completely adversary system of trial; and third, to take the administration of military justice out of the hands of the service at large. Each of those mistakes—which I propose to discuss briefly, very briefly—was a reflection of their fundamental error of not perceiving the special needs of the military community.

First. The earlier American military codes were greatly limited as to

offenses. They did not seek to cover all criminality by soldiers, but only such conduct as affected the Army. As late as 1833 for instance, the trial of a soldier for a theft committed off the reservation was disapproved by the Commanding General of the Army (GO 22 of 1833). Under the NATO and NATO type arrangements abroad, and under the Defense-Justice agreement at home, military jurisdiction in practice has now been sharply curtailed. I suggest that the entire jurisdictional pattern should be restudied on the view that military jurisdiction has no justification apart from military needs, that it should not parallel civilian jurisdiction, and that, when limited, it has a better chance of being permitted to proceed more summarily than at present.

That restudy should also cover jurisdiction over non-military persons, a subject which in the last few years I have somewhat fully discussed before a different audience, and which I shall therefore not further expound here.

Many years ago, Maitland wrote of "the verdict of long experience, that an army cannot be kept together if its discipline is left to the ordinary common law," and again, "that a standing army could only be kept together by more stringent rules and more summary procedure than those of the ordinary law and the ordinary courts." We are very close, in the UCMJ, to the ordinary criminal law and procedure of our ordinary criminal courts. But the only chance of reversing the trend, of making military procedure more summary, and hence more effective

as a disciplinary sanction, lies in narrowing its scope to those offenses that have a demonstrable bearing on the military effectiveness of the forces.

Second. In the earlier military practice, with its narrow range of offenses, the court-martial was not a court of general criminal jurisdiction. It was accordingly regarded as a "court of honor", and lawyers were not permitted to speak before it.

Here are passages from the action disapproving, in 1809, the proceedings of a GCM because the accused's counsel had been allowed to question witnesses and to address the court:

"Were Courts Martial thrown open to the Bar, the officers of the Army would be compelled to direct their attention from the military service & the Art of War, to the study of the law.

"No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defense in writing—but he is not to open his mouth in Court."

I do not suggest that we return to that standard, which has not been followed for a century at least. I do think, however, that the full flowering of the adversary system in military trials, far from protecting the accused, actually hurts him, and that it is not conducive to furthering the discipline of the armed forces.

Under the old Articles of War, the rule was that omissions by counsel did not bind the accused,

essentially because counsel was generally a layman. Today, many, many decisions turn on waivers by counsel, who, though not technically laymen, are in most instances lieutenants just out of law school. I am aware of the vice inherent in generalizations, but I can only say that most of the cases I have dealt with in the last few years have been poorly tried—on both sides. It seems to me unrealistic to apply to such trials the rigid standards of waiver that civilian courts apply in their criminal cases, most of which are tried by much more experienced counsel. And I think that if there were some lessening of the combative techniques that the young lieutenants now apply, influenced no doubt by what they see nightly on the TV screen, trial counsel would be less inclined to emulate Mr. District Attorney and might well feel that he owed a duty other than winning at all costs. I suggest that the discipline of the services would be enhanced rather than otherwise if there were less need on the part of the prosecution to counter the imaginative tactics of the budding Perry Masons' defending hopeless AWOL and barracks larceny cases. (Perhaps I should announce at this juncture that I regard myself as the great friend of the common man, of the ordinary brand, and of that poor punching bag for Perry Mason, Della Street, and Paul Draper, the very sad sack, the Hon. Hamilton Burger.)

I have the uneasy feeling, as I read current records of trial, that hammer-and-tongs forensic battles by untrained forensic battlers are

not the solution for any ills that have beset military law in the past. I urge that we restudy the Code to see whether a return to a more paternalistic system would not make it more workable, and more conducive to discipline, without of course any sacrifice of fundamental fairness.

Third. The traditional military code was a body of law administered by the service at large and therefore familiar to the service at large. After 1920, there were refinements not generally known, but the basic outlines of the system and of its procedure were still familiar. Now we have an excessively technical system that is a closed mystery to the ordinary officer. One result is that those opinions of the CMA that need most to be communicated to the layman, particularly to commanding officers, and most particularly to commanding officers exercising GCM jurisdiction—which is to say, the opinions dealing with standards of basic fairness—those opinions seem never to reach the persons most affected thereby.

Under the old system, the services disciplined themselves. They investigated their cases, then tried them. Today the entire investigatory process, in virtually every routine case, is in the hand of the always inadequate and frequently vicious CID, ONI, and OSI; and the trial of cases has been almost wholly handed over to the lawyers, and so has but little impact on the thinking of the service at large.

I suggest that we would have better disciplined services if they would remove the administration of mili-

tary justice from the cops and the lawyers, and returned to the traditional process of self-administered discipline, with simplified procedure, and with only sufficient legal participation to eliminate patently inadmissible evidence and to insure the observance of basic standards of decency and fair play. Then military law would not be, as unfortunately it seems to be now, something foreign to the consciousness of the average conscientious officer.

Finally,—and this is my last point—I come to a matter where the soldiers may justly complain of the lawyers, and that is the somewhat delicate subject of the lawyers' pay bill.

Here also I suggest a preliminary thought: In the military services, lawyers are a minority group. That may be an unpalatable thought, but it is pretty fundamental. And since it happens to be a fact, it is well to remember that the only way that a member of a minority group can obtain the respect of the community at large is to earn that respect, and that he cannot do so by going about telling how wonderful or how underpaid he is.

The remarks that follow do not run counter to any expressed policy of this Association, because it has never gone on record as favoring the lawyers' pay bill unconditionally. So I am free to state my personal opposition to it, on three grounds: It is indefensible on the merits; it cannot be passed; and it does not get to the heart of the difficulty.

First, it is indefensible. It proposed to pay more to the JA in the rear area, sitting where the JA

usually sits, than to the soldier getting shot at up front. I will say quite frankly that if I were ever to advocate such a measure I could never afterwards look a fighting man in the eye—and I would have to wince pretty hard if I had to look into a mirror at myself.

Some of you may ask, What about the doctors? Well, I don't think much of the doctors' extra pay either, but there is a shortage of doctors, so much so that doctors, alone of all professions, are subject to draft as such. There are plenty of lawyers, and they are not about to be drafted.

Second, the bill cannot possibly pass. It had seventeen sponsors; when the vote came, only one was present, and he was not the one who first introduced the measure and gave it his name. If anyone here believes that this was accidental, then he will believe that the stork brings babies. The fact of the matter is that with all the ABA big shots behind it—and the leaders of the ABA are master politicians, however deficient some of them may be as lawyers—the bill never got off the ground. And I feel perfectly safe in predicting that they will never, never push through Congress a bill that gives more pay to a legal officer than to a fighting officer. After all, with World War II and Korea under our national belt, there will be few if any Congressional districts where the number of lawyers duly admitted and practicing exceeds the number of registered voters who have been exposed to enemy fire.

Third, the bill does not get to the heart of the difficulty, which is the

very real and very troubling problem of legal personnel procurement. I do not for a moment underestimate the existence of that problem or its magnitude.

It exists in all three services, but it will be sufficient to quote these figures from General Hickman's statement (104 Cong. Rec. A3530):

"\* \* \* of the 1242 law school graduates who have been granted commissions with concurrent call to active duty since 1950, only 9 have accepted commissions in the Regular Army and less than 1 percent have remained on active duty in any status."

That disproportion reflects something deeper than just a low rate of pay. That disproportion demonstrates that, in time of peace, the armed services cannot look to law school graduates as their source of legal personnel procurement. And why should that be so surprising? A young man who goes to law school does so because he wants to be a lawyer. If he wants to be an officer, he goes to the service academies or seeks further duty after his obligated ROTC tour.

And so I suggest that the only solution is to go back to the older method procurement, to take the young officer who is already in the service, who is already committed and dedicated to military life, and to send him to law school at public expense, just as other young officers are sent at public expense to learn other technical specialties needed by the services.

But, you will ask, what about the legislative rider that forbids? In

its latest form—Section 618 of the Defense Appropriation Act of FY 1959—it reads as follows: "None of the funds provided in this Act shall be available for training in any legal profession nor for the payment of tuition for training in such profession," with a proviso that it does not apply to off-duty training.

Well, I looked up the hearings when that rider was first enacted, and the theme of those who objected to that kind of training was, "Why send regular officers to law school when you can get all the legally trained reserve officers you need?" That question was repeatedly asked by our genial friend Judge Ferguson, sitting right here, who in those days was on the Senate Appropriations Committee as Senator from Michigan.

Here is an exact quotation from the Senate Hearings on the Department of Defense Appropriation Bill for Fiscal Year 1954:

"Senator Ferguson. I still do not understand why you cannot use reserve officers already educated as lawyers."

We have an answer now that was not available then. We know that the services cannot get all the legally trained officers they need. And I feel confident that when the experience of the last few years is laid before Congress, the rider would be deleted, provided certain safeguards are introduced.

In that connection, I sensed in the hearings a fear that senior officers would be sent to law school so that on graduation they would command persons junior to them in military

rank but far senior to them in professional legal experience—much as the Navy used to send 50-year-old commanders to Pensacola so that carriers and air installations would not fail to be commanded by devotees of the capital ship.

That difficulty can be overcome.

I suggest—and these figures are put forward simply as a basis for discussion—that law school details be restricted to regular officers of not less than three nor more than seven or eight years' commissioned service, who shall not be higher than captain in permanent grade nor than major in temporary grade. After three years their commissions are no longer probationary; after five or six or seven years they are certain to want to continue to be officers; and by limiting their rank there will be no danger of disproportion between military grade and legal experience. As a further safeguard there should be a provision that, as a prerequisite to being sent to law school, such officers must agree not to resign for a certain number of years after graduation. Thus there will be a steady flow of legally trained personnel who would not be lost to the services.

Immediately after a war—I assume that there will be wars in the future, though it may be a violent assumption that anyone will be left after the next one—immediately after a war the regular officer of seven or eight years service will probably have too much rank to qualify for the law school detail. But immediately after a war there is available the other group of legally trained officers who like the

military life, the reservists who want to stay in. We know that every post-war recruiting program has always brought in a host of able officers from that class.

A few other items would round off a really attractive career program. One would be to establish the rank of Captain as the minimum grade for any JA or legal officer one year after his admission to the bar. (After all, the minimum grade for a JA in the Army up to WWI was major.) And I think it would be fair to provide that a legal officer who obtains his law degree at his own expense should be given three years constructive credit for pay, promotion, and—possibly—retirement.

I say "possibly", because it seems to me that the forced early retirement features of the Officer Personnel Act may be lessening the attractiveness of the military lawyer's career. Under its provisions, most legal officers must go out at age 55. If a lawyer has any ability at all, he will be coming into his own just then. I suggest that serious consideration be given to raising the mandatory retirement of JAs and legal officers to 60. After all, we want those people to be, not battle-ready combat leaders, but able law officers, wise staff JAs, and knowledgeable advisers to the General Staff and to the Secretariat.

A procurement bill along those lines would make sense, and could probably be passed. Properly drawn it could include three star rank for the JAGs, and whatever additional flag officers the Navy feels it needs. Certainly it should include provisions

to ease for the Navy's law specialists the forced attrition resulting from what to an outsider appears to be a discriminatory rigging of the zone of consideration in the pass-over process. And if the organized bar were to support that kind of a proposal, it could look straight in the eye people whose life-work it is to be shot at by an enemy.

You will no doubt have observed that with respect both to the Code and the procurement of military lawyers I have looked backwards in the course of planning forwards. Change is inevitable, and what appears to be progress is not always for the best. I think I can appropriately document these views with two short quotations.

One is from a Rhode Island judge of ninety or a hundred years ago, the late Mr. Justice Shearman. "Progress," he snorted, "is like a goose: It devours everything in

front, and befools everything behind."

The other is a reporter's comment in that same Year Book of 5 Edward II in 1311, concluding his report of a case: "Such writ did not used to be made of old time \* \* \*. But all was once other than it is now, and will be other again. New King, New law, new Justices, new masters."

Everything passes, so the proverb has it, and I am sure you will not be too sorry to learn that this address is drawing to a close.

The thought I wish to leave with you is that the JAA as a liaison group between the bar and the services, interpreting the needs and standards of each to the other, has a real task to perform—and a real future if only it will perform the task.

With your help, I feel certain that the Association can make substantial progress towards its goal in the year that lies ahead.

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## In Memoriam

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Members of the Judge Advocates Association profoundly regret the passing of the following members, whose deaths are here noted.

Nathan R. Graham of Tampa, Florida.

Lester T. Hubbard of Albany, New York.

Robert S. Eastin of Kansas City, Missouri.

Bernard Sobol of New York, New York.

Cedric W. Clark of Pomeroy, Ohio.

Warren A. L. McKeithen of Pinehurst, North Carolina.

John J. McCurdy of Lincoln, Kansas.

## *Recent Decisions*

# of the Court of Military Appeals

### SJA Reviews

**U. S. v. Payne (Air Force) 14 March 58, 9 USCMA 40**

The accused was found guilty of using provoking speech contrary to Article 117. The SJA in a post trial review referred to other acts of misconduct of the accused which had been set out in evaluation statements made by the accused's commander and others. Of course, this matter was not contained in the record of trial. In the post trial review, the accused was offered no opportunity to rebut. CMA reversed the conviction and remanded the case for a new review, holding that the inclusion of the new adverse matter in the review without furnishing the accused an opportunity to rebut or explain it was error.

**U. S. v. Sarlouis (Air Force) 11 April 58, 9 USCMA 148**

The accused was found guilty of carnal knowledge, Article 120, and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. In the SJA's review, reference was made to evaluation statements made by the commander and others commenting upon the accused's lack of military appearance and efficiency. However, the personal history section of the SJA's review and the recommendations of the convening authority were based upon a comprehensive and thoughtful review of the entire case, the accused's back-

ground, and in fact, recommended that confinement at hard labor be cut to two years. Here the Court of Military Appeals affirmed conviction and sentence, holding that the inclusion of the adverse matter in the review without affording the accused an opportunity to rebut or explain was not prejudicial.

**U. S. v. Smith (Army) 11 April 58, 9 USCMA 145**

Following conviction of the accused and in the post trial review of the case, the SJA in the clemency section of the review set forth information concerning the accused's prior convictions by court-martial, his record of non-judicial punishments and statements of unsatisfactory character. The SJA recommended, however, the accused be afforded the opportunity of rehabilitation, which advice was followed by the convening authority. Here CMA affirmed the conviction saying that although it was error to include in the SJA's post trial review adverse matter outside of the record, without affording the opportunity to rebut or explain, here the review noted that although the accused's prior record was poor, only military offenses were involved and they did not involve moral turpitude and his recommendation was favorable to the accused. The convening authority followed the recommendation and the accused could not be said to have been prejudiced by the review.

**U. S. v. Bugros (Air Force) 23 May 58, 9 USCMA 276**

The accused was found guilty of indecent assault. In a post trial interview following advice under Article 31, the accused talked fast and long concerning his background and a great deal of disparaging information was revealed. The SJA's post trial review included the derogatory information concerning the accused and did not recommend clemency. On appeal, the accused contended that the review was prejudicially deficient on the ground that he was not given an opportunity to rebut the derogatory information obtained from his military superiors. CMA affirmed the conviction upon the ground that the information contained in the review certainly precluded any exercise of clemency and the views of the superiors expressed concerning him added nothing to his self-destruction in his own interview with the post trial interviewer. Accordingly, The Court found no prejudice in the failure to permit him an opportunity to rebut or explain.

**U. S. v. Morris (Navy) 13 June 58, 9 USCMA 365**

In this case, the accused was found guilty of AWOL and missing movement. In the post trial review, the SJA stated that the accused had been disrespectful of superior officers and incapacitated for duty by drinking after the trial and he declined to recommend clemency because of the seriousness of the offenses plus the present attitude of the accused. CMA held it was prejudicial error not to give the accused

an opportunity to rebut the adverse matters found in the SJA's review where the accused's background was not of an aggravated criminal nature and the conduct commented upon was as serious as the offenses for which the accused was convicted.

**U. S. v. Withrow (Navy) 21 February 58, 8 USCMA 728**

The accused was convicted of attempted bribery. In the post trial review, the staff legal officer summarized the evidence but failed to include his opinion as to its weight and sufficiency. On the accused's contention that the review was fatally deficient, CMA reversed the conviction and directed a new review, holding that Paragraph 85 b, MCM, requires the SJA to include in his review his opinion as to the adequacy and weight of the evidence. A summarization of evidence, it held, does not satisfy the requirement of an advice upon weight and adequacy of the evidence.

**U. S. v. Morris (Air Force) 28 February 58, 8 USCMA 755**

Accused was convicted of a narcotics offense. In the post trial review, the SJA stated there was sufficient evidence in the record to sustain the findings and in the absence of an indication of a manifest in justice, these findings should be approved. The accused appealed, contending that the SJA's review misled the convening authority as to the standard of evidentiary sufficiency. CMA reversed the conviction and remanded the proceedings for a new post trial review, holding that the standard prescribed with

regard to the narcotics offense was not that by which the convening authority should judge the accused's guilt and although the correct standard was stated with regard to other offenses of which the accused stood convicted, the offenses were separately considered in the review and the subsequent correct statement as to the other offenses did not cure the error.

**U. S. v. Fields (Army) 28 March 58,  
9 USCMA 70**

The accused was convicted of larceny. The SJA noted in his post trial review that the court is the sole judge of the facts and has the right to disbelieve and reject the accused's denials and explanations, that the evidence warranted the court in making its findings and the findings were justified. The accused contended that the SJA review misled the convening authority as to the standard to be applied in measuring the proof of his guilt. CMA reversed and remanded for a new review. The Court said that the advice of the SJA was tantamount to advising the convening authority that it was bound by the court's finding, that under Article 64, the accused was entitled to an independent assessment of the facts by the convening authority, and he was, therefore, prejudiced by the improper SJA review.

#### Intention to Desert

**U. S. v. Slanford (Navy) 21 February  
58, 8 USCMA 729**

The accused was found guilty of desertion. The evidence showed that the accused absented himself

from Ft. Knox and was apprehended ten months later in Birmingham by the FBI. The accused admitted his absence, the use of aliases, widespread travel, civilian employment and attempted evasion of arrest, but stated that he had an intention to return but just hadn't gotten around to it. The law officer gave the instruction that an intention to desert may reasonably be inferred from evidence of a much prolonged period of absence without authority for which there is no satisfactory explanation. CMA reversed the conviction, holding the instruction prejudicially erroneous. The Court decided the case on the basis of the opinion in *U.S. v. Soccio*, 8 USCMA 477, where it had held that the period of absence regardless of its duration shall be a single fact which considered with all the other evidence may infer an intent to desert, but the intent may not be inferred from the fact of long absence alone.

**U. S. v. Demaris (Navy) 28 February  
58, 8 USCMA 750**

In this case the accused was found guilty of desertion. Trial counsel in argument pointed out that the intent necessary for desertion could be inferred from a much prolonged absence without excuse. The defense counsel agreed in his argument and said that the court may infer from that fact alone an intent to remain absent permanently. The law officer did not instruct the court in that regard. CMA reversed the conviction as to desertion and said that although the law officer did not misinstruct in this case, counsel on both sides

assumed the validity of their discussion and the law officer acquiesced in it by not correcting the situation; therefore, counsel on both sides may be said to have implemented the law officer's charge and the offense of desertion was submitted to the court under insufficient instructions.

**U. S. v. Krause (Army) 28 February 58, 8 USCMA 746**

The accused was found guilty of desertion based upon evidence showing an absence of over two years. The law officer instructed the court that the intent to desert could be established by circumstantial evidence such as evidence of a much prolonged period of absence without authority for which there is no satisfactory explanation. The Court held that the evidence was sufficient to establish accused's guilt of desertion. It stated that long term absence is of great probative value to prove intent and considered with other evidence, it may be sufficient to predicate a finding of intent to remain away permanently, but long term absence is not a substitute for intent to desert but must be submitted to the court as one of the facts from which they may find the intention.

#### **Effective Date of Forfeitures**

**U. S. v. Schuld (Army) 21 February 58, 8 USCMA 721**

The accused was found guilty of desertion from June 1942 until March 1957 and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for three years. The convening author-

ity directed that the forfeitures applied to pay and allowances becoming due on and after the date of his action. On appeal, the accused contended that the convening authority must defer the application of forfeitures until the completion of appellate review. CMA disagreed with this contention and affirmed. At the time of accused's desertion in 1942 and at the time of his trial, the convening authority could order into execution, at the time of his action, forfeitures adjudged against the accused and the mere fact that a more favorable state of the law existed during the period of the absence under the Elston Act could not avail the accused of any better treatment. The accused should have surrendered himself during the period in which the Elston Act was effective if he wished to take advantage of its more favorable provision.

#### **Faulty Instruction in Assault Case Charged under Article 134**

**U. S. v. Lawrence (Air Force) 21 February 58, 8 USCMA 732**

The accused was found guilty of a violation of Article 134 arising out of an assault upon a civilian policeman then in the execution of his duties. The president of the special court-martial failed to advise the members that they must find the accused's conduct was to the prejudice of good order and discipline in the Armed Forces or of a nature to bring discredit upon the Armed Forces. CMA reversed the conviction holding that the president's failure to instruct the court to the effect that the accused's con-

duct must be found to be Service discreditable or prejudicial to good order amounted to prejudicial error in that it omitted instruction on an essential element of the offense.

#### Sentence of More Than Six Months without Punitive Discharge

**U. S. v. Varnadore (Navy) 22 July 58, 9 USCMA 471**

The accused, upon a guilty plea, was found guilty of AWOL. The law officer instructed the court-martial that any period of confinement greater than six months without being accompanied by a punitive discharge is an illegal sentence. While defense counsel pleaded by way of extenuation and mitigation for the retention of the accused in Service, the prosecution argued that the offense required a bad conduct discharge. Upon the law officer's instruction, the accused was sentenced to total forfeitures, reduction, bad conduct discharge and confinement at hard labor for one year. CMA reversed as to the sentence and authorized a rehearing. The Court stated that although the law officer's instruction was justified by Paragraph 127 B of the Manual and the earlier decision of this Court in *U.S. v. Brasher*, 2 USCMA 50, the Manual provision was held to be contrary to the provisions of UCMJ which provide that an offender "shall be punished as a court-martial may direct". The Court, therefore, held that it is not illegal for a court-martial to impose a sentence of confinement in excess of six months without also adjudging a punitive discharge.

#### Search and Seizure

**U. S. v. Rogan (Army) 28 February 58, 8 USCMA 739**

The accused officer was found guilty of larceny of a camera. An NCO in the unit, suspecting the officer but with no personal interest in the case, searched the accused's desk and found the camera in the accused's gas mask bag. No one in authority had directed the NCO to make the search. Evidence of the result of the search was received in evidence over objection among other matters. The accused contended on appeal that the evidence concerning the result of the search should have been excluded on the basis that the NCO's search was illegal. CMA affirmed the conviction holding that the NCO was not acting in an official capacity making the search, and, that, therefore, the search was not under the authority of the United States. Therefore, the evidence concerning its result was admissible.

#### AWOL Caused by Civilian Arrest

**U. S. v. Myhre (Navy) 14 March 58, 9 USCMA 32**

While on authorized leave, the accused was apprehended by civilian police and received a suspended sentence as a youthful offender. While in the hands of civil authorities, he overstayed his leave and this absence was the basis of a charge of an absence without leave. On the accused's appeal from the conviction, CMA affirmed the conviction holding that the accused's inability to return within his authorized leave resulted from his own willful

misconduct and he was, therefore, responsible for the absence without leave thereby occasioned.

### Inadequate Representation by Counsel

**U. S. v. Gardner, 21 March 58**  
**(Navy), 9 USCMA 48**

The accused was convicted by a special court-martial of larceny of an allotment check among other offenses. At the trial, counsel were non-lawyers. Defense counsel entered a plea of guilty which thereafter was changed to a plea of not guilty with an explanation by defense counsel that the change was made in order to accord with what the accused desired. The prosecution introduced the accused's confession and rested. The defense counsel then called the accused and his wife to the stand with the result that the accused repeated the content of his confession from the witness stand. On appeal from a conviction, the accused contended that he was inadequately represented by counsel. CMA reversed the conviction saying that the prosecution did not corroborate the accused's confession and failed to make out a prima facie case. Skilled counsel would not have permitted the accused to take the stand and by his judicial reiteration of his statement make the evidence sufficient to convict him. This negligence or palpable inexperience amounted to the denial of effective assistance of counsel.

**U. S. v. Wheaton (Air Force) 16 May 58, 9 USCMA 257**

The accused, under suspicion of larceny, was interrogated by an Air Police sergeant who informed him

when he requested counsel that he was not allowed to have counsel at that time. Later an OSI agent, after fully advising the accused of his rights under Article 31, took a written statement from the accused. When this statement was offered in evidence, the accused objected to its admission contending that the misadvice of the Air police sergeant caused him to believe that he was not entitled to counsel during the OSI investigation. The accused admitted that the statement was voluntary. The board of review reversed the conviction and TJAG certified the question to CMA. The Court affirmed the board of review holding that the board of review had construed the evidence as affirmatively indicating that the accused was misinformed as to his rights to the benefit of counsel and the court would not say as a matter of law that that finding was not supported by the record.

**U. S. v. Rawdon (Army) 20 June 58.**  
**9 USCMA 396**

Upon a guilty plea, the law officer held a side bar hearing in which it was disclosed that the plea was a negotiated plea, that the accused pleaded guilty because he knew he was wrong and that the agreement with regard to punishment was fair. Thereupon the law officer excluded counsel for both sides and inquired of the accused as to whether he was satisfied with his defense counsel. The accused stated that he was and the trial resumed. On appeal, it was contended that the exclusion of counsel by the law officer under the circumstances amounted to a

denial of military due process and caused the court to lose jurisdiction. CMA rejected these contentions. The law officer's private talk with the accused about his personal satisfaction with appointed counsel was in the interest of and not a deprivation of a fair trial, the thought being that the accused would be permitted to speak more freely in private. Therefore, he was not denied military due process. The Court also concluded that the proceedings had no jurisdiction consequences since the accused was not deprived of counsel at any stage of the proceedings against him.

#### Command Influence

**U. S. v. Carter (Army) 4 April 58, 9 USCMA 108**

Seven accused were found guilty of rape of a fifteen year old girl in Germany. The incident caused a great wave of public protest, indignant newspaper editorials, expressions of the outrage of the local populace and official local action demanding the removal of American troops from the area. Shortly thereafter the Commanding General of the American Forces in Europe delivered an address before an Ambassador-Army Commanders Conference in which he stressed the fact that the Army's reputation and the United States' reputation were being jeopardized by a few bums and the necessity of bringing criminal conduct under control.

The particular case here involved was pointed out with reference to its effect upon the military forces in the area. This speech was given

wide circulation among subordinate commanders. At the trial on voir dire examination, court members indicated they had formed no opinions because of the publicity of military directives which would prevent them from giving the accused fair and impartial trials. A motion for change of venue and challenges for cause were denied. Upon conviction, the accused contended that the rulings on these motions constituted prejudicial error. CMA affirmed the conviction. The Court held that the motion for change of venue was directed to the discretion of the law officer and that there was no evidence of abuse of that discretion. The trial was held sixty miles away from the scene of the crime, the newspaper publicity was all written in the German press in the German language which was beyond the comprehension of seven of the ten members of the court and was either unread or made no impression upon the other three. As far as the remarks of the Commanding General were concerned, he was discussing German-American relations and was concerned with reducing criminal incidents, not with the merits of the particular case; and, in any event, no member of the court admitted that he was influenced by these comments.

#### Multiplicious Sentences

**U. S. v. Williams (Army) 21 March 58, 9 USCMA 55**

The accused was found guilty of taking indecent liberties with a child and assault with intent to commit sodomy upon evidence that showed an assault upon the victim

while attempting to force an act of fellatio. The law officer instructed the court that the sentence could include punishment for both offenses. On appeal, CMA held the law officer erred in that his instruction on maximum sentences should have been limited to the more serious of the two offenses because they were multiplicitous.

**U. S. v. Bridges (Navy) 4 April 58, 9 USCMA 121**

Upon trial by special court-martial, the accused was found guilty of AWOL and missing movement of his vessel during the same period. The president of the court did not instruct that the offenses were multiplicitous and the board of review held this to be error and reassessed the sentence. Upon certification by TJAG, CMA held that offenses were multiplicitous for the purpose of sentence and affirmed the board of review.

**U. S. v. Modesett (Navy) 11 April 58, 9 USCMA 152**

Here the accused was found guilty of breach of restriction and absence without leave based on evidence which established that the accused went beyond the limits of his restrictions without authority. The sentence imposed was cumulative. From an affirmance by the board of review, the accused petitioned CMA for review and that court ordered the return of the record to the board of review for reconsideration of the sentence, holding that the offenses for which the accused was convicted were multiplicitous and

should not have been considered as separate for sentencing purposes.

Likewise in a case where the larceny charge duplicated various fraud charges, CMA held it to be error for GCM to treat such offenses as separate in assessing the sentence (U.S. v. Rosen (Army) 18 April 58, 9 USCMA 175).

Also, a conviction of AWOL and breach of parole arising out of the same unauthorized absence was held to be multiplicitous requiring reassessment of the sentence in U.S. v. Taglione (Army) 25 April 58, 9 USCMA 214. See also, to the same effect, U.S. v. Welch (Army) 16 May 58, 9 USCMA 255. However, where a hiatus intervened a breach of restriction and an absence without leave, CMA found no multiplicity of offenses and approved a sentence based on the separate offenses in U.S. v. Helfrick (Army) 2 May 58, 9 USCMA 221.

**Law Officer's Participation in Court Deliberations**

**U. S. v. Turner (Coast Guard) 11 April 58, 9 USCMA 124**

In this case, the accused was found guilty of AWOL and larceny. In the prearrest proceedings, it was revealed that the law officer had prepared the pretrial advice. Notwithstanding this disclosure, the defense counsel did not exercise any challenges. In the formal instructions, the law officer gave no instruction on the maximum sentence but during deliberations on the sentence, the court called the law officer into closed session for advice concerning the time of execution of a punitive discharge. In

his answer to the court, the law officer referred the court to a part of the MCM. The record did not reveal the time the law officer entered the closed session and when he left. The sentence, including a punitive discharge, was affirmed by the board of review. On petition of the accused, CMA reversed the board and directed a rehearing on the sentence. The Court held that the law officer's preparation of the pretrial advice gave grounds for a challenge for cause, but the failure of the defense counsel to exercise that right amounted to an intelligent and conscious waiver; however, the Court held that the failure of the law officer to instruct on the maximum sentence was error and the law officer's participation in the deliberations of the court was likewise error aggravated by his referring the court to outside legal sources.

#### **Admissions Obtained by Promised Confidentiality**

**U. S. v. Washington (Army) 11 April 58, 9 USCMA 131**

Upon a trial for larceny by check and false official statements, a pre-trial statement made by the accused to his company commander was received in evidence although it developed that the statement had been obtained by the company commander after he had informed the accused that whatever he said would be held in confidence between them. The accused had been advised of his rights under Article 31. CMA held that the admission of the incriminating pretrial statement was

error, for even though the accused had been advised of his rights, the advice by the company commander that whatever said would be in confidence between them would naturally induce a belief in the mind of the accused that his disclosures would not be made the basis for criminal prosecution.

#### **Burning of Dwelling to Defraud Insurance Company**

**U. S. v. Fuler (Army) 11 April 58, 9 USCMA 143**

The accused, together with the owner of a house, by agreement set fire to the dwelling and thereafter participated in filing a claim against the insurance company. The accused was found guilty of willfully and intentionally burning the property of another with intention to defraud the insurance company under Article 134. Before CMA, he contended that the matter charged against him did not constitute an offense under UCMJ because it was not arson within Article 126 which was intended by Congress to cover all types of burning of property. CMA affirmed the conviction, holding that the fraudulent purpose of the act constituted conduct of a nature which directly discredited the Armed Forces and was punishable under Article 134.

#### **Availability of IG Investigation Statements to Defense**

**U. S. v. Heinel (Army) 23 May 58, 9 USCMA 259**

In this case, the accused, an officer, was the subject of an extensive IG investigation upon which he was later tried by a GCM for

various offenses. Summaries of expected testimony prepared from the IG report were used in the Article 32 investigation. Prior to trial defense counsel requested a copy of the actual testimony of each witness in the IG investigation. This request was not acted upon prior to commencement of the trial, so the request was renewed at the trial and a motion for continuance was made so that counsel would have an opportunity to examine the statements in the IG report. These motions were denied. On the second day of the trial, the entire transcript of the IG investigation was made available to the defense and he moved for a continuance to examine it which motion was denied. The prosecution continued. The witnesses appearing for the prosecution both before and after the production of the IG transcript were persons who testified in the IG investigation. The conviction was reversed by CMA because of the rulings on these motions. The Court said the right to inspection arises as soon as it appears that the witnesses have submitted earlier statements on matters related in their testimony. The accused in this case was in fact in the course of trial given a copy of the transcript, but possession was held to be not enough; he must also have a reasonable opportunity to inspect.

#### Juvenile Records Referred to in Court-Martials

**U. S. v. Cary (Armv) 13 June 58, 9 USCMA 348**

The accused officer was convicted of the offense of signing a false official document. The document in question was a personal history form and in answer to the question concerning previous arrest or conviction, the accused had made a negative answer, whereas in fact he had been convicted of a bad check offense. The prosecution attempted to introduce evidence of prior juvenile convictions including one for burglary in an attempt to impeach the accused who had taken the stand. CMA reversed the conviction and authorized a rehearing. The Court said that the introduction of evidence of the juvenile court proceedings violated its policy of excluding evidence of youthful offenses and was prejudicial error. This policy insures that the indiscretions of youth will not be used to brand a man in later life. The Court cited its own opinion in *U.S. v. Rorak*, 8 USCMA 297.

**U. S. v. Barrow (Army) 6 June 58, 9 USCMA 343**

The Court held that the rule that juvenile proceedings are inadmissible at trial to impeach the accused's credibility as a witness does not prevent the SJA including in the clemency section of his review information concerning juvenile offenses prior to military service.



# *What The Members Are Doing*

## California

Ingemar E. Hoberg and John H. Finger recently announced the formation of a new firm for the continuation of the practice of law under the style of Hoberg, Finger, Brown & Abramson, with offices in the Central Tower, 703 Market Street, San Francisco 3. Colonels Hoberg and Finger are charter members of the Association and Colonel Finger is currently a member of the Board of Directors of the Association.

## District of Columbia

Members of the Association in the Washington area held a luncheon meeting at the Army & Navy Club on July 10th at which the principal speaker was Judge Homer Ferguson of the Court of Military Appeals. At this meeting, the members elected Captain William B. Hanback as their State Chairman for the ensuing year. A full program of meetings will be scheduled by Captain Hanback for this local group during the winter of 1958-59.

Colonel Frederick Bernays Weiner was recently elected a Fellow of the International Academy of Trial Lawyers.

Major Eli E. Nobleman, counsel to the U. S. Senate Government Operations Committee, has been nominated to succeed Senator (Brig. Gen.) Strom Thurmond as President of the Military Government Association. Major Nobleman, a member of the Judge Advocates Association, has

been a contributor of articles on military government to this Journal.

## Kansas

Jay W. Scovel (8th Off.) of Independence has been elected President of the Bar Association of the State of Kansas for the current year. Mr. Scovel, who served in the U. S. Navy in World War I, served in The Judge Advocate General's Department of the Army in World War II as a Lieutenant Colonel. He is a charter member of the Association.

## Michigan

Captain Arnold M. Gold, USAFR, who practices under the style of Hart & Gold, recently removed his office to 1670 Penobscot Building, Detroit.

## Missouri

Bertram W. Tremayne, Jr., of the firm of Tremayne, Joaquin & Lay, recently announced the removal of their offices for the general practice of law to the new Shell Building, 212 South Central Avenue, St. Louis 5.

## New York

John J. McGlew recently became associated with the firm of Moses, Nolte & Nolte for the practice of law specializing in patent, trademark and copyright causes with offices at 11 West 42nd Street, New York 36.

William J. Rooney recently announced the removal of his office to 119 E. 36th Street, New York City.

Capt. Paul D. Heyman, who is Assistant Wing Legal Officer, 106th Fighter Interceptor Wing, New York Air Guard, recently moved his office for the general practice of law to offices at 277 Broadway, New York 7.

Col. David George Paston has written a full-length treatise on the law of SUMMARY JUDGMENT in NEW YORK. The book, published by Central Book Company, Inc., 850 DeKalb Avenue, Brooklyn is priced at \$10. Col. Paston is chairman of the Committee on Military Justice of the New York County Lawyers Association.

#### Pennsylvania

Col. Fred Wade retired from the Air Force on August 31 after 35 years of military service. At his retirement, Col. Wade was judge advocate of the Middletown Air Materiel Area at Olmstead AFB. A former director of the JAA, Col. Wade served in the Foreign Claims Service during World War II in both the European and Pacific theaters.

#### Texas

The State Bar of Texas has approved the formation of a Section on Military Law. The first Chairman of the new Section is Harry S. Pollack of Austin. Other officers are Robert D. O'Callaghan of San Antonio as First Vice-President, Lt. Gen. Robert Harper of Harlingen as Second Vice-President and Philip E. Hammer as Secretary. The council of the Section includes Thomas K. McElroy, Kerns B. Taylor, Irving L. Bates, James A. McMullen, Bert

E. Johnson, Selsen Simpson and Carl L. Phinney.

Lt. Ernest E. Marlatt, JAGC-USAR, and Lt. A. Mitchell Belchic, USAFR, recently announced the formation of a partnership for the practice of law under the name of Marlatt & Belchic with offices in the Universal International Building, Houston.

#### Virginia

The Virginia State Bar Association committee on cooperation with foreign bar associations held a conference on international relations in Washington, D. C., on June 16th. The chairman of this committee, Capt. Walter W. Regirer of Richmond, had arranged an interesting program which opened with a briefing at the State Department, a visit to several of the Embassies and a luncheon-panel discussion. Colonel John Marshall Pitzer, Chief of the International Affairs Division of Army, JAGO, spoke on the subject of The Lawyer's Role in Foreign Military Policy. The luncheon-panel discussion was on the subject "What can Lawyers Do in Promotion of International Understanding and Trade". Representatives of nine foreign countries were present, together with representatives from the State Department and a delegation of 30 lawyers from the Commonwealth of Virginia.

#### Wyoming

Lt. Bruce P. Badley, USNR, was recently named City Attorney for the City of Sheridan, Wyoming. Lt. Badley is a law specialist in the Naval Reserve.

# JAA Favors Incentive Pay For Service Lawyers

At a meeting of the Board of Directors held in Washington on November 1, 1958 the following resolution was adopted:

WHEREAS, on February 23, 1957, the Board of Directors of the Judge Advocates Association passed the following resolution:

"The Judge Advocates Association resolves that unless legislation is promptly enacted by the Congress which will provide a realistic, scientific pay schedule for all members of the armed services sufficient to provide the incentives to keep competent officers and technical enlisted men on a career basis, thus saving huge sums now lost by the rapid turnover of highly trained and experienced personnel in all branches of the armed service, then this Association considers it essential to provide adequate inducement for members of the legal profession serving with the armed services to follow a military legal career commensurate with the special inducements now available to the other professions, notably physicians and dentists."

and

WHEREAS, The 85th Congress failed to pass legislation which will induce members of the legal profession serving on active duty in the Armed Forces to follow a military career, and

WHEREAS, Such lack of inducement is still impairing the ability of the legal departments of the military services to provide adequate legal services with the barest minimum of experienced professional personnel, and

WHEREAS, It appears that the level of inexperience in the legal departments of all services will continue to rise unless immediate action is taken leading to the retention of officers serving in legal capacities in the Armed Services, and

WHEREAS, Professional pay, increased rank and other incentives for lawyers in the Armed Forces, as proposed in S.1093 and S.1165 legislation introduced in the 85th Congress, are deemed to be essential to the furnishing of adequate legal services to the Armed Forces by their respective military legal departments.

*NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE JUDGE ADVOCATES ASSOCIATION:*

That the Judge Advocates Association strongly favors the adoption of legislation to provide such professional incentives, and

That the officers and committees of the Judge Advocates Association be, and they hereby are, authorized and directed when speaking for the Association to support fully any legislation which may be introduced in the Congress to provide such incentives to members of the legal profession serving in their professional capacities on active duty in the military service.

The resolution made by Col. King, seconded by Col. Fitts won the support of sixteen of the twenty board members present at the meeting. One abstained; and two voted nay with the President.

