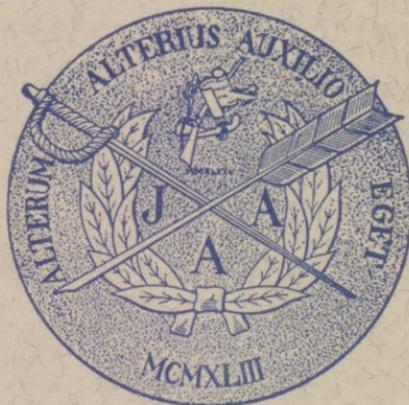


The Judge Advocate JOURNAL



Published By

JUDGE ADVOCATES ASSOCIATION

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

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Executive Secretary and Editor

RICHARD H. LOVE
Washington, D. C.

Bulletin No. 35

June, 1963

Publication Notice

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

TABLE OF CONTENTS

	PAGE
Report of Nominating Committee.....	1
Constitutional Rights of Military Personnel.....	4
Annual Report on UCMJ.....	13
Ervin Admitted by COMA.....	17
Ritchie Heads ABA Committee.....	17
Security Clearance	18
In Memoriam	20
What the Members are Doing.....	21
1963 Annual Meeting.....	23
Status of Pending Legislation.....	24

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REPORT OF NOMINATING COMMITTEE — 1963

In accordance with the provisions of Section 1, Article IX of the By-laws of the Association, the following members in good standing were appointed to serve upon the 1963 Nominating Committee:

Brigadier General Herbert M. Kidner, USAF-Ret.
Captain Robert Keehn, USN
Colonel William H. Lumpkin, USAF
Colonel John Lewis Smith, Jr., USAR
Colonel Samuel C. Borzilleri, USAFR
Lieutenant Patrick J. Attridge, USAR
Lieutenant Colonel Oliver Gasch, USAR

The By-laws provide that the Board of Directors shall be composed of twenty members, all subject to annual election. It is provided that there be a minimum representation on the Board of Directors of three members for each of the Armed Forces: Army, Navy and Air Force. Accordingly, the slate of nominees is divided into three sections; and, the three nominees from each section who receive the highest plurality of votes within the section shall be considered elected at the annual election as the minimum representation on the Board of that Armed Force. The remaining eleven positions on the Board will be filled from the nominees receiving the highest number of votes irrespective of their arm of service.

Members of the Board not subject to annual election are the three most recent past presidents. They will be: Commander Frederick R. Bolton, USNR-Ret., Major General E. M. Brannon, USA-Ret., and Major General Reginald C. Harmon, USAF-Ret.

The Nominating Committee has met and has filed with the Secretary the following report as provided by Section 2, Article VI of the By-laws:

SLATE OF NOMINEES FOR OFFICES

President: Col. Allen G. Miller, USAFR, N. J. (1)
First Vice President: Col. John H. Finger, USAR, Calif. (1)
Second Vice President: Lt. Cdr. Penrose L. Albright, USNR,
Va. (1)
Secretary: Cdr. Zeigel W. Neff, USNR, Md. (5)
Treasurer: Col. Clifford A. Sheldon, USAF-Ret., D. C. (1)
A.B.A. Delegate: Col. John Ritchie, III, USAR, Ill. (2)

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

Navy Nominees:

- Capt. Robert G. Burke, USNR, N. Y. (1)
- Capt. Mitchell K. Disney, USN, Va. (3)
- Capt. Eugene J. P. Harmon, USNR, D. C. (3)
- Cdr. Hugh H. Howell, Jr., USNR, Ga. (1)
- Capt. Mack K. Greenberg, USN, D. C. (3)
- Adm. William C. Mott, USN, Md. (3)

Army Nominees:

- Col. John F. Aiso, USAR, Calif. (4)
- Col. Glenn E. Baird, USAR, Ill. (1)
- Capt. James L. Bennett, USNG, Iowa (1)
- Col. Franklin Berry, USAR, N. J. (1)
- Maj. Herman M. Buck, USAR, Pa. (1)
- Maj. Cary E. Bufkin, USAR, Miss. (1)
- Gen. Charles L. Decker, USA, D. C. (3)
- Gen. Sheldon D. Elliott, USAR, N. Y. (2)
- Lt. Col. Osmer C. Fitts, USAR, Vt. (1)
- Col. John H. Hendren, Jr., USAR, Mo. (1)
- Gen. Kenneth J. Hodson, USA, Md. (3)
- Capt. Harvey A. Katz, USAR, Conn. (1)
- Col. William B. Lott, USAR, La. (5)
- Lt. Col. Joseph F. O'Connell, Jr., USAR, Mass. (1)
- Col. Alexander Pirnie, USAR, N. Y. (6)
- Col. Robert M. Williams, USA, Va. (3)
- Col. Ralph W. Yarborough, USAR, Tex. (7)

Air Force Nominees:

- Col. Daniel F. Andersen, USAFR, D. C. (1)
- Maj. Robinson O. Everett, USAFR, N. Car. (1)
- Col. Morton J. Gold, USAF, Calif. (3)
- Maj. Alfred M. Goldthwaite, USAFR, Ala. (1)
- Lt. Col. Gerald T. Hayes, USAFR, Wisc. (1)
- Gen. Herbert M. Kidner, USAF-Ret., Va. (1)
- Gen. Thomas H. King, USAFR, Md. (1)
- Gen. Albert M. Kuhfeld, USAF, Va. (3)
- Gen. Robert W. Manss, USAF, Va. (3)
- Col. Martin Menter, USAF, D. C. (3)
- Capt. Douglas W. Metz, USAFR, Mich. (5)
- Col. Frank E. Moss, USAFR, Utah (7)
- Lt. Col. Sherwood M. Snyder, USAFR, N. Y. (1)

Under provisions of Section 2, Article VI of the By-laws, members in good standing other than those proposed by the Nominating Committee shall be eligible for election and will have their names included on the printed ballot to be distributed by mail to the membership on or about 15 July 1963, provided they are nominated on written petition endorsed by twenty-five, or more, members of the Association in good standing; provided, however, that such petition be filed with the Secretary at the offices of the Association on or before 10 July 1963.

Balloting will be by mail upon official printed ballots. Ballots will be counted through noon 12 August 1963. Only ballots submitted by members in good standing as of 9 August 1963 will be counted.

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



THE CONGRESSIONAL STUDY ON THE CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

By Senator Sam J. Ervin, Jr.*

Our government has only recently overcome the traditional deprivation of constitutional rights of military personnel. American law conceded just a little less than 50 years ago that the serviceman was entitled to safeguards and prerogatives that the Constitution bestows upon all citizens. However, as a result of numerous judicial pronouncements, today there is no doubt that our military enjoy such rights. And, indeed, it would be ironic if the men who volunteered or were conscripted to defend their country and its institutions thereby lost all rights under the very Constitution they were defending.

Although the constitutional rights of our service personnel are now granted recognition, I have been disturbed by reports that in some instances denials of those rights have been without remedies. For instance, I was greatly perturbed by the statement in a recent report by the Court of Military Appeals which follows:

"The unusual increase in the use of the administrative discharge since the code became a fixture has led to the suspicion that the services were resorting to that means of circumventing the requirements of the code. The validity of that suspicion was confirmed by Major General Reginald C. Harmon, then Judge Advocate General of the Air Force, at the annual meeting of the Judge Advocates Association held at Los Angeles, California, August 26, 1958. He there declared that the tremendous increase in undesirable discharges by administrative proceedings was a result of efforts of military commanders to avoid the requirements of the Uniform Code. Although he acknowledged that men thereby affected were deprived of the protections afforded by the code, no action to curtail the practice was initiated."

The Court's statement suggested that all the efforts Congress had made in enacting the Uniform Code

* Senior U. S. Senator of the State of North Carolina and Chairman of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. This article is the address given by Senator Ervin on 8 May 1963 at a meeting of District of Columbia area members of the Judge Advocates Association.

with a view to implementing the constitutional rights of service personnel were being negated by military authorities. Shortly after this statement had come to my attention, I read the Court of Military Appeals opinion in *United States v. Kitchens*,¹ in which the constitutional right of the accused to receive a fair and impartial trial was being threatened. Here also there were serious allegations that the defense counsel had been penalized for his vigor in asserting the accused's right to due process and a fair trial. I realize that this case was probably an isolated exception and reflected merely a failure on the part of certain military officials to realize that the Uniform Code was intended to usher in a new day in military justice. However, it appeared to me, as Chairman of the Subcommittee on Constitutional Rights, I should inquire further into the manner in which the rights of military personnel were being protected—especially with reference to courts-martial and administrative discharges. When I asked the other Subcommittee members for their approval to institute such an inquiry, they gave enthusiastic assent.

Some years ago the Subcommittee investigated one area of the rights of military personnel—that of trial by foreign courts of American military personnel stationed overseas. In that connection, a Subcommittee observer attended the Japanese criminal trial of

Corporal William Girard, a soldier accused of killing a Japanese national while he was performing guard duty. Also, the Subcommittee has had numerous occasions to ask the Department of Defense for information on the observance of constitutional rights in specific cases. However, the inquiry begun early in 1962, entitled "The Constitutional Rights of Military Personnel," differs in scope and depth from any previous effort by Congress in this field.

At the beginning of our study, the Subcommittee submitted to Secretary McNamara a questionnaire with the request that each military department furnish answers to 36 enumerated questions. On the basis of the Subcommittee's detailed analysis of the answers received, it submitted further interrogatories. All of the questions and answers—some 140 pages—are printed as an appendix to the hearings the Subcommittee held in February and March of last year. I remember incidentally that when we began the seven days of hearings, all of those present were distracted from military law for awhile by Colonel Glenn's historic space flight. And I recall wondering whether the Colonel would still be subject to the jurisdiction of the military courts under the Uniform Code while circling the earth. I'll leave this question to the academicians of military law among you.

¹ 12 USCMA 589, 31 CMR 175 (1961).

The hearings were followed by a questionnaire mailed to several thousand reservists with legal training. Some of you undoubtedly received this questionnaire; and I wish to thank you for the information you furnished us at that time. Of course, we addressed our questions to reservists, rather than active duty personnel, since it might be easier and less embarrassing for the former to be completely objective in their comments. Many of the reservists had been on active duty until recently and most of the answers we received were responsive to present conditions. The hundreds of letters we received, and the painstaking care with which they were prepared, revealed that lawyers who have served in the armed forces do not lose interest in military justice when they doff their uniforms.

Legislative duties have prevented my personally observing military justice as it is administered in the field. However, through the Subcommittee hearings, correspondence, and the visits of staff counsel to the field, I have a vivid picture of the problems being encountered in military justice.

Against this background, let me explain some of my own conclusions and recommendations. Proceeding first to the administrative discharge under other than honorable conditions, I find it indisputable that such a discharge can be as damaging as a punitive discharge imposed by a court-martial. In fact, the Subcommittee has

been told that some would prefer a bad conduct discharge from a special court-martial to an undesirable discharge issued administratively.

Secondly, the effects of a discharge under other than honorable conditions, however imposed, are not limited to the military career of the person affected; instead such a discharge will follow the individual the rest of his life; it will affect his reputation, his job opportunities, and his veterans benefits. According to some evidence, even a general discharge, which is issued under honorable conditions, may affect the recipient adversely.

Thirdly, in light of the effects of an administrative discharge issued under other than honorable conditions, it becomes important to assure that anyone for whom such a discharge is proposed receives the same due process to which he would be entitled if he were being tried by a court-martial or by a civil court. This is especially true where he is to be discharged administratively by reason of misconduct which could have been made the basis for criminal charges that would be tried under the procedures and with the safeguards prescribed by the Uniform Code of Military Justice. In other words, an administrative board should not become a dumping ground for allegations which would be impossible to prove in a trial by court-martial. The Subcommittee has learned of cases where it was proposed that a serviceman be discharged under other

than honorable conditions by reason of alleged misconduct for which he had asked and was denied trial by court-martial. If the allegations against the serviceman constitute a violation of the Uniform Code for which he could be court-martialed, especially if the serviceman requests a court-martial, in which he would have the safeguards prescribed by the Uniform Code, then the Services should not be able to accomplish indirectly what they could not do directly. That is, they should not be able to adjudge a man guilty and stigmatize him with an undesirable discharge without granting him the procedural protections that Congress intended he have. Of course, I would not dispute the Services' power under such circumstances to discharge the man under honorable conditions; but that power has not been at issue.

Fourthly, before a serviceman is discharged under other than honorable conditions, he should have the right to legally qualified counsel to advise him with respect to any trial or board hearing which may be in prospect. For many years, the assistance of counsel has been required even to establish jurisdiction in the Federal Courts. Yet, the Navy special courts-martial impose sentences to a bad conduct discharge in trials where the accused does not have the aid of a lawyer to defend him. Furthermore, in the Army and the Navy, and perhaps still to some extent in the Air Force, a serviceman may be discharged admin-

istratively under other than honorable conditions without having the assistance of a lawyer. I realize that in such instances the serviceman may be provided with counsel who is not an attorney; but I find it difficult to believe that, for such purposes, even the most skilled layman is generally a satisfactory substitute for an attorney. I realize that it may be inconvenient to make a lawyer available for every serviceman who is threatened with a discharge under other than honorable conditions. However, if the Armed Services display the same initiative and imagination in confronting this problem that the Army has shown in developing its field judiciary system, I believe the difficulties can be surmounted.

Next, let me speak for a moment about the field judiciary program which I just mentioned and which was initiated by the Army and praised by many of the witnesses at our hearings. It makes sense that a judge should not be saddled with non-judicial duties. Similarly, it makes sense that the law officer of a general court-martial, whom the Court of Military Appeals has frequently compared to a judge, should be allowed to focus his attention on his judicial duties, instead of being switched frequently from one task to another—from legal assistance, to claims, to courts-martial and so on. The statistics submitted to the Subcommittee by the Army show that law officer error dropped from about 4 percent in 1957 to about

1.2 percent in 1960, the first full year of the field judiciary program and that the decline continued in 1961. At the time of the hearings the Navy only had the field judiciary program in effect for certain commands. There, according to Navy statistics, the law officer error factor had been reduced from 8.7 percent to approximately 2 percent. Undoubtedly, this reduction helped produce the subsequent worldwide adoption by the Navy of the field judiciary program. This reduction in law officer error ultimately produces cost savings for the Armed Services by eliminating the expense of retrials; but the protection to the accused serviceman that results from having an efficiently conducted trial simply cannot be measured in dollars. Moreover, under the field judiciary program, the law officers are assigned to the Office of The Judge Advocate General, rather than to field commands. Thus, they are not under the direct control of the commanders who have appointed the court-martials on which they are sitting as law officers; and these commanders do not prepare their efficiency reports or fitness reports, on which hinge promotions, assignments, and transfers. The net gain for the law officer's impartiality and the freedom of trials from command influence should be readily apparent.

The field judiciary system has proved itself so well that many of our witnesses recommended that it be given specific statutory sanc-

tion. I am planning to introduce in the near future legislation which will have this objective. Furthermore, I trust that we shall see greater inter-service exchange of the members of the field judiciary. These military judges, I believe, should be given exactly that title, in lieu of their present designation as law officers. There is no reason why an Army law officer could not preside satisfactorily over a Navy general court-martial; or vice versa. In theory we have a *Uniform Code of Military Justice* and so an experienced law officer of one Service should encounter no difficulty in applying the applicable law to a member of a different Service. Indeed, inter-service utilization of law officers would help underscore the goal of uniformity in military justice.

On this subject of uniformity, I might add here that the Subcommittee examined carefully the extent to which policies and practices diverged among the different services as to military justice and administrative discharges. In some instances, we found differences that we felt were unjustified; in others the differences reflected the special circumstances under which each Armed Service performed its defense mission, or in some other way were justified.

For example, the Army and the Navy have adopted a negotiated guilty plea procedure; but the Air Force frowns on negotiated guilty pleas. On the basis of the evidence before the Subcommittee, we came to the conclusion that the Army

and Navy had administered the negotiated guilty pleas in a way that was consistent with the constitutional rights of the accused soldiers and sailors. However, it was difficult to be very critical of the Air Force's position because that Service convincingly maintained it provided an extra safeguard for the accused airman in its requirement of a prima facie case for each offense, regardless of the plea. This is the type of matter where we consider that there is a permissible area for divergence among the different Armed Forces by reason of each Service's own peculiar problems and necessities.

Many of the complaints that have come to the Subcommittee concern summary and special courts-martial, rather than general courts. The recent statutory expansion of nonjudicial punishment power under Article 15 has eliminated the need for the summary court martial; and, I believe it should be abolished. There have even been proposals to abolish both the special and summary court-martial and retain only non-judicial punishment and general courts-martial. These proposals are too drastic. Although I can think of several meritorious reforms, the special court-martial should be retained. I can see no objection to proposals for legislation that would enable the convening authority to appoint a qualified law officer to preside over a special court-martial, just as such an officer presides over a gen-

eral court-martial. Moreover, I presently favor the view that in any court-martial which has a law officer, the accused, with the advice of legal counsel, should be free to waive trial by the court members, as jury trial may be waived in the Federal Courts. All the issues would then be tried and the sentence imposed by the law officer. If the law officer has been properly selected for his duty, he should be able to make findings and to impose sentence as correctly and fairly as the members of the court-martial. Since the court-martial derives its authority from the Federal Government, proposals to have courts-martial procedure correspond more closely to Federal District Court procedure are persuasive.

I spoke earlier of the *Kitchens* case which concerned command influence upon defense counsel. I am not sure that we can ever, under any system of military justice, eliminate every occasion for such complaints. On the other hand, some reduction in command influence is practical under present conditions—as the Army has demonstrated in the establishment of its field judiciary. Even though the Court of Military Appeals, by a two-to-one vote, has refused to outlaw pretrial lectures by a commander or his staff judge advocate to members of a court-martial which he has appointed, I believe these lectures are unnecessary and dangerous. Fortunately, the Army has already taken steps to abolish pretrial lectures. However, Article

37 of the Uniform Code should be amended specifically to prohibit them; and I am drafting a bill that will include such a prohibition. I should add that I have no objection whatsoever to general instructions given at the beginning of a trial by a law officer to the members of a general court-martial; nor do I object to general courses in military justice, which are not designed to effectuate a particular command policy.

Command influence can be exercised over a military board just as easily as over a court-martial and can amount to a denial of due process in either case. Yet the administrative board—especially if it has been appointed to make findings and recommendations concerning a proposed discharge under other than honorable conditions—may be acting on a matter of great importance to the serviceman involved. Article 37 of the Uniform Code, which prohibits command influence over courts-martial, does not presently include any prohibition of command influence over military boards. This omission should be remedied and the Subcommittee is now considering the feasibility of a legislative remedy.

I might add here that any commanding officer who resorts to command influence over courts-martial or military boards indicts himself on the charge of not having selected the members of the court or board with suitable care. In almost any command, and especially in peacetime, there should

be available for court-martial duty enough officers able to evaluate evidence fairly and to return a just and appropriate sentence. If the commander has appointed mature, competent officers to the court-martial, he should be content to abide by their decision, instead of attempting to influence them. Unfortunately, there appear to be a few commanders who think they are so infallible that, without hearing the evidence or seeing the witnesses, they can reach a better verdict than the court members who have sworn to perform their duties fairly and who have heard the evidence and seen the witnesses.

A number of witnesses praised the work that the Court of Military Appeals is doing; and, knowing the distinguished members of that Court, I am sure that praise is justified. The court's task was undoubtedly complicated at the outset by the demands from some quarters that it be abolished and that civilian review of courts-martial be eliminated. I might add that, if these representations had been heeded, we probably would have seen more and more military cases reviewed by the Federal District Courts on petitions for habeas corpus. Clearly the Supreme Court is not willing at present to sanction the view that court-martial action should be immune from inspection by civilian judges; and Congress was wise to establish a qualified and specialized civilian court which could expeditiously and fairly dispose of appeals from

court-martial convictions. I am convinced that any future Congressional action will be in the direction of strengthening that Court and even extending its jurisdiction, rather than abolishing it.

Various individuals have contended that the Uniform Code of Military Justice would not work in wartime. Several witnesses at the Subcommittee's hearings replied that the Code had already proved itself during the Korean conflict. As several of them added, probably *no* code of military justice would function smoothly during a period of all-out nuclear war. In this connection, I took the position at the hearings—and I am convinced that it is the correct one—that we should not scrap the Uniform Code of Military Justice, even if we were convinced that it would not work during wartime. Many millions of Americans have already been subject to the Uniform Code under conditions of the cold war, it would hardly be justified to deprive them of the protections that the Uniform Code affords because of the Code's possible shortcomings during an all-out war. Similarly it does not seem appropriate today to deprive our young men in uniform of safeguards we now provide them because those safeguards might not work well if war should come at some undetermined future time. There are several Articles of the Code, as it now exists, which make special provision for conditions of war; and, the Court of Military Appeals has interpreted those ar-

ticles quite reasonably. Now we may need other provisions in the Uniform Code to cope with wartime conditions—provisions which would apply only in time of war. For instance, one or two of the bills that the Subcommittee is considering would make certain rules applicable except in time of war. However, this is quite different from throwing out the baby with the bath, as has been proposed by those who advocate return to the old Articles of War.

As I have indicated, a number of bills are being drafted which will be designed to give greater protection to the constitutional rights of military personnel and, in many instances, at the same time to improve the efficiency with which military justice is administered. Some of these measures will, in one form or another, embody proposals submitted to the Congress over the years by the Court of Military Appeals and the Judge Advocates General and espoused by various witnesses at the Subcommittee hearings. Other of these bills will propose reforms suggested by information and testimony received by the Subcommittee.

Some very substantial results have already accrued from the Subcommittee's investigation of the Constitutional Rights of Military Personnel. For instance, our inquiry helped lead to the Army's abolition of pretrial lectures by commanding officers to court-martial members. It led to the elimination of the ill-considered Army

practice whereby the Chairman of a Board of Review established under Article 66 of the Uniform Code prepared efficiency reports on the junior members. Unfortunately, the Air Force has not yet abolished this practice.

We feel that the information adduced during our hearings had some tendency to induce the Navy and Marine Corps to adopt on a service-wide basis the field judiciary system which the Army had already tested—and which in the Subcommittee's view represents a real breakthrough in improving military justice. Furthermore, we have been informed that since our inquiry began, legal counsel has become more readily available to respondents in administrative proceedings that might give rise to an undesirable discharge; and the Services seem to have reconsidered somewhat the practice of using

administrative undesirable discharges to by-pass court-martialing a serviceman for misconduct which he denies. Finally, there have been a number of special cases involving meritorious complaints from servicemen where, once defects were brought to light by us, relief was speedily granted. The Armed Services have cooperated with the Subcommittee throughout its investigation and undoubtedly will continue to do so. I trust that when the legislation pertaining to military justice and administrative discharges is introduced, the Services will not view those proposals with a closed mind. We all must share the goal of producing further improvement in a system of military justice which already embodies very constructive thought. I will appreciate your suggestions and your support in our efforts to reach this goal.



ELEVENTH ANNUAL REPORT ON UCMJ

Article 67(g) of the Uniform Code of Military Justice, 10 U.S.C. 867(g), requires the Judges of the United States Court of Military Appeals, The Judge Advocates General of the Armed Forces, and the General Counsel of the Department of the Treasury to meet annually to survey the operations of the Code and to prepare a report to the Committees on Armed Services of the Senate and of the House of Representatives, to the Secretary of Defense and the Secretary of the Treasury, and to the Secretaries of the Departments of the Army, Navy, and Air Force with regard to the status of military justice and to the manner and means by which it can be improved by legislative enactment.

The Judges of the United States Court of Military Appeals, The Judge Advocates General of the Army, Navy, and Air Force, and the General Counsel of the Department of the Treasury, have met and have reported that because of the press of legislative business in the Congress, it had been determined that the so-called Omnibus Bill, discussed in reports for the years 1959 and 1961, which encompasses detailed legislative changes to the Uniform Code of Military Justice, could not be considered by the Congress in that form. Consonant with the suggestion made that short individual bills embodying the legislative changes deemed of primary

importance to the administration of justice be submitted for the consideration of the Congress, individual bills have been drafted and serially lettered for reference purposes. Each of these proposals deals essentially with a single aspect of the amendments previously recommended.

Two of these legislative proposals were enacted by the Eighty-seventh Congress. Public Law 87-385, which proscribes the making, drawing, or uttering of checks, drafts, or orders without sufficient funds, became an effective part of the Code as Article 123a, on March 1, 1962. Public Law 87-648, which provides increased authority to commanders to impose nonjudicial punishment, was approved by the President on September 7, 1962, and superseded the former Article 15 of the Code on February 1, 1963. An implementing Executive order has been promulgated.

The bills, lettered "B", "D", and "F", have not yet been considered by the Congress. Very brief summaries appear below.

The "B" bill provides for single-officer general and special courts-martial, and increased authority of the law officer and the president of a special court-martial. The primary purpose of this bill is to establish courts in which an accused person may, subject to appropriate safeguards, waive his

hearing before members of the court, and be tried by the law officer alone. This procedure, comparable to that provided in the Federal courts by the Federal Rules of Criminal Procedure, will both speed and improve the administration of justice. The bill includes the procedural changes necessary to the functioning of such courts, and also eliminates the present anomalous situation in which the law officer's rulings on certain questions of law may be overturned by the legally untrained members of the court.

The "D" bill permits the simplification of court-martial trials by providing for the holding of pretrial sessions by a law officer, before the members are assembled, to consider and dispose of interlocutory questions and other procedural matters. Pretrial disposition of motions raising defenses and objections in the Federal criminal courts is authorized by the Federal Rules of Criminal Procedure. By adopting a similar provision for courts-martial, the continuity of the proceedings before the court members will be improved. A concomitant saving of time and manpower will result, as the members will no longer be required to stand by while questions for resolution solely by the law officer are litigated. The bill includes the necessary technical amendments to clarify the status of the law officer in such proceedings, and related administrative provisions.

The "F" bill provides authority for convening authorities to order the forfeiture and confinement portions of certain sentences into execution upon approval, and clarification of the lesser punishments included in a death sentence. Under the present law, many prisoners complete service of confinement before their cases have been finally reviewed. As such a prisoner, while in confinement, is not subject to the same treatment as a sentenced prisoner, the administration of confinement facilities is unduly complicated. In some instances, complex administrative problems and loss of morale have resulted. Consequently, the proposed legislation provides that at the time he approves a sentence, a convening authority may order executed all parts of the sentence except that portion involving punitive separation. The bill will also eliminate an anomaly of the present law by permitting the imprisonment and forfeiture of pay inherent in a death sentence to be made effective when the sentence is approved by the convening authority.

Judge Ferguson has expressed strong reservations concerning the desirability of some aspects of the proposed legislation. Generally, Judge Ferguson's views are these:

a. The system of trying an accused before a law officer alone should not be instituted unless the Army's field judiciary system is made statutory and extended to all the Armed Forces. Otherwise, the local appointment of any certified

law officer will revive the dangers occurring under the law member system of the Articles of War. Single-officer courts should also be required to make written findings of fact and law in support of any finding of guilty, in order to provide an appropriate basis for appellate review. Finally, neither consent by the convening authority nor identification of the law officer to the accused in advance should be made conditions of his election to be tried before a single-officer court. These considerations detract from the law officer's judicial stature and will lead inevitably to bargaining between an accused and a convening authority over the reference of his case to a particular judge.

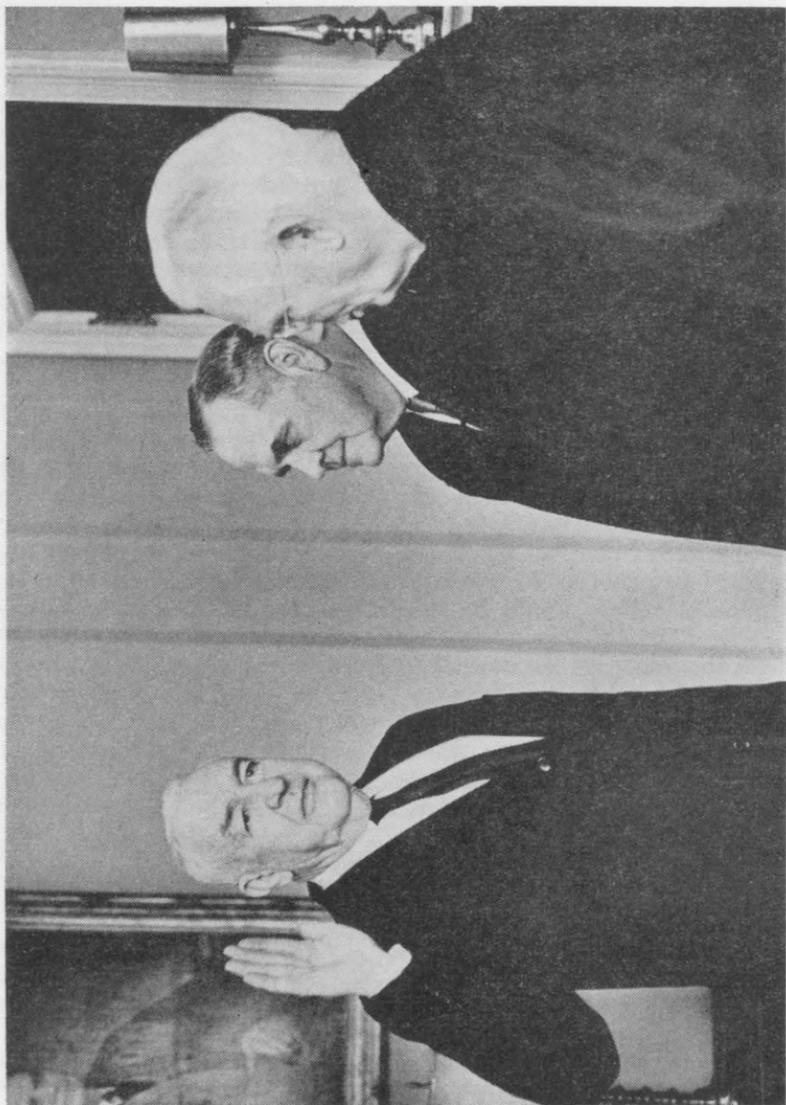
b. While Judge Ferguson favors the institution of pretrial hearings before the law officer in general courts-martial, they should be expressly limited by Congress in scope to the comparable constitutional practice in the United States district courts under the Federal Rules of Criminal Procedure, with the law officer being afforded the full stature and responsibility of a judicial officer.

c. Congress should retain the present system of executing sentences. Most of the delay in appellate processes is attributable to the armed services rather than the accused, who is also denied the remedy of bail. Moreover, there has been no demonstration of complications in the present administration of confinement systems

which justify execution of a sentence despite the fact that the case may later be reversed or the nature of the punishment completely altered at appellate levels. Finally, it is contrary to prior experience in the administration of military justice to require an accused to undergo the rigors of the adjudged sentence and thus to eliminate any real relief to him in the event of reversal. This is a matter which was fully considered by the Congress when the Code was enacted, and the system now in effect reflects the best balance between the needs of military discipline and the rights of a military accused.

d. A better system of authentication of records in the absence of the law officer should be devised, as the provision for the trial counsel to act in this capacity permits one of the parties to the litigation to set the record. Action should also be taken to provide the accused with a statutory right to examine the record on due notice and to endorse any objection there-to on the authentication sheet.

e. Opportunity should be taken at this time to abolish the practice of having the law officer confer in private with the court members on the form of their verdict. The procedure is unnecessary and has led in the past to reversal on frequent occasions. There seems to be no reason why these proceedings cannot take place in open court and in the presence of the accused.



SENATOR ERVIN ADMITTED BY COMA

Senator Sam J. Ervin, Jr., of North Carolina, Chairman of the Senate Subcommittee on Constitutional Rights, was recently sworn in as the 10,000th member of the bar of the United States Court of Military Appeals. Shown with the Senator taking the oath are

Associate Judges Homer Ferguson and Paul J. Kilday.

The Court had its first admission on July 25, 1951 and its membership now includes attorneys from every State in the Union.



Ritchie To Head ABA Committee on DOD Lawyers

Colonel John Ritchie III, Dean of Northwestern University School of Law and JAA's delegate in ABA's House of Delegates, has been designated Chairman of the American Bar Association Committee on Lawyers and Legal Services in the Defense Establishment to take office on 15 August 1963.

Colonel Ritchie was also recently elected President-Elect of the Association of American Law Schools. He will take office as President of AALS in December, 1964.

SECURITY CLEARANCE

By Irvin M. Kent *

Analysis of several willful security violations reveals a common and disturbing factor. In each such case known to the author a security clearance would never have been granted to the violator had he been subjected to a psychiatric examination *prior* to the granting of such clearance.

Further analysis reveals that in the history of each such violator there were no overt indicia, which could have been discovered by present clearance procedure methods, that would have served to bar granting of clearance for access to classified information through and including top secret.

While psychiatric examination might be a desirable prerequisite for all clearances, we must face the fact that there are not enough qualified psychiatrists in the United States, let alone in its armed forces, to accomplish the number which would thus be required. This seeming impasse, however, is basically no different from the one faced by any commander in a tactical defensive situation. A unit on the defense never has sufficient force to completely cover all possible enemy routes of approach. Analysis of the terrain and of the opposing forces indicate which avenues of

approach must be guarded in strength and which can, by calculated risk, be left to light security forces or mechanical ground surveillance instruments. This same sound tactical principle may be used to show us the way out of our impasse in the granting of security clearances.

Psychiatric examination is far from foolproof, and five minutes after clearance by a qualified psychiatrist a subject *might* commit a willful security violation, but the chances of his doing so are about the same as those that any enemy might be able to elude our security forces and enter in force through a lightly held section of a defense perimeter and catch us by surprise. While the chance cannot be ignored, the risk is nonetheless far less than would be the case with no security patrols or radar surveillance between strong points.

Let us analyze our security situation. Present clearance techniques and other security procedures as outlined in AR 380-5 and other pertinent directives provide the strong points of security defensive structure but do not guard us adequately against certain less probable avenues of approach, which, nevertheless, are

* Lt. Col. J.A.G.C.

potentially extremely dangerous to our security position.

Present procedures base all clearance techniques strictly on the degree of clearance requested, e.g. for confidential, secret, et cetera without regard to the extent of exposure of the individual concerned to classified material. Thus, a clerk in a staff branch which may handle less than a dozen secret documents a year is treated on the same basis as a clerk in classified message control who may handle several hundred secret documents a day. While present security clearance procedures may provide us with an acceptable degree of risk in the first case, they have proven obviously inadequate in the second.

To remedy this situation the first thing needed is a classification by G-2 or S-2 of the command concerned of each position requiring a security clearance to indicate those positions which represent maximum risk to the command and the security of the nation. Probably such maximum risk positions will not amount to more than one in one hundred positions requiring security clearances. These maximum risk positions would obviously be those having access to the greatest amount of classified material of the most sensitive nature such as the classified control personnel in a headquarters, the G-3 and G-4 plans people, and certain personnel in the G-2 structure itself.

At least one other factor must be given great weight. How old

is the subject and how long has he been in the military service? The younger the person and the less service he has had, the less chance have his personality weaknesses, if any, to have manifested themselves in the overt forms likely to come to the attention of investigative personnel. For example, a young soldier with strong latent homosexual tendencies may never have previously had real opportunity to give vent to such tendencies, which indeed may be unknown to him, prior to his arrival at his first overseas station. In civilian life the impact of his home, community and school may well have served to suppress their outward manifestation totally. He arrives in an overseas command after basic training and perhaps one short specialist's school and his total record, civilian and military, may well be absolutely unblemished. Under our present procedures such a young soldier would unhesitatingly be granted a secret clearance and assigned to work in a message center with access to thousands of classified documents.

This is the man for whom we must have psychiatric evaluation prior to the granting of clearance. Those whose neurotic tendencies have already been outwardly manifested will either be kept out of the service or denied a clearance in most cases, but the relatively young new soldier, officer, or civilian employee with a clean record may be a hidden danger in a key spot, and represent an unacceptable degree of risk.

To reduce the risk to an acceptable minimum, security clearance procedures for a maximum risk position for those with either less than three years active duty or less than 25 years of age should include a battery of psychological tests with complete psychiatric evaluation in any doubtful case.

By thus limiting our requirements for psychiatric evaluation

we would avoid placing a burden on the limited number of expert professionals available, such as would break down the entire system, and at the same time assure ourselves that another less likely but nonetheless dangerous avenue of approach into our security position is at least being kept under surveillance.



In Memoriam

Since the last issue of the Journal, the Association has been advised of the death of the following members: Capt. James S. Clifford, Jr., of Philadelphia, Pennsylvania; John L. Culler of Arlington, Virginia; John H. Daily of Indianapolis, Indiana; Leon A. Grapes of Davenport, Iowa; Lt. Col. Donald L. Manes of Washington, D. C.; Leon E. McCarthy of Ansonia, Connecticut; Gus C. Ringole of San Francisco, California; and Col. Charles Edward Royer of Bethesda, Maryland.

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

What The Members Are Doing . . .

Arizona

Col. John P. Clark (4th O.C.) of Winslow was recently named member of the Corporation Commission of the State of Arizona.

California

Col. Milton Goldinger, USAF-Ret., was recently named Assistant County Counsel of Solano County, California.

Colorado

Col. Royal R. Irwin, USAR-Ret., of Denver, recently announced that his firm has moved its offices for the general practice of law to the First National Bank Building, Denver 2. Col. Irwin is associated in practice with his son. The younger Irwin is an Assistant Attorney General of the State of Colorado and Chief Counsel for the Inheritance Tax Department.

Col. Milton J. Blake, USAR-Ret., as State Chairman of Colorado, held a meeting of members of the Association at Denver on May 23rd. The guest speaker on this occasion was Rear Admiral William C. Mott, The Judge Advocate General of the Navy, and a Director of the Judge Advocates Association. The meeting was attended by 50 members of the Association and other judge advocates serving in Colorado. Col. Blake reports that those present

indicated desire to organize for periodic meetings in the future and are making plans for a meeting of judge advocates coincident with the annual meeting of the Colorado Bar Association. At this gathering, Colonel Blake obtained six applications for membership and expects more to follow.

District of Columbia

Members of the J.A.A. met at the Officers Club of the Navy Weapons Plant on May 8, 1963. Cdr. Zeigel W. Neff, Chairman of the local group, arranged an excellent party and presented as the guest speaker, Senator Sam J. Ervin, Jr., of North Carolina, who spoke upon the work of the Subcommittee on Constitutional Rights. Almost 100 members of the Association and their ladies and guests attended this meeting. At the close of the meeting, the members present elected Col. Michael Leo Looney, USAR-Ret., as their Chairman for the coming year.

Gen. Thomas H. King, USAFR, recently announced that Mr. Neil B. Kabatchnick, also a member of the Association, has become associated with him in the practice of law specializing in military causes. Their offices are located in the Barr Building, Washington 6. Col. Clifford A. Sheldon, USAF-Ret., is also associated with General King.

Florida

Lt. Col. Sanford M. Swerdlin of Miami announces the return of his offices for the general practice of law to Seybold Building, 35-37 Flagler Street, Miami 32.

Maj. Ainslee R. Ferdie, USAFR, of Coral Gables, recently announced the removal of his offices for the general practice of law to Suite 202, 2315 LeJeune Road, Coral Gables 34.

Hawaii

Lt. Col. V. Thomas Rice, USAFR, of Honolulu, recently announced the formation of a partnership for the general practice of law under the firm name of Quinn and Moore. The members of the firm are Ernest C. Moore, Jr., Raymond M. Torkildson, William F. Quinn, former Governor of the State of Hawaii, and Colonel Rice. Their offices are located at 1441 Kapiolani Boulevard, Honolulu 14.

Illinois

Mr. Richard H. Deutsch of Chicago recently announced that Howard N. Gilbert had joined his partnership for the general practice of law and that the firm name has been changed to Rusnak, Deutsch and Gilbert. Their offices are located at 208 South LaSalle Street, Chicago 4.

Mr. William W. Brady recently announced that Lyle C. Brown has joined his partnership for the

practice of law. The firm name is Kirkland, Brady, McQueen, Martin & Schnell. Their offices are at 80 South Grove Avenue, Elgin.

Mississippi

Col. Richard A. Billups, Jr., of Jackson, as State Chairman for the State of Mississippi, has called a meeting of members of the Association in his state, together with other judge advocates, to meet coincident with the Mississippi State Bar Association between June 19th and 22nd.

Missouri

Maj. Bertram W. Tremayne, Jr., of St. Louis, was recently named a Director of Washington University. Major Tremayne is a member of the firm of Tremayne, Joaquin, Lay, Batts & Carr, with office at 212 South Central Street, St. Louis 5.

New York

Lt. Col. Sherwood M. Snyder, USAFR, of Rochester, as co-State Chairman of the State of New York, called a meeting of members of the Association in New York coincident with the annual meeting of the New York State Bar Association in New York City on January 26th. This meeting, attended by approximately 100 members of the Association, heard a panel discussion on the new Article 15—Non-Judicial Punishment. The panel was chaired by Maj. Gen.

E. M. Brannon, and the panelists were Capt. Mack K. Greenberg, USN; Col. Gilbert R. Ackroyd, USA; Col. Arnold LeBell, USAF and Col. Joseph M. Caffall, USAF. All members of the panel are members of the Association.

Capt. Edward F. Huber, USAR-Ret., recently announced that his law firm has changed its name to Naylon, Foster, Aronson, Huber & Magill. The firm continues to have offices at 61 Broadway, New York 6.



1963 ANNUAL MEETING

The annual meeting of the Judge Advocates Association will be held in Chicago at 3:00 p.m. on Monday, 12 August, in private dining room No. 3 of the Conrad Hilton Hotel. Col. Glenn E. Baird of the Chicago bar is chairman of the committee on arrangements.

For the occasion of the Seventeenth Annual Dinner and the twentieth anniversary of the Judge Advocates Association, Col. Baird has reserved for the Association the beautiful Cathedral Hall of the

University Club. The reception and cocktail hour will begin at 7:00 p.m. and dinner will be served at 8:00 p.m. Col. Baird has also arranged for a fine program of entertainment. This social event of the Association promises to be one of the best in the history of excellent annual gatherings of JAG's. You are urged to reserve the date on your calendar. Reservation blanks will be distributed shortly to the membership with the formal announcement of the annual meeting.

STATUS OF PENDING LEGISLATION

By Judge Advocates Association Legislation Committee ¹

The Military Pay Bill, now H.R. 5555, as originally introduced would have given lawyers and others requiring post-graduate degrees "foggy" credit for those years that they attended law school or graduate school provided they were not accumulating such credit at the same time by other means such as being in the National Guard, a member of a federally recognized Reserve, etc. However, this provision was deleted from the Bill reported out by the Committee on Armed Services in the House and passed by the House. H.R. 5555 is now in the Senate for consideration. It is expected that hearings before the Senate Committee on Armed Forces will start during the first or second week of July. The JAA takes the position that a section giving constructive credit for post-graduate degrees, or a comparable provision, applicable to lawyers, should properly be included in the pay bill. At the present time, when a young lawyer is asked to integrate into the regular Armed Services, he frequently will find if he accepts he will be penalized because of the fact that he obtained a post-graduate degree rather than having gone directly into the service con-

cerned from college as some of his undergraduate contemporaries may have done. This penalty results from the present law whereby he will for the balance of his career be entitled to less pay than any one of such college contemporaries of the same rank. The President of the JAA has requested an opportunity to appear and be heard before the Senate Committee on this matter. This request has been acknowledged and the JAA is to be notified when hearings are scheduled.

The House Committee on Armed Services has reported out H.R. 3179, whereby the judges appointed to the Court of Military Appeals will have a life, rather than the present fifteen year, tenure. This will not, however, apply to the present judges of the Court of Military Appeals unless they are reappointed by the President. The Bill also delineates the Court of Military Appeals to be a legislative, as distinguished from a judicial, court. The Committee did not buy proposals which would have eliminated the requirements that the judges be members of a Bar, and that not more than two of the judges be appointed from the same political party.

¹ Members of the Committee are: LCDR Penrose L. Albright, USNR; Col. Daniel Andersen, USAFR and Col. John Herberg, USAR-Ret.

The subcommittee on Constitutional Rights, headed by Senator Sam J. Ervin, Jr., last year conducted extensive hearings on the Constitutional Rights of Military Personnel. To date, neither a report nor any bills have resulted from the study made by this subcommittee. However, it is understood that legislative proposals should be forthcoming before the end of June.* It is less certain when a report can be expected.

There has been no action on H.R. 691, which, to aid in procuring lawyers, would give them substantially the same benefits as now received by doctors, dentists and veterinarians. At the present time, the controlling attitude in the Armed Services Committee of the House, if not actually hostile, does not seem to be favorably disposed towards any legislation which would aid in the procurement from outside the Armed Forces of judge advocates and law specialists. Nevertheless, the Judge Advocates Association is on record as urging the passing of this legislation. The Committee has been advised by the JAA that the situation as now exists tends to discourage applications from high-caliber attorneys for integration into the regular Services. The President of the JAA has asked to be informed when and where hearings will be heard on H.R. 691 for the purpose of appearing on its behalf.

The Department of Defense proposed in the budget submitted for fiscal 1964, that the previous restriction imposed on the Armed Services which keeps them from sending officers to law school be omitted. It was apparently felt that this is necessary in order to obtain Service lawyers in the numbers needed of the desired excellence and experience. However, the proposal has apparently been killed in the House although it could, of course, be revived in the Senate.

At the present time, proposals are now circulating in the Executive branch of the Government which would provide for single-officer general and special courts-martial, certain pretrial procedures in courts-martial, and execution of certain courts-martial sentences. These have not been sent to Congress.

More than a dozen bills have been introduced by various members of Congress to provide certain boards which will give consideration to evidence relating to good character and exemplary conduct in civilian life after a less than honorable discharge or dismissal wherein authorization for a certificate of exemplary rehabilitation may be made. Also, bearing upon the separation of military personnel under conditions other than honorable are H.R. 686 which will prohibit the discharge of a member of the Armed Forces un-

* See "The Congressional Study on the Constitutional Rights of Military Personnel" by Sen. Sam J. Ervin, Jr., page 4, *supra*.

der conditions other than honorable except pursuant to sentence of a general court-martial, and H.R. 688 and H.R. 3088 which would establish additional boards to review and correct military discharges and dismissals.

H.R. 1008 would amend the uniform code of military justice by allowing Secretaries of the Armed Services to substitute bad conduct for dishonorable discharges and administrative discharges for courts-martial discharges.

H.R. 3051 would prohibit fees in excess of \$10 for attorneys on certain claims filed with the Military Departments by members of the Armed Forces.

H.R. 3327 would provide that an honorable discharge from the

Armed Forces would expunge convictions for misdemeanors from the record of the member concerned.

The JAA is on record as opposed to H.R. 686, H.R. 688, H.R. 3088 and H.R. 3327.

The Senate has passed S. 384, which increases from \$80 to \$135, a maximum monthly rental of a serviceman's dwelling which comes within the protective provisions of the Soldiers and Sailors Relief Act of 1940, as amended.

The Bolte package which would radically revise the officer personnel laws in the Armed Forces and, incidentally, establish a JAG Corps in the Navy, was sent to Congress some time ago. It appears to be getting nowhere.



