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OCTOBER, 1949

# The Judge Advocate JOURNAL



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JUDGE ADVOCATES ASSOCIATION

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**OCTOBER, 1949**

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### Publication Notice

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

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# The Annual Meeting

The Annual Meeting of the Association was held concurrently with the American Bar Association Convention at St. Louis, Missouri, September 6 and 7, 1949. Major Philip A. Maxeiner, as Chairman of the Annual Meeting Committee, assisted by Majors Abe J. Garland and Ed L. Wiese, and others of our members of the St. Louis Bar, made all the advanced plans and arrangements in an excellent manner, and the Meeting was a very pleasant social and business success.

The Annual Dinner was held at the University Club on the evening of September 6th. During the cocktail hour, the more than 150 members and their guests had ample opportunity to mingle and renew old acquaintances and establish new ones. The facilities of the University Club were extraordinarily good, and the location of our dining room on a high floor afforded an excellent view of the city. United States Senator James P. Kem, of Missouri, was the Guest Speaker of the evening and addressed the Association upon the subject of "Military Justice legislation and the proposed Uniform Code of Military Justice." Colonel Earl Hepburn, of Philadelphia, Pennsylvania, performed admirably as Toastmaster of the occasion. Being confronted with an audience of lawyers, and recognizing the pleasure that members of our profession get

from talking, one of the startling Hepburn features was the calling upon everyone present to rise, introduce himself, tell what he did in the Military or Naval Service during the recent war and his present location and activity. These personal introductions moved quite rapidly with enjoyable interjections of wit; and, to the general interest of everyone attending, afforded each successive member an opportunity to talk upon a favorite subject.

The Business Meeting of the Association was convened at the Soldiers' Memorial at four o'clock, September 7th. Col. William J. Hughes, Jr., of Washington, D. C., presided. Maj. Gen. Reginald C. Harmon, The Judge Advocate General of the Air Force, addressed the members upon the subject of the organization of his Department the procurement of officer personnel and the plans of his Department for Reserve officers. Col. Hughes then introduced Capt. George W. Bains, Assistant to The Judge Advocate General of the Navy, who spoke briefly upon the subject of the "Uniform Code of Military Justice." Honorable Alexander Holtzoff, United States District Judge for the District of Columbia, formerly a member of the Vanderbilt Committee of the American Bar Association on Military Justice Reform, and an old friend of the Association and many of its members, spoke briefly

to the Meeting upon the valued position of our Association and the good work that it is doing in the field of military law.

Report was made for the Training Committee concerning progress made at a conference conducted by The Judge Advocate General at Camp Edwards, Massachusetts, August 29th through September 2nd, upon the subject of Reserve training for Judge Advocate Reserves. A full report on this subject is contained in this issue of the Journal.

One of the most interesting and timely subjects of discussion at the Meeting was Atomic Defense. It was recalled that Russell J. Hopley, Director of the Office of Civil Defense Planning, after extensive study and research, had prepared a rather lengthy report upon this subject in October, 1948, and that on the National scene at least, very little had been done toward the implementation of the material there collected and reported.\* The view was expressed that this Association should take an interest in this problem and take necessary action toward the end that Congress at an early date investigate and consider the problem and take required legislative action. Later in the proceedings, Col. George H. Hafer, newly elected President of the Association, appointed Col. William

J. Hughes, Jr., as Chairman of a Committee, to study the problems of Atomic Defense and to report to the membership of the Association at an early date. Majors John Lewis Smith, Jr., and James A. Bristline were designated as members of this Committee. Mr. Truman's recent announcement concerning Russian atomic activity demonstrates how timely the consideration of the members of our Association was upon this problem.

Pursuant to the recent election conducted by mail ballot, the following newly elected officers were installed:

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\*NOTE: See article entitled "Atomic Defense" by William J. Hughes, Jr., in the December, 1948 issue of the Judge Advocate Journal.

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tended by the following:

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- Mr. Raymond S. Roberts, Farmington, Mo.
- Capt. James J. Robinson, Washington, D. C.
- Mr. James E. Ross, Oklahoma City, Okla.
- Mr. Thomas H. Sands, Minneapolis, Minn.
- Comdr. Schoolfield, Washington, D. C.
- Maj. Walter Schroeder, Chicago, Ill.
- Mr. Jay W. Scovel, Independence, Kans.
- Mr. John McIlhenny Smith, Harrisburg, Pa.
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Mr. R. Yarborough, Austin, Tex.

The Association expresses its whole-hearted appreciation and thanks to Major Philip A. Max-einer, the members of his Committee and the St. Louis Bar for a very enjoyable and successful Annual Meeting.

## Senator Kem Addresses Annual Meeting

The Association was pleased and honored to have as its guest at its Annual Dinner at the University Club, on September 6th, United States Senator James P. Kem, of Kansas City, Missouri. Senator Kem served in the United States Army during World War I, and engaged in the general practice of law for many years in Kansas City. He has been active in the American Bar Association. He was elected to the United States Senate, November, 1946, and while in that office, has repeatedly demonstrated interest and thoughtfulness upon the subject of Military Justice. Senator Kem is in large measure personally responsible for the enactment into law of Public Law 759 of the 80th Congress, which is the present "Articles of War" governing the Army and Air Force. He has, at all times, lent a friendly ear to the advices of the Association upon the subject of Military Justice and the current proposed "Uniform Code of Military Justice." It is his view, and one followed by a great many of the members of the

Association, that uniformity should be accomplished by the simple adoption of the present "Articles of War" for the Army and Air Force, by the Navy. Upon introduction by Col. Hepburn, the Toastmaster, Senator Kem addressed the Association as follows:

"I am glad to meet tonight with my brethren of the bar who have had occasion to specialize in military law. Fortunately the occasion for the lay lawyer to specialize in this field comes only at widely separated intervals in point of time. However, during the lifetime of those of us here tonight intervals have been all too frequent. The job of this generation is to work out a plan to prevent the recurrence of the necessity for laymen to study war.

"I shall not attempt to discuss military justice or the Articles of War. All of you have had far more experience in this field than I. A brief report on the legislative situation in connection with the proposed unified military code may be of interest.

"During and following World

War II it was demonstrated that basic changes in the system were urgently needed. The underlying causes of these defects were twofold. First, the substantive law, that is, the applicable Articles of War, and, second, the quality of personnel assigned to administer military justice, particularly in the lower commands, was not always competent. Too often the actual trial was conducted by officers of the line. Members of the Judge Advocate General's Department, who were trained in military law, were by necessity kept in Headquarters of Divisions or larger units. Upon this trained personnel fell the duty to find the record made below legally sufficient, and too often it took some legal gymnastics to accomplish this.

"I have been told by Alden Stockard, my Administrative Assistant in Washington, who had extensive experience in military law during the late war, of the case of *United States v. August Kobus*, a German civilian. This was a trial before a Military Government Court. Kobus was charged with the murder of an American airman who had surrendered after his plane had been shot down. The Court sentenced him to be shot to death by a firing squad. On review it was determined that the Theater directives provided that death sentences of this type should be carried out according to the local custom which was by decapitation or hanging. It was determined that the hanging method should be used, so the action order was

changed to provide for death by hanging rather than shooting. The writer of the review then stated that, and I quote, 'The irregularity' that is of ordering Kobus to be shot instead of hung, 'did not injuriously affect any substantial right of the accused.'

"In 1944 and 1945 Colonel Philip McCook, a prominent New York lawyer, was sent by the War Department to the various theaters of operations to conduct a study of the operations of military justice. Immediately after the end of hostilities the Vanderbilt Committee was appointed. Extensive hearings were held and investigations made. During the 79th and 80th Congresses committees conducted extensive hearings. As a result of what was probably the most thorough study of military law ever made, H. R. 2575, known as the Elston Bill, was drawn up and passed by the House. The Senate Committee took no action on the bill and Congress was drawing to a close.

"One of the bills left to be acted on was Selective Service. After consulting with representatives of the Judge Advocates Association, the Reserve Officers Association, and veterans organizations, I offered an amendment, or a rider as some choose to call it, to the Selective Service Bill, consisting of the exact terms of the military justice bill which had passed the House.

"In support of the amendment, I told my colleagues in the Senate that the Congress has a duty to

the young men of the United States, when they are inducted into a peacetime army, and also it had a duty to the parents of these young men, to provide a system of military justice that will guarantee a fair trial and assure the judicial safeguards cherished in the American system of jurisprudence. It was my position that if Congress had time to reinstate the Selective Service system, it had time to pass legislation to revise the Articles of War.

"The Senate concurred in this, the amendment was adopted, and placed in the law.

"This provided the changes for the Army and the Air Force. The separate Judge Advocate Generals Corps, however, was, because of a peculiar legislative situation, held not applicable to the Air Force.

"No change was made in the Navy system. Last year the so-called Morgan Committee was appointed by the Secretary of Defense and a proposed unified code, applicable to all services, was drawn up and submitted to Congress. This unified code has passed the House and has been reported by the Senate Committee. We now have, therefore, pending before the Congress a measure which would wipe out the changes of last year, would eliminate all existing court-martial rules and procedures for all services, and, in the name of unification, start all over again. If this law is enacted we would begin completely from scratch, and write a completely new set of rules and procedures.

My position is that *this is unnecessary*.

"One of the main purposes of unification was simplification.

"To abolish all existing law and start out with a completely new set of rules, certainly would not contribute to that end. To the contrary, it seems to me, this would introduce a complication that is entirely unnecessary.

"It is generally admitted that a unified code of courts-martial rules is desirable. The simple, direct way to accomplish this end is to extend to the Navy the revised rules already provided for the Army and Air Force.

"I have offered an amendment in the nature of a substitute to the pending bill to make applicable to the Navy the existing Articles of War, and to also establish a separate Judge Advocate Generals Corps for the Air Force and Navy. There may be some changes needed to conform with the needs of the Navy.

"I don't claim this is a perfect solution. I assert it will result in unification, in simplification and that it will preserve our precedents. I believe that it is the best plan now under consideration.

"There is one provision in the pending bill applicable only to the Navy. Why it is there, why it is applicable only to the Navy, I do not know. It provides that Navy personnel shall behave themselves while attending church. It was not brought out at the hearing why it is necessary for the Navy to have attention in this respect—

to the exclusion of the Army and Air Force.

"There are questions yet to be decided concerning the proposed unified code. Should there be a civilian Supreme Court for the Armed Forces? Should there be a single reviewing authority for all services? Should reserve personnel on reserve training be subject to the Articles of War? These and others are questions of policy and must be determined by Congress. Present indications are that the

revision of military justice will not be considered by Congress until next year.

"Those here tonight have had extensive experience in military justice and in the civilian practice of law. You are peculiarly well qualified to say what the code of military justice should contain. I hope you will study the pending bill and the proposed amendments, and give Congress the benefit of your views. For my part, I shall be delighted to hear from you."

### *Senator James P. Kem and General Ralph G. Boyd Presented With Awards of Merit*

The Committee on Awards, through its Chairman, Gen. Franklin Riter, of Salt Lake City, Utah, recommended the presentation of the Association's "Award of Merit" to Senator James P. Kem, of Kansas City, Missouri, and Gen. Ralph G. Boyd, of Boston, Massachusetts.

The Award is granted for outstanding and constructive work toward the sound development of law, relating to the Armed Forces and their legal and judicial systems.

The present "Articles of War" for the Army and Air Force were enacted into law in the closing days of the 80th Congress, upon the successful passage by the Senate of the Kem Amendment to the "Selective Service Act" of 1948. Senator Kem's amendment consisted of the "Elston Act," which had passed the House and ap-

peared to be side-tracked in the Senate Armed Forces Committee. Senator Kem has continued his interest in the subject of Military Justice, and there is pending in the Senate his amendment to the proposed "Uniform Code of Military Justice," which would make applicable to the Navy, the present "Articles of War," for the Army and Air Force.

General Boyd, who is engaged in active practice in Boston, Massachusetts, as a member of the firm of Nutter, McClennen and Fish, is a former President of the Association. During World War II he served as Chief of Claims in the Office of the Judge Advocate General. General Boyd actively participated in Military Justice reform and very ably presented the composite views of the members of this Association to the Committees of the Congress.

# General Harmon Addresses Annual Meeting

Major General Reginald C. Harmon, The Judge Advocate General of the Air Forces, attended the Annual Meeting of the Association, September 6th and 7th, at St. Louis. Gen. Harmon, who is the first Judge Advocate General for the Air Forces is a former Reserve Field Artillery and Judge Advocate General officer who, prior to his present appointment, engaged in the active practice of the law for some twenty years at Urbana, Illinois. Gen. Harmon addressed the members at the Soldiers' Memorial on September 7th. Some of the highlights of his address are the following:

1. Public Law 775 of the 80th Congress, approved June 25, 1948, provides for the establishment of the Office of the Judge Advocate General of the Air Force and for the transfer to the Air Force of its legal functions formerly performed by the Judge Advocate General of the Army, including the administration of military justice with respect to Air Force personnel.

2. Nearly two and a half months passed before a Judge Advocate General was appointed. At the time of Gen. Harmon's appointment on September 8, 1948, there were exactly 364 court-martial cases up for appellate review, with only seven people in the office available for Military Justice work so it was quite a job to set up an organization, eliminate the back-

log, and take care of current business all at the same time. After the passage of a year, the Office of the Judge Advocate General of the Air Force in Washington is an organization consisting of two main divisions: (1) Military Justice, and (2) Civil Law. The Military Justice Division consists of the Military Justice Branch, Clemency Branch, New Trial Board, and six Boards of Review. The Civil Law Division consists of five Branches: Military Affairs and Legal Assistance; Legislative Drafting; Claims; Patents; and Litigation, Tax and Contracts. After a year's hard work by everyone, a good legal organization is now established, each unit of which is now current in its work with the exception of the Claims Branch. The Claims function and pending claims matters were not transferred from the Army to the Air Force until July 1, 1949, and another 60 days will be required for that Branch to eliminate its backlog and become current.

3. Personnel have been obtained by transfers from the Army, by the utilization of lawyers who had been commissioned in the Air Force during the integration program and who had not formerly been on strictly legal work, by taking Reserve officers on extended active duty and by the commissioning of young lawyers in the Regular Air Force in the grade of first lieutenant.

4. General Harmon finds it more desirable to take in young lawyers (Reserve officers in most instances) as new Judge Advocates in the Regular Air Force than to send Regular officers through law school at Government expense. There are two objections to sending Regular officers to law school: (a) Too many go without a fervent desire to become lawyers and only expect to use the training as a secondary occupation (b) Many graduate from law school at a time when they have a temporary rank which is far too high for their professional capacity.

5. On July 13, 1949, by General Orders No. 49, the United States Air Force announced the establishment of the Judge Advocate General's Department Reserve. Three phases of Reserve training for Air Force lawyers have been developed:

a. Mobilization Assignment Program: This takes care of between 150 and 200 lawyer-officers and is confined to those who are already Air Force Reserve officers.

b. Volunteer Air Reserve Training Unit Program: This provides for the organization and activation of groups of officers of at least 10 each who reside in one city or geographical area and meet for the purpose of improving their efficiency as Reserve officers. Such participation enables an officer to obtain points for promotion and retirement but no pay.

c. Extension Course Program:

Extension courses may be obtained from the Commanding Officer, 2220th Extension Group, Continental Air Command, Fort Benjamin Harrison, Indianapolis, Indiana. Judge Advocate Extension Courses are now being written and it is expected that they will be completed by January 1, 1950.

6. The Judge Advocate General of the Air Force believes that a law office for one of the Departments of the Government should be run in exactly the same manner as a private law firm. There are three guiding principles:

a. It should be run with the minimum number of people that are required to do a particular job rather than the maximum number that can be justified for it. In other words, the test should always be how many people would I have to do this job if I were paying the bill.

b. As many layers of authority as possible should be abolished.

c. Absolute freedom of discussion between the various lawyers connected with the office should be preserved at all times without regard for differences in rank or whether military or civilian employees of the Government.

7. The Judge Advocate, as is indicated by the very words of his title, has two distinct functions:

a. Part of the time he is a judge and exercises judicial discretion. As a judge, in the exercise of judicial discretion, he

should always keep an open mind and never judge the case until all the facts and law have been considered. Otherwise, he will get into the habit of prejudging cases and start rendering decisions of expedience. As a result, his decisions will become inconsistent and hopelessly confused.

b. Part of the time he is an advocate and represents the interests of the Government against all others. As an advocate, he should use every legitimate means to protect the interests of the Government and always see that all of the relevant facts are properly pre-

sented and all of the law applicable thereto cited.

8. General Harmon expressed the hope that the members of the Judge Advocate General's Department of the Air Force, in the beginning years of their organization, might consider the experience of the past in the light of the needs of the present to establish a body of law which will always be useful to the Government and highly respected by this and future generations.

The Association was very pleased and honored that Gen. Harmon was able to attend our sessions and we wish to express our thanks for his very informative remarks.

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There are organized in the Judge Advocates Association committees functioning with relation to various fields of law concerning the Armed Forces. Thus, there are committees on the following subjects: Admiralty, Aviation Law, Claims, Education, Government Contracts, International Law, Legal Assistance, Military Affairs, Military Government, Military Justice, Military Reservations, Patents, Procurement, Relations with Civil Authorities, Selection of Reserve Personnel, Taxation, Training, and War Crimes. Committee chairmen will be appointed by Col. Hafer in the near future. It will be helpful to the organization of these committees if members having special interest in the subject matters of any of them will advise National Headquarters, so that interested committee chairmen can be designated and so that they may be assisted in organizing their committees.

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### GENERAL GREEN RECOVERS

Major General Thomas H. Green, the Judge Advocate General of the Army, was unable to attend the annual meeting this year. Gen. Green had planned on being with us and had made all necessary reservations, when he was taken suddenly and seriously ill at Camp Edwards, Mass., on September 2nd while attending a Reserve Training Conference for J. A.'s. He was returned by air to Walter Reed Hospital where he effected a rapid and uneventful recovery after a week of critical condition. TJAG is back at his desk again as hale and hearty as ever.

# Renegotiation

## The World War II Acts—Background and Legislative History

By *Clinton D. VanValkenburgh, Captain, JAGC\**

History has well documented the fact that national defense costs money and frequently brings exorbitant profits to suppliers of war materials. World War I was no exception. The production of war materials was on a vast scale and provided special opportunities for such profits. Consequently, it left a fertile field for the investigations which brought to public notice the rich harvest reaped by many war contractors. The public reaction was reflected in numerous proposals for legislative action.

The proposals made subsequent to World War I included plans to tax World War I profits, and to legislate universal conscription of property, manpower and labor, price freezing, and 100% recapture of war profits in future emergencies. Various organizations actively supported several of these proposals and marshalled sufficient sentiment throughout the country

to force their adoption "in principle" as basic planks in the platforms of the two great party organizations. Congressional commissions and committees held extensive hearings and made lengthy studies. However, up to World War II, none of these proposals had become law, but the investigations, discussions and debates, had fixed the problem firmly in the consciousness of the people and their law-making representatives.

Although none of the broad proposals had been adopted, their consideration had resulted in the acceptance of some of a more limited nature. One of these was the so-called "Vinson-Trammell Act" limiting the profits on naval ships construction.<sup>1</sup> When, in 1934, Congress authorized a naval ship-building program to bring the Navy up to the limits authorized by the Washington and London treaties, the statute contained a provision limiting, on a percentage basis, the profit which might be made on the construction of any naval vessel or aircraft. Later the Merchant Marine Act of 1936 included a similar limitation on the profits which might be made on vessels constructed under the subsidy provisions of that Act.

During 1939 and 1940 consideration was given by Congress to a new excess profits tax. The Sec-

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\*NOTE: The author is a graduate of Columbia Law School and a member of the New York Bar. He is presently on extended active duty as a member of the Army Renegotiation Division of the Armed Services Renegotiation Board.

<sup>1</sup>Section 3 of the Act of 27 March 1934—48 Stat. 503.

ond Revenue Act of 1940,<sup>2</sup> which contained a new excess profits tax, suspended the profit limitation provisions of the Vinson-Trammell Act, and also suspended the profit limitations of the Merchant Marine Act of 1936, in so far as they related to subcontracts, but for special reasons retained the limitations with respect to prime contracts, making specific provision to prevent double taxation under the excess profits tax provisions.

After the enactment of the Second Revenue Act of 1940, there remained no profit limitations on war procurement except a law limiting the allowable fee on cost-plus-a-fixed-fee contracts. The laws requiring competitive bidding on Government construction and procurement had also been relaxed to speed the defense program by permitting negotiated contracts in lieu of competitive bidding.

During 1941 and the early part of 1942 considerable thought was given by Congress as to how to take care of the excessive profit situation.

#### THE BETHLEHEM STEEL DECISION

The Supreme Court on 16 February 1942, handed down its opinion in the case of *United States v. Bethlehem Steel Corporation, et al.*<sup>3</sup> This case arose out of contracts entered into in 1917 and 1918 between the United States Shipping Board Emergency Fleet

Corporation and subsidiaries of Bethlehem Steel Corporation for the construction of ships. The contracts provided that the company was to be paid costs plus a profit, and also provided that if actual costs were less than estimated costs, the contractor would receive one-half the difference as additional profits. Total estimated costs under the contracts in question were \$119,750,000 and total actual costs were \$92,990,521. Prior to the commencement of the suit the company had been paid its agreed profit and also a part of its share of the difference between estimated and actual cost. In its suit the Government, alleging, among other things, that the extra-payment clause was void and unenforceable, sought an accounting and decree requiring the company to refund all amounts in excess of what the Court might find to be just and reasonable compensation for building the ships. The company, on the other hand, claimed breach of contract by the Government, and sought damages. The Court's decision was for the company. In the Supreme Court it was argued by the Government that as the company had not shown the difference between estimated and actual costs to be due to special efforts resulting in increased efficiency, the company was entitled to no payment under the clause. The Court rejected this argument, referring to the wording of the clause, which was unconditional.

The contention to which the

<sup>2</sup>Title 4, (Sec. 401) of the Second Revenue Act of 1940—54 Stat. 974, 8 October 1940.

<sup>3</sup>315 U. S. 289.

Court's opinion devoted most attention, however, was the argument that with the extra-payment clause, the contracts were invalid because unconscionable, and unconscionable because of duress and profits grossly in excess of customary standards. The Government argued that duress existed because the great need for shipping at the time of the contracts, and the impossibility of meeting the building requirements without the Bethlehem facilities and organization, compelled the Government to accept whatever proposition Bethlehem Steel might insist upon; that although the facilities might have been commandeered, performance by the organization could not have been compelled. This argument the Court refused to accept. In the absence of evidence showing that commandeering had been suggested, the Court was not willing to assume that the company's organization would have refused to perform, but even so, the Court could not see the position of the Government as a "helpless supplicant." Congress, it said, could draft men for battle service, and "its power to draft business organization to support the fighting men who risk their lives can be no less." As to profits, while those made by the company might justly arouse indignation, the Court held that that question was not within its province.

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<sup>4</sup>Congressional Record, 17 February 1942.

In closing its opinion, the Court took occasion to point out that the problem of war profits was not new, that Congress in the past had adopted various measures to meet the evil and that perhaps these measures should be used more comprehensively or new measures devised, "but if the Executive is in need of additional laws by which to protect the Nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them."

On the day after the Bethlehem decision was handed down, Mr. Walsh called it to the attention of the Senate and asked that it be printed in the Congressional Record.<sup>4</sup> He pointed out that since World War I, Congress had adopted various provisions, commencing with the Vinson-Trammell Act, attempting to restrict the profits in building ships and airplanes, and that the Committee on Naval Affairs was then striving to obtain the enactment of a clause limiting profits. Mr. Hill said that the decision made it clear that Congress had full power to do whatever was necessary to protect the Government from extortionate or unconscionable profits and that the decision "encourages Congress, if it does not challenge it, to meet its responsibility and to do its full duty in preventing and stopping the payment of huge profits."

On 23 March 1942, the House Naval Affairs Committee, sitting as a Committee Investigating the

National Defense Program, received a report of Counsel showing the profits of a number of Navy contractors, in terms of percentage of cost of individual contracts, and a report showing the increase in compensation paid by certain Navy contractors, in terms of percentage of "pre-defense compensation." This information, Counsel reported, was taken from Committee questionnaires returned by contractors and showed substantial profit percentages (in terms of the cost of contracts, many of which were small in amount) and substantial percentage increases in executive compensation. The Committee then received a report on the operations of a particular company, made by the Cost Inspection Division, Bureau of Supplies and Accounts, Navy Department, and in that connection examined executives and employees of the company. The testimony of the witnesses which substantiated findings of the audit report, revealed very high profits of the company and sensational increases in salary and bonus payments to certain of the officers and employees.<sup>5</sup>

On 13 April 1942 Counsel re-

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<sup>5</sup>Hearings before the Committee on Naval Affairs, House of Representatives 77th Congress, 2nd Session, pursuant to H. Res. 162, Vol. 1.

<sup>6</sup>Hearings before Committee on Naval Affairs, House of Representatives, 77th Congress, Second Session, Pursuant to H. Res. 162, Vol. 1.

ported to the House Naval Affairs Committee that after the Committee's hearing on 23 March, at which the above mentioned company had been the subject of investigation, the Navy and War Department had called in the president of the company and had requested him to renegotiate contracts of the company as a result of which both departments had been able to make substantial savings under their contracts with the company. Counsel also reported that as a result of the Committee's activity the Navy Department had been able to renegotiate contracts with various contractors with an aggregate saving to that date, of approximately 33 million dollars. He further reported that the War Department had also been able to effect large savings, citing particularly that Department's renegotiation of contracts with several large companies.<sup>6</sup>

Thus was evolved the essence of renegotiation. The concept, which had its inception in the necessity of doing something about appalling abuse of the taxpayers' pocket-books, which might well lead to economic disaster, and to seriously undermined morale of the armed services personnel, consists of a re-examination of the contractor's government business on an overall fiscal year basis after the fact. The World War II Renegotiation Acts merely implemented and made mandatory what was done voluntarily in the cases referred to above.

Under the Renegotiation Acts of

1942 and 1943,<sup>7</sup> contractors with the Government were required to report their renegotiable business on a fiscal year basis and the renegotiation agencies were then empowered to arrive at a mutually satisfactory determination as to the existence and extent of excessive profits. In the event of failure to agree the appropriate Price Adjustment Board was empowered to enter an appealable order, setting forth its determination as to the amount of excessive profits realized by the contractor for the fiscal year in question. In arriving at the determination the law required the following factors to be considered:

i. efficiency of contractor, with particular regard to attainment of quantity and quality production,

<sup>7</sup>Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; by Public 149, 78th Congress, Approved July 14, 1943; as amended in full by Section 701 (b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944; and as further amended by Public 104, 79th Congress, approved June 30, 1945.

<sup>8</sup>Additional Report of the Special Committee Investigating the National Defense Program, Pursuant to S. Res. 71 (77th Congress; S. Res. 46, 80th Congress; S. Res. 6, 78th Congress; S. Res. 55, 79th Congress).

reduction of costs and economy in the use of materials, facilities and manpower.

ii. reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime production;

iii. amount and source of public and private capital employed and net worth;

iv. extent of risk assumed, including risk incident to reasonable pricing policies;

v. nature and extent of contribution to the war effort including inventive and development contribution and cooperation with the Government and other contractors in supplying technical assistance;

vi. character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;

vii. such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

As to the accomplishment of renegotiation in World War II we quote from the Report of the Special Committee to Investigate the National Defense Program.<sup>8</sup>

"The committee feels that considering the magnitude and importance of the job, the unique nature of the Renegotiation Act, and the problems involved in obtaining proper and adequate personnel, the administrators of the Renegotiation Act on the

whole performed a difficult task ably and efficiently. Many of the top officials in the administration of the Renegotiation Act left important positions in private life or put aside the peacefulness of life in retirement after successful business or professional careers and plunged into the turmoil of administering a law, felt by many to be not only unconstitutional but repugnant to the American system of private enterprise. The success of the Renegotiation Act, because of its flexibility, was due in a great measure to the ability which these men brought to their jobs and the confidence they generated in the individuals with whom they dealt.

"Mr. John R. Paull, Chairman of the War Contracts Price Adjustment Board during 1947, testified before the committee that based on the latest figures then available, the Price Adjustment Boards had renegotiated more than \$190,000,000,000 of war business and recovered excessive profits of over \$10,000,000,000. As excess-profits taxes would have recovered about \$7,000,000,000 of this amount the actual recovery directly attributable to renegotiation was between 3 and 4 billion dollars. The cost of making this recovery was about \$37,000,000 or slightly over 1 per cent of the net amount recovered.

"In addition to the cash recoveries other less determinable but even more beneficial results were brought about by renegotiation. For example, during the renegotiation period contract price reductions in the amount of 4½ billion dollars were brought about partly by information derived from renegotiation and partly by the inde-

pendent action of contracting officials. Further savings were realized by permitting contractors to waive termination settlements thereby eliminating the contract-settlement procedure. The War Department has informed the committee that renegotiation also contributed to resisting the inflationary trend for services and supplies in the wartime market and had a tendency to control the pricing policies of contractors when bids were submitted. Greater efficiency in production was stimulated by the fact that during renegotiation larger profits would be allowed a contractor for close pricing, low costs, and efficient operation."

As to the constitutionality of renegotiation, it should be pointed out that a renegotiation clause embodied in a contract, has equal standing with the other provisions of the contract and is just as much a part thereof. It would seem that mutual consent subjecting the contract to renegotiation would prevent any contest as to whether a contract could be mandatorily subjected to renegotiation against the wishes of the contractor. However, that may be, the constitutionality of the World War II Renegotiation Acts has been sustained, even though the contractor did not agree thereto, by the Supreme Court in *Lichter et al v. The United States of America*.<sup>9</sup>

With the advent of the increased procurement for National Defense incident to the "Cold War," Congress enacted the Renegotiation

<sup>9</sup>334 US 742.

Act of 1948.<sup>10</sup> The following excerpts and information are self explanatory.

#### RENEGOTIATION ACT OF 1948

"Sec. 3 (Supplemental National Defense Appropriation Act, 1948)

(a) All contracts in excess of \$1,000 entered into under the authority of this Act, obligating funds appropriated hereby, obligating funds consolidated by this Act with funds appropriated hereby or entered into through contract authorizations herein granted, and all sub-contracts thereunder in excess of \$1,000 shall contain the following article:

"Renegotiation Article—This contract is subject to the Renegotiation Act of 1948 and the contractor hereby agrees to insert a like article in all contracts or purchase orders to make or furnish any article or to perform all or any part of the work required for the performance of this contract."

"(b) Whenever in the opinion of the Secretary of Defense excessive profits are reflected under any contract or contracts or subcontract or subcontracts required to contain the Renegotiation Articles prescribed in subsection (a), the Secretary is authorized and directed to renegotiate such contracts and subcontracts for purpose of eliminating excessive profits. He shall endeavor to make an agreement with the contractor or subcontractor with respect to the amount, if any, of such excessive profits and to their elimination. If no such agreement is reached, the Secretary shall issue an order deter-

mining the amount, if any, of such excessive profits and shall eliminate them by any of the methods set forth in subsection (c) (2) of the Renegotiation Act of February 25, 1944, as amended. In eliminating excessive profits the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in Section 3806 of the Internal Revenue Code. The powers hereby conferred upon the Secretary shall be exercised with respect to the aggregate of the amounts received or accrued under all such contracts and subcontracts by the contractor or subcontractor during his fiscal year or upon such other basis as may be mutually agreed upon; except that this section shall not be applicable in the event that the aggregate of the amounts so received or accrued is less than \$100,000 during any fiscal year.

"(f) The Secretary of Defense shall promulgate and publish in the Federal Register regulations interpreting and applying this section and prescribing standards and procedures for determining and eliminating excessive profits hereunder using so far as he deems practicable the principles and procedures of the Renegotiation Act of February 25, 1944, as amended, having regard for the different economic conditions existing on or after the effective date of this Act from those prevailing during the period 1942 to 1945. In any case in which the contract price of any such contract or subcontract was based upon estimated costs, then the Secretary of Defense shall determine the difference between such estimated costs and actual costs and shall, in eliminating excessive profits, take into consideration as an element the extent to which such difference is the result of the efficiency of the contractor or subcontractor.

<sup>10</sup>Section 3, Supplemental National Defense Appropriation Act, 1948, (P. L. 547, 80th Congress) approved 21 May 1948, Section 401, Second Deficiency Appropriation Act, 1948, (P. L. 785, 80th Congress) approved 25 June 1948.

"(i) This section may be cited as the "Renegotiation Act of 1948."

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"Sec. 401 (Second Deficiency Appropriation Act, 1948 The Secretary of Defense is authorized and directed, whenever in his judgment the best interests of the United States so require, to direct the insertion of a clause incorporating the Renegotiation Act of 1948 in any contracts for the procurement of ships, aircraft, aircraft parts, and the construction of facilities or installations outside continental United States entered into by or in behalf of the Department of the Army, the Department of the Navy or the Department of the Air Force which obligates any funds made available for obligation in the fiscal year 1949."

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On June 30, 1948, the Secretary of Defense issued the following directive:

"Pursuant to the authority vested in me by Section 401 of Public Law 785 (80th Congress), I hereby adjudge that it is in the best interests of the United States, and accordingly, I direct the inclusion of a clause incorporating the Renegotiation Act of 1948 in all contracts for the procurement of aircraft and aircraft parts entered into by or on behalf of the Department of the Navy or the Department of the Air Force, which obligate any funds made available for obligation in the fiscal year 1949.

"This order is effective 1 July 1948."

The renegotiation agencies for the administration of the 1948 Act have already been set up and personnel assigned or retained. The

Military Renegotiation Regulations have been promulgated in the Federal Register and are now available from the Superintendent of Documents, Washington, D. C.

The 81st Congress is presently engaged in finalizing the National Defense Appropriation Act for fiscal 1950 which contains the following proposed section dealing with renegotiation.<sup>11</sup>

"Sec. 622. (a) All negotiated contracts for procurement in excess of \$1,000 entered into during the fiscal year 1950 by or on behalf of the Department of Defense (including the Department of the Army, Department of the Navy, and Department of the Air Force), and all subcontracts thereunder in excess of \$1,000, are hereby made subject to the Renegotiation Act of 1948 in the same manner and to the same extent as if such contracts and subcontracts were required by such Act to contain the renegotiation article prescribed in subsection (a) of such act. Each contract and subcontract made subject to the Renegotiation Act of 1948 by this section shall contain an article stating that it is subject to the Renegotiation Act of 1948. In determining whether the amounts received or accrued to a contractor or subcontractor during his fiscal year from contracts and subcontracts subject to the Renegotiation Act of 1948 amount in the aggregate to \$100,000, receipts or accruals from contracts and subcontracts made subject to such act by this section shall be added to receipts or accruals from all other contracts and subcontracts subject to such act.

"(b) Notwithstanding any agreement to the contrary, the profit limitation provisions of the act of March 27, 1934 (48

<sup>11</sup>H. R. 4146, 81st Congress.

Stat. 503, 505), as amended and supplemented, shall not apply to any contract or subcontract which is subject to the Renegotiation Act of 1948."

The Military Renegotiation Regulations which have already been promulgated under the 1948 Act will need very little amendment to

make them cover the contracts subjected to renegotiation by the above quoted Section 622. Such amendments as may be necessary will be supplied by the Superintendent of Documents as part of its service to a subscriber to Renegotiation Regulations.

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## TJAG Conducts Reserve Training Conference

A conference was held at Camp Edwards, Massachusetts from 29 August through 2 September 1949 at the instance of The Judge Advocate General for the purpose of discussing ways and means to implement the Reserve Training Program for Reserve Judge Advocates. Twelve officers of the Judge Advocate General's Corps-Reserve residing in the First and Second Army Areas were present, together with The Judge Advocate General, two representatives of his office and The Army Judge Advocates from the respective Army Areas.

The Office of the Judge Advocate General has been cognizant of the difficulties facing Reserve officers of the Corps in connection with the earning of the necessary credits to allow them to remain in the active Reserve. Such requirements were initiated under the present program approximately one year ago and as such a program presented an entirely new policy in Reserve training many

difficult problems could readily be foreseen.

Many Reserve officers were not sufficiently familiar with the broad aspects of the Reserve training program so as to be able to distinguish clearly the agencies of the regular establishment which were primarily responsible for the training program as a whole. It was pointed out that the Commanding Generals of the Army Areas were primarily responsible for Reserve training with supervisory control vested in the Department of the Army General Staff and ultimate responsibility in the Chief of the Army Field Forces. The role of the Chief of a Special Staff Division or Technical or Administrative Service is strictly one of coordination with those agencies in making recommendations for the training of its particular Reserve component.

It was further realized that all of the facilities necessary for the acquisition of credits must be made available to the Reserve of-

officers in order to enable him to follow his civilian avocation and still remain active in the Reserve component.

After lengthy discussions on many subjects pertinent to the above matters it was generally agreed that the following means of earning credits were the most satisfactory at the present time and should be used to the greatest extent possible.

1. Formation of JAG Training Units in all centers of population of sufficient size in which twelve or more Reserve officers reside. Such training units are formed under the authority of the respective Army Commander and have been found to be of value to both the Army in the training program and to offer to the Reserve officer a means by which he can obtain the necessary credits to remain in the active Reserve. Some twenty-five of these units have been activated and are in operation. There is no limitation upon the number of meetings which such units may hold and if other means of obtaining credits cannot be utilized the number of meetings of any unit may be increased if such is found to be necessary.

2. During the first year of the present training program the Office of the Judge Advocate General did not administer extension courses. This was due to the fact that the Amended Articles of War and certain other changes brought about through experience gained in World War II necessitated the revision of all of its basic courses.

A special division has been formed in the Office of The Judge Advocate General which has revised all of the extension courses including those under the new Manual and it is contemplated that an Extension School will be established and in operation prior to 1 November 1949. All JAG Reserve officers may enroll for those courses in which they are interested. A prospectus of the courses, which will be available at any time, may be obtained upon request.

3. Training Aids for JAG Units. The Office of The Judge Advocate General will do its utmost to make available to all training units any training aids which will assist the unit in its training program. Each JAG Reserve officer has been sent a copy of the new Manual for Courts-Martial; he receives the Quarterly issue of the JAG Bulletin, and has recently been forwarded a copy of the Seminars presented during the Orientation Conference on the Manual for Courts-Martial, 1949, held in the Office of The Judge Advocate General during the week of 7-10 December 1948. This publication also contains four charts showing the Appellate Review and confirming action on all Courts-Martial records received in the office.

4. Short tours of active duty. It was stressed at the conference that the funds available for short tours of active duty would allow only a small percentage of Reserve officers the opportunity of obtaining credits in this manner; nevertheless, it was stressed that the re-

spective Army Areas give consideration to using these funds for the active duty training of the Reserve officer who resides in an isolated area due to the fact that he could not be afforded the opportunity of training with a unit.

5. JAG instructors for Reserve Units of other branches. Another method of obtaining credits for JAG Reserve officers was discussed and that was that all of the Reserve Units of other branches are interested in the basic principles of Military Justice and desire instructors on this subject to implement their own training program. All JAG Reserve officers who are

familiar with the amended Articles of War should be available for this instruction and thus gain multiple credits for the preparation of such lectures and the instruction to the units of the other branches of the service.

Although many of the problems discussed were not susceptible to a definite solution at this time it was believed that a more comprehensive understanding of the entire training program was gained at the meeting and it is anticipated that conferences of this nature will be held at future periods in the other Army Areas.

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## *Due Process of Law and Military Justice*

By *Vincent C. Allred, Lt. Col., JAGC-Res.\**

World War II, which was productive of so much heroism among American servicemen, was also productive of several thousands of convictions by general courts martial. This might have been expected when one realizes that the Armed Forces are a cross-section

of the nation's population, both good and bad. But courts martial do make for newspaper publicity. Likewise making for newspaper publicity are the habeas corpus actions filed by ex-GIs serving time in military prisons. While the writer does not have figures on the number of such petitions for habeas corpus, they have been legion. Most of them have failed, as usually happens with habeas corpus, for this extraordinary remedy is generally the last desperate fling by the agonizing prisoner, and the reasons solemnly alleged for breaking the case would be laughable, often, if the background was not so tragic.

But while habeas corpus has freed few convicted GIs, it has

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\*NOTE: The author is a graduate of the Law School, University of Kansas and has been admitted to the bar in the District of Columbia and Kansas. He engaged in private practice at Leavenworth, 1930-41; served as SJA, U. S. Army Forces, New Zealand 1942-44, and in the Claims Section, U. S. Army Forces, Philippines. He attained rank of Lt. Col., JAGC-Res. Col. Allred presently is of counsel to the National Catholic Welfare Conference.

made military legal history since VE Day. The Judge Advocates of World War II were taught that the judgment of a courts martial, having jurisdiction, would not be touched in a civil court. The "old" Manual for Courts Martial put it thus:

"Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." (Citing *Grafton v. U. S.* 206 U. S. 333, 347-348.)

"The jurisdiction of a courts-martial, i. e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court thus constituted was invested by act of Congress with power to try the person and the offense charged." *Manual For Courts Martial*, U. S. Army, 1928, page 7.

It appears that the recent decisions may have added a new jurisdictional requisite, which, while not as yet clearly defined, might

be said to consist in the necessity that the military justice system accord to the accused due process of law as measured by the legal procedure prescribed for courts-martial. This article is being written from the viewpoint of the Army courts martial system, but the principles covered apply equally to the other branches of the National Military Establishment.

This development need not be considered a reflection on the integrity of service courts. Rather it is an accompaniment of a wider movement in the law whereby the scope of the writ of habeas corpus has been broadened, so as to permit re-examination of convictions in the lower courts, federal and state. The broad outlines of this trend are summarized by the Supreme Court in its opinion in the case of *Hawk v. Olson*, 326 U. S. 271, 66 S. Ct. 116. This case did not involve a court-martial. The court said:

"Since *Frank v. Mangum*, 237 U. S. 309, 331, 35 S. Ct. 582, 69 L. Ed. 969, this court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution,' even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. This opportunity for an examination into 'the very truth and substance of the causes

of his detention' was said in the Frank case to have come from the adoption in 1867 of a statute which empowered federal courts to examine into restraints of liberty in violation of the Constitution of the United States . . . The legislation enlarged for the federal courts the 'bare legal review' of the authority under which a petitioner was held which had been previously afforded by habeas corpus. . . ."

In the advance guard of this march of habeas corpus cases are two frequently cited decisions, *Hicks v. Hiatt*, 64 F. Supp. 328 and *Shapiro v. United States*, 69 F. Supp. 205.

The case of *Hicks v. Hiatt* was an unfortunate one, in which, according to the federal district court, the Army personnel made numerous mistakes. The pre-trial investigation did not include the questioning of witnesses deemed vital by the court. At the trial hearsay, and otherwise incompetent evidence was adduced, prejudicial to the accused. Certain witnesses, who might have been favorable to the accused were not called, although available and requested by him. The Trial Judge Advocate appeared to have made improper and harmful remarks in

his closing argument. The President of the courts-martial, in a letter urging clemency, indicated that the personnel of the court-martial had doubts as to the sufficiency of the evidence on some points. Other errors were alleged. These things all added up to what was referred to as a "totality of errors," deemed by the federal district court to have been highly prejudicial to the accused. The Judge summarized by saying: "Casting up all the errors committed hereinbefore referred to under the first three headings of this opinion, by reason of failure to observe the provisions of the Articles of War and Courts Martial Manual, whether in the pretrial procedure, at trial, and on review, I conclude that these were so numerous, and of such effect, as to deprive Hicks of the substance of a fair trial. The procedures of the military law were not applied to Hicks in a fundamentally fair way."

The court thereupon granted the writ.<sup>1</sup>

The case of *Shapiro v. United States* was not on habeas corpus, but in the Court of Claims. However, it did involve the finality of a court-martial sentence. The claimant was a former officer and sued to recover pay as such from the date of his dismissal, following conviction by court-martial, and his eventual discharge on medical grounds as an enlisted man, having been re-inducted following the dismissal. His claims were allowed. It was shown that he had

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<sup>1</sup>A footnote to this decision states that the military authorities on review of the courts-martial proceedings, had already set aside the sentence, so that the above decision was actually moot, and the habeas corpus proceedings were later dismissed.

been brought to trial before the Army court within a few hours after charges had been served on him. The Court of Claims said, page 207:

"The court martial, of course, had jurisdiction of the case and ordinarily it would follow that any judgment rendered by it, however erroneous, would not be void, but the Supreme Court in *Johnson v. Zerbst* . . . held that while jurisdiction of the court may be complete in the beginning it 'may be lost' in the course of the proceeding, due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel . . . Nor can it be doubted that the right afforded by the Sixth Amendment has been denied when counsel has been refused an opportunity to prepare his defense . . . It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or the law of the case."<sup>2</sup>

In the great majority of these cases relief has been denied. The federal courts have steadfastly refused to let themselves be made into appellate tribunals for the court-martial system. A high degree of proof has been required of the petitioner. The judicial view is concisely set forth by the

District Judge in the case of *Jackson v. Sanford*, 79 F. Supp. 74:

"The burden of proof is upon petitioner to establish his grounds for habeas corpus by a preponderance of the evidence . . . and although subject to collateral attack, clear and convincing proof is necessary to set aside the judgment of a general court-martial . . . it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained, not as a matter of speculation, but as a demonstrable reality. . . .

"In determining where the preponderance of the evidence lies, the usual rules of evidence apply. . . . The mere assertions of petitioner are not sufficient to establish a preponderance of the evidence when contradicted by all other facts and circumstances."

The rule as hesitatingly evolved to date seems to be that the court on habeas corpus will not correct mere errors of law, but will grant relief only when the fault is so grave as to deprive the petitioner of due process of law according to military procedure.

Relief has been refused where the following grounds of invalidity were urged:

Presence of Trial Judge Advocate at a closed session of the court-martial, no actual injury to the rights of accused being shown, *United States v. Hiatt*, 141 F. 2d 664.

Exclusion of accused's civilian

<sup>2</sup>In the *Shapiro* case judgment for plaintiff was entered by stipulation.

counsel from court room while classified maps were being exhibited in evidence, *Romero v. Squier*, 133 F. 2d 528.

Allegation that accused had been convicted on insufficient, incompetent or conflicting testimony. Federal courts have consistently refused to weigh evidence on these habeas corpus cases. *United States v. Okenfus*, 67 F. Supp. 528, *Bigrow v. Hiatt*, 70 F. Supp. 826, sustained 168 F. 2d 922, *Boone v. Nelson*, 72 F. Supp. 807, *Flackman v. Hunter*, 75 F. Supp. 871, *McDaniel v. Hiatt*, 78 F. Supp. 573, *Harris v. Sanford*, 78 F. Supp. 963, *Ex Parte Steels*, 79 F. Supp. 428, *Adams v. Hiatt*, 79 F. Supp. 433, *Wentroub v. Swenson* 165 F. 2d 756. This principle was specifically sustained by the Supreme Court in the case of *Humphrey v. Smith*, discussed at greater length hereinafter.

Alleged mistakes of defense counsel, *Ex Parte Steel*, 79 F. Supp. 428.

Failure to have officer of Judge Advocate General's Department on court-martial. *Glenn v. Hodges*, 79 F. Supp. 400, *Henry v. Hodges*, 76 F. Supp. 968, sustained 171 F. 2d 401. These cases arose prior to adoption of present Articles of War and the revised Manual for Courts Martial.

Conduct of court-martial personnel "after closing the court" in making "inquiry concerning relative positions of the command post and the house where petitioner and his outfit were stopping," *Randle v. Sanford*, 79 F. Supp.

585.

Technical defects in wording of specifications, *Bigrow v. Hiatt*, 70 F. Supp. 826.

The above decisions were by district courts and courts of appeal. In the *Application of Yamashita*, 327 U. S. 1, 66 S. Ct. 340 (1946) the Court decided that General Yamashita, as a war criminal, was not entitled to invoke the protective clauses of either the Articles of War or the Federal Constitution. But it did speak thus of the prerogatives of military tribunals:

"We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this court. . . . They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power to 'grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty' . . . If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong

decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."

The case of *Humphrey v. Smith*, 69 S. Ct. 830 (1940) gave answer to the vexatious question as to the jurisdictional quality of the pre-trial investigation required by "old" A. W. 70, now A. W. 46b. This question had been decided variously by a number of lower federal courts. It had probably never happened that the pre-trial investigation had been completely omitted, but cases did arise, as in the *Humphrey* case, where it was alleged that the investigation "was neither 'thorough' nor 'impartial' as the 70th Article requires." The Supreme Court in that case said:

"We hold that a failure to conduct pre-trial investigation as required by Article 70 does not deprive a general court-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. It is contended that this interpretation of Article 70 renders it meaningless, practically making it a dead letter. This contention must rest on the premise that the Army will comply with the 70th Article of War only if courts in habeas corpus proceedings can invalidate any court-martial conviction which does not follow an Article 70 pre-trial procedure. We cannot assume that judicial coercion is essential to com-

pel the Army to obey this Article of War. It was the Army itself that initiated the pre-trial investigation procedure and recommended congressional enactment of Article 70. A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure to the end that Army work shall not be unnecessarily impeded and that Army personnel shall not be wronged as the result of unfounded and frivolous court-martial charges and trials."

As an incidental matter the court in the *Humphrey* case also disposed of a contention that the evidence before the court-martial had been insufficient to justify conviction, by saying:

"We may at once dispose of the contention that the respondent should not have been convicted on the evidence offered. That evidence was in sharp dispute. But our authority in habeas corpus proceedings to review court-martial judgments does not permit us to pass on the guilt or innocence of persons convicted by courts-martial."

Three of the justices dissented.

*Wade v. Hunter*, 69 S. Ct. 834 (1949) involved a claim of double jeopardy. In that case the accused was a member of a division advancing through Germany in the spring of 1945. He was charged with the rape of a local girl, and placed on trial before a division court-martial. "After hearing evidence and arguments of counsel, the court-martial closed

to consider the case. Later that day the court-martial reopened and announced that the court would be continued until a later date to the fixed by the Judge Advocate. The reason for the continuance was the desire of the court-martial to hear other witnesses not then available before deciding the guilt or innocence of the accused."

The rapid advance of the division was carrying it an ever increasing distance from the scene of the alleged crime. The division commander withdrew the charges from his court-martial and transmitted them to the Commanding General of the Third Army, who in turn transmitted them to the Commanding General of the Fifteenth Army. The latter appointed a court-martial which tried and convicted the accused over his plea of former jeopardy. After exhausting military review the accused filed a petition for habeas corpus. A federal district court granted the writ, which action was reversed in the court of appeal. The Supreme Court held that the plea of former jeopardy was not good, three of the justices dissenting. The following passages may be quoted from the opinion:

"The interpretation and application of the Fifth Amendment's double jeopardy provision have been considered chiefly in civil rather than military court proceedings. . . . When justice requires that a particular trial be discontinued is a question that should be decided by persons con-

versant with factors relevant to the determination . . . a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice. We see no reason why the same broad test should not be applied in deciding whether court-martial action runs counter to the Fifth Amendment's provision against double jeopardy . . . This case presents extraordinary reasons why the judgment of the Commanding General should be accepted by the courts. At least in the absence of charges of bad faith on the part of the Commanding General, courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the charges."

The law is still far from clear despite the pronouncements of the Supreme Court. Some points have been settled by that high tribunal. A court-martial conviction will not be set aside because of allegedly conflicting evidence, the pre-trial investigation is not jurisdictional, the commander's decision must be respected when charges are withdrawn from consideration by a court martial because of the military situation.

But the principle has not been repudiated that a court-martial must award the accused due process of law as measured by the rules of military procedure. We have precedents on some situations where it was held that this test was not met, and a greater num-

ber of situations where it was held that it was. Possibly a sharp and perfectly legible line of demarcation may never be established. One thing is certain. An accused need not hope for relief on habeas corpus unless the failure of military justice was so glaring as to shock the sensibilities of civil lawyers and Judge Advocates alike. In the last analysis the test is probably one that can be more easily felt than defined. As long as military courts maintain the standards required by their respective services there is no need to fear for the security of their judgments.

All the cases cited in this article, of course, arose prior to the effective date of the new Articles of War. There is a provision in

the new code, Article of War 53, whereby persons convicted in courts-martial may petition for a new trial. Detailed procedure is spelled out in Chapter XXII of the revised Manual for Courts-Martial.

Also, in the new Articles of War, there is a provision, Article of War 50(h), to the effect that the action of courts-martial "shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53."

How the federal courts will react to this apparent restriction on their prerogatives is problematical.

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## Book Reviews

*Okinawa: The Last Battle* is contemporary history, written by professional historians, based on eye-witness observations, front-line interviews and examination of American and enemy documents. The material is presented objectively without dramatics, which will perhaps make the book more convincing and interesting.

The story of the Okinawa campaign, which was known by the code name ICEBERG, is significant from both historical and military standpoints: consequently it should prove interesting to both the citizen and the soldier; and the fact that it is already in its sec-

ond printing seems to bear this out.

Okinawa was taken in 83 days of the most effective resistance put up by the Japanese in any campaign. Our success was based on a magnificent combination of coordination, leadership, combat determination, logistics, fire-power, and, perhaps most importantly, the application of the hard lessons learned by all units of the armed forces from Guadalcanal to Iwo Jima. Caves, Kamikaze suicide planes, and a hard-core defensive made the conquest costly. American casualties totaled 49,151 of whom 12,520 were killed. The

fact that the Navy, exclusive of the Marines, had more men killed than either the Army or the Marine Corps, testifies to the deadliness of Kamikaze planes.

Perhaps no campaign in American military history represented such a high degree of unification. The Navy was in overall command, was responsible for the development of the plan, prepared the way for the amphibious landing, provided logistical support, and furnished fire-support for land operations throughout the campaign. The Marine Corps provided half of the divisions in continuous combat, and part of the air support. The Army provided the ground commander, half of the divisions in continuous combat, and part of the air support. Air support, whether Army, Navy or Marine Corps was continuous from well before D-day to the end of the campaign.

The nature of the campaign permits the presentation of both overall strategy and platoon engagements. It has a reality and coherence not often found in military history. The authors without passing judgment themselves give the reader essential facts. It contains equally lessons in command and in character. The reader will feel personal regret at the death by enemy artillery action of Lt. Gen. Simon Bolivar Buckner, third Buckner to reach general officers rank in as many generations, just three days before the end of organized resistance.

This is the first of the Army's 38 combat histories which will tell, professionally and objectively, the combat history of the U. S. ARMY IN WORLD WAR II. An additional 43 volumes are scheduled to record the administrative history of the Army. It may be purchased from the Superintendent of Documents, G.P.O., Washington 25, D. C. at the price of \$6.00.

\* \* \*

*Military Justice* by Louis F. Alyea is a guide for persons interested in the administration of Military Justice as a supplement to the 1949 "Manual for Courts-Martial." The book in a very easy fashion points out the changes effected by the 1948 amendments to the "Articles of War"; and, with very carefully prepared text, makes helpful comments and suggestions following each Article, which should be of value and interest to the military lawyer.

The author, Major Louis F. Alyea, is presently on duty in the Office of the Judge Advocate General, U. S. Air Force. He has had extensive and varied experience in law, penology, legislation and all phases of Judge Advocate work. He is formerly of the Judge Advocate Generals Department, Army and has been a member of the Association since 1943.

The book is published by the Oceana Publications, 461 West 18th Street, New York, New York. Price, \$2.50. Members of the Association may obtain a ten per cent discount.

# Lost Members--Bad Addresses

Since the war and return of many of our members to civilian pursuits, the Association has had to cope with the problem of constant changing of addresses. Despite our efforts, and there may be errors committed by us, a number of the members have become completely lost to us for want of address. Recent mailings have been returned to us with regard to the following members of the Association. If you have any information concerning the present whereabouts of any of these members, it will be greatly appreciated if you will advise the National Offices of your Association or the member, so that we may correct our mailing address and reestablish contact.

## CALIFORNIA

James C. Graham, North Sacramento.

Lawrence E. Mullally, Oakland  
Capt. Elmer S. Stephens, March Field

Guy E. Ward, Beverly Hills

## CONNECTICUT

William J. Galvin, Jr., Hartford

## DISTRICT OF COLUMBIA

Howard Hillman Hasting

Robert W. Mapes

Lt. Col. Robert H. McCaw

## FLORIDA

Lt. Col. Richard A. Billups, Jr., Tyndall Field

Harold H. Schaaf, St. Petersburg

## GEORGIA

Lt. Col. Edward J. Burke, Fort Benning

Edwin Dent Fulcher, Augusta

## ILLINOIS

Robert E. Covert, Chicago

David R. Gallagher, Winnetka

## INDIANA

George H. Leonard, Jr., Fort Wayne

## IOWA

Charles L. Dollerhide, Davenport  
F. R. Boyles, Iowa City

## KENTUCKY

Capt. George F. Dillemoth, Fort Knox

Axel R. Ernberg, Richmond  
Joe B. Williams, Hopkinsville

## LOUISIANA

Lt. Col. Arnold Nelson Davis, New Orleans

## MARYLAND

Eugene W. Brees, Baltimore

## MICHIGAN

Robert E. Finch, Owosso  
Burton E. Hoffman, Battle Creek

## MISSOURI

Wright Conrad, Moberly

## NEBRASKA

Albert W. Elsasser, Omaha  
Edward A. Nelson, Omaha

## NEW YORK

Malcolm A. Crusius, New York City

Lt. George P. Gabbert, New York City

Capt. Robert E. Hough, New York City

Norman F. Lent, Mineola

Joel R. Parker, New York City

Edward Reed Taylor, Hicksville

George F. Wenger, Albany

## OHIO

Warren M. Briggs, Cleveland

John A. Brink, Cincinnati

Paul C. Palmer, Toledo

Arthur F. Radcliffe, Williamsport

## OKLAHOMA

Fred M. Black, Oklahoma City

George A. Fisher, Oklahoma City

## OREGON

Preston W. Gunther, Portland

Gayle H. Nichols, Grants Pass

## PENNSYLVANIA

Gregory G. Lagakos, Philadelphia  
George F. McGuigan, Wilkes-Barre

Leon Sacke, Philadelphia  
John G. Stephenson, Pittsburgh

## TEXAS

Judson I. Clements, San Angelo  
Gorden Fogg, Houston  
Rupert R. Harkrider, Beaumont  
Carl D. Levy, Beaumont  
Anthony J. Maniscalco, Houston  
Louis E. Marshall, San Antonio  
Rodham C. Routledge, San Antonio

Eugene Talbert, Tyler  
Fulton C. Vowell, El Paso

## UTAH

Frank L. Copening, Jr., Salt Lake City

## VIRGINIA

John Gordon O'Brien, Arlington

Col. John Marshall Pitzer, Arlington  
Ellwood W. Sargent, Arlington  
Joseph J. Stern, Arlington

It is very important to the success of our organization and our ability to serve the membership that we have your correct address at all times. You are urged, therefore, to advise us of your correct address if there is any error in our present listing, as indicated by the envelope containing your copy of the Journal. If you know of other members who are complaining of not receiving material from the Association, please pass this word on to them, and perhaps "a change of address notice" will remedy their complaint.

## *What the Members Are Doing*

## CALIFORNIA

Ingemar E. Hoberg and John H. Finger 5th OFF. S. & F., recently announced the removal of their offices for the general practice of law under the firm name of Hoberg and Finger, to the Central Tower Building, San Francisco.

Lt. Col. Gerald G. Kelly, 13th O. C. of Los Angeles will argue before the Supreme Court of the United States, during November, several cases which he has prosecuted involving the legality of the the requirement by the County Board of Supervisors that officers and employees under its jurisdiction take an oath of allegiance to the State and Federal Constitutions and affirmatively state that

they do not advocate the overthrow of the Government by force. Col. Kelly served as Ninth Service Command JA. He is now Deputy County Counsel of Los Angeles County.

Col. John P. Oliver, who until recently very efficiently served as Legislative Counsel of the ROA and who has been a member of the Board of Directors of this Association for several years, has recently returned to his home in Los Angeles to reengage in private practice as a member of the firm of Fitts, Grivi and Oliver with offices in the Garfield Building.

Henry C. Clausen, recently appointed Chairman for Northern California, is actively undertaking

steps toward the local organization of our members in the Northern part of that state. Col. Clausen is engaged in private practice in San Francisco as a member of the firm of Keesling, Keesling & Clausen.

#### DISTRICT OF COLUMBIA

Members of the Association in the metropolitan area of Washington held a supper meeting at the Continental Hotel on the evening of September 26th. The Guest Speaker of the evening was Dr. Hobart M. Corning, Superintendent of Schools, D. C., who brought to the attention of the members some of his problems in connection with the High School Cadet program. Among those present were Maj. Gen. Harry Vaughan, Maj. Gen. Myron C. Cramer, Maj. Gen. Reginald C. Harmon, Brig. Gen. Ernest M. Brannon, Brig. Gen. Franklin P. Shaw, Brig. Gen. Bert E. Johnson, Brig. Gen. Albert M. Kuhfeld, Capt. James J. Robinson, USN, Senator Harry P. Cain, Congressman Joe Evins and our President, George H. Hafer.

The meeting was conducted by Col. Oliver Gasch 3rd OFF and was attended by approximately 75 of our members.

This meeting was the first of the Winter series of monthly dinner meetings, conducted by the local Judge Advocates Association and the Reserve Officers Association.

Milton I. Baldinger recently announced the opening of his offices in the Woodward Building,

Washington, D. C. Mr. Baldinger specializes in Federal tax matters.

#### LOUISIANA

Dr. Paul M. Hebert (4th OFF) has been elevated from the office of Dean of the Law School of Louisiana State University to Dean of the University.

The visit of Gen. Thomas H. Green to Baton Rouge as one of the principal speakers at the annual Convention of the State Bar Association in May was the occasion for an informal gathering with a number of former members of the JAGC located in Louisiana. Gen. Green, who was accompanied by Mrs. Green, gave an interesting history of the Judge Advocate's office which evoked much favorable comment.

Victor A. Sachse (4th OFF) has been appointed Attorney for the City of Baton Rouge and Parish of East Baton Rouge on a part time basis. He will continue his private practice.

Maj. John Baumgarten (7th OFF) is on extended active duty at Fort Sam Houston in the office of the Staff Judge Advocate of the Fourth Army. Lt. Col. Riley McClain, Clarence L. Yancey of Shreveport, and Hermann Moyse (8th OFF) of Baton Rouge were among the Reserve officers recently detailed for two weeks active training at that office.

#### NEW YORK

Kenneth Chandler Schwartz, 5th OFF, recently announced the removal of his office for the general practice of law to 8 West Fortieth Street, New York.

William J. Rooney, 2nd O.C., has announced the removal of his office to 75 Fulton Street, New York.

Col. John T. Daly, AUS, Retired, who served at the Post Judge Advocate at Fort Dix, N. J., during the second World War, has recently been elected to his fifth term as Police Justice of Great Neck, New York.

#### MINNESOTA

Leslie L. Anderson, 1st O. C. and S. & F., recently elected member of the Board of Directors of the Association, formerly a member of the firm of Stinchfield, Mackall, Crouse & Moore of Minneapolis, was appointed Municipal Judge of that city, and assumed judicial duties on September 1st. Judge Anderson has been engaged in private practice since 1928, and served in the JAGO during the past war in the rank of Major. He has more recently served as Chairman of the Minnesota Citizens Mental Health Committee, President of the Commonwealth Club and Chairman of the State Bar Admissions Review Panel. He is one of the founders of the Young Republican League in Minnesota and has served on the Republican State Central Committee.

#### UTAH

Brig. Gen. Franklin Riter, JAGC, has just completed his term as State Commander of the American Legion and has also resumed private practice of law with Henry Henroid, a former JA Officer at Salt Lake City. Gen. Riter was Chairman of the Board

of Review in England.

Col. Raymond R. Brady, JAGC (Ret.) 3rd C.T., has just finished his term as President of the Utah Department Reserve Officers Association. Col. Brady has also returned to private practice in the Utah Savings & Trust Building in Salt Lake City. Col. Brady was Staff Judge Advocate of the Panama Coast Artillery Command and also the Flying Training Command at Maxwell Field, Alabama.

Capt. Perry Burnham, JAG, USAFR, has just resigned as Deputy County Attorney of Salt Lake County and is engaged in private practice in the Brockbank Building in Salt Lake City.

Maj. Delos Daines, 6th OFF, is engaged in private practice in the Continental Bank Building in Salt Lake City. Maj. Daines was Staff JA at the Sacramento Air Base.

Lt. Clifford Ashton, 9th O. C., has just resigned as City Judge of Salt Lake and is now one of the attorneys for the Denver and Rio Grande Western Railroad. Lt. Ashton was Assistant Staff JA in the Philippines.

#### WASHINGTON

Col. Sam M. Driver, 7th OFF, (U. S. District Judge for the Eastern District of Washington) has retired as President of the Judge Advocates Association of the State of Washington.

Col. Ward W. Roney has just been elected as President of the Washington Judge Advocates Association. Col. Roney has just been appointed Superior Court

Judge for King County, Washington, at Seattle.

Col. Chas. O. Carroll is now the Prosecuting Attorney for King County at Seattle.

Lt. Col. John A. Burns, 1st O. C., is U. S. Commissioner for the Western District of Washington at Seattle.

Lt. Col. Bruce Shorts, 6th OFF, in addition to practicing law in Seattle, has just been named an honorary member of the Seattle Transit Commission.

Maj. Herb Davis, 10th OFF, is now practicing law at Prosser, near the atomic project.

Col. Eugene G. Cushing is the Superior Court Judge for Clark County, at Vancouver.

Col. Hereford T. Fitch is the "Wing Commander of the 9012 Bar Training Wing."

#### PHILIPPINES

Col. Luis P. Torres, formerly the Judge Advocate General, Philippine Army, was appointed August 19, 1949 by President Quirino as Justice of the Supreme Court of the Philippines. Prior to his appointment, he was the presiding Justice of the Court of Appeals. He has had a long and distinguished public career with more than twenty years of judicial experience. He was appointed Judge Advocate General with the rank

of Colonel in 1938, and in 1940, was named to the Court of Appeals. Upon the liberation of Manila, President Osmena again appointed him Judge Advocate until he was reappointed to the Court of Appeals in 1947.

At the ceremonies attending Col. Torres' elevation to the Supreme Court, Lt. Col. Mamerto R. Montemayor (24 OFF) and John A. O'Donnell (1st O. C.) were present. Presently Col. Montemayor is Senior Military Commissioner and Chief, Public and Legislative Relations Division of the Armed Forces of the Philippines. He served as Division Judge Advocate of the 41st Infantry Division and has been representative of the Philippine Government in the United States Military Commissions from 1945 to 1947. He has served since that time as a Senior Military Commissioner in charge of Philippine Military Commissions trying Japanese war criminals.

O'Donnell is presently serving as a member of the United States-Philippine War Damage Commission handling private and public claims under the Rehabilitation Act of 1946. He served during the war in the Claims Division under Gen. Boyd and later was attached to the Office of the Under-Secretary of War.

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A strong Association can serve you better. Pay your annual dues. Stay active. Recommend new members. Remember, the Judge Advocates Association represents the lawyers of all components of all the Armed Forces.

