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THE FEDERAL LEGISLATIVE PROCESS

By Colonel James K. Gaynor *

I. INTRODUCTION

The President of the United States is the commander-in-chief,¹ but the military services are dependent upon the Congress for their existence, for the rules and regulations by which they are governed, and for the money necessary to maintain them.²

Most of the larger agencies of the executive branch of the Government have legislative offices to assist the President in performing the duty given him by the Constitution of recommending to the Congress such measures "as he shall judge necessary and expedient."³ The Secretary of Defense has an assistant for Legislative Affairs, the Army and the Air Force have Legislative Liaison offices, and the Navy has a Legislative Affairs office.

The Congress enacts many proposals each session which in one way or another affect the military services. The process by which such proposals become public laws generally is known

to all lawyers. The details of the process may not be so well known except to those lawyers who act as legislative counsel, or a part of the legislative branch of the Government. However, every military lawyer should have more than a passing knowledge of the federal legislative process.

II. CONGRESSIONAL STRUCTURE

That the Congress of the United States should consist of two houses was the result of a compromise. Most of the colonial legislatures were two-house bodies with a small chamber representing the Crown and a larger one selected by the people. The Congress established by the Articles of Confederation was merely a gathering of delegates of the states, with voting by states.⁴ When the convention called to revise and strengthen the Articles of Confederation determined to overhaul completely the governmental structure, there were

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¹ U. S. Const., Art. II, § 2.

² *Id.*, Art. I, § 8.

³ *Id.*, Art. II, § 3. Cf. Nobleman, *The Delegation of Presidential Functions*, 307 *Annals of the American Academy of Political and Social Science* 134 (1956).

⁴ Articles of Confederation, Art. V.

various proposals as to the desirable nature of the legislature.

Virginia, a large state, proposed a two-house body with the lower house to be selected by the people, the upper house to be selected by the lower house, and the number of representatives—each to have equal vote—to be determined upon the basis of population. New Jersey, a small state, wanted only one house with voting by states. The scheme adopted, the Connecticut compromise, provided for two houses, with a Senate to be composed of two members from each state and a House of Representatives with its membership apportioned according to population.⁵ The members of the Senate were not elected by the people until the Seventeenth Amendment became effective in 1913;⁶ prior to that time, the legislature of each state selected the members of the Senate from that state.⁷

When the First Congress assembled in New York in 1789, there were 22 Senators and 59 members of the House of Representatives.⁸ North Carolina and Rhode Island were not represented because they had not yet ratified the Constitution. The Senate met on the second floor of the provisional capitol building and the

House of Representatives met on the first floor. This is one version of the origin of the custom of calling the Senate the "upper house." In the halls of the Congress, each house now refers to its counterpart as the "other body" rather than as upper or lower house.

The Constitution provides that the members of the House of Representatives shall not exceed one for every 30,000 people, but that each state is guaranteed at least one seat in the House, regardless of size.⁹ There still are six states with only one member each in the House of Representatives: Alaska, Delaware, Hawaii, Nevada, Vermont, and Wyoming. The Constitution provided that the House initially should consist of 65 members, but as the country grew, the number of members of the Congress increased. By 1873, the House consisted of 283 members, and in succeeding decades the number rose to 325, to 356, and to 386. Finally, an act of 1911 fixed the number at 433 with two additional members should Arizona and New Mexico become states before the next decennial census.¹⁰ Since they did, the number was permanently fixed at 435, although the number was increased temporarily to 437 because of the

⁵ U.S. Const., Art. I, §§ 2, 3; Bancroft, *History of the United States of America* (New York: Appleton, 1884), Vol VI, p. 244.

⁶ Proclamation by the Secretary of State, 31 May 1913.

⁷ U.S. Const., Art. I, § 3.

⁸ Compare Bassett, *The Federalist System* (New York: Harper, 1906), pp. 7-8.

⁹ U.S. Const., Art I, § 2.

¹⁰ 37 Stat. 13 (1911), 2 U.S. Code, § 2.

admission of Alaska and Hawaii. The number will be reduced to 435 again with the apportionment following the 1960 census.¹¹ The Commonwealth of Puerto Rico has a resident commissioner who sits as a member of the House and may introduce bills and enter into debates but cannot vote.¹² Alaska and Hawaii, while in territorial status, each had a delegate who was in the same status as the resident commissioner. The membership of the Senate was automatically increased to an even hundred with the admission of Hawaii.

During the 86th Congress (1959-1960), the Congressman from the 8th District of Texas represented 806,701 people and the Congressman from the 2d District of South Dakota represented only 159,099 people, to show the extremes.¹³ However, except for the Representatives at Large, 95 per cent of the members of the House represented between 200,000 and 500,000 people, and the range was between 300,000 and 400,000 in the case of 60 per cent of the members.¹⁴

Although the Congress apportions the number of representatives to each state based upon the decennial census, it is the state legislature which fixes the Congressional districts within the state. If there is no redistri-

bution by the state legislature following a reapportionment, and the state has gained a member of the House because of an increase in population, the extra member is a Congressman at Large from that state.¹⁵ If a state loses one or more representatives by a reapportionment and the state legislature fails to adjust the districts, all representatives from that state are elected at large until there is an adjustment.¹⁶ During the decade following the 1950 census, New Mexico and North Dakota each were entitled to two members of the House, and both were elected at large. Texas, Washington, and Connecticut each had one Representative at Large, in addition to those representing districts; thus the Representative at Large from Texas had a constituency in excess of 7 million people. It appears that the redistribution following the 1960 census will provide California with the most substantial gain, that New York and Pennsylvania each will lose three seats, that Arkansas and Massachusetts each will lose two, and that one seat will be lost by each of nine other states (Alabama, Georgia, Iowa, Kansas, Maine, Minnesota, Mississippi, North Carolina, and West Virginia).¹⁷

¹¹ 106 Cong. Rec. A1676 (daily issue, 29 Feb 1960).

¹² 39 Stat. 963 (1917), as amended, 48 U.S. Code, § 891.

¹³ 106 Cong. Rec. A946-A947 (daily issue, 4 Feb 1960).

¹⁴ *Id.*, p. A946.

¹⁵ 37 Stat. 14 (1911), 2 U.S. Code, § 4.

¹⁶ Rev. Stat. § 22 (1874), 2 U.S. Code, § 6.

¹⁷ 106 Cong. Rec. A945-A946 (daily issue, 4 Feb 1960).

By comparison with legislative bodies of other countries, the Congress of the United States, with its 100 Senators and 437 Representatives, is not an unusually large legislative body. The Senate of France has 300 and the National Assembly has 546; the Japanese Diet consists of a House of Councilors of 250 and a House of Representatives of 467, and in Ireland there are 60 in the Seanad Eireann and 147 in the Dail Eireann. By far the largest legislative body is the Russian Supreme Soviet, with more than 600 members in the Soviet of Nationalities, and almost 1400 members of the Soviet of the Union. The English Parliament has two houses, but the House of Lords, which is not an elective body, cannot propose legislation nor can it defeat legislation; it can only delay it by returning it to the House of Commons for reconsideration. The House of Lords has 891 members but an average voting strength of between 85 and 120, and the House of Commons has 630 members. The smallest legislative body of an independent state is that of Liechtenstein. Its Diet has 15 members. Although Monaco has a total area of less than a square mile, its National Council has 18 members.

III. THE MEMBERS OF CONGRESS

The Constitution requires that a senator be at least 30 years old, an

inhabitant of the state from which elected, and have been a United States citizen for at least nine years.¹⁸ Several times in history men have been elected to the Senate at less than 30 years of age, most notably Henry Clay, who was permitted to serve for three and a half months while only 29 years old.¹⁹ Since each house of the Congress is the judge of the qualifications of its own members,²⁰ the question of one's age may not be raised. However, some persons elected prior to attaining the required age have been required to wait until qualified before being seated. Senators are elected for six years and the terms of a third of the members expire every two years. A member of the Senate is addressed and referred to as "Senator" (unless one is addressing him in his capacity as chairman of a committee, in which case it is "Mister Chairman") although his office door in the Senate Office Building has "Mister" preceding his name and he is described as "Mister" in the *Congressional Record*.

A member of the House of Representatives must be at least 25 years old, a United States citizen for at least seven years, and an inhabitant of the state (but not necessarily the district) from which elected.²¹ A member of the House ordinarily is referred to as "Mister Congressman" (or "Mister Chairman" if he is acting in his capacity as committee

¹⁸ U.S. Const., Art. I, § 3.

¹⁹ *Biographical Dictionary of the American Congress, 1774-1949*, House Doc. No. 607, 81st Cong., 2d Sess. (1950), pp. 986-987.

²⁰ U.S. Const., Art. I, § 5.

²¹ U.S. Const., Art. I, § 2.

chairman) but some members prefer the use of their surname with the prefix "Mister."

Although members of the House are elected for two years compared with six-year terms for senators, the total Congressional service of a member of the House may be quite long. In the 86th Congress there were seven members of the House who had been in Congress longer than the continuous Senate service of the senior senator. Speaker Sam Rayburn of Texas and Congressman Carl Vinson of Georgia served their twenty-fourth consecutive terms in the 86th Congress. Congressmen Cannon of Missouri, Celler of New York, and Taber of New York served their nineteenth terms. Congressman Martin and the late Congresswoman Rogers, both of Massachusetts, served their eighteenth terms in the 86th Congress.

The senior senator of the 86th Congress was Senator Carl Hayden of Arizona, serving his sixth term. He previously had served eight terms in the House, with continuous Congressional service of forty-nine years, but the service in the House did not affect his seniority in the Senate.

The average age of the members of the 86th Congress was 53. No one in history has served in Congress at an age older than Senator Green of Rhode Island, whose ninety-third

birthday was October 2, 1960. The youngest member of the 86th Congress was Congressman Rotenkowski of Illinois who had just passed his thirty-first birthday when he took his seat in January 1959. About 90 per cent of the members of the 86th Congress held political office before being elected to Congress, and a sizeable group were war veterans: 144 of World War I, 186 of World War II, 3 of the Korean War. Senator Green served in the Spanish-American War, and Congressman O'Hara of Illinois was the last of 93 Spanish-American War veterans to serve in the House of Representatives. Many different professions always are represented in Congress but by far the largest representation invariably is from the legal profession. In the 86th Congress, 62 of the 100 senators were lawyers and 241 of the 437 representatives were lawyers.²² Next in line in professional representation in the 86th Congress was business and banking with 157 in the two houses of the Congress. There were 63 educators, 40 journalists, and 8 physicians. There were 17 woman members of the 86th Congress: 16 in the House and Mrs. Margaret Chase Smith of Maine in the Senate. The first woman to serve as a member of Congress was Miss Jeanette Rankin of Montana who was elected in 1916, four years before the Nineteenth

²² *American Bar News*, Jan. 15, 1960, p. 3. In the 86th Congress, of the five ranking Democrats in the Senate, Senators Russell, Murray, and Chavez were members of the bar. Of the five ranking Republicans in the Senate, Senators Wiley, Langer, and Hickenlooper were members of the bar. Of the five ranking Republicans in the House, Congressmen Reed, Taber, and Allen were members of the bar. The five ranking Democrats in the House—Congressmen Rayburn, Vinson, Cannon, Celler, and McCormack—all were members of the bar.

Amendment to the Constitution guaranteed woman suffrage. The first woman to serve in the Senate was Mrs. Hattie W. Caraway of Arkansas, appointed in 1931 to fill the vacancy created by the death of her husband and then elected to two terms in the Senate thereafter.

That the membership of the Congress is drawn from all segments of the citizenry is illustrated by the fact that of the 537 members of the 86th Congress, 103 were Roman Catholic, 12 were Jews, and 4 were Negroes. Congressman Saud of California was born in Amritsar, India, and received his first college degree from the University of Punjab. Congressman Kasem of California, although born in the United States, is the son of Arabians. Of the three Hawaiian members of Congress, one is of Japanese descent and another is of Chinese descent. Of approximately 10,000 men and women who have served as members of Congress, several hundred have been foreign born.²³ Ire-

land has been the land of birth of more members than any other foreign country.

The salary of a member of Congress is \$22,500 a year.²⁴ The Speaker of the House receives \$35,000 a year and an additional \$10,000 for expenses.²⁵ Each member of Congress is authorized an allowance for payment of his office staff, and some members employ additional assistance at their own expense. The *Congressional Staff Directory*²⁶ lists as few as four staff members for some senators and as many as eight for others. They are given different titles, depending upon the desires of the individual senators. Most senators have someone designated "administrative assistant" (commonly referred to as the "AA") who is the chief of the staff, and such terms as executive secretary, legislative clerk, research assistant, secretary, and clerk are among those used. The directory lists three to eight staff members for representatives and their titles are

²³ Statistics from 1789 through 1949 are in Lawson, *The Foreign Born in Congress, 1789-1949: A Statistical Summary*, 51 Amer. Pol. Science Rev. 1183 (1957). This article states that of the 9,618 persons who served in Congress through 1949, 374 were foreign born. There were 122 born in Ireland, 55 in England, 49 in Canada, and 41 in Germany, with the remainder from other countries. There were 38.8 per cent foreign born in the 1st Congress, 7.9 per cent in the 2d Congress, and 1 to 5 per cent at most times thereafter although the number rose to 7 per cent during the 1885-1888 period.

²⁴ 69 Stat. 11 (1955), 2 U.S. Code, § 31; 67 Stat. 322 (1953), 2 U.S. Code, § 31c.

²⁵ 69 Stat. 11 (1955), 2 U.S. Code, § 31; 63 Stat. 4 (1949) as amended by 65 Stat. 570 (1951), 2 U.S. Code, § 31b. Should the office of Vice President become vacant, the President *pro tempore* of the Senate shall receive the salary of the Vice President. Rev. Stat. § 36 (1874), 2 U.S. Code, § 32.

²⁶ Brownson, *Congressional Staff Directory, 1959* (Indianapolis: Bobbs-Merrill, 1959).

as varied as those of the senators' staffs. Not all staff personnel of the members' offices are chosen as reward for past political support. There are many staff members who are long-time professionals, who "know their way around," who are not resident of the state represented by their employers, and may not even be of the same political party. Each member of Congress is authorized \$1,200 a year for office rental in his home district.²⁷ This was brought to public attention early in 1959 when one Congressman rented his front porch to the Government for that consideration.

IV. CONGRESS IN ACTION

A Congress consists of two regular sessions, each of which convenes on the third day of January or such other time as the Congress may designate.²⁸ Before the close of a session, the convening date of the following regular session is fixed, and it usually is within the first ten days of January. Prior to 1933, the convening date was the first Monday in December.²⁹ The Legislative Re-

organization Act of 1946 provided for adjournment of Congress *sine die* (literally, without appointment of a day) no later than the last day of July "unless otherwise provided by the Congress,"³⁰ but 1952 was the only year since enactment that the Congress adjourned *sine die* earlier than the second day of August. The Second Session of the 81st Congress did not adjourn until January 2, 1951, the day preceding the opening of the 82d Congress.³¹

The President may call a special session of Congress "on extraordinary occasions"³² and he may call only one house of Congress into special session if he chooses. Forty-seven special sessions of the Senate were called between 1791 and 1933, two of them in the same year, 1881.³³ The special session in 1933 adjourned after three days of deliberations. When Congress is in session, neither house may adjourn for more than three days without permission of the other house,³⁴ but in 1960 the Second Session of the 86th Congress was in recess for more than a month for the national political conventions.

²⁷ 70 Stat. 359 (1956), 2 U.S. Code, § 52; 68 Stat. 403 (1954), amended by 71 Stat. 622 (1957), 2 U.S. Code, § 122.

²⁸ U.S. Const., Amend. XX, § 2.

²⁹ U.S. Const., Art. I, § 4.

³⁰ 60 Stat. 831 (1946), 2 U.S. Code, § 198. Since this enactment was an exercise of the rule-making power, it may be said that it does not have the force and effect of law.

³¹ *Congressional Directory, 86th Cong., Jan 1960*, pp. 325-326.

³² U.S. Const., Art. II, § 3.

³³ *Congressional Directory, 86th Cong., Jan. 1960*, p. 327.

³⁴ U.S. Const., Art. I, § 5.

The Senate may (but seldom does) hold an executive session which is closed to the public.³⁵ The House in modern times does not hold executive sessions. Except for executive sessions of the Senate, visitors may view and hear the proceedings of either house. There are 621 seats in the Senate gallery and 616 seats in the House gallery but a visitor's pass must be obtained from a senator for the Senate or a representative for the House. These passes are not difficult to obtain except for an unusual occasion such as an address by the President at a joint session. In such case a special pass is necessary, and these are carefully allotted to the Members of Congress. A visitor is not permitted to read or take notes while in the gallery; only accredited members of the press, seated in the press gallery (which is above and behind the presiding officer in each house), may do so. There are more than a thousand accredited press representatives listed in the *Congressional Directory*.

Each house of the Congress has a chaplain, a secretary, a sergeant at arms, a parliamentarian, and numerous clerks, doorkeepers, and other necessary adjuncts. The presiding officer of the Senate is the Vice President of the United States, and in his absence, the president *pro tempore* (or someone designated by him) presides. The president *pro tempore* usually is the senior senator from the political party having the ma-

majority in the Senate. The Speaker or someone designated by him presides in the House. The Speaker usually is the senior representative from the political party having the majority in the House. Each house also has a majority leader, a majority whip, a minority leader, and a minority whip. The leader, as the name implies, takes the lead in shaping policy, and in the Senate he exerts great influence in shaping the legislative program. Since the Speaker of the House is of the same political party as the majority, he may wield more influence than the presiding officer of the Senate. The whip is the one who is charged with urging attendance of the members of his political party to insure party loyalty on important issues.

Each house also has an Office of Legislative Counsel in which there are experienced lawyers available for assistance in legislative drafting without reference to political party. The statute creating these offices provides that they shall "aid in drafting public bills and resolutions or amendments thereto on the request of any committee" of either house, and that the Committee on Rules and Administration of the Senate and the Committee on House Administration may determine the preferences to be given requests placed upon legislative counsel.³⁶ As a matter of practice, the House legislative counsel generally restrict their assistance to committees although some

³⁵ During the first three Congresses, the Senate met only in executive sessions. 104 Cong. Rec. A1623 (1958).

³⁶ 40 Stat. 1141 (1919), as amended 2 U.S. Code, § 775.

drafting is performed for individual members where time is available, and the members of the House rely to a considerable extent upon the Library of Congress or other agencies for legislative drafting. The Senate legislative counsel long has provided a considerable amount of drafting service for individual senators. In England, the parliamentary counsel serves only the party in power, and Members of Parliament of the minority parties must seek drafting assistance from private sources.

V. INTRODUCTION OF A BILL

The legislative process³⁷ begins with the introduction of a measure which may be either a bill or a resolution. A bill is introduced in the Senate by a senator arising, being recognized by the presiding officer, and stating that he introduces the bill. He may or may not give a

short explanation of it. In the House, a bill is introduced by dropping it into a box known as the "hopper." A Senate bill may be co-sponsored by more than one senator. Co-sponsors are not used in the House, so any number of identical bills may be introduced.³⁸

A legislative proposal, upon introduction, is given a numerical designation. If it is a bill, the number will be preceded by "S" if introduced in the Senate, or "H.R." if introduced in the House. Thus, H.R. 500 is the five-hundredth bill introduced in the House during the current Congress. This designation continues to be used even after the measure has been passed by one house and is being considered in the other house. If a bill is introduced in the first session of a Congress, it may be considered during that session, or in the second session, or in

³⁷ An authoritative but concise treatise on the federal legislative process is Zinn, *How Our Laws are Made*, republished in 1959 as House Doc. No. 156, 86th Cong., 1st Sess. The author, Dr. Charles J. Zinn, has been law revision counsel to the House Committee on the Judiciary since 1939. A professorial lecturer in law of The George Washington University, Dr. Zinn teaches legislative drafting. Another treatise by Dr. Zinn, *American Congressional Procedure*, was published by the West Publishing Co., St. Paul, Minn., in 1957 as a companion handbook to The Inter-Parliamentary Union publication, *European Parliamentary Procedure*, by Lord Campion and Mr. D. W. S. Lidderdale. A graphically-illustrated booklet on the federal legislative process is Smith and Riddick, *Congress in Action* (Manassas, Virginia: National Capitol Publishers, Inc., 3d ed., 1953). Dr. Riddick is Assistant Parliamentarian of the Senate. One of the best general references on the legislative process is Chamberlain, *Legislative Processes—National and State* (New York: Appleton-Century, 1936). Also see Luce, *Legislative Procedure* (Boston: Houghton Mifflin, 1922), which is a comprehensive historical and analytical treatise on legislative assemblies with emphasis upon British and American institutions.

³⁸ *E.g.*, During the 86th Congress, two Senate bills were introduced to permit recomputation of the pay of certain retired military personnel. There were 23 sponsors of S. 269 and 10 sponsors of S. 541. More than 50 bills upon the subject were introduced in the House, many of them in identical language.

a special session if one is called. However, if not enacted into law by the close of Congress, it cannot be acted upon by a later Congress unless again introduced. New committee action is required if introduced in a later Congress.

A bill which is of general application is known as a public bill and, if enacted into law, becomes a public law. A private bill, often termed a relief bill, affects only one person or a particular group, or an organization, designated by name in the bill. Such bills in most cases involve money claims or immigration matters. There have been cases, however, where bills affecting only one or a few named persons have been denominated public bills.³⁹

A bill may originate in either house of the Congress with one exception: A bill to appropriate money must originate in the House of Representatives.⁴⁰ In addition to bills, there are joint resolutions (with the designation of H.J.Res. or S.J.Res. preceding the number), concurrent resolutions (designated H.Con.Res. or S.Con.Res.), and resolutions (designated H.Res. or S.Res.), which commonly are known as "simple resolutions."

There is little difference between a bill and a joint resolution: the

latter may be presented to the President for approval and become public law.⁴¹ An exception, however, is that an amendment to the Constitution is presented in the form of a joint resolution and it requires a two-thirds concurrence by each house, does not require Presidential approval, and must be ratified by three-fourths of the states.⁴² The first four joint resolutions introduced in the House in the 86th Congress were to establish commissions to study particular problems.

A concurrent resolution usually expresses facts, principles, or purposes and is not legislative in character. It does not require Presidential approval. Among the first concurrent resolutions introduced in the House in the 86th Congress were one to call for a crusade for world peace and freedom, one to establish a joint Congressional committee, and an authorization for the President to proclaim March as Neighborhood House Month.

A simple resolution is considered only by the house in which introduced and concerns a matter of internal interest only to that house. Examples are those adopting rules of the House, fixing of compensation of House employees, and authorizing the

³⁹ *E.g.*, Public Law 326, 79th Cong., 60 Stat. 56 (1946), authorized Regular Army appointments for five named individuals, and Public Law 888, 79th Cong., 60 Stat. 681 (1946), authorized the Regular Army appointment of one named individual.

⁴⁰ U.S. Const., Art. I, § 7.

⁴¹ *E.g.*, S. J. Res. 178, 86th Cong., relating to the pay of Senate employees, became Public Law 86-426.

⁴² See U.S. Const., Art. V.

expenses for an investigation by a Congressional committee.

Although a bill may be introduced only by a Member of Congress (or by the resident commissioner of Puerto Rico), the source may be varied.⁴³ A Member of Congress may have the idea and either draft it or have an agency draft it for him, it may be sent to the Congress by an executive agency of the Government with a request for enactment, or a private organization or individual may draft it and request that a Member of Congress introduce it. If a Member of Congress wishes to introduce a bill but does not wish to commit himself as favoring it, he will state that it is introduced "by request" and this will appear after his name on the bill.

When an agency of the executive branch of the Government sends a legislative proposal to Congress with a request for enactment, it will include a draft of the bill, a sectional analysis of the bill, and what is known as a "Speaker letter"—identical letters to the President of the Senate and the Speaker of the House with an explanation of the bill and a request for enactment. This is denominated by the Congress as an executive communication and it is referred to the appropriate committee for consideration. The committee chairman may introduce the bill, or

designate another member of the committee to introduce the bill, or take no action whatever. An agency of the executive branch of the Government does not send a legislative proposal to the Congress with a request for enactment unless the Bureau of the Budget has approved it as being consistent with the President's legislative program.

The form of the enacting clause of a bill—"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled"—is prescribed by statute.⁴⁴ Occasionally there is introductory matter preceding the enacting clause (or, if a resolution, the resolving clause) which states the reason for the enactment, such as clauses beginning with the word "whereas." If the measure is long and involved, it may have a table of contents, referred to as an analysis, at the beginning. That which precedes the enacting or resolving clause does not, upon adoption of the measure, have the force and effect of law. If definitions are included in a measure, they usually follow immediately after the enacting or resolving clause. The first section of a measure is not numbered and one may not know that it has more than one section until he reaches "Sec. 2."⁴⁵ The Uniform Code of Military Justice, as set forth in the *Manual for Courts-*

⁴³ See Leitch, *The Birth of a Bill*, 44 Amer. Bar. Assn. Jour. 789 (1958).

⁴⁴ 61 Stat. 634 (1947), 1 U.S. Code, § 101. A resolution has a resolving clause rather than an enacting clause. 61 Stat. 634 (1947), 1 U.S. Code, § 102.

⁴⁵ "Each section shall be numbered, and shall contain, as nearly as may be, a single proposition of enactment." 61 Stat. 634 (1947), 1 U.S. Code, § 104.

Martial, United States, 1951, is the first section of an act of 5 May 1950; section 2 of the act begins on page 452 following Article 140 of the Uniform Code. If a bill is divided into titles—such as the annual Military Construction Authorization Bill, which has different titles for the different services—the first title begins with section 101, the second title with section 201, and so forth.

The importance of proper legislative drafting cannot be overemphasized. The entire legislative process exists to provide a useful product, and that product is legislation. The product is not useful unless it is legally sufficient to accomplish the intended objective, is drawn in such manner that it will avoid harmful effects which have not been in-

tended, and is drawn so as to express the objectives with reasonable certainty and avoid ambiguity which can lead to administrative confusion, needless litigation, or both.⁴⁶

There are certain rules which must be considered in the drafting of a measure.⁴⁷ For example, the word "shall" is used as mandatory language rather than "must," and the word "may" is permissive.⁴⁸ There are rules which are provided by statute,⁴⁹ and rules of statutory construction have been enunciated by the courts. Words used in a statute are presumed to have their known and ordinary meaning⁵⁰ and technical words must be accorded their technical meaning unless the statute indicates the legislative intent to have been otherwise.⁵¹ Three Latin phrases are well known in statutory construc-

⁴⁶ The British jurist, Mr. Justice Stephen, is quoted as having said: "I think that my late friend, Mr. Mill, made a mistake upon the subject [draftsmanship] probably because he was not accustomed to use language with that degree of precision which is essential to every one who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it." Lord Thring, *Practical Legislation* (Boston: Little, Brown, 1902), p.9.

⁴⁷ See Conrad, *New Ways to Write Laws*. 56 Yale L. Jour. 458 (1947); and Dickerson, *Legislative Drafting: American and British Practices Compared*, 44 Amer. Bar Assn. Jour. 865 (1958).

⁴⁸ Dickerson, *Legislative Drafting* (Boston: Little, Brown, 1954), p. 80. Also see Sutton, *Use of "Shall" in Statutes*, 4 John Marshall L. Quar. 204 (1939).

⁴⁹ 61 Stat. 633 (1947), 1 U.S. Code §§ 1-6.

⁵⁰ *Old Colony Railroad Co. v. Commissioner of Internal Revenue*, 284 U.S. 552 (1932).

⁵¹ *Cadwalader v. Zeh*, 151 U.S. 171 (1894). Compare *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927).

tion: *noscitur a sociis*, if a word as used in a statute is ambiguous, other words used with it may be considered to determine its meaning;⁵² *ejusdem generis*, where general wording is followed by particular wording, the general words include only those persons or things of the same general class as those particularly enumerated;⁵³ and *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of others.⁵⁴

A measure is printed and distributed not later than the day following its introduction. Far more measures are introduced in each Congress than ever have even committee hearings. Of 871,753 measures introduced in the Congress from 1789 through 1959, only 75,560 were enacted.⁵⁵ The largest number of measures introduced in any Congress was 44,363, introduced in the 61st Congress during the period 1909-1911.⁵⁶

VI.

CONGRESSIONAL COMMITTEES

A committee system in a legislative body the size of the Congress of the United States is a practical necessity since there are thousands

of measures introduced each year. Each measure is referred to a committee, and it is unlikely that the full body will take action until the committee has submitted its report. Although it nominally is the presiding officer who refers a proposal to a committee, he acts upon the advice of the parliamentarian. In a rare case, by agreement of the chairmen of two committees concerned, a bill may be referred to a committee which does not normally have jurisdiction over the particular type of legislation involved.⁵⁷ Although the jurisdiction of the committees is set forth in the rules of the Senate and of the House, it may happen that two or more committees appear to have jurisdiction of a particular measure. Occasionally the draftsman of a measure will use language which will cause it to be referred to a particular committee whereas the use of other language would cause it to be referred to another committee.

It is in the committee that a proposal receives detailed consideration, and it is there that proponents or opponents of the proposal have an opportunity to express themselves.

⁵² *Wong Kam Wo v. Dulles*, 236 F. 2d 622 (9th Cir., 1956); *Eastman v. Armstrong-Byrd Music Co.*, 212 Fed. 662 (8th Cir., 1914).

⁵³ *Perko v. United States*, 204 F. 2d 446 (8th Cir., 1953). Compare *United States v. Alpers*, 338 U.S. 680 (1950).

⁵⁴ *Walla Walla City v. Walla Walla Water Co.*, 172 U.S. 1 (1898).

⁵⁵ *Our American Government*, House Doc. No. 394, 86th Cong., 2d Sess. (1960), p. 17.

⁵⁶ *Id.*

⁵⁷ *E.g.*, see remarks of Senator McClellan, 105 Cong. Rec. 5487 (1959), upon introduction of S. 1616, 86th Cong.

One who appears before a Congressional committee may be an official representative of the executive branch of the Government, he may be a Member of Congress who is not a member of that committee (or he may be a member of the other house), or he may be an individual citizen who wishes to express his views. If a person wishes to testify concerning a particular proposal, he may write to the committee chairman and request that he be heard. In most cases the committee will permit him to appear and testify. The witness may be the legislative representative of an organization or corporation. The public may look with misgivings upon these so-called "lobbyists," but the misgivings are not necessarily shared by the Members of Congress. Although it is recognized that a legislative representative's view may be colored by the fact of his employment, it nevertheless is known that he probably is extremely well informed and can be very helpful in providing facts and figures.

The Lobbying Act of 1946 requires that a person who receives pay or other consideration for attempting to influence legislation shall file a quarterly report with each house of the Congress, detailing his receipts, the source of them, and his expenditures.⁵⁸ These reports are published in the *Congressional Record*. Some

organizations, such as the Association of American Railroads and the AFL-CIO, may expend in excess of \$100,000 a year for this purpose.

There are sixteen standing committees in the Senate and twenty in the House. The Legislative Reorganization Act of 1946⁵⁹ reduced the number from the thirty-three standing Senate committees and forty-eight standing House committees which previously had existed. The number of members of each standing committee varies according to the nature of the committee. The smallest committee in each house now has nine members. The largest of the Senate is the Committee on Appropriations with twenty-seven members, and the largest of the House is the Committee on Appropriations with fifty members.

The members of standing committees nominally are appointed by the full body of each house, and the proportion of Democrats to Republicans generally is the same as the proportion of Democrats to Republicans in the full body. Actually, the standing committee members are selected by the parties prior to action by the full body and there is a formal adoption of the party selections. An exception to the proportionate representation is the House Committee on Rules, where two-thirds of the committee always are from the majority party. Occasionally a special or

⁵⁸ 60 Stat. 841 (1946), 2 U.S. Code, § 267.

⁵⁹ 60 Stat. 812 (1946). The portion of the act which provides committee jurisdiction is not included in the U.S. Code because subject to change incident to the rule-making power of each house. For an informative commentary on the purposes of the act, see Galloway, *Congress at the Crossroads* (New York: Thomas Y. Crowell, 1946).

select committee will be designated with equal representation from the two major political parties.

Generally, there are corresponding committees in the two houses, although the Senate has a Committee on Finance and a Committee on Labor and Public Welfare which have no counterparts in the House, and there are no Senate counterparts to the House Committee on Education and Labor, House Administration, Merchant Marine and Fisheries, Un-American Activities, Veterans' Affairs, and Ways and Means. There are several joint committees, one of the most important of which is the Joint Committee on Atomic Energy.⁶⁰ Special or select committees are appointed by each house from time to time as the need arises, with jurisdiction generally limited to the purpose for which appointed. They are discharged and cease existence when the purpose has been served. A committee is termed "select" because the members are selected by the presiding officer of the Senate or the House rather than by the full body.

The military services may be concerned at one time or another with many of the committees of each house, but the ones of principal interest are the Committees on Appropriations, Armed Services, and space activities. The Senate space committee is designated the Committee on Aeronautical and Space

Sciences and its House counterpart is known as the Committee on Science and Astronautics. This difference in designation is not singular since the Senate has a Committee on Foreign Relations whereas the House has a Committee on Foreign Affairs.

Although the jurisdiction of each standing committee was set forth in the Legislative Reorganization Act of 1946, this was an exercise of the rule-making power vested in each house, and there have been many subsequent changes by simple resolution. An example of the jurisdiction provided by the 1946 act, still generally in effect, is that of the House Committee on Armed Services. It was given jurisdiction over common defense generally; the military departments; soldiers' and sailors' homes; the pay, promotions, retirement, and other benefits and privileges of members of the armed forces; selective service; the size and composition of the military services; military installations, including ammunition depots; the consideration, development, and use of naval petroleum and shale reserves; strategic and critical materials necessary for the common defense; and scientific research and development in support of the armed services.⁶¹

Some members of the House serve on only one standing committee, others serve on two, and a few members additionally serve on a joint committee. Some senators serve

⁶⁰ Established by § 15 of an act of Aug. 1, 1946, 60 Stat. 772. The oldest joint committee is the Joint Committee on the Library. 2 Stat. 56 (1800).

⁶¹ 60 Stat. 824 (1946). The jurisdiction of the Senate Committee on Armed Services generally is similar, 60 Stat. 815 (1946).

as members of three standing committees and also may serve on one or more joint committees.⁶² It is interesting to see, in the Senate committee structure of the 86th Congress, how a few senators had interlocking committee memberships on the three committees which were of most importance to the military services. Among the Democrats, Senators Russell of Georgia, Johnson of Texas, Stennis of Mississippi, and Symington of Missouri served as members of the Committees on Appropriations, Armed Services, and Aeronautical and Space Sciences. Among the Republicans, Senators Bridges of New Hampshire and Smith of Maine served as members of all three of these committees, and Senator Saltonstall of Massachusetts served as a member of the Committees on Appropriations and Armed Services.

The seventeen members of the Senate Committee on Armed Services included, in the 86th Congress, an Army reserve major general, Senator Strom Thurmond of South Carolina, and the only woman member of the Senate, Mrs. Margaret Chase Smith of Maine. The chairman during the 86th Congress was Senator Richard Russell of Georgia and the ranking minority member of the committee was Senator Leverett Saltonstall of

Massachusetts. Senator Russell was the second-ranking member of the Senate in length of continuous service.

The chairman of the House Committee on Armed Services during the 86th Congress was the Honorable Carl Vinson of Georgia, the second ranking member of the House in point of service. He had served in Congress continuously since November 1914. Chairman Vinson headed the House Committee on Naval Affairs from 1931 until 1947, when that committee and the Committee on Military Affairs were abolished with the creation of the Committee on Armed Services. He then served as chairman of the Committee on Armed Services continuously except when the Republican party controlled the House and he was ranking minority member. Republican chairmen of the committee were the Honorable Walter G. Andrews of New York, 80th Congress (1947-1948), and the Honorable Dewey Short of Missouri, 83rd Congress (1953-1954); the latter became Assistant Secretary of the Army in March 1957.

The ranking minority member of the House Committee on Armed Services in the 86th Congress was the Honorable Leslie C. Arends of Illinois, the minority whip, serving his thirteenth term in Congress. Like

⁶² Senate Rule XXV, as amended, states that no Senator may serve as a member of more than two of twelve specified standing committees. No Senator may serve as a member of more than one of the four remaining standing committees. *Senate Manual*, Sen. Doc. No. 14, 86th Cong., 1st Sess. (1959), p. 38. Exceptions sometimes are made which stem from the desire of the majority party to control all committees and yet provide fair representation on all committees for the minority party. Minority representation on committees is a matter of tradition; theoretically, the majority could exclude the minority from all committees.

its Senate counterpart, the House Committee on Armed Services in the 86th Congress numbered among its members an Army reserve major general, Congressman Leroy H. Anderson of Montana, commander of the 96th Infantry Division of the Ready Reserve, who did not seek election to the House for the 87th Congress. Congressman Frank Kowalski of Connecticut, serving his first term in the 86th Congress and a member of the Committee on Armed Services, is a retired Regular Army colonel.⁶³ Congressman William G. Bray, also a member of the Committee, is an active colonel in the Indiana National Guard. In the 85th Congress, a retired Marine Corps officer served as a member of the House Committee on Armed Services. Brigadier General James P. S. Devereux, who commanded Wake Island early in World War II. He did not seek re-election to the House in 1958.

Most committees have standing subcommittees and special subcommittees are appointed as the need arises.⁶⁴ However, the Senate Committee on Armed Services has no standing subcommittees. Its Special Military Construction Subcommittee

with six members chaired by Senator Stennis and Special Preparedness Investigation Subcommittee with seven members chaired by Senator Johnson were quite active in the 86th Congress. The House Committee on Armed Services has three standing subcommittees, designated by number but without fixed jurisdiction. In the 86th Congress, personnel matters usually were referred to Subcommittee No. 1, chaired by Congressman Paul J. Kilday; logistics matters usually were referred to Subcommittee No. 2, chaired by Congressman Carl T. Durham (who did not seek election to the 87th Congress); and National Guard and reserve matters usually were referred to Subcommittee No. 3, chaired by Congressman L. Mendel Rivers. There were more than a half-dozen special subcommittees of the House Committee on Armed Services in the 86th Congress.

The committee chairman is the member of the political party having the majority in that house of the Congress who has the longest continuous service as a member of that committee. If he is absent, the next senior member of the same political party acts as chairman.⁶⁵ It

⁶³ As to the legality of a retired military officer serving as a Member of Congress, see Blandford, *It's Your Congress*, 82 United States Naval Institute Proceedings 185, 187-188 (1956).

⁶⁴ The Committees on Appropriations have standing Department of Defense subcommittees. Chairmen in the 86th Congress were Senator Chavez and Congressman Mahon. The House Committee on Government Operations has a Subcommittee on Military Operations. Congressman Holifield was chairman in the 86th Congress.

⁶⁵ The committee seniority system was begun in the Senate in 1846 and in the House in 1910. *Our American Government*, House Doc. No. 394, 86th Cong., 2d Sess. (1960), p. 20.

is the chairman of a committee who, as a practical matter, determines whether a measure will be considered by a committee and the priority for consideration of measures that are to be heard. Although his power rests upon the acquiescence of a majority of the committee, it is seldom that the committee overrules the chairman. He also controls the questioning by committee members during a hearing. Thus, the chairman may wield a tremendous amount of influence.

An extremely important factor in the functioning of each Congressional committee is its staff. Each committee has a permanent staff and may at various times have temporary staff members. Although a few committees have a staff member designated as the minority clerk or minority staff member, the staff generally is appointed on a nonpartisan basis and the members are scrupulously nonpartisan in their official activities. The different committees have different designations for their staff members, and in each committee there is a professional level and a clerical level.

The Senate Committee on Armed Services uses the designation "professional staff member" for those who normally act as committee counsel—Messrs. William H. Darden, T. Edward Braswell, and Gordon A. Nease. Mr. Harry L. Wingate, Jr., is chief clerk, Mr. Herbert S. Atkinson is assistant chief clerk, and there are four permanent clerical assistants. In addition, the committee employs special counsel and investigators from time to time. The House Com-

mittee on Armed Services has Mr. Robert W. Smart as chief counsel; Messrs. John R. Blandford, Philip W. Kelleher, and Frank M. Slatinshek as counsel; Mr. James A. Deakins as bill clerk; and five secretaries. Mr. John Courtney serves as special counsel, and other staff members are employed as needed.

The importance of the work of the committee staff members should not be underestimated. In the course of a year a committee may have as many as a thousand bills referred to it. The committee staff analyzes each bill and informs the chairman as to the ones which should have priority, just as the members of a military staff do the detail work for the commander. The staff members prepare analyses of bills for use by the chairman or committee members. A staff member may brief the committee in executive session prior to the hearing on a bill. Questions to be asked during a hearing quite often are prepared by the committee staff, and committee counsel may question a witness during a hearing. Finally, the committee report is prepared by the staff.

The great majority of the committee staff members at the professional level are lawyers.

VII. COMMITTEE HEARINGS

Congressional committee hearings are of two types: legislative and investigative. A legislative hearing is one in which a bill or resolution is being considered. An investigative hearing is, as the name implies, one in which a matter is being investigated to determine whether legisla-

tion is necessary. The investigative hearing is far more likely to receive public attention, and the hearings which in recent years have been televised have almost all been investigative in nature. An investigative hearing usually is conducted by a select committee or a special subcommittee rather than by a standing committee.

The Constitution does not specifically authorize the conduct of investigative hearings, but the power of the Congress to do so now is firmly established.⁶⁶ One of the earliest Congressional investigations was by a select committee of the House which was authorized in 1792 to inquire into the failure of a military expedition under General St. Clair.⁶⁷ A Congressional investigation of John Brown's raid on the arsenal at Harper's Ferry was authorized in 1859.⁶⁸ In 1876 a House resolution authorized a committee to inquire into the bankruptcy of Jay Cooke & Co., and a witness called by the committee was jailed for contempt after having refused to answer cer-

tain questions. He was successful in a *habeas corpus* action, the Supreme Court holding that the Congress did not have jurisdiction to inquire into the matter being investigated.⁶⁹

Almost a half-century later, a Congressional committee was authorized to investigate the failure of Harry M. Daugherty, former Attorney General of the United States, to prosecute alleged violations of antitrust and monopoly statutes, and Mr. Daugherty's brother failed to appear when summoned before the committee. Jailed for contempt, he sought release in a *habeas corpus* action and the appeal finally was heard by the Supreme Court.⁷⁰

In sustaining the contempt conviction of Mr. Daugherty, the Court pointed out that there is no provision of the Constitution "expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively," so it is appropriate to inquire "whether this power is so far incidental to the

⁶⁶ With respect to Congressional investigations, see Morgan, *Congressional Investigations and Judicial Review*, 37 Calif. L. Rev. 556 (1949); Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926); Dimock, *Congressional Investigating Committees* (Baltimore: Johns Hopkins Press, 1929); and Eberling, *Congressional Investigations* (New York: Columbia Univ. Press, 1928). Also of interest is a compendium of cases compiled by the Legislative Reference Service of the Library of Congress entitled *Congressional Power of Investigation* and published as Senate Doc. No. 98, 83d Cong., 2d Sess. (1954). The Spring 1951 issue (vol. 18, p. 421 *et seq.*) of the University of Chicago Law Review is devoted entirely to a symposium on legislative investigations.

⁶⁷ 2 Annals. Cong. 490 (1792).

⁶⁸ Cong. Globe, 36th Cong., 1st Sess. (13 Dec 1859), p. 141.

⁶⁹ *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

⁷⁰ *McGrain v. Daugherty*, 273 U.S. 135 (1927).

legislative function as to be implied." The Court said:

"In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures."⁷¹

After pointing out that the investigation of General St. Clair's campaign was authorized by the House of Representatives when it numbered among its members James Madison, "who had taken an important part in framing the Constitution only five years before, and four of his associates in that work," the Court continued:

"We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. * * * So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as

fixing the meaning of those provisions, if otherwise doubtful."⁷²

The Court then concluded:

"* * * A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus, there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."⁷³

The Supreme Court since has adhered to its view that Congressional

⁷¹ *Id.*, p. 161.

⁷² *Id.*, p. 174.

⁷³ *Id.*, p. 175.

committees have the power to conduct investigative hearings.⁷⁴ But nevertheless has held that the propriety of an individual hearing may be questioned, such as the case in which a quorum of the committee is not present,⁷⁵ or the committee exceeds the limits set by the Senate or House in authorizing the investigation.⁷⁶

With respect to legislative hearings, it is unlikely that there will be a hearing on any bill unless specifically requested by the one who introduced it. Most bills initially are heard by subcommittees unless of unusual importance. The Committees on Appropriations have permanent subcommittees which hear specific portions of appropriations bills. As a matter of fairness, the chairman may grant a hearing on a bill which he personally opposes. If he refuses to hold a hearing, a majority of the committee may force a hearing, or a majority of the Senate or House may vote to discharge the committee from further consideration of the bill, but these are unusual procedures and seldom are used.

Most committees have regular meeting days although they may meet on other days or they may fail to meet for several weeks at a time. The Legislative Reorganization Act of 1946 provides that no standing committee other than the House Com-

mittee on Rules may meet when the full body (Senate or House) is in session without permission of the full body,⁷⁷ although this has been relaxed with respect to the Committees on Appropriations. Both the Senate and House usually convene at noon, but one house or the other occasionally may have a morning session and this must be considered in scheduling committee meetings. The regular meeting time of the Senate Committee on Armed Services is at 1030 hours on Thursday; the regular meeting time of the House Committee on Armed Services is at 1000 hours on Tuesday. Committee hearings usually are open and may be attended by the public. A committee may meet in closed or executive session either to hear classified information affecting national security (in which case only witnesses and others authorized to have access to the information may be present) or for the consideration of committee business such as the private discussion of a bill (in which case only committee members and staff personnel may be present).

Notice of a committee meeting usually is given a few days or even a few weeks in advance. Although the committee staff will notify agencies of the executive branch of the Government who are required to furnish witnesses, and will notify those who have requested that they

⁷⁴ *Barenblatt v. United States*, 360 U.S. 109 (1959).

⁷⁵ *Christoffel v. United States*, 338 U.S. 84 (1949).

⁷⁶ *United States v. Rumely*, 345 U.S. 41 (1953).

⁷⁷ § 134, act of 2 Aug 1946, 60 Stat. 831.

be heard by the committee, advance notice to others may be only a card placed on the bulletin board of the committee office. On the morning of the hearing, a notice of it will appear in the *Congressional Record* and in the *Washington Post and Times-Herald*.

If a bill concerns an agency of the executive branch of the Government, that agency usually will be asked to furnish a witness. In an unusual case, the committee may request a named individual, such as the Secretary of the Army or the Chief of Staff, but the choice usually is within the discretion of the agency furnishing the witness. If the witness is the Secretary or Assistant Secretary of a military service or other executive agency, or a military chief of staff or general or flag officer, he usually will be expected to testify only concerning broad policy matters. In such case he ordinarily will be accompanied or followed by others who are prepared to relate details and statistics.

Committee or subcommittee hearings have less formality than sessions of the Senate or House. The committees are authorized to establish their own rules of procedure and there may be a wide variation between different committees. Ordinarily, the committee rules of procedure are not published and familiarity with them must be obtained by personal contact. A hearing may be held even though only a few committee members are present. The question of a quorum seldom is raised unless there is a vote on an important proposal. Some committee

chairmen insist that there be at least one committee member from each political party present for all portions of a hearing. Because of the pressure of other Congressional business, it is not uncommon for some of the committee members to arrive late and for others to leave during the proceedings.

The arrangement of the hearing room usually has the committee members seated at a table with the chairman in the center, Democrats to one side and Republicans to the other, arranged according to length of service as members of the committee. Committee members of the majority party usually are seated to the right of the chairman although this is reversed in some committees. Seated facing the committee members is the witness, who may have others seated with him to provide factual information during questioning. Also in front of the committee are committee counsel and the reporter. A portion of the hearing room is reserved for spectators, who if it is an open hearing, may arrive and depart as they choose, although excessive noise in moving about may bring a rebuke from the chairman.

The chairman, after calling the committee or subcommittee to order, usually announces the purpose of the hearing and administers an oath to the witnesses if they are to be sworn. The swearing of witnesses is discretionary with the committee, and they usually are sworn in an investigative hearing but seldom in a legislative hearing. The chairman may make a short statement as to

the purpose of the hearing prior to calling the first witness.

A witness in a legislative hearing almost always begins by reading a prepared statement, and sometimes this will be done in an investigative hearing. The statement identifies the witness and, if appropriate, indicates his representative status. For example, he may say, "I represent the Department of the Army on behalf of the Department of Defense on the bill under consideration." The statement should give the purpose of the proposal (if a legislative hearing) and some details as to the effect of enactment. The witness may give the cost to the Government if the proposal is enacted. He may recommend that the proposal be enacted, or urge that it not be favorably considered, or he may in a rare case say, "The Department has no objection to enactment." The statement should close with an expression of appreciation to the committee for the opportunity of being heard and an expression of willingness to answer questions.⁷⁸

Seldom is a witness excused without being questioned. The questions may be searching, in rare cases they may be embarrassing. Unless the chairman intervenes, they may not even be relevant. The chairman begins the questioning and then calls upon the ranking minority member of the committee who is present. Thereafter he alternates, majority and minority according to length of

service as members of the committees until all have had an opportunity to pose questions.

One who testifies as the representative of an agency in the executive branch of the Government (such as the Department of the Army) will present the position of the agency he represents in his prepared statement. During the questioning which follows, if the witness is not certain that the answer to a question is in conformance with the policy of the agency he represents, he should make it clear to the committee that he is expressing only his personal view rather than speaking on behalf of the agency. If asked a question requiring the giving of classified information, the witness should respectfully inform the committee that he cannot answer in open session. If the witness is asked for information which he does not have, he should so state but offer to furnish the information later for the record.

There may be only one witness during a hearing or there may be many. A hearing may last several days, or it may move so rapidly that several bills can be considered in one sitting. After completion of the testimony, the committee or subcommittee may act at the time in open session, or discuss the matter in closed session, or defer action until a later date. The committee may meet in closed session to "mark up" a bill, which means consideration

⁷⁸ Guidance for witnesses who represent the Department of the Army is provided by DA Memo 1-24, 17 Feb 1959. The Comptroller of the Army has issued a pamphlet to provide guidance for witnesses who testify before the Committees on Appropriations.

section-by-section and amendment to express the committee views. If the amendments are extensive, to obviate printing each amendment in the reported bill, a member of the committee may introduce a "clean bill," which will have a different numerical designation. The hearings previously held need not be repeated for the clean bill.

A stenographic transcript is made of each open hearing and may, within the discretion of the committee, be made of a closed or executive session. In the latter case the transcript is carefully marked "Executive" and is safeguarded in a manner similar to that of the military services in safeguarding classified information. The reporters are provided by commercial concerns on a contract basis, but they are authorized access to classified information by a clearance procedure somewhat like that used by the military services. The transcript is prepared immediately after the hearing and is available the following morning. If a hearing continues for several days, each day's transcript is available on the morning following that day's session. Only a few copies of the transcript are prepared and they are reproduced by a duplicating process. One having a legitimate need for it may be authorized by the committee to purchase a copy of a transcript but the order must be placed prior to the close of a day's session if the transcript for that day is desired. Most of the committees extend to witnesses the courtesy of editing their testimony. In such a case the witness must obtain the transcript

from the committee (usually on the morning following his testimony), edit it, and return it to the committee within one to three days, depending upon the requirements of the particular committee. Typographical and grammatical errors may be corrected, but committee permission is required for changes in substance.

If a hearing on a bill or resolution has been by a subcommittee, consideration by the full committee usually will consist only of a brief report by the subcommittee chairman. There may be discussion by the full committee and there may be a roll-call vote. If the proposal is not controversial, the chairman may announce, "Without objection the bill will be favorably reported," and move to the next business at hand.

A committee which favorably reports a bill or resolution to the Senate or House must file a report which explains the nature of the proposal and the reasons for the recommendation of the committee. The committee report of a measure which will repeal or amend existing law must include a comparative print showing the existing law to be changed and the proposed changes, using stricken-through type and italics, or parallel columns, or some other appropriate typographical device. This is required by the "Ramseyer" rule of the House, and the changes indicated are those in the measure as introduced. The "Cordon" rule of the Senate provides a similar requirement except that the changes are those in the measure as reported by the committee. The committee report may include the full tran-

script of testimony received during the hearing. One or more members of the committee may dissent and file a minority report. A minority report does not necessarily mean that it represents the views of the minority political party. In addition to a minority report, one or more members of the committee may express individual views.

VIII.

CONSIDERATION BY THE HOUSE

The procedure for committee consideration generally is similar in the two houses, but there are differences in the floor consideration (the term generally used for consideration by the full body). A measure of a public nature reported favorably to the House⁷⁹ is placed on the Union Calendar if it is for raising revenue of appropriating money or property, either directly or indirectly; otherwise it is placed on the House Calendar. A private bill is placed on the Private Calendar which normally is called on the first and third Tuesday of each month. There is a Consent Calendar, normally called on the first and third Monday of each month, which will be discussed later. Although not frequently used, there is a Discharge Calendar, normally called on the second and fourth Mon-

day of each month. If the committee to which a measure has been referred has not acted after the passage of thirty days, any member of the House may move that the committee be discharged from further consideration of the measure, and the motion is placed upon the Discharge Calendar.

The rules of the House require that all measures involving tax, appropriations, or the expending of money previously appropriated must, before being acted upon by the House, be considered by the Committee of the Whole House on the State of the Union. The House resolves itself into this committee for consideration of measures on the Union Calendar. One hundred members constitute a quorum rather than the usual 219. The Speaker appoints a chairman to preside and leaves the chair. At the conclusion of the consideration of a bill, the Committee of the Whole (as it usually is termed) rises and reports to the House and the House proceeds to act upon the recommendation of the Committee of the Whole. At the time the House resolves itself into the Committee of the Whole, the mace (a bundle of 13 ebony rods bound with silver surmounted by a silver ball on which stands a silver eagle

⁷⁹ The basic procedural guide used in the House is *Constitution, Jefferson's Manual and Rules of the House of Representatives* (House Doc. No. 458, 85th Cong., 2d Sess. (1959), for use in the 86th Cong.), revised for each Congress by Lewis Deschler, *House Parliamentarian*. Also used are *Hinds' and Cannon's Precedents of the House of Representatives* (published by the Government Printing Office in eleven volumes, the last of which was issued in 1941) and *Cannon's Procedure in the House of Representatives* (House Doc. No. 122, 86th Cong., 1st Sess. (1959)).

with outspread wings—the visible symbol of Government, used by the sergeant-at-arms to preserve order) is removed from its usual pedestal. Thus, a spectator may determine whether the House or the Committee of the Whole is in session.

A measure on either the House or the Union Calendar may be placed upon the Consent Calendar by any member of the House. This calendar is for measures which are not expected to be controversial. When the Consent Calendar is called, proposals on it are read by title only and the Speaker asks only if there is an objection. One objection will cause a bill to be deferred until the next calling of the Consent Calendar: three objections result in the bill being stricken from the Consent Calendar and returned to the Union or House Calendar. Each party has three "official objectors" and these members automatically object if the bill appropriates more than a fixed amount of money, if they consider that it has aspects requiring explanation and debate, or upon request of members of their party. If there is no objection upon a measure being called on the Consent Calendar, it is passed unanimously without debate.

A measure placed on the Union or House Calendar is given a calendar number. If the measure is of sufficient importance, the chairman of the committee which reported it (or a committee member designated by him) may ask for a "rule." The Committee on Rules is requested to present a resolution for immediate floor consideration. This resolution

will specify the maximum number of hours of debate (perhaps as much as four hours if the measure is particularly important) in the Committee of the Whole if the bill is on the Union Calendar, or in the House if on the House Calendar. Half of the debate time is controlled by the chairman of the committee which reported the bill, the other half by the ranking minority member of the committee. A member wishing to be heard will tell the floor manager of his party, who will allocate the time. The resolution of the Committee on Rules also determines the type of rule which will be granted. If an open rule is granted, amendments can be proposed and debated on the floor of the House. No floor amendments are permitted on a closed rule. If a modified rule is granted, amendments are permitted only by the committee which held hearings on the measure. The granting of an open rule on an extremely controversial proposal may result in the measure being amended so drastically that it is unrecognizable to the sponsor. This may result in recommitment to the committee and relegation to obscurity.

There are two other ways of obtaining consideration of a measure by the House. On what is known as Calendar Wednesday, the Speaker calls the committees in alphabetical order and a committee chairman may call up for consideration any bill which his committee previously has reported. Debate is limited to two hours. On the first and third Monday of each month, and during the

last six days of a session, a motion may be made to suspend the rules and consider any measure on the Union or House Calendar. The motion must be seconded by a majority and adopted by two-thirds of the Members voting, a quorum being present. Debate is limited to forty minutes.

The prolonged speeches in the Senate which are known as filibusters are not possible in the House since in no case may a member speak for more than one hour without the unanimous consent of the House. Occasionally a member who speaks in the House will ask permission to "revise and extend" his remarks. In such case he may speak for only one or a few minutes but the remainder of his speech will appear in the *Congressional Record* as though he had delivered it on the floor of the House.

The usual method of voting on a measure is for the Speaker to say, "As many as are in favor, say 'aye,'" followed by "As many as are opposed, say 'No,'" and then determining the outcome by the volume. If the outcome is close, a division may be demanded, and those in favor arise and are counted, following which those opposed arise and are counted. One-fifth of the House may demand a teller vote, in which case the Speaker appoints a teller from each party, and the Members pass between the tellers to be counted. One-fifth of those present (as opposed to one-fifth of the Committee of the

Whole, or one-fifth of the House as the case may be) may demand a roll-call vote, in which case the vote of each Member is recorded.

If a Member anticipates that he will be absent, he may find another Member having opposite views who also will be absent. They may arrange to have themselves announced as "paired" so that their views will be expressed for the record. However, these "pairs" are not counted as votes and merely express the members' views for the record.

Immediately after passage of a measure by the House, it is customary for a Member to move that it be reconsidered, and the motion is "laid on the table" and is lost for lack of action upon it. The reason is that a House vote is not final until there has been an opportunity to reconsider it.

After favorable action upon a measure, it is "engrossed" by the enrolling clerk to provide an exact copy as passed by the House, including amendments adopted during the floor consideration.⁸⁰ After favorable action by one house, a bill thereafter is known as an "act". The engrossed copy is signed by the Clerk of the House and is delivered to the Senate with traditional ceremony.

IX.

CONSIDERATION BY THE SENATE

A measure which has been passed by the House, upon being received

⁸⁰ 61 Stat. 634 (1947), 1 U.S. Code, § 106.

by the Senate,⁸¹ is referred to the appropriate Senate committee, just as a Senate-passed measure is referred to the proper House committee. The hearing in the second house to consider a measure may be as extensive as the hearing in the original house, although often the hearing may be abbreviated because reliance is placed upon the committee report of the other house.

When a Senate committee reports a bill favorably, the committee chairman or a senator designated by him announces on the floor that he is reporting the bill and he may ask for unanimous consent to consider it immediately. If it is noncontroversial in nature, it may be passed with little or no debate. If there is an objection to immediate consideration, it must lie over for a day and is placed upon the calendar. The Senate has but one calendar and the rules of the Senate require that the calendar be called on each legislative day. The Senate quite often will recess rather than adjourn at the end of a day to obviate the necessity of calling the calendar the following day. Thus, the *Congressional Record* often will show at the beginning of the Senate proceedings a "legislative day" several days or even weeks prior to the actual day.

Upon the call of the calendar, bills are considered in the order in which placed upon the calendar, be-

ginning with the one following the last bill considered on the previous calendar call. Each senator may speak five minutes, and an objection may be interposed at any time to further consideration of the bill on that calendar call. Upon motion, further consideration may be given to a bill after completion of the calendar call, and time limitations do not apply. On any day except Monday, following notice of the conclusion of the preliminary proceedings known as "morning business," any senator gaining recognition may move to take up any bill on the calendar, regardless of its place on the calendar. There is no time limitation upon debate and it may continue until the presiding officer calls up the unfinished business of the day. At that point it becomes the unfinished business for consideration on a later day.

It is the policy committee of the majority party, represented on the floor of the Senate in the person of the majority leader, that determines the time at which a bill will be called for debate. The motion to call a bill for debate is itself debatable, and may result in lengthy speeches known as filibustering. In most cases there is no time limit for debate in the Senate unless the cloture rule is invoked, which requires the signature of sixteen senators and a two-thirds vote of the total membership of the

⁸¹ The *Senate Manual*, Senate Doc. No. 14, 86th Cong., 1st Sess. (1959), which is revised for each Congress, governs basic procedure in the Senate. Also used is Watkins and Riddick, *Senate Procedure* (printed by the Government Printing Office in 1958 pursuant to Public Law 504, 84th Cong.). The authors are the Parliamentarian and the Assistant Parliamentarian of the Senate.

Senate. Although a senator may not speak more than twice upon any one question in debate on the same day without leave of the Senate, once he has gained recognition, a senator may continue to speak without limit and yield the floor only to whom he pleases. Prior to 1806, Senate debate could be ended by calling for the previous question, but from that date until 1917 there was no limit on Senate debate. The famous Rule 22 then was adopted which permitted two-thirds of the members of the Senate to end debate but with the provision that there should be no limit on debate to amend the rules. In 1959 the rule again was modified by adoption of the present requirement. Some rather interesting filibuster records have been established in the Senate. The record is held by Senator Strom Thurmond who, in 1957, spoke for 24 hours and 18 minutes against a civil rights bill. The previous record was established in 1953 by Senator Wayne Morse, who spoke for 22 hours and 26 minutes against a tidelands off-shore bill, and the record prior to that, established by Senator Robert M. La-Follette, Sr., was 18 hours and 23 minutes against a financial bill. Filibustering in the Senate also has caused some long continuous meetings of the body. The record was established in 1960 when the Senate adjourned on March 5 after 82 hours and 3 minutes without recess. Southern senators talked in opposition to a civil rights bill, in relays, and except for a fifteen-minute recess, the body

was continuously in session beginning at noon on February 29—125 hours and 31 minutes.

Whereas amendments on the floor of the House may be limited by the resolution of the Committee on Rules, there is no such limitation on the floor of the Senate. The amendment need not be germane unless an appropriations act is involved, and even in this case a "rider" proposing substantive legislation may be added upon the giving of a one-day notice in writing and suspension of the prohibitory rule by a two-thirds vote.

The vote upon a bill in the Senate usually is *viva voce* although, as in the House, one-fifth of the members present may require a roll-call vote. A Senator who voted in favor of a bill or one who abstained from voting may, within two days after a favorable vote upon a bill by the Senate, move for reconsideration. If there was no record vote, any Senator may move for reconsideration. The motion usually is tabled.

X. CONFERENCE AND PRESIDENTIAL ACTION

If the Senate passes a House measure without amendment, or if the House passes a Senate measure without amendment, it is returned to the house in which it originated for enrollment on parchment paper and forwarding to the President for his approval. At this state it becomes known as an enrolled enactment.⁸² If a measure is amended in the second house in which it is considered, it is returned to the house in which

⁸² 61 Stat. 634 (1947), 1 U.S. Code, § 106.

it originated with a request that there be concurrence in the amendments. If the amendments are minor in nature, there may be concurrence without objection. It usually is the chairman of the committee which originally reported the bill who takes the initiative in securing concurrence without objection.

If the amendments are substantial in nature, the house in which the measure originated may refuse to concur and request a conference. This house will appoint three or more conferees, usually the ranking majority and minority members of the committee which originally reported the measure. If the other house appoints conferees, they likewise will probably be the ranking majority and minority members of the committee which considered the measure. The Senate conferees vote among themselves, and the House conferees vote among themselves, with one final conference vote for each house on each question, so the number of conferees is not important. The conferees are limited in their consideration to those portions of the measure in which there is disagreement. No substantive amendments which do not involve the areas of disagreement may be proposed by the conferees. If there is a difference in amounts in a measure, the conferees are limited to the range between the two amounts passed by the different houses. The measure as agreed upon by the conferees will be reported to each house and usually will be adopted without objection. If either house fails to adopt the conference report, the measure is defeated un-

less there is a further effort to reach an agreement.

The conferees may reconvene several times, with or without instructions from the full bodies, in an effort to reach agreement. After one failure, informal discussions may be held by the conferees in an effort to find a basis for resolution of differences before another formal meeting of the conferees is held. If there is a sharp difference between the views of the houses, the stronger bargaining position ordinarily is held by the house which has the least desire for enactment of the measure.

Upon a resolution of differences by the conferees, a Conference Report is prepared which recites the action taken with respect to each point of disagreement. This recital will state that one house or the other recedes or recedes with amendment. Staff personnel of the committee of each house which initially reported the measure ordinarily attend the conference sessions and prepare the report, with or without assistance of the legislative counsel of one or both houses. The House conferees also prepare, in addition to the committee report, a statement of the House managers which explains the action taken by the conferees. There is no comparable Senate requirement.

It may be observed that there is no mandatory requirement that the conferees ever actually meet, and periods of more than a month have passed without a meeting of conferees.

After a measure has been passed by each house of the Congress, it is presented to the President for his

approval.⁸³ If the President approves the measure, it becomes law. If the President objects to the measure, he may veto it by returning it to the house in which it originated, expressing his objections.⁸⁴ If each house approves the measure by a two-thirds vote after a veto, it becomes law without Presidential approval.⁸⁵ If the President fails to approve or disapprove a measure within ten days after it is presented to him (Sundays excepted), it becomes law without his approval unless the Congress by adjournment prevent its return, in which case it shall not become law. The latter is known as a "pocket veto."

The ten-day period after which a measure is presented to the President for his approval is a busy one. The Bureau of the Budget sends the enrolled enactment to each agency of the executive branch of the Government which may have an interest in it with a request for advice as to the action which the President should take. If an agency recommends a veto, it drafts a veto message for use by the President. Needless to say, the processing of an enrolled enactment is given the high-

est priority within each agency of the executive branch.

XI. LEGISLATIVE PUBLICATIONS AND HISTORY

There are a number of publications designed to provide timely information concerning federal legislative activities, and there are publications necessary to the legislative process which constitute the legislative history of the proposals which become law.

At the beginning of each session of Congress, a *Congressional Directory* is published which includes biographies of the members, committee assignments, principal officials of the executive and judicial branches of the Government, and accredited press representatives. Each house of the Congress publishes a calendar for each day that such house is in session. The calendar lists only those proposals which have been reported by the committees and those which are in conference, although the House calendar additionally gives the legislative history of each proposal which has been reported by a House committee or has been passed by the Senate. Each house is required by the Constitution to keep a journal

⁸³ U.S. Const., Art. I, § 7.

⁸⁴ President Franklin D. Roosevelt, during the twelve years, one month, and eight days which he served, vetoed 631 measures, of which 260 were pocket vetoes. The next largest number was by President Cleveland, who vetoed 584 bills, including 238 pocket vetoes, although a very large number were private pension bills. President Truman vetoed 250 bills (including 70 pocket vetoes), President Hoover vetoed 37, President Coolidge vetoed 50, President Harding vetoed 6, and President Wilson vetoed 44. *Our American Government*, House Doc. No. 394, 86th Cong., 2d Sess. (1960), p. 26.

⁸⁵ From 1789 through 1959, Presidential vetoes were overridden only 72 times. *Id.*, p. 27.

of its proceedings and from time to time publish it except for those parts which may require secrecy,⁸⁶ but the journal includes only a summary of the proceedings.

A stenographic transcript is made of all proceedings in each house and these (except for executive sessions⁸⁷ of the Senate) are published each day in the *Congressional Record*.⁸⁸ There are eight official reporters in the Senate (with an assistant, two clerks, and five expert transcribers) and a like number in the House (with a clerk and eight expert transcribers). The reporters work in short relays and they do not sit at a table but walk about the floor to stand near the one who is speaking as they make their shorthand notes. As soon as a reporter is relieved, he dictates his notes into a mechanical device, they are transcribed, and the member who has spoken is given an opportunity to make minor corrections. By midnight the *Congressional Record* is being printed and the printing requires about two hours. It is delivered early on the morning

following the day of the proceedings reported. It costs the Government about \$80 per page to print the *Congressional Record*, and individuals may subscribe to it.⁸⁹ The cumulative issues of the *Congressional Record* are bound in permanent form and it is the bound volumes, the pagination of which may not always conform to that of the daily issues, which is cited for the legislative history of an act. A new volume number is used for each year, but there may be as many as fifteen or more separately-bound parts for a volume. The *Congressional Record* was established in 1873. Prior to that time, the debates of Congress were reported only in unofficial publications. One of these, the *Congressional Globe*, reported the proceedings of Congress from 1830 until 1873.⁹⁰

The legislative history of a law⁹¹ includes the text of the bill as introduced and any amendments, the transcripts of the hearings, the reports of the committees, the debates in the House and the Senate, and in rare cases, the text of similar

⁸⁶ U.S. Const., Art. I, § 5.

⁸⁷ Executive sessions are to be distinguished from "executive business" of the Senate, such as confirmations of executive appointments and consideration of treaties. These may be considered in open session. "Executive business" is to be distinguished from "legislative business" which is the consideration of measures.

⁸⁸ A private concern, Congressional Record Clippings, Suite 510, 1868 Columbia Road, N.W., Washington 9, D.C., provides a clipping service for those who subscribe to it.

⁸⁹ Government Printing Office, \$1.50 per month.

⁹⁰ For an interesting history of Congressional reporting, see 104 Cong. Rec. A1623 (1958).

⁹¹ See Finley, *Crystal Gazing: The Problem of Legislative History*, 45 Amer. Bar Assn. Jour. 1281 (1959).

bills which have been introduced. The courts may consider legislative history an important factor in determining the interpretation which should be given a law,⁹² although an eminent jurist expressed the opinion that resort to legislative history is only justified where the face of an act is inescapably ambiguous, and then it should be limited to the committee reports since the President, in approving a measure is not assumed to endorse the entire *Congressional Record*.⁹³

One who has a legitimate need for a bill which has been introduced usually may obtain a copy of it from the committee to which it has been referred. The same is true of the committee report and a transcript

of the testimony taken by the committee if it is printed (although in many cases there will be no printed transcript). The Legislative Reference Service of the Library of Congress issues a *Digest of Public General Bills and Selected Resolutions* with about five cumulative issues each session and supplements about once each two weeks between cumulative issues.⁹⁴ Commerce Clearing House⁹⁵ publishes the *Congressional Index*, a loose-leaf service with weekly supplements, which includes a digest of each measure introduced, its status, the voting records of individual Members of Congress, a weekly summary of Congressional activities, and a subject index of each measure introduced.⁹⁶ West Publish-

⁹² *E.g.*, United States v. St. Paul, Minneapolis & Manitoba Railway Co., 247 U.S. 310 (1918), remarks of a committee chairman; Wright v. Vinton Branch, 300 U.S. 440 (1937), a committee report; Federal Trade Commission v. Raladam Co., 283 U.S. 643 (1931), the floor debate; and Helvering v. Twin Bell Oil Syndicate, 293 U.S. 312 (1934), reference to prior legislation. Also see Moorehead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 Amer. Bar Assn. Jour. 1314 (1959).

⁹³ Mr. Justice Jackson in a concurring opinion in *Schwegmann Bros. v. Calvert Corp.* 341 U.S. 384, 396-397 (1951), in which he also said: "Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. * * * Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country."

⁹⁴ Government Printing Office, \$10 per session.

⁹⁵ 425 13th St., N.W., Washington 4, D. C.

⁹⁶ A weekly report of Congressional activities is issued to its subscribers by Congressional Quarterly, 1156 19th St., N.W., Washington 6, D. C.

ing Company⁹⁷ publishes the *U. S. Code Congressional and Administrative News* twice monthly while Congress is in session, cumulated in bound volumes at the end of the session, which includes the text of each law enacted and the principal committee reports.

A public law is given a numerical designation by the National Archives and Records Service. Prior to 1957, the designation was, for example, Public Law 145, 84th Congress, which indicated that it was the one hundred and forty-fifth public law enacted by that Congress. Since the beginning of the 85th Congress in 1958, the designation has included the numerical designation of the Congress followed by a hyphen and the number of the law, such as Public Law 85-143. A public law first is issued as a "slip law," with a separate pamphlet for each law. At the end of a session of Congress, laws enacted during that session are issued in bound volumes, with one volume for public laws (sometimes in two or more parts, or separate bindings) and another for private laws. These volumes are entitled *Statutes at Large* and provide the official reference to a law. The public laws of a general and permanent nature are compiled by the National Archives and Records Service and published by the Government Printing Office in the *United States Code* which is

in fifty titles according to subject. Only fifteen of the fifty titles thus far have been enacted into positive law, but the process of preparing other titles for enactment is continuing. A new edition of the *United States Code* is published every six years with a cumulative supplement after each regular session of Congress.

An individual or library desiring to receive all Congressional material may subscribe to it, by session of Congress, from the Government Printing Office. There are various classes of subscriptions, such as all public bills, all private bills, all reports of public bills, all reports of private bills, all printed transcripts of hearings, all Senate and House documents and all slip laws. One desiring to subscribe must make a deposit at the beginning of the session in an amount which will cover the average cost; he is charged for the actual cost, however, which may be less or greater than his deposit. The cost for all subscriptions during a session of Congress is considerably in excess of \$1,000. One wishing to purchase an individual report or document may do so only if it has been printed in sufficient quantity for sale to the public, although an advance order may be placed before the printing if one wishes to insure that he will receive it.

⁹⁷ 50 Kellogg Blvd., St. Paul 2, Minn.

THE 1960 ANNUAL MEETING

The Annual Meeting of the Association was held in the United States Court of Military Appeals at Washington, D. C., on August 30, 1960. About 150 of the members were present.

Captain Robert G. Burke, USNR, of New York City, presided. After the usual reports, Captain Burke called upon Associate Judge Homer Ferguson who welcomed the members of the Association to the Court House and expressed pleasure that so many people have a continuing interest in the field of military justice. He commended the Association for its help in keeping that interest alive. He reported that the Court is current with its docket and that actually the number of cases coming to the Court for review has been declining. The reasons Judge Ferguson assigned for this reduced work load were: First, cases are tried better in the courts below; second, administrative separations are eliminating from the Services many unsuitable persons who are chronic offenders; third, the use by the Army and Navy of negotiated pleas has reduced the possibility of reviewable error; and fourth, the Army's Law Officer Program resulting in the establishment of a Military Field Judiciary has had the effect of eliminating much trial error. Judge Ferguson expressed concern about the adequacy of the protection afforded the soldier administratively discharged because such discharges are often, in the popular mind, considered to be punitive.

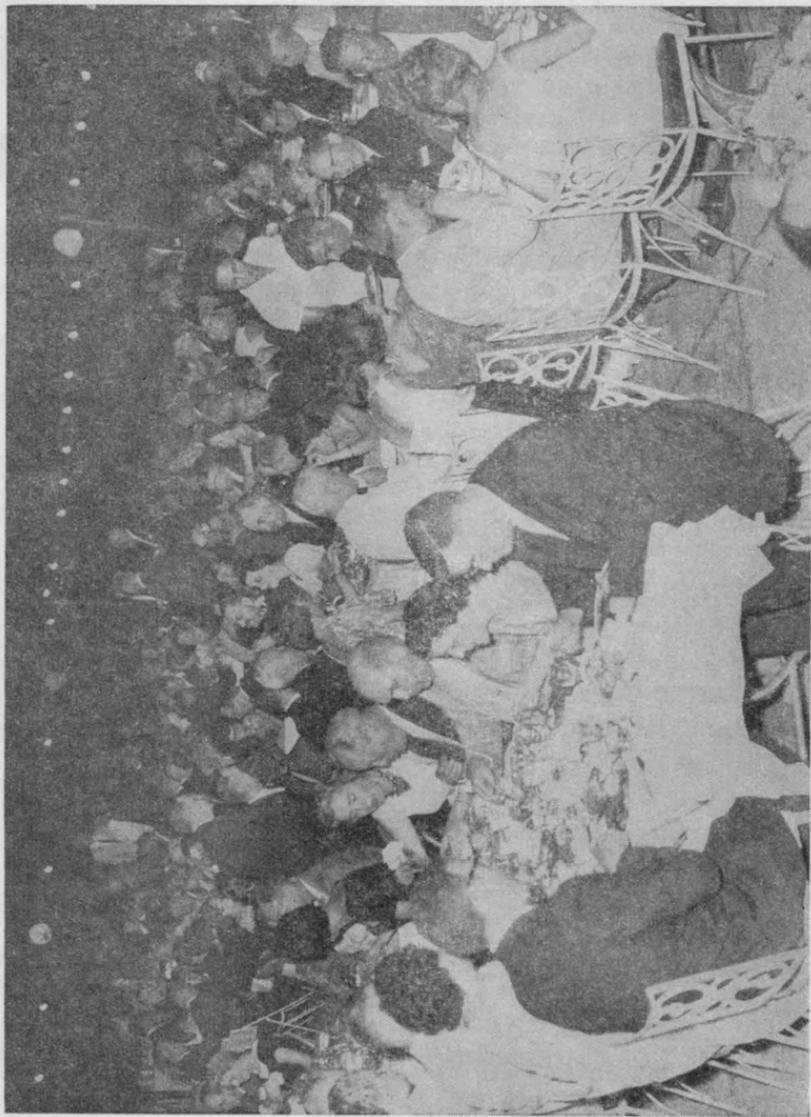
Judge Ferguson pointed out that young lawyers in the Services are trying tremendously important criminal cases. While the Trial Counsel has the assistance of a Staff Judge Advocate and his entire staff, the Defense Counsel usually is without the benefit of senior counsel and is completely on his own. He urged that the Services might consider a program for the special training of Defense Counsel along the lines of the Army's Law Officer Program. He closed his remarks with a quotation from General Lemnitzer to the effect that the Armed Services and the American people should take pride in the positive strides taken in the administration of military justice which have brought our troops to the highest state of discipline in their history.

The Judge Advocates General of each of the Services also made brief reports concerning their offices, progress and problems.

One of the interesting items of discussion raised from the floor of the meeting was the Connally Amendment under which the United States reserved its right to determine what causes, if any, it will submit to the jurisdiction of the International Court of Justice at the Hague. The American Bar Association had heretofore opposed the Connally Amendment and that matter was again before the House of Delegates. After some heated and well considered debate on the floor, the membership of the Association passed a resolution to support the repeal of



The 1960 Annual Banquet: A view of the veranda at Bolling A.F.B. Officers' Club showing some of the members and guests.



The 1960 Annual Banquet: A group of some of those attending.

the Connally Amendment and to support the adoption by the House of Delegates of ABA of the Rhyne Report.

At the conclusion of the meeting, the report of the Board of Tellers was read and the following persons were announced to have been elected to their respective offices:

PRESIDENT

Maj. Gen. Reginald C. Harmon,
USAF, Ret., Virginia

FIRST VICE PRESIDENT

Maj. Gen. E. M. Brannon, USA, Ret.,
District of Columbia

SECOND VICE PRESIDENT

Cdr. F. R. Bolton, USNR, Michigan

SECRETARY

Cdr. Penrose L. Albright, USNR,
Virginia

TREASURER

Col. C. A. Sheldon, USAF, Ret.,
District of Columbia

DELEGATE TO ABA

Col. John Ritchie, III, USAR, Illinois

BOARD OF DIRECTORS

Army:

Maj. Gen. George W. Hickman, USA,
D. C.

Brig. Gen. Charles L. Decker, USA,
D. C.

Col. Ralph W. Yarborough, USAR,
Tex.

Col. Joseph A. Avery, USAR, Ret.,
Va.

Col. Osmer C. Fitts, USAR, Vt.

Lt. Col. John H. Finger, USAR, Cal.

Maj. Gen. S. W. Jones, USA, Va.

Brig. Gen. Clio E. Straight, USA,
Va.

Col. James Garnett, USA, Va.

Lt. Col. Joseph F. O'Connell, USAR,
Mass.

Col. Gordon Simpson, USAR, Tex.

Col. Alexander Pirnie, USAR, N.Y.

Navy:

Col. J. Fielding Jones, USMCR, Va.

R. Adm. William C. Mott, USN, Md.

Capt. Robert A. Fitch, USN, Va.

Air Force:

Brig. Gen. Herbert M. Kidner,
USAF, Ret., Penna.

Maj. Gen. Albert M. Kuhfeld, USAF,
Va.

Maj. Gen. Moody R. Tidwell, USAF,
Va.

Col. Fred Wade, USAFR, Ret.,
Penna.

Lt. Col. Perry H. Burnham, USAF,
Colo.

General Harmon was then introduced by Captain Burke. General Harmon stated that the Association needs an expanded membership if it is to be effective and that there must be a program outlined which will give the organization a real mission and a challenge. He promised to outline a program on both of these matters very promptly.

The annual dinner was held at the Bolling Air Force Base Officers' Club on the evening of August 30. Over 450 members of the Association and their guests were present for cocktails and supper. The guest speaker on that occasion was Mr. Raymond Burr, television's "Perry Mason".

The Association also presented its Citation of Merit to Rear Admiral Chester Ward, the retiring Judge Advocate General of the Navy.

THE \$2500 LIMITATION ON ADMINISTRATIVE SETTLEMENTS UNDER FTCA -- GOOD OR BAD?

By Colonel Robert M. Williams and 1st Lt. Robert G. Petree *

The Army has a special and continuing interest in the administrative settlement of claims under the Federal Tort Claims Act.¹ Its operations extend throughout the nation and its activities affect the lives and property of all the citizens. The Army has long recognized that the prompt settlement of Army generated tort claims is essential to accomplishment of its mission. If the public is provided prompt compensation for losses suffered because of the negligence or other wrongs of its personnel, the Army receives a corresponding benefit in the form of a favorable public attitude toward continuation of its essential military functions.

The Army's experience over the fourteen years since the Federal Tort Claims Act became law has clearly demonstrated that numerous advantages result for both the claimant and the government through the administrative settlement of claims. At the same time, this experience has shown that the benefits received have been unnecessarily limited by two factors. First, there is a seeming reluctance of members of the bar to employ the administrative procedures of the Act and to resort, instead, to court action. Second, the monetary

limitation imposed on administrative settlement is inappropriately low. Although this limitation was recently raised by the 86th Congress from \$1,000 to \$2,500, it still remains unrealistic.

We believe that attorneys have reason to employ the administrative process whenever possible, for it provides simple, speedy settlements of professional quality. We believe, further, that the limitation on administrative settlement should be raised from \$2,500 to \$5,000. These conclusions are believed justified by the following brief consideration of the procedural steps in the settlement of a claim, the requirements imposed upon a claimant and his attorney, the manner of adjudication of the merits of a claim, and the effect of the maximum limitation of \$2,500.

PROCEDURES

Though the Federal Tort Claims Act specifically provides for the administrative adjustment of claims, it does not provide the details by which the adjustments shall be made. The head of each federal agency provides the procedures by which he will "consider, ascertain, adjust, determine and settle"² the claims which his agency generates. The

* Of the Claims Division, Office of The Judge Advocate General of the Army.

¹ 28 U.S.C. 2671-2680 (1958)

² 28 U.S.C. 2672 (1958)

procedures must conform to the statutory provisions relating to the submission and withdrawal of a claim, the basis of liability of the United States, and the provisions for conclusiveness of an administrative determination and award which is accepted by a claimant. The manner in which the Army settles claims generated by its activities is one example of the type of procedures established by all federal agencies. The outstanding feature of the process is its simplicity.

The administrative procedures prescribed for the claimant who has suffered a loss through the negligence or other wrongful act of Army personnel are contained in Army Regulations 25-20 and 25-30.³ The requirements are simplicity itself. The claimant need only provide the information required by Bureau of the Budget Form 95 and file it with the claims officer at the nearest military installation.

The absence of a requirement for filing of the claim with a specified claims officer in a specific location is characteristic of the simplicity of the process. The claims officer of the nearest military installation will furnish forms on request and receive any claim submitted. If the claim arose at his station, he will investigate the circumstances and forward the claim for adjudication. If it arose at a distant location, he will forward it to the proper command where the investigation and adjudication will be made.

Where complicated issues of fact or law are involved, the claimant may seek the assistance of an attorney. A working knowledge of the Federal Tort Claims Act will enable the attorney to recognize these issues and present a properly documented claim. Ordinarily a showing of the following suffices: (1) a loss was caused, (2) by a member of the Army establishment acting within the scope of his employment, (3) the act causing the loss was negligent or wrongful according to the law of the place where the incident occurred, and (4) demand for compensation is made for an amount within the prescribed limitation—presently \$2,500. An administrative claim filed in excess of this amount may not be considered.

Great flexibility of procedure is enjoyed by a claimant under the administrative settlement provisions of the Act. The submission of a claim does not bind the claimant to await either the full processing of the claim or to accept any award which may be offered. The claim may be withdrawn from consideration upon fifteen days' written notice. Thereafter the claimant is free to bring suit against the United States in the district court. If a claimant is unwilling to accept an award tendered or if his claim is disapproved, he may bring suit in the district court. A claimant need not hesitate to file administratively for fear that administrative delays will extend beyond the 2-year period

³ 24 Fed. Reg. 8676-8679 (1959), amending 32 C.F.R. 536 (1959), AR 25-20; and 24 Fed. Reg. 8904-8905 (1959), amending 32 C.F.R. 536.29 (1959), AR 25-30.

of limitations for he has six months from the date of withdrawal of the claim or from the date of mailing of notice by the agency concerned of final disposition of the claim in which to bring suit. A claimant is bound, however, in any subsequent suit based on the same facts to the amount of his administrative claim.

The few administrative requirements imposed upon the claimant and his attorney contrast sharply with the complex procedures required for the initiation and prosecution to judgment or compromise of a suit against the United States. The attorney's fee permitted in administrative settlements of \$500 or more is 10%; the fee in judicial actions is 20%.⁴ It is an understatement to assert that the additional 10% fee is no measure of the difference in time and effort required by the two procedures.

ADJUDICATION

The adjudication of claims by the Army is in the hands of lawyers. It is the function of a world-wide claims organization made up of legally trained personnel under the supervision of The Judge Advocate General of the Army. This organization is superimposed upon the existing command structure of the Army, and its personnel are members of the units they serve. In the accomplishment of the administrative settlement of claims, however, they are linked by direct channels of communication and act under the exclusive direction of The Judge Advocate General.

The budgeting for amounts required in the settlement of claims, the standards of training of claims personnel, the selection and assignment of judge advocates as approving authorities, the professional standards and policies governing adjudication, and the review of all settlements for conformance with the applicable statutes and court decisions are accomplished within this organization. The Chief of the Claims Division in the Office of The Judge Advocate General, heads up the world-wide claims organization and assures that the adjudication function is accomplished in accordance with legal requirements, professional standards, and administrative policies of The Judge Advocate General and the Secretary of the Army.

The Secretary of the Army has delegated the power to approve tort claims to every command in which there is a judge advocate (an officer of the Judge Advocate General's Corps), and to certain officers of the Corps of Engineers. In this country there are 103 approving authorities currently authorized. Where the commander exercises general court-martial jurisdiction, he and his staff judge advocate have authority to approve payments up to \$1,000 in amount. Certain officers of the Corps of Engineers have similar authority. Smaller commands which have judge advocates on the staff are delegated authority to approve payments up to \$500.

The larger claims, those in which the amount payable exceeds \$1,000,

⁴ 28 U.S.C. 2678 (1958)

receive special treatment in keeping with the amount involved. These claims, after investigation has been completed, are forwarded for adjudication by the Chief of the Claims Division. A legal study (Memorandum Opinion), prepared by the judge advocate of the command in which the claim arose, accompanies the file. This Memorandum Opinion sets forth facts and applicable law as determined by the judge advocate, and his reasoned opinion as to the merits of the claim. The Chief of the Claims Division takes action not only on all claims involving payments of over \$1,000, but also on all claims forwarded from field approving authorities with a recommendation that the claim be denied or paid in a lesser amount than the claimant is willing to accept.

The adjudication of the merits of an administrative claim is based upon the same legal considerations which would be applied by a court. Liability of the United States is predicated upon an "injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . .",⁵ and both procedures look to the law of the place where the incident occurred to define the acts or omissions which are wrongful. The exceptions to liability⁶ afforded the government in a court action apply equally to an administrative settlement.

The adjudication by an approving authority is in every sense a judicial

act. The judge advocate, a trained attorney and a member of the bar, weighs and considers the evidence in the light of the law and precedents of the jurisdiction in which the claim arose. His function parallels that of the judge of the district court where the claimant has the alternative of presenting his demand. His conclusions as to the liability of the United States and the amount of damages are binding upon the government. His adjudications, however, must be based upon credible evidence contained in the claim file, for he has no power to compromise the claim.

The conclusive quality of an administrative settlement of a claim has a dual aspect. It is final and conclusive on all officers of the government, unless procured by fraud, and, if accepted by the claimant, constitutes a full and complete release of the government as well as the employee whose conduct gave rise to the claim.

The Chief of the Claims Division, in addition to his active role in the settlement of claims, audits each of the claims settled by other approving authorities. His review assures that settlements are made according to the provisions of the statute and decisions of state and federal courts. Where errors are discovered, the erring approving authorities are advised. Selected opinions on claims settlements regarded as significant and of general interest to all approving authorities are digested and published in the periodic *Judge Ad-*

⁵ 28 U.S.C. 2672 (1958)

⁶ 28 U.S.C. 2680 (1958)

*vocate Legal Service*⁷ and in the *Digest of Opinions—The Judge Advocates General of the Armed Forces*.⁸

The adjudication and determination of the merits of a claim by the Chief of the Claims Division usually terminates the administrative process. The regulations provide for an appeal to the Secretary of the Army from an adverse decision on a claim, but few claimants avail themselves of the opportunity.⁹ When an appeal is taken, a Memorandum Opinion of The Judge Advocate General accompanies the file and recommends the action believed appropriate. The Secretary of the Army reviews the entire file and his decision represents a "final determination" of the matter.

An important restriction is imposed on all approving authorities where there is a potential companion claim which may result in litigation. The regulations provide that no claim will be settled when a claim arising from the same incident will be litigated.¹⁰ Although the statute provides that evidence of an administrative settlement shall not be "competent evidence of liability or amount of damage",¹¹ where litigation is possible or probable, no claim is administratively settled except

with the concurrence of the Department of Justice.

Although thoroughness of investigation is stressed and legally qualified officers give careful consideration to each claim, Army experience as to the time required for the administrative settlement of claims is remarkable when compared to the time required for judicial determinations. In its consideration of the recent amendment of the Federal Tort Claims Act which raised the limit on administrative settlement from \$1,000 to \$2,500, the Senate Judiciary Committee reported delays in litigation in the district courts extending to 4 and 5 years. In the six months beginning November 1, 1959 and extending through April 30, 1960, the average time required from filing to payment by field approving authorities of 689 claims in amounts of \$1,000 or less was 37.6 days. For the same period the average settlement time required for 75 claims settled by the Chief of the Claims Division was 142 days.

The \$2,500 LIMITATION

There has been controversy over the monetary limitation on administrative settlements ever since the enactment in 1946 of the Federal

⁷ DA Pam. 27-101 series

⁸ Vols. 1-8, *Digest of Opinions of The Judge Advocates General of the Armed Forces*, Lawyers Cooperative Publishing Co.

⁹ In the 5 years 1955 through 1959, the Army administratively processed a total of 10,240 Federal Tort Claims Act claims. Of that number only 380 were appealed to the Secretary of the Army.

¹⁰ Par. 17c, AR 25-20, 1 October 1959

¹¹ 28 U.S.C. 2675(c) (1958)

Tort Claims Act. Originally set at \$1,000, the limitation was raised to \$2,500 in 1959. The report of the Senate Judiciary Committee which considered this amendment noted, as factors supporting the need for increasing the settlement limit, rising costs associated with personal injuries and rising costs of material and labor in replacing or repairing late model automobiles. These cost factors were observed to force the claimant to institute suit in the federal courts rather than accept administrative settlements of less than \$1,000. This increase in cases on already crowded court dockets in turn increased the delays in all suits before those courts.

Statistics¹² show that an approximately equal number of cases would be removed from the court dockets by increasing the limitation from \$2,500 to \$5,000 as was removed by the recent increase from \$1,000 to \$2,500. Here, then, is a certain way to ease to a degree the burden on the crowded dockets of the district courts. This result, however, is only an incidental and indirect benefit accompanying the larger gains which would be afforded claimants and their attorneys by the increased availability of the simple, speedy, and highly professional administrative settlement.

If the limitation were increased from \$2,500 to \$5,000, a large number of the cases now filed for more than \$5,000 would probably be reduced and made the subject of ad-

ministrative claims. This step would require a more realistic appraisal by attorneys of the damages capable of proof. There is ample reason to believe this can be accomplished. The recent experience in compromise settlements made in suits generated by Army operations is pertinent. Since 1956 there have been 291 suits which have been compromised varying in the amounts claimed from \$1,500 to over \$100,000. The average compromise settlement was \$3,907.80. If the administrative settlement limitation were set at \$5,000, many such suits would become administrative claims, reducing further the burden of the district courts.

CONCLUSION

The conclusion to be drawn seems clear. Army experience in the years since the enactment of the Federal Tort Claims Act demonstrates that an increase in the administrative settlement limitation of \$5,000 offers benefits to claimants and their attorneys, to the government, and to the courts. The principal advantages will inure to claimants and their attorneys who will be afforded simple, speedy settlements of claims which now must be the subject of suits. Since experienced attorneys, officers of the Judge Advocate General's Corps, are charged with the duty of adjudication of the claims, the settlements by the Army will be of a professional caliber in every sense comparable to the results reasonably obtainable by court action.

¹² Statistics supplied by the Administrative Office of the United States Courts.

For its part, the United States will be required to defend fewer law suits and the Army will reap the incidental favorable public reaction generated by more prompt settlement of meritorious claims. Finally, the

United States District Courts will be the recipient of benefits in the form of reduced dockets affording more time for the trial of cases for which no adequate alternative to court action exists.



HONORARY MEMBERS

Over the years, the Association has designated eleven persons as honorary members of the Judge Advocates Association. They are: Major General Myron G. Cramer, Major General Thomas H. Green, Major General Hubert D. Hoover, Major General Eugene M. Caffey, Admiral Chester Ward, Chief Judge Robert

E. Quinn, Judge George W. Latimer, Judge Homer Ferguson, Major General E. M. Brannon, Major General R. C. Harmon and Rear Admiral Oswald S. Colclough. Notwithstanding their honorary membership, the last three named are also dues paying members in good standing.

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



Annual Banquet 1960: A part of the head table—left to right: Mrs. Ferguson, Mr. Burr, Capt. Burke, Judge Ferguson, Mrs. Hickman, Gen. Hickman, Mrs. Hickman.

THE 1961 ANNUAL MEETING

The JAA will have its annual meeting and banquet in St. Louis, Missouri on August 8, 1961, during the week of the annual meeting of

ABA. Major Philip A. Maxeiner of the St. Louis bar has been named chairman of the committee on arrangements.



In Memoriam

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

Major Merl A. Barns of Fort Wayne, Indiana
Colonel Grenville Beardsley, who prior to his death was Attorney
General of Illinois
Colonel Sol J. Chasoff of Kearney, New Jersey
Major Willard B. Cowles of Lincoln, Nebraska
Colonel Aaron A. Melniker of Jersey City, New Jersey
Colonel David S. Meredith, Jr. of Long View, Texas
Major L. Sanford Schwing of Houston, Texas
Cmdr. William E. Seidensticker of Chicago, Illinois
Colonel Leonard J. Sheahan of Silver Spring, Maryland
Lt. Col. Harry M. Smith of New York, New York
Colonel John H. Sweberg of Rhinelander, Wisconsin



Annual Banquet 1960: A part of the head table—left to right: Gen. Kuhfeld, Mrs. Yarborough, Adm. Ward, Mrs. Harmon, Capt. Powers.

HOW GUILTY IS GUILTY?

By Colonel Jean F. Rydstrom, USAF

How much reliance can be placed on an accused's plea of guilty before a court-martial? In the early leading case of *United States v. Lucas*, the United States Court of Military Appeals found no prejudice to accused in several flagrant procedural errors made at trial because, in the words of Judge Latimer,

"A plea of guilty is a confession of guilt and equivalent to conviction. It removes from the trier of the fact any question of innocence or guilt. If the plea is regularly made there remains only the requirement by the court of imposing an appropriate sentence." (*United States v. Lucas*, 1 USCMA 19 1 CMR 19, 23).

The late Judge Brosman and Chief Judge Quinn concurred without reservation.

This rule of law for courts-martial has been relied upon in difficult cases and frequently cited by reviewing

authorities of the armed forces ever since it was announced, but can they continue to rely upon it? I think not, because the United States Court of Military Appeals has, through a change in membership and in basic philosophy, shown an increasing disbelief in the principle underlying the *Lucas* case.¹

The Court has already come "full circle" in denying the validity of an otherwise unimpeachable guilty plea when a hint of improvidence in the plea can be construed to exist in the accused's favor. No matter what the source of the hint, the Court will now accept it, set aside the guilty plea, and order a rehearing.

I reach this unhappy conclusion after assessing, in the light of prior decisions, the thinking of the members of the Court reflected in their decision of *United States v. McCoy*, 12 USCMA 68, 30 CMR 68, decided 16 December 1960. In that case accused

¹ Upon Judge Brosman's untimely demise in 1955, Homer Ferguson was appointed a Judge of the Court, and "the law" soon began to change despite yeoman efforts of Judge Latimer to hold the line with reasonable precedents. This occurred in many areas where the philosophy might have been *stare decisis*, and is suggested in a case close to the subject under discussion: *United States v. Cruz*, 10 USCMA 458, 28 CMR 24.

That case raised the same problem which had been considered in the early *Lucas* case: the court made no findings of guilty after a guilty plea. The Chief Judge joined with Judge Latimer in reaffirming the validity of the *Lucas* rule but, as appellate defense counsel apparently anticipated in re-arguing a well-settled point of law, Judge Ferguson dissented. He would have affirmed the decision of the Board of Review that this procedural error materially prejudiced the substantial rights of accused despite the valid plea of guilty.

pleaded guilty to wilful disobedience and adhered to his plea after its meaning and effect were fully explained. After he had been found guilty he made an *unsworn* statement, hoping to mitigate the punishment which the court might impose on him; in his own self-serving narration of the facts extenuating the offense was a not-surprising suggestion of oppressive circumstances which had caused him to disobey the order.²

From this, Judge Ferguson concluded "we are certain" the order was illegal, hence the statement "demonstrated the improvidence" of the plea, and a rehearing was required. Judge Latimer concurred in this result, and the Chief Judge differed only in suggesting the rehearing be initially limited to the sentence. Neither disagreed with the author judge that the unsworn statement raised a question of improvidence of the plea.³

In setting aside this plea of guilty which had removed "from the trier of fact any question of innocence or

guilt," the Court relied on an *unsworn* statement which was "not evidence" for the court-martial to consider (MCM, 1951, par. 75c(2)). In another decision rendered the same date, the Court affirmed the right of an accused to make an unsworn statement on which "cross-examination is not permitted and court members are not allowed to interrogate him," citing with approval the same paragraph of the Manual for Courts-Martial which says such a statement is not evidence (United States v. King, 12 USCMA 71, 30 CMR 71).

Thus, a self-serving statement in mitigation in which an accused can lie with impunity—because not sworn and not subject to cross-examination—has become sufficient to overturn a judicial confession of guilt. It is the Court's unanimous decision that a hint such as this, which is not evidence at the trial level, suffices on appellate review to overturn a guilty plea. From it, I must conclude the time has come when, as a practical matter, a guilty plea places

² A second point at issue in the case (requiring only a rehearing on the sentence) was advice to the Court at this rehearing of the sentence imposed at the first trial. At one time, Judge Latimer had consistently disagreed with the majority that this was error, but had previously conceded the majority's views to have become the law of the Court (United States v. Eschmann, 11 USCMA 64, 28 CMR 288, 292).

³ It is interesting to note that a change of one word in accused's unsworn statement could have changed the result in this case. Accused said—without cross-examination, of course—that he was given 14 *hours'* extra duty at most as nonjudicial punishment, and his troubles started in the 19th and 20th hours of performance. He could have been given 14 *days'* extra duty, in which case the reference to the 19th hour of performance would not have excited the attention of the members of the Court. Even if the latter were the truth, one can understand counsel's failure to make an issue of accused's misstatement at the trial, knowing that he had already pleaded guilty and this was an unsworn statement in mitigation on which he could not be cross-examined.

upon the government, at trial level, the burden of proving beyond peradventure of post-trial attack that accused's plea was providently entered.

This decision almost completes the devastation of the *Lucas* rule as a general principle, but perhaps the decision was to have been expected. In the early case of *United States v. Messenger*, 2 USCMA 21, 6 CMR 21, accused had pleaded guilty to larceny of property of a certain value, but produced *sworn testimony* minimizing the value of the property stolen. Under the "old rule," the Court united in reversing the Board of Review which had held accused's plea of guilty to the alleged value fatally inconsistent with the evidence of a different value.

This problem was next considered in *United States v. Kitchen*, 5 USCMA 541, 18 CMR 165, where the Chief Judge showed the later bent of his views. He joined with Judge Brosman in determining that a guilty plea to absence without leave should have been withdrawn by the law officer because, in accused's *sworn testimony* presented prior to findings, he maintained he had been gone for a shorter period. Judge Latimer dissented vigorously in the terms which have, until today, marked his views on guilty pleas:

"Apparently I take a tighter view of pleas of guilty than do my associates, but in my opinion they

have a solemnity, dignity, and degree of finality which ought to prevent their being discarded on the slightest pretense or provocation. Most courts require a showing that the plea was inadvertent and at least some assertion that the accused has a defense to the crime he admits before action is taken. . . . In the military, as in the civilian sphere, every self-serving statement made by the accused in extenuation, presented in a light most favorable to him, should not require a law officer at his peril to gamble on the finality of the plea." (p 172).

The next landmark case was *United States v. Hood*, 9 USCMA 558, 26 CMR 338 (after an indicative decision in *United States v. Welker*, 8 USCMA 647, 25 CMR 151). This was remarkable in that accused had pleaded guilty at trial in regular fashion but then filed *his own affidavit* with the Court, averring his innocence and blaming his counsel for his guilty plea. His plea was ultimately determined by the Court not to have been improvident, but the gyrations it went through to test his post-trial statement were astonishing, the Court permitting the filing of numerous affidavits and even going to the extreme length of calling the affiants to hear personal testimony from each.⁴

⁴I would have supposed this incident with Hood whom the Court heard and saw "grounded on the shoals of his own misrepresentations" might have forcibly demonstrated what working-level staff judge advocates have learned: accused (with a new defense counsel on appeal, provided at no expense)

(Footnote continued on page 52)

This case should be especially remarked for two points: it showed the Court permitting an attack on a guilty plea to be launched for the first time by post-trial averments, and these found entirely in accused's own unsupported assertions. In previous cases the question of providence of the plea had been raised because of evidence presented at trial level. Up to the time of the Hood decision in late 1958, it was rare for an accused to question successfully pleas of guilty regularly entered in court. After the Hood decision, the popularity of this legal sport increased immensely.⁵

The line having been breached, the next attack upon the validity of a guilty plea occurred because of an accused's unsworn statement in a post-trial interview with a staff judge advocate (*United States v. Lemieux*, 10 USCMA 10, 27 CMR 84). Without questioning the reliability of such statements to impeach

a guilty plea and verdict, the Chief Judge concurred with Judge Ferguson's statement:

"Had the facts which the accused disclosed to the staff judge advocate properly disclosed the elements of a common-law marriage, we would have no hesitancy in holding accused's guilty plea to be improvident." (p. 86).

Judge Latimer included a *caveat*:

"I elect to reserve my ruling on the use of unsworn and self-serving statements of an accused to undercut his plea of guilty merely because they are recorded in a staff judge advocate's review."

The next step in the dissolution of the guilty plea occurred in *United States v. Epperson*, 10 USCMA 582, 28 CMR 148. Whereas previous decisions appear to have tacitly assumed that accused's "evidence,"

will go to any lengths to avoid conviction. Second thoughts on an earlier plan of defense are easy to have when the immediate danger is past: there is nothing to lose and, too often, there is much to gain.

In my own experience, I have never known an airman's case to be referred to trial when the government could not produce the evidence required, nor even when he had a technical, but valid, defense. In short, whatever the inducement offered accused in terms of maximum sentence for pleading guilty, I have never seen the government gain a conviction it could not, barring some fluke unforeseen by either side, have gained anyway. The *only* advantage gained by the government in a guilty plea case exists in terms of time and effort saved, both of which we have in plenty for the airman "from Missouri."

⁵ Earlier in the same year the famous case on failure to pay gambling debts was decided, overturning decades of military law (*United States v. Lenton*, 8 USCMA 690, 25 CMR 194). On the point here at issue, Judge Latimer said:

"... My point of departure in this instance arises out of the principle that a judicial confession may be treated so lightly that a puffing unsworn statement in mitigation or a comment found in a staff judge advocate's pretrial advice can be seized upon to reject a plea of guilty." (*ibid.*, p. 198).

whatever its form, must show improvidence of his plea, in the Epperon case Judge Ferguson stated:

"Where doubt exists concerning the propriety of an accused's plea, it is proper that the issue be resolved in his favor." (p. 150).

This step was, of course, vigorously opposed by Judge Latimer:

". . . A plea of guilty should not be set aside on appeal unless it appears clearly that it was improvident and here the principal opinion concedes that the posture of the post-trial statement leaves the issue in doubt. Under well-settled law that sort of showing does not justify a holding. . . ." of improvidence. (p. 151).⁶

The position that each Judge might have been expected to take in future cases was set out in *United States v. Brown*, 11 USCMA 207, 29 CMR 23. Accused had pleaded guilty to stealing a radio but, in his unsworn rebuttal to the convening authority's synopsis of the case, he explained his

possession of the radio. The Board of Review found his plea of guilty to larceny improvident in view of his explanation, the government (mistakenly?) conceding error in this respect. In affirming the conviction, Judge Latimer reiterated his view that improvidence should be found in *evidence*, or something closely akin thereto, and a plea should not be set aside in appellate channels

". . . except upon a strong and convincing showing of the deprivation of a legal right by extrinsic causes; certainly not merely by an *ex parte* unsworn statement setting out facts which could have been questioned had there been an opportunity at trial."

The Chief Judge, in affirming the conviction, simply compared the facts admitted by plea with accused's unsworn assertions in rebuttal, as though they were of comparable reliability. Judge Ferguson found a palpable conflict in law between the plea and the rebuttal.⁷

⁶ At this point, all Judges still agree that a plea of guilty eliminates the need for instructions on the elements of a lesser included offense (*United States v. Thompson*, 11 USCMA 5, 28 CMR 229). and that a plea of guilty cannot be changed at a rehearing on the sentence without a clear showing of entitlement to relief (*United States v. Kepperling*, 11 USCMA 280, 29 CMR 96).

⁷ The same individual approach to this problem may be noted in *United States v. Clay*, 11 USCMA 422, 29 CMR 238, and in *United States v. Miles*, 11 USCMA 622, 29 CMR 438, both decided at about this time.

All Judges yet agree that a plea is not improvident because accused does not understand its entire legal effect. In *United States v. Pajak*, 11 USCMA 686, 29 CMR 502, accused claimed his plea was improvident because he did not realize what effect the "Hiss Act" (68 Stat 1142, 5 USC, Sec 2281 *et seq*) might have upon his retirement pay if convicted of the offense to which he pleaded guilty. The Court pointed out that Act had no bearing whatever upon the substance of the acts charged to him to which he pleaded guilty.

Nevertheless, a misconception of the law concerning the evidence necessary to prove an offense charged will render a plea improvident (*United States v. Fernengl*, 11 USCMA 535, 29 CMR 351).

Then came the decision in the McCoy case discussed above: all Judges agreed that an unsworn statement in mitigation nullified an otherwise valid plea of guilty. Having observed that a determination of improvidence of a guilty plea can be based upon any self-serving statement of an accused, made at any time and under any circumstances following findings of guilty, we must conclude affirmative action is necessary to insulate our cases from such collateral attack. It is this conclusion which forced me to say at the outset the burden of proving providence of a guilty plea has now shifted to the government at the trial level.⁸

What measures are open to the armed forces short of refusing all guilty pleas? Judge Ferguson has suggested:

"While the Manual for Courts-Martial, United States, 1951, purports to implement the Congressional purpose by providing advice to be used in the event of a plea of guilty, see Manual, supra, Appendix 8, page 509, I believe it fails to achieve the desired result. Accordingly, I suggest that the officers charged with that duty in courts-martial interrogate the accused upon his plea in simple, non-technical language and determine if he understands it in fact, admits the allegations involved in the specifications, and that he is plead-

ing guilty because he is in fact guilty. An extended examination of the accused along these lines insures providence upon the record and gives the lie to his later claims of impropriety." (United States v. Brown, above, at p. 31).

This is surely an excellent rule, but plainly it is not enough. In the later case of United States v. Watkins, 11 USCMA 611, 29 CMR 427, the law officer went to extraordinary lengths in interrogating accused and his counsel before he would accept a guilty plea, even pointing out possibly valid defenses. From the report of the case, it seems that the law officer did everything suggested in the rule of correct procedure which Judge Ferguson had enunciated in the Brown case, yet he found the plea improvident in the Watkins case despite its affirmance by other members of the Court.

A balance scale to be used by the traditionally blindfolded figure of Justice must be found which permits all cases to be weighed equally. I suggest we already have such a scale:

"It is the firmly established policy of the Air Force that the prosecution *will establish a prima facie case as to each offense charged* regardless of a plea of guilty and notwithstanding a request by the defense that the prosecution pre-

⁸ One who would attempt to forecast the future decisions of the Court on guilty pleas cannot fail to observe that Judge Latimer's term of office will expire 1 May of this year (see UCMJ, Art. 67(a)). Whatever the eminence of his judicial qualifications for reappointment to this position, one must further observe that both he and Judge Ferguson are Republicans in a Democratic administration.

sent no evidence in view of the guilty plea." (par. 41a, AFM 110-8-C, emphasis added).

Perhaps it was with prescience this policy was established, for it seems to have anticipated completion of the "full circle" on guilty pleas.

Needed in the area of guilty pleas before courts-martial is substantial proof, at the trial itself, that accused's plea was providently and wisely entered. The "negotiated plea" has recently come under attack (see United States v. Watkins, above) because it is not always apparent "the deal" was as good for accused as a full defense on the facts or law might have been. What better way

for the government to carry this added burden of proving the decision to plead guilty was intelligent and voluntary than by invariably putting on all available evidence as to each offense?

Consideration should be given to making this policy a mandatory rule of trial procedure for courts-martial in all the armed forces, with thought to defining *minimum* acceptable standards for a "prima facie case." Only by recognizing that a guilty plea is now considerably less than sacrosanct, and by taking positive measures to minimize variables in this area, can we ensure that our military cases will withstand and post-trial attack upon a guilty plea.⁹

⁹ Even raising high the standards of proof deemed adequate after a guilty plea may not provide an infallible solution. I think of the principle behind cases like United States v. Krull, 3 USCMA 129, 11 CMR 129, in which the government had presented a complete case "as if pleas of not guilty had been entered" (p. 130). Nevertheless, the Chief Judge found accused's post-findings statement inconsistent with his plea.

Relying upon Article 45(a) of the Uniform Code of Military Justice that if an accused sets up matter inconsistent with the plea or if it appears he has entered the plea of guilty improvidently, "a plea of not guilty shall be entered in the record," the Chief Judge found fatal error in the failure of the law officer to have entered a plea of not guilty and to have directed the court to reconsider its findings.

Law officers cannot always anticipate changes which may occur in substantive law between similar cases, hence they cannot be infallible in predicting that a certain assertion by accused may not later be held legally inconsistent with facts admitted in his guilty plea, particularly when he and his counsel insist upon adherence to it in the face of the most current information *pro* and *con*. But presentation of a substantial case by the government will find most shadow areas of "inconsistency," "improvidence," and "involuntariness" (Brown, above) to be without substance when later asserted for the first time on appeal. At least accused must be held to have had a fair opportunity to dispute or explore these subtle variables at the trial level, and his failure to have done so should weaken his claim of right to pursue them on appeal.



Rear Admiral William C. Mott, USN

THE NAVY'S NEW TJAG

Admiral William C. Mott was sworn in as The Judge Advocate General of the Navy on August 1, 1960, to succeed the retiring Admiral Chester Ward. Admiral Mott has long been an active and interested member of the Judge Advocates Association and currently serves as a member of its board of directors.

The new Navy TJAG is a native of New Jersey, forty-nine years of age, a graduate of the U. S. Naval Academy and of the Law School of George Washington University. Upon graduation from the Academy in 1933, he resigned and entered civil life and later upon completion of his law studies, he was admitted to the District of Columbia bar and became a patent lawyer.

He was commissioned in the U. S. Naval Reserve in 1940 and was called to active duty in that year to serve in the Office of Naval Intelligence. During 1942, he was Assistant Naval Aide to President Roosevelt in charge of the Naval Section of the White House Intelligence and Communications Center. After a brief tour as student at the Naval War College in 1943, he served as Flag Secretary and Legal Officer on the staff of Commander Cruiser Division TWO, USS Omaha flagship and later as Aide, Flag Secretary, Legal and Personnel Officer on the staff of Commander Amphibious

Force, U. S. Pacific Fleet. He participated in the Marianas, Iwo Jima, and Okinawa Gunto operations. On return to the United States, he was assigned to the Office of Chief of Naval Operations for liaison duty with the Department of State and the United Nations.

He was transferred to the U. S. Navy in 1946 and was assigned to the Office of The Judge Advocate General. In the succeeding years, he has served as a legal officer in the Navy Department at Washington, with the Pacific Fleet, the Naval School of Justice in Newport, Rhode Island, and at the Ninth Naval District, Great Lakes, Illinois. He attained the rank of Captain in 1952. From 1956 to 1958, he served as Military Assistant to the Chairman of the Joint Chiefs of Staff successively under Admiral Radford and General Twining. Until his recent promotion to Rear Admiral and appointment as The Judge Advocate General, he was Deputy and Assistant TJAG of the Navy and Special Assistant to the Secretary of Defense.

At home, Admiral Mott's chief of staff is the former Edith Grace of Massachusetts, and his command has grown in the last 13 years to include six children. The family flagship is moored at this time at 7415 Wynedale Lane, Chevy Chase, Maryland.



Captain Robert D. Powers, Jr.

THE DEPUTY AND ASSISTANT TJAG—NAVY

On 1 August 1960, Captain Robert D. Powers, Jr., a member of the Judge Advocates Association, was named the Deputy and Assistant Judge Advocate General of the Navy.

Captain Powers, a native of Virginia, graduated from the law school of Washington and Lee University in 1929 and thereafter engaged in the practice of law at Portsmouth, Virginia. Having been commissioned in the U. S. Naval Reserve in 1937, he was called to active duty in 1941. After about two years of duty at Trinidad, in 1943, he was assigned to the Office of The Judge Advocate General of the Navy until 1945. After about a year as District Legal Officer of the Fifth Naval District at Norfolk he was released to inactive

status. In 1947, he was recalled to active duty and transferred to the U. S. Navy. Until 1950, he served as Fleet Legal Officer for the Atlantic Fleet. During the following three years, he served again in OTJAG in various duty assignments. In 1952, he was promoted to the rank of Captain. From 1953-1956 he was again District Legal Officer of the Fifth Naval District. For the two years prior to his present assignment, he was The Judge Advocate General of the Navy, West Coast.

Captain and Mrs. Powers reside at 2411 N. Quincy Street, Arlington, Virginia with two of their children; an elder son, Robert, is an Ensign, USN presently on sea duty.





Annual Banquet 1960: A part of the head table—left to right: Congressman Pirnie, Mrs. Powers, Senator Moss, Gen. Harmon, Mrs. Harmon, Mrs. Ward, Senator Yarborough.

JAA BOARD ACTIONS

At the meeting of JAA's Board of Directors in November, it was determined that the Association should continue with renewed vigor its legislative program on three subjects: First, it should continue to seek legislation to assist the military services in recruiting and retaining the services of lawyers in uniform through incentive pay and other means; second, it should continue to support legislation to establish a separate JAG Corps in the Navy; and, third, it should continue to seek amendment to the Uniform Code of Military Justice as repeatedly advocated by the Committee of The Judges of the Court of Military Appeals and The Judge Advocates General of the services for some years. The legislative committee for 1960-61 is composed of Thomas H. King, Sheldon D. Elliott and M. Emilius Carlson. All state chairmen are considered members of the legislative committee.

Three new areas of interest were decided upon:

1. To establish a system by which Judge Advocates going off of active duty either by the completion of their obligated tours, retirement, or otherwise, may be brought into contact with prospective employers such as law firms, corporations and institutions of learning in order that they may obtain employment and continue their service to society.

2. To embark upon a campaign to get State Bar Admission authorities

of the various states to give credit for military legal service in the same manner as they give credit for civilian law practice for admission to the Bar of those states on a comity basis.

3. To adopt a public relations program which will have for its purpose the establishment of better relations between lawyer and client or Judge Advocate and Commanding Officer in the military service.

The State Chairmen appointed at this meeting are:

- Alabama
Edward O'Connell, Jr.
- Arizona
John Paul Clark
- Arkansas
Edwin L. McHaney, Jr.
- California
John Finger
- Colorado
Milton J. Blake
- Connecticut
Max Traurig
- Delaware
Charles P. Grahl
- District of Columbia
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- Indiana
Lenhardt E. Bauer
- Iowa
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- Kansas
Donald I. Mitchell
- Kentucky
Walter B. Smith
- Louisiana
William B. Lott
- Maine
Kenneth Baird
- Maryland
Morris Rosenberg
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- Michigan
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John H. Derrick
- Mississippi
Guy Nichols
- Missouri
John H. Hendren
- Montana
Dalton Pierson
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Clel Georgetta
- New Hampshire
Ralph E. Langdell
- New Jersey
Franklin Berry
- New Mexico
Claire D. Wallace
- New York
Birney M. Van Benschoten
- North Carolina
Robinson O. Everett
- North Dakota
Everett E. Palmer
- Ohio
James Arthur Gleason
- Oklahoma
James H. Ross
- Oregon
Adelbert C. Closterman
- Pennsylvania
Sherwin T. McDowell
- Rhode Island
Edwin B. Tetlow
- South Carolina
William Hope
- South Dakota
Leo A. Temmey
- Tennessee
Earle H. Marsh
- Texas
Gordon Simpson
- Utah
Calvin Rampton
- Vermont
Charles F. Ryan
- Virginia
Walter Regirer
- Washington
Josef Diamond
- West Virginia
Abraham Pinsky
- Wisconsin
Gerald T. Hayes
- Wyoming
George F. Guy

What The Members Are Doing . . .

District of Columbia

About one hundred of the members and their ladies in the Washington area met at Bolling AFB Officers' Club on the evening of 9 January 1961 to honor General and Mrs. George W. Hickman upon the General's retirement from active military duty and departure to take up a law school teaching post at San Diego. Col. Samuel Borzilleri, State Chairman for the District of Columbia, made arrangements for this splendid event, but because of hospitalization was not present and called upon General Harmon to preside. After hearing words of high praise from General Kuhfeld, General Decker, Captain Powers, Judge Latimer and Commander Caliendo, and receiving the Association's "Certificate of Merit" from General Harmon, General Hickman made his own modest defense. All those present were unanimous in the opinion that it was entirely fitting and proper that the honored guest should have the accolade he received and they jointly and severally wished him well in the new direction of his career.

Illinois

Colonel Glenn E. Baird of the Chicago law firm of Griffen, Stout and Baird was recently designated as S.J.A. of the 322d Logistical Command.

Missouri

Charles Frank Brockus of Kansas City (1st O. C.) is the C. O. of the

8th JAGSO Detachment. He was recently promoted to Colonel.

New York

Lt. Henry W. Connelly of Winston-Salem recently received The Army Commendation Medal at a ceremony conducted at First Army Headquarters by Colonel Tom B. Hembree, First Army Judge Advocate. Lt. Connelly, upon his return to civilian status, has taken a position with the New York law firm of Shearman, Sterling and Wright.

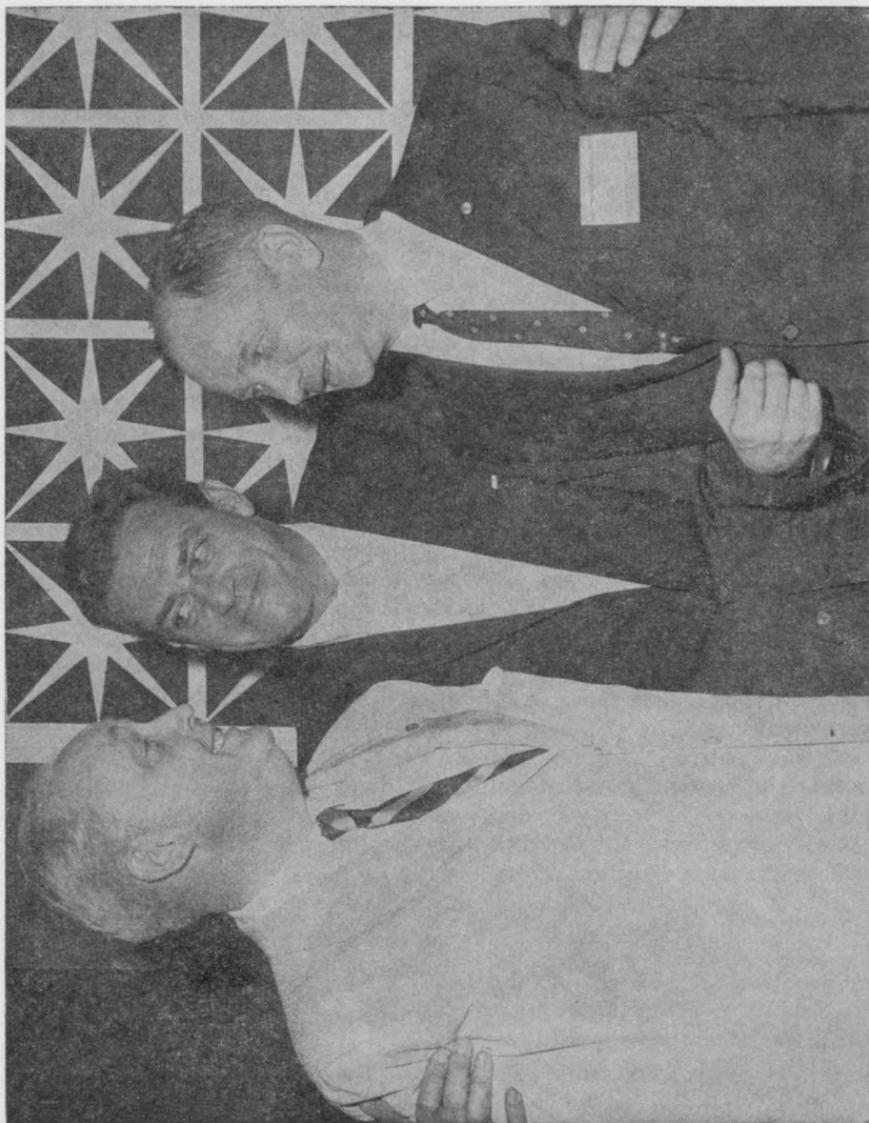
Samuel G. Rabinor recently announced the removal of his law offices to 163-18 Jamaica Avenue, Jamaica, Queens County, New York City, where he will continue to specialize in the trial of negligence cases. Mr. Rabinor was named by the State Bar Association of New York last summer to a special action committee to meet the problem of Court congestion and trial delay in New York City.

William J. Rooney recently announced the removal of his law offices to the Chrysler Building, New York 17, New York.

Harold J. Kaufmann of Rego, Pa., was recently promoted to Lieutenant Colonel, JAGC, USAR.

Pennsylvania

Paul Breen has recently announced the opening of law offices for the practice of law in association with Dolnick and Gardner at the Bankers Securities Building, Philadelphia 7, Pennsylvania.



At the Annual Banquet 1960: Bob Burke says "cheese" to the amusement of Raymond Burr and the astonishment of Dick Love as the camera clicked.

GENERAL HICKMAN RETIRES AS ARMY TJAG

Major General George W. Hickman retired as The Judge Advocate General of the Army on 31 December 1960. General and Mrs. Hickman will take up their residence in San Diego, California, where the General has been appointed a professor of law at the recently formed San Diego School of Law. Upon General Hickman's retirement, General Charles L. Decker was promoted to major gen-

eral and appointed to the office of The Judge Advocate General of the Army. Major General Stanley W. Jones who was The Deputy Judge Advocate General has been assigned to the Army Council of Review Boards and General Robert H. McCaw has been designated The Deputy Judge Advocate General of the Army.



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

SUPPLEMENT TO DIRECTORY OF MEMBERS, 1959

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An affiliated organization of the American Bar Association

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I hereby apply for membership in the Judge Advocates Association and
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