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Bulletin No. 47

June, 1976

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# 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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# JUDGE ADVOCATE JOURNAL

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## Publication Notice

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

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Officers and Directors 1975-76—see inside back cover.

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# Report of the Nominating Committee—1976

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 by the President to serve as the 1976 Nominating Committee:

RADM. William O. Miller, USN, Chairman  
LTC. James J. Nero, USAF  
LTC. James N. McCune, USA  
COL. John A. Everhard, USAFR-Ret.  
LT. Peter F. Fedak, AUS-Hon.-Ret.  
LT. Rawls S. Jensen, USAF-Ret.  
COL. Richard H. Love, USAR-Ret., Secretary

The By-laws provide that the Board of Directors shall have twenty members subject to annual election. It is provided that there be a minimum representation of three members for each of the Armed Services: Army, Navy and Air Force, including not less than one from each service in a rank not higher than Captain in the Army and Air Force, or Lieutenant Senior Grade in the Navy or equivalent rank in the Marine Corps or Coast Guard. The Marine Corps and Coast Guard are included in the Navy representation. For the purpose of determining service minimum representation, the slate of nominees for the Board of Directors is divided into three sections; and, upon the balloting, the two nominees from each section who receives the highest plurality of votes within the section, together with the junior officer representative of each service shall be considered elected. The remaining eleven elected members of the Board will be 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 Judge Advocates General of each of the services, all former TJAG's, the senior uniformed lawyer in the active service of the United States Marine Corps and of the United States Coast Guard and all past presidents of the Association. They are not listed in the following slate of nominees.

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

### Slate of Nominees for Offices

President:	MG. Albert M. Kuhfeld**, USAF-Ret., O. (6)
First Vice President:	COL. Williams S. Fulton***, USA, Va. (1)
Second Vice President:	CAPT. Julian R. Benjamin****, USNR, Fla (2)
Secretary:	CAPT. Martin E. Carlson*, USNR-Ret., Md. (2)
Treasurer:	COL. Charles M. Munnecke*, USAR-Ret., Va. (2)
Delegate, ABA	MG. Kenneth J. Hodson*, USA-Ret., D.C. (5)

### Slate of Nominees for the Twenty Positions on the Board of Directors

#### Army:

- COL. Gilbert G. Ackroyd\*, USA-Ret., Pa. (5)
- MAJ. H. Jere Armstrong, USA, Va. (1)
- COL. Richard J. Bednar, USA, Va. (1)
- MAJ. John R. Boseman, USA, D.C. (1)
- COL. Barney L. Brennen, Jr., USA, Va. (1)
- COL. Robert H. Clark, USA, Va. (1)
- COL. James A. Gleason\*, USAR-Ret., O. (2)
- COL. Forrest S. Holmes\*, USAR, Md. (3)
- COL. John S. McIntire, USAR, Ca. (2)
- CPT. Glen E. Monroe, USA, Va. (1)
- MAJ. Charles A. Murray, USA, N.C. (1)
- LTC. Lenahan O'Connell\*, USAR-Ret., Mass. (2)
- MG. Harold E. Parker\*, USA-Ret., Va. (3)
- CPT. William R. Robie\*, USAR, Va. (3)
- BG. Robert D. Upp\*, USAR-Ret., Ca. (2)
- LTC. Charles W. White\*, USA, Tx. (1)
- MG. Lawrence H. Williams, USA, Va. (1)

#### Navy:

- CAPT. Donald R. Bradshaw, USNR, Tx. (2)
- LCDR. William D. Cohen, USN, Va. (1)
- CDR. John D. Fauntleroy, USAR, D.C. (7)
- LCDR. Robert T. Gerken\*, USNR, D.C. (1)
- CDR. John T. Gladis, USN, D.C. (1)
- LCDR. Michael J. Jacobs\*, USCG, Ca. (1)
- CPT. Dennis O. Olson, USMCR, Va. (1)
- CDR. Matthew J. Wheeler\*, USNR, Ca. (3)

**Air Force:**

- COL. Myron N. Birnbaum\*, USAF-Ret., Va. (3)
- COL. Perry H. Burham\*, USAF, Tx. (1)
- COL. Vincent J. Del Becarro, USAF, Tx. (1)
- COL. Arthur Gerwin, USAFR, N.Y. (2)
- BG. Frank O. House, USAF, Hi. (1)
- CPT. Laurent R. Hourcle, USAF, Md. (1)
- COL. William R. Kenney\*, USAF-Ret., Md. (5)
- BG. Walter D. Reed\*, USAF, Md. (1)

Under provisions of Section 2, Article VI of the By-laws, members in good standing other than those proposed by the Nominating Committee may be nominated and will have their names included in the printed ballot to be distributed by mail to the membership on or about 5 July 1976, 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 office of the Association on or before 30 June 1976.

Balloting will be by mail upon official printed ballots. Ballots will be counted through noon 9 August 1976. Only ballots submitted by members in good standing will be counted.

- \* Incumbent
- \*\* Incumbent First Vice President
- \*\*\* Incumbent Second Vice President
- \*\*\*\* Incumbent Member of the Board of Directors

(1) active military service as judge advocate; (2) private law practice; (3) lawyer in U.S. Civil Service; (4) lawyer in State Civil Service; (5) bar association or related public service activity; (6) law school staff or faculty; (7) trial judge.



# THE REPORT OF TJAG—AIR FORCE

Major General Harold R. Vague, The Judge Advocate General of the Air Force, reported to the 32nd Annual Meeting of the Judge Advocate Association in Montreal on 11 August 1975 as follows:

I am privileged to appear before you again this year to report on activities of the Air Force Judge Advocate General's Department since our meeting last year in Hawaii.

I might say that I am also happy to have gained a bit in stature since that meeting. When the TJAG's made their presentations in Honolulu, I was told by the chairman: "I have lined up the order of speakers both by seniority and alphabetically. Either way, you speak last."

The fact that I am speaking first today is at least a tribute to my longevity.

I do not intend today to give you a lengthy statistical summary of our work. Instead, I would like to simply hit some of the high points of the past year.

First of all, I will mention people. We presently have 1231 judge advocates on board. This number has been fairly steady for the past several years. The significance of this fact—which I will touch on again later—is that during this time there has been a substantial overall decrease in the size of the Air Force. However, the increase

in the amount and complexity of legal business that we are handling has prevented any corresponding decrease in the size of the JAG Department.

Probably the most remarkable change in the Air Force last year was the decline in courts-martial—both in absolute terms and in the rate per thousand. Between fiscal year 1974 and fiscal year 1975, the number of cases tried declined from 2947 to 1820. During that same period, our rate of trials per 1000 people in the Air Force declined from 4.3 to 2.9—a rather dramatic 33% decrease.

Why has this been true?

In my view, there are several reasons.

First of all, all of the armed forces have—for the first time—been able to be selective in their recruiting. I am not, at this early point, going to say that the all-volunteer force is an unqualified success. I will say, however, that for whatever reason, be it a successful all-volunteer force, a lack of a shooting war, or economic conditions in the country, the number of applicants for military service is at the point where we can be highly selective about who we take in.

Secondly, because recruiting is not presently a problem, we can be and are—selective about who we permit to graduate from basic training and technical schools.

For years, we have had what we called the "179 day rule". In other words, during the first 6 months of a recruit's military service we looked at him closely. If it appeared that, for some reason, he was not likely to be a good airman, we would give him an honorable discharge. In effect we were saying, "Son, we appreciate your volunteering for the Air Force. However, we have come to the conclusion that it would be in the best interests of both the Air Force and you if you tried another line of work. Here is your honorable discharge, and good luck."

Beginning in 1973, we extended this concept to include airmen with less than three years of service who have not attained the grade of E-4. Part of the reason for this change was to make the treatment of airmen identical to that of officers. An officer is a "probationary officer" for three years, during which period he can be discharged with a minimum amount of justification and due process. However, he must receive an honorable discharge. We use the same rules for the selective discharge of airmen.

A third reason—in my opinion—for our rather startling decline in courts-martial is our "preventive law" program. We—and the other services—have, of course, always had preventive law programs. Through legal assistance and other contacts, we have endeavored to prevent legal problems from arising. What we did in the Air Force was formalize a preventive law program and, more important, adver-

tised it. We concluded, for example, that one of the reasons that military people get into difficulty is because they did not understand the legal system under which we live. We found, for example, by surveys that both officers and airmen had some pretty wild misconceptions about military law.

Therefore, as a part of our Preventive Law Program we encourage the use of military law seminars—led by judge advocates—designed to dispel some of these misconceptions and give our people a better appreciation of our military legal system.

A fourth reason for our lower court-martial rate is an unexpected fall-out from our Area Defense Counsel program.

As I briefed this group last year, the Air Force established an independent defense counsel program—called the Area Defense Counsel program—consisting of some 110 judge advocates, assigned worldwide, who perform defense counsel duties. To avoid the specter of command influence, these officers are not assigned to the commands but are instead assigned to Hq USAF, directly under my supervision.

We went into this program with some trepidation, I admit, and I will shortly describe the results in more detail. However, one unexpected fall-out was "front-end" rehabilitation. In other words, as commanders report it to me, they will send to the area defense counsel airmen who are not yet in serious trouble but are borderline. The area defense counsel, who has cred-

ibility because he is not a member of the establishment, then talks to the young man to try to get him to mend his ways. Commanders report that he is successful in a surprisingly large percentage of cases.

I told you that I would expand somewhat on the progress of the area defense counsel program.

One hundred and ten officers—and about the same number of administrative personnel—are assigned to the program. We have about 120 bases. This means that most bases have one ADC assigned. Some of our smaller bases are served by the ADC at one of our nearby bases. On the other hand, a few of our larger bases—such as Lowry—have two or more ADC assigned (Lowry actually has four).

After a year of operation, we ran an evaluation in June 1975. We used a board which included commanders as well as senior judge advocates. The board invited criticism of the program (and got it, too).

However, in the final analysis approval of the program—from commanders, first sergeants, staff judge advocates, and the ADC's themselves—was overwhelming.

On 19 July 1975, the Chief of Staff of the Air Force approved the program as a permanent one.

1975 also saw the use of computers expanded in the Air Force JAG Department. In addition to their use in FLITE—our computerized legal research office with which most of you are familiar—and in our claims office, we have also developed a computer program

to keep track of, and analyze, courts-martial and article 15's. We have found it a highly useful tool to analyze trends, put people where they are needed, and answer the questions that are always asked about military justice matters.

In the Civil Law area, our biggest problems have been in civil litigation.

Our most worrisome problem is Constitutional tort suits, in which commanders, security police, and other personnel are sued for personal liability for acts performed by them in their official capacities. So far, the Air Force has lost none of these cases, but—as the Chief sometimes pointedly reminds me—we really can't afford to lose the first one.

In the Federal court arena, I think that all the TJAG's breathed a sigh of relief when the *Councilman* and *De Champlain* cases were decided. These cases concluded that, except in rare instances, Federal courts had no business jumping into the middle of courts-martial with TRO's and injunctions. The rule now is that a court-martial will be allowed to complete its business, through final appellate review, and only then may it be challenged in the Federal courts by means of a collateral attack.

An area of increasing interest to military lawyers is environmental law. The Air Force got a taste of how important it was when a proposed move of a headquarters from Richards-Gebaur AFB, Missouri, to Scott AFB, Illinois, was enjoined by a Federal court because we had

not filed an environmental impact statement.

We had concluded that such a statement was not required because we were only moving people from one place to another. No construction or other action that would adversely affect the environment was necessary at either location.

However, the court pointed out that when you move people you increase the amount of automobile exhaust and sewage at the other end, and that schools may become crowded. Hence, an environmental impact statement is required.

We have another environmental law suit in Arizona, testing whether we can beddown the new F-15 fighter aircraft at Luke AFB with-

out filing such a statement. Presumably, aircraft flight patterns will change, and possibly noise levels may increase, so the question is whether locating an F-15 wing at a base will have such an adverse environmental effect that a formal impact statement must be prepared.

This, gentlemen, is a quick history of the AF JAG Department during the year since our last meeting. In accordance with the expressed desires of the Chairman, I have purposely kept this brief, knowing that you are anxious to hear from my brothers' TJAG's.

I appreciate the opportunity to be here and be a part of your program, and I am looking forward to our evening program.



# THE REPORT OF TJAG—NAVY

Rear Admiral H. B. Robertson, Jr., The Judge Advocate General of the Navy reported at the Annual Meeting of the Judge Advocates Association on 11 August 1975, at Montreal as follows:

The Navy JAG Corps has undergone substantial organizational changes since July 1, 1974. These changes were necessitated by four basic factors.

1. Substantial reductions in manpower—the JAG Corps took its share of cuts as part of overall Navy manpower reductions.
2. The Secretary of Defense Task Force study of Military Justice, 1973—recommending substantial independence for military defense counsel.
3. Increasing legal requirements—increases in numbers of courts-martial trials, civil litigation, legal assistance, and administrative law matters.
4. Reduced availability of funding in terms of real dollars—the result of congressional budget reductions, reallocation of funds to higher priority operational areas, and inflation.

As a result of these circumstances, it became obvious that current JAG Corps organizational structures were not geared to meet a shrinking asset-increasing legal service need environment. Follow-

ing one year of intensive study, it was recommended to CNO and the Secretary of the Navy that the JAG be afforded greater control over assets in order to meet the legal needs of the Navy. That recommendation was approved, and our organization was modified on 1 July 1974.

This chart (Chart 1) shows Navy JAG Corps organization prior to July 1974. You will note that the majority of Navy judge advocates—approximately 700 out of 825—were under the direct command line to the CNO, that the JAG had no direct control over judge advocates and that there were only some 15 general court-martial military judges in the direct JAG command line. Under this organization, the JAG could not control billet placement nor the locale of manpower reductions. He had no control over allocation of available dollars expended to support the Navy's judge advocates. And, the perception—more imagined than real, but still the perception—of command influence over defense counsel and special court-martial military judges existed. There was no effective means of controlling these matters, although, of course, JAG could and did make recommendations in the premises to the Commander of the judge advocates concerned.

This second chart (Chart 2) shows the JAG Corps organization

effective on 1 July 1974 and currently in existence. Our field staff judge advocates and those in training remain under the CNO, and rightly so. But, law centers have been retitled Naval Legal Service Offices and placed under the JAG, who is interposed in the command chain as the Director of the Naval Legal Service, with additional duty to the CNO for legal service matters. At the same time the JAG remains on an equivalent echelon of command, as CNO, under the Secretary of the Navy. Additionally, special court-martial military judges have been placed directly under JAG cognizance. By this organization, the JAG was given direct control of over 400 judge advocates, out of 765 total strength. The 350 remaining judge advocates are the staff judge advocates (command house counsel) and incumbents of training billets as shown on Chart 1.

The net result is that the Navy, for the first time and as the first service to do so, has independent law offices rendering legal service to the entire Navy, but coming directly under JAG command in his hat as the Director of the Naval Legal Service. This organization has afforded us the ability, within given strength limitations, to meet the legal service requirements of the Navy, and to allocate available funds to our offices on a fair share basis. Additionally, we have noted improvement in junior judge advocates morale. Essentially, our people now feel that they are a part of the firm.

The mission of our Naval Legal Service Offices is to provide all necessary legal services and counsel within a given geographical area by assignment of judge advocates to provide services for any command legal matter. There are 18 NAV-LEGSVCOFFs and 15 branch offices under them—spread throughout the world from the Mediterranean Sea, the long way around, to Yokosuka, Japan. They are busy, and in some cases short-handed. But, they are getting the job done. If by no other means, they do it by helping each other out of workload log-jams.

After one year of operation we have, I think, worked out most of the bugs in the system. Navy lawyers have learned how to budget funds and conserve resources—areas with which they previously had no intimate involvement. Essentially, they now are law office managers in the same respect as, and facing most of the same problems as, civilian practitioners in large firms.

Initially, our clients—some senior Navy Commanders—tended to view this new organization with a jaundiced eye. They were reluctant to lose control of their legal personnel. They were suspicious of our motives. And they did not like the possibility of "Private Navies" within the naval service. I hope we have overcome most of those objections. In our field visits to NAV-LEGSVCOFF's, we make a point of visiting the senior commands in the area to find out if they are dissatisfied with the legal services they are receiving. None have ex-

pressed dissatisfaction with those services, and in fact, many have indicated a high regard for the way we have met their needs.

Of course, we still have problems. Our exceptionally high case loads have not disappeared—the legal business is booming. We need additional judge advocates and clerical personnel to handle the workload. But we realize the Navy cannot be entirely manned with lawyers. And operating money is always in short supply.

We are, however, managing to live with these problems. And they are not new problems. As a matter of fact, in each year of my more than 30-year career, those same problems have existed to a greater or lesser extent. The prime test is whether or not we are meeting our task of providing necessary legal service to the Navy with a minimum of judge advocates, clerks, and money. I feel that we are meeting that test.



PRE 1 JULY 1974 ORGANIZATION  
NAVY JUDGE ADVOCATE PLACEMENT

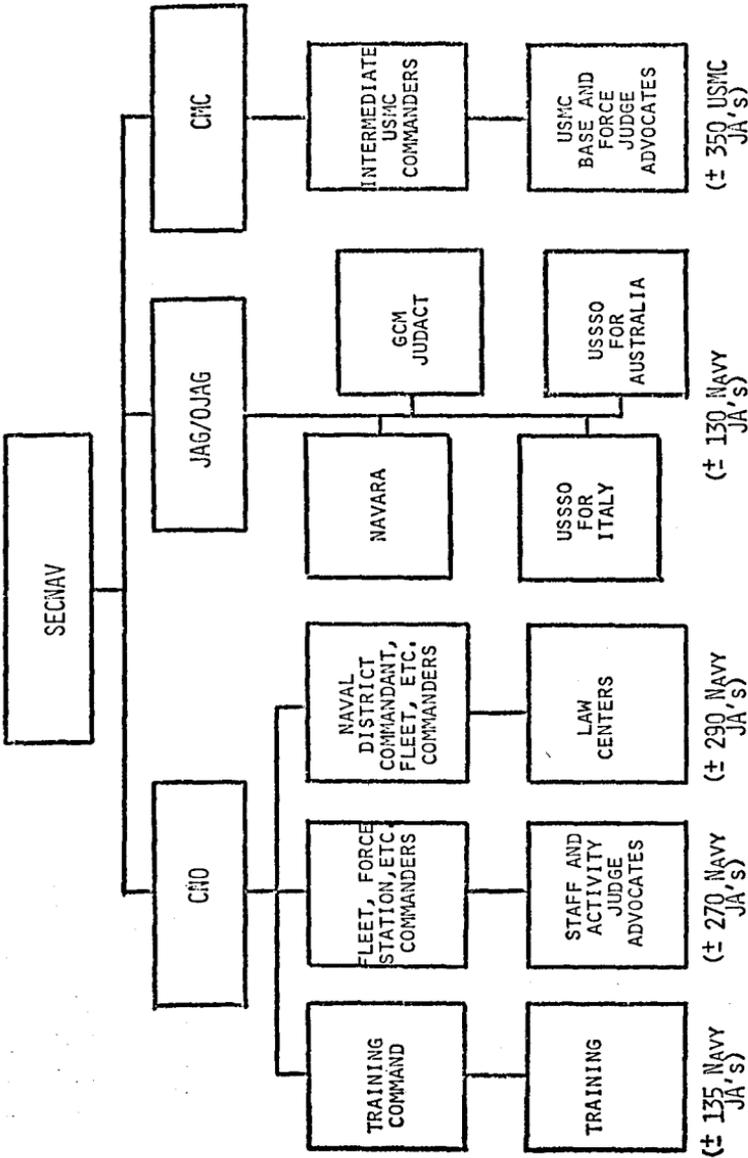
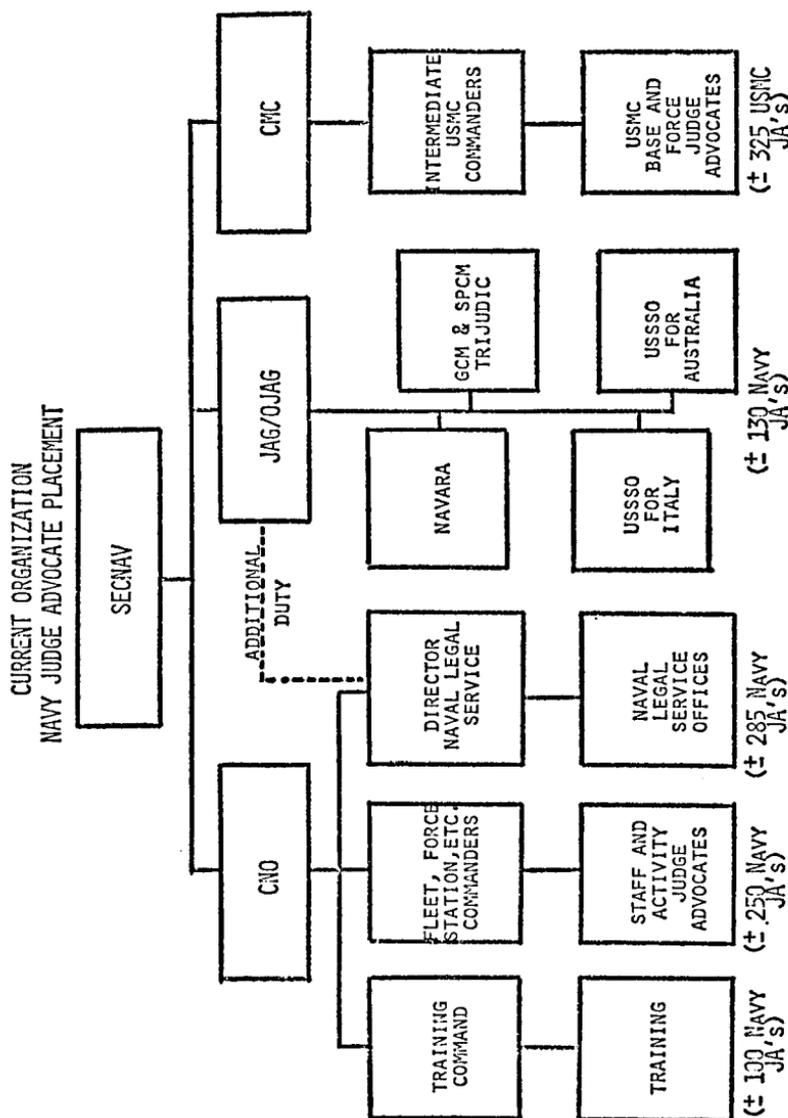


CHART 1

NAVY JUDGE ADVOCATE TOTAL FORCE: ± 825



# THE REPORT OF TJAG—ARMY

Major General Wilton B. Persons, Jr., The Judge Advocate General of the Army, reported to the Judge Advocates Association at its Annual Meeting in Montreal on 11 August 1975, as follows:

As this is my first "Annual Report" to your association and as I have only held this position for little over a month, I must perforce speak of events which occurred under my predecessor, General George Prugh.

The military justice system in the Army continues to be our main point of interest. The functioning of the justice system affects the entire structure of discipline in the Army. While the Army has continually decreased in strength over the last few years, to a level of about 785,000, the court-martial case load has remained fairly heavy. The monthly general court-martial rate per thousand average strength is higher today than in 1968 and 1969, although it has—at last—started to decline after a steady rise for the past few years. With continued manpower shortages in key positions, and a high turnover in personnel in our corps, the thrust of our work in the area of criminal law has been toward expediting the administration of the justice system.

In this connection, I would like to draw your attention to the fact that Congress is likely to give early consideration to legislation

to grant additional compensation to military attorneys. ABA support of such legislation may be of key importance in obtaining passage of the legislation. The support of the ABA and the Judge Advocates Association will be deeply appreciated.

Court-martial processing times continue to be a critical area. The United States Court of Military Appeals in the 1971 case of *U.S. v. Burton*, (21 U.S.C.M.A. 117, 44 C.M.R. 166 (1971)) held that a presumption of a denial of speedy trial would arise when pretrial confinement exceeds ninety days. Last year, the same court found that presumption of a denial of speedy disposition of a case will arise when the accused is continuously under restraint *after* trial and the convening authority does not promulgate his formal and final action within ninety days of the trial (*Dunlap v. Convening Authority*, 23 U.S.C.M.A. 135; 48 C.M.R. 751 (1974)). I am pleased to report that General and BCD Special court-martial processing times have been reduced to the lowest point ever in the last three years. The average time from restraint to receipt of records at the U.S. Army Judiciary, for fiscal year 1975, is 127 days for GCM's and 108 days for BCD Specials.

In June and July of last year, there was a backlog of over 980 unfiled cases at our defense appeal-

late division. Thanks to increased manpower and improved administrative procedures, we were able to reduce this figure to 310 today. At the same time, we were able to reduce the processing time substantially. Over the past year, the appellate processing times for guilty plea cases have been cut in half while the time for not guilty pleas has been reduced forty percent.

While we are attempting to speed up and streamline our justice system, we are not going to sacrifice the quality of the justice rendered. With that in mind, we have undertaken a program to upgrade defense services.

It had often been the contention of defense counsel that the prosecution controlled access to polygraph examinations. Last fall my office developed a plan in coordination with the Criminal Investigation Division which allowed defense counsel to seek directly a polygraph examination for their clients. The reaction from the field has been mostly positive. Defense counsel now feel a greater latitude in the support they receive for the preparation of their cases. This past month I sent a letter to all SJA's to upgrade profession competency by in court training by assigning assistant prosecutors and defense counsel where personnel situations permit.

In addition, this past year has seen greater efforts to improve the image of the military lawyer. My office has been active in seeking private office facilities for all counsel along with necessary adminis-

trative and logistical support and adequate transportation.

We have attempted to have the offices of military counsel furnished in a manner to create an atmosphere of professional distinction, and equipped with modern secretarial devices to facilitate the preparation of papers. Emphasis has been placed on updating and expanding the law libraries at the various installations. To remove the "appearance of evil" we have attempted to separate visibly the offices of the defense counsel from those of the SJA and the trial counsel.

Probably the most significant event last year was the Army-wide implementation of the Military Magistrate Program. While some commanders have expressed concern over the effect this program will have on discipline and command responsibility, I believe this program to be a most worthwhile endeavor. The Military Magistrate reviews the necessity for pretrial confinement and has the authority to direct release. Results of tests of the program conducted at CONUS installations and in USAREUR, where it has been in existence for almost four years, were quite favorable. Implementation of the Magistrate Program has resulted in reducing tension in confinement facilities, particularly racial tension; preventing unnecessary incarceration; insuring that confined personnel are provided counsel; and speeding up trials. We are continuing to refine this program and, I believe, the Magistrate system will aid

both the morale and the discipline of the Army.

Two congressional acts have created a good deal of work for us in the administrative law area. In November, 1974, Congress amended the Freedom of Information Act. Generally, the amendments narrow certain of the exemptions from mandatory release, provide for *in camera* inspection of classified documents withheld from release, require disciplinary action against personnel who act arbitrarily and capriciously in denying requests for information, prescribe strict time limits for processing requests, and, as before, require annual reporting to Congress on the implementation of the Act.

The amendments necessitated immediate revision of Department of Defense and Department of the Army regulations which implement the Freedom of Information Act. Accordingly, between November 1974 and 19 February 1975, the effective date of the amendment, DOD Directive 5500.7 underwent a complete revision, while Army Regulation 340-17 was changed substantially.

Experience to date indicates that Judge Advocates both at departmental level and in the field are coping well with the new requirements. Most requests for information are being processed within the statutory time limits, and, in accordance with the Army's policy of openness, release is the rule, denial the exception. So far the impact of the amendments has been much less than was expected.

On 31 December 1974, the President signed into law the Privacy Act of 1974. The primary purposes of the act are to limit access by other parties to information about an individual, and to permit individuals access to information pertaining to them in federal agency records, to have copies of these records, and to request that they be corrected or amended. To this end, agencies which maintain systems of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual, must publish in the *Federal Register*, at least annually, a notice of the existence and character of such records system. The Army has taken the necessary action to comply with this requirement.

The Act is not absolute; that is, its requirements are subject to specific exceptions, such as investigative files compiled for law enforcement purposes. However, for the most part, government records will become increasingly available to the individuals to whom they pertain.

The Army's legal assistance program appears to be improving, due to a greatly increased emphasis by our Judge Advocates in the field.

The Expanded Legal Assistance Program (ELAP), established in order to provide free legal representation in civilian courts for our service personnel and dependents who could not otherwise afford the services of a lawyer, is now being

actively conducted at thirteen installations in eleven states. This is an increase of approximately 25 percent in the last year; negotiations now being conducted will, if successful, place ELAP in operation in five other states. One substantial change that was made to the Army's program is requiring the proper approval of my office before a felony case may be defended by a JAG attorney. The effect of this change appears, from a practical standpoint, to be minimal, as very few service members charged with felonies were represented through ELAP before the change was announced.

In the area of legal assistance publications, I am glad to report the completion and distribution of the new Legal Assistance Handbook (DA Pamphlet 27-12). I feel that this revised document, updated on a regular basis, will assist greatly in the resolution of the personal legal problems of our personnel.

Anyone who reads the newspapers knows that we in the military are experiencing a "litigation explosion." The Army has certainly had its share of time in court. Let me now conclude by going over some of the more important areas in which the Army is involved.

The Supreme Court has granted certiorari in the case of *Spock v. David*. On 14 August 1974 the United States Court of Appeals for the Third Circuit decided that case adversely to the Army (502 F.2d 953). The three-judge panel affirmed the district court on the

merits. Specifically, the opinion permanently enjoined military authorities at Fort Dix from interfering with political campaigning and distribution of leaflets within the unrestricted areas of Fort Dix and from requiring prior submission and approval of materials to be distributed (reasonable restrictions as to time, place, and number of persons is permitted). After the Supreme Court granted certiorari in the case, the Solicitor General began to have doubts about the wisdom of litigating the case further. After a conference involving the Solicitor General, the Judge Advocate General and the General Counsel of the Army and the Litigation Division Action Attorney, however, the Solicitor General agreed to continue the appeal with vigor. He has prepared and submitted to the court a very strong brief on the two issues to be considered by the court:

a. Whether the commanding officer of a military installation has authority to prohibit political speeches on the installation.

b. Whether the commanding officer of a military base has authority to prohibit the distribution on the base of unauthorized publications without his prior approval.

The case should be argued and decided in the Fall, 1975, term.

Last year's report contained several paragraphs on the continuing saga of former Lieutenant William Calley. To recapitulate, on 27 February 1974, U.S. District Court Judge Robert Elliott released Calley on personal recognizance bond

of \$1,000.00. After an unfruitful attempt to have the District Court reconsider and reverse its own order, the Army obtained a precedent setting reversal of the lower court by the United States Court of Appeals for the Fifth Circuit on 13 June 1974, reversing Judge Elliott. Calley was returned to confinement and transferred to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, on 20 June 1974. On 25 September 1974, Judge Elliott issued a 132-page opinion and a one-page judgment finding that Calley's conviction was constitutionally invalid. The rationale of Judge Elliott's opinion is that Calley was denied a fair trial by excessive and inflammatory pre-trial publicity; was denied process to compel the appearance of necessary witnesses (including the Secretary of Defense, the Secretary of the Army, and the Chief of Staff of the Army) and access to the House Armed Services Committee transcript of its investigation into the My Lai incident; and was tried on improperly drawn charges that precluded him from preparing his defense and did not protect him from double jeopardy. Consequently, Judge Elliott ordered that Calley "be released forthwith from his present confinement . . . and that he be discharged from custody or restraint of any nature."

On 26 September 1974 the Solicitor General of the United States authorized the Army to seek a stay from Judge Elliott's decision and, if that motion were denied, to seek a stay from the Court of Appeals

for the Fifth Circuit in New Orleans. Judge Elliott denied the motion for stay and the motion for clarification and the issue was taken to the Fifth Circuit on an emergency basis. Chief Judge Brown of that court granted the motion. Initially, it was indicated that the judgment would be stayed until Monday, 30 September, only. The formal order of the court entered on 27 September, however, provides that the judgment of the District Court was stayed until further order of the Court of Appeals. On 8 November 1974 the U.S. Court of Appeals for the Fifth Circuit in New Orleans denied the government's motion for a stay of Judge Elliott's order releasing Calley on bail and the stay previously granted by Chief Judge Brown was vacated. The court ordered that Calley be released on bail pending appeal under conditions initially to be set by Judge Elliott. This order was by a vote of 10 to 4 of the judges participating. The court also ordered that the appeal would be heard *en banc* during the week of 17 February 1975. On 9 November 1974 Calley was brought before the United States District Court for the Middle District of Georgia at a hearing pursuant to the request of Judge Elliott. Pursuant to the order of the Court of Appeals dated 8 November 1974, the District Court ordered Calley released on a \$1,000.00 recognizance bond.

As a result of publicity at the time, some individuals think Calley was released on parole. This was

due to Secretary Callaway's offer to release him on parole because of his good behavior. (The Secretary of the Army had already decided that Calley would be paroled on his eligibility date—a few days after Judge Elliott's order. Calley, however, is out on bond pursuant to court order.)

The appeal was argued before the fifth circuit court sitting *en banc* on 18 February 1975. The appellate court has not issued its opinion in the case.

Women have also taken us to task and have actively challenged sex discrimination in entrance requirements for the military services. In *Chandler v. Callaway*, the Army's requirement that female applicants for enlistment be eighteen years old and high school graduates while seventeen year old male, school drop-outs could enlist, was challenged. A favorable decision to the army was appealed by the plaintiff. During the pendency of the appeal it was learned that the plaintiff had enlisted in the marine corps. The government's "munsingwear motion" to dismiss the appeal as moot is pending.

On 31 December 1974 another case (*Parise and Cartwright v. Schlesinger and Callaway*) was filed in the U.S. District Court for the District of Columbia. Barbara Parise, an eighteen year old who failed the "stringent written test score requirement," and Helen Cartwright, a twenty-one year old non-high school graduate, initiated class action attacking the sex differentiated enlistment criteria, test

scores and level of education. This case is now in extensive discovery proceedings. On 17 June 1975 the plaintiffs filed 69 pages of interrogatories containing 359 items. Responses to the interrogatories are being prepared by a task force in the office of the Deputy Chief of Staff for personnel.

Reductions in force involving civilian employees have also spawned lawsuits. The proposed closing of the Frankford Arsenal in Philadelphia, which would result in the retirement, discharge, or relocation of all employees in the Arsenal, has resulted in two lawsuits. One is brought by a number of congressmen from the Philadelphia area and others alleging that the closing is in violation of the military construction authorization act of 1967 which requires proper notice of proposed closings to the Congress (*National Association of Government Employees, et al. v. Callaway*). At hearings on this suit, the army presented evidence that it had furnished to the Congress the same type of information in the same format and to the same people that it has done in other closings. On 21 July the suit was dismissed primarily on the basis that no justiciable issue was presented. In a companion suit, the city of Philadelphia and one of the affected employees seeks to halt the closing as a violation of the so-called arsenal act (*City of Philadelphia, et al. v. Callaway*). Plaintiffs allege in their suit that the arsenal act requires the army to maintain arsenals for the produc-

tion of weapons and materiel as opposed to buying such materiel from civilian sources.

The army is also involved in an environmental impact statement controversy. This involved the destruction of huge flocks of blackbirds at Fort Campbell, Kentucky, and the Milan Army Ammunition Plant in Tennessee. Roosts at these installations contained an estimated 14 million blackbirds during the winter of 1974-75. These concentrations posed a health hazard to the surrounding military and civilian communities and were a severe hazard and handicap to flight operations in the area. The army proposed to reduce these hazards by spraying the roosts with Tergitol, a substance that would destroy the inner insulation of the birds' feathers and allow them to become rain-soaked and freeze to death. Environmental groups from various parts of the United States sought to enjoin this process on the basis that no environmental impact statement was prepared. Although, the injunction was denied, the army hastily prepared an environmental impact statement. Several roosts were sprayed, and a substantial number of the birds were killed. The judge will hear the case on its merits and will focus primarily on a consideration of the adequacy of the environmental statement that was prepared.

Also in the field of environmental law, the issue of whether the army must comply with state procedural as well as substantive environmental laws is still not settled. Two

federal judicial circuits have reached opposite views. In *Alabama v. Seeber*, 497 F.2d 1238 (1974), the U.S. Court of Appeals for the Fifth Circuit held that the army must apply for state environmental permits. In *Kentucky v. Puchelshaus*, 497 F.2d 1172 (1974), the U.S. Circuit Court of Appeals for the Sixth Circuit reached just the opposite view. Because of this conflict in the circuit, a writ of certiorari is being sought from the Supreme Court. In the meantime, except for activities in the Sixth Circuit, the army policy to comply with all state substantive environmental laws, but not to subject the United States to procedural requirements, such as applying for state permits, remains in effect.

In the field of tort law, medical malpractice has become the major problem confronting the army. The number of malpractice claims and suits involving army medical personnel is probably directly proportional to the number of such suits involving civilian medical facilities. That is to say we have a lot of such suits.

So far, the *Feres* doctrine (*Feres v. U.S.*, 340 U.S. 135) remains viable. Under this doctrine, a serviceman may not recover for damages or injuries incident to his service. This includes any damages resulting from alleged medical malpractice. That principle is under constant attack and someday we may lose it. Another defense enjoying considerable success is the one of official immunity. In at least one case, however, (*Henderson v. Blue-*

*mink*, 511 F.2d 399) the U.S. Court of Appeals for the District of Columbia held that an army physician was not entitled to the official immunity defense in a malpractice proceeding. The case was remanded for a trial on the merits. Before the trial, however, the plaintiff died of causes not related to his malpractice claim. To date, there has been no refiling by the plaintiff's heirs or estate and it appears that the claim is now moot.

Legislation is pending to alleviate this morale problem among the military medical personnel. At the present time, only government physicians employed by the veterans' administration and the public health service have statutory immunity from suit in their individual capacities. There are four bills before congress that would in one way or another afford protection to military physicians. Congressman Gonzales has submitted H.R. 3954 which brings military physicians under the same immunity enjoyed by the Veterans' Administration and Public Health Service Physicians. This legislation passed the house on 21 July and is now pending in the senate. Congressman Chapel has introduced H.R. 387. This is the so-called "Omnibus" bill giving all federal employees immunity from suit. In the senate, two broader bills which address the problem of malpractice in the civilian community as a whole have been introduced; they would provide an umbrella under which the military physician could practice also. The Inouye-Kennedy

Bill, S-215, would establish a system comparable to workmen's compensation, avoiding court litigation to pay damages incurred by an individual undergoing medical treatment. Senator Nelson has introduced S.188, which would provide a combination of private malpractice insurance and governmental coverage with the government paying damages incurred over a fixed amount. The Gonzales bill, if passed, would most directly relieve the military physician from the considerable uncertainty under which he now works. I understand that this bill is being supported by DOD.

For years it has been stated that the Posse Comitatus Act (18 U.S.C. 1385) has never been judicially interpreted. That statement can never be made again. In the last few years there have been four judicial interpretations of the Act.

The possible "Posse Comitatus" activities of army personnel were directly involved in three recent district court cases: *United States v. Banks*, 383 F.Supp. 368 (D. South Dakota, 1974); *United States v. Jarmillo*, 380 F.Supp. 1375 (D. Neb. 1974); and *United States v. Geneva Red Feather*, 392 F.Supp. 916 (D. South Dakota, 1975).

Prior to 1974, there was very little case law on the meaning and scope of the so called "Posse Comitatus" Act. In that year, however, because of the peculiar wording of the 18 U.S.C. 231(a)(3), the civil disorder statute, the Posse Comitatus Act arose as a broad defense in cases rising out of the 1973

Wounded Knee, South Dakota, takeover in three federal district courts in South Dakota and Nebraska. In the *Banks* and *Jarmillo* cases, the defense raised the issue in a motion to dismiss two counts charging the defendants Russell Means and Dennis Banks with violations of 18 U.S.C. 231(a)(3). This code section makes it unlawful to interfere with a federal officer "lawfully engaged in the lawful performance of his official duties" during a civil disorder. The defense argued that because of the large amount of military equipment (weapons, ammunition, armored personnel carriers, flares, helmets, etc.) and the presence of military advisors and support personnel, the federal officers present at Wounded Knee in 1973 were not "lawfully engaged" in their duties since 18 U.S.C. 1385 makes it unlawful to use "the Army or Air Force as *Posse Comitatus* or otherwise." The courts held that the presumption of regularity and lawfulness attached to a law enforcement officer's duties had been rebutted by evidence of the use of military equipment and the use of advice and expertise of the military personnel by department of justice officials. This evidence supported a finding that the federal officers had used the military as a "*Posse Comitatus* or otherwise."

On April 1, 1975, the government, in *United States v. Geneva Red Feather, supra*, (a Wounded Knee non-leadership case) filed a motion *in Limine* to prohibit the defense from introducing any evidence con-

cerning the department of defense involvement at Wounded Knee in 1973. On April 7, 1975, Judge Andrew Bogue ruled that the defense could only introduce evidence of a *direct active* role in the execution of the law at Wounded Knee by military *personnel* such as investigation, search, arrest, pursuit and other like activities. Judge Bogue specifically found that aerial photographic flights, maintenance personnel for loaned equipment, training by military personnel, advice or recommendations by military personnel, and other similar activities were not unlawful under 18 U.S.C. 1385. The court found that such *indirect passive* roles by military personnel were not intended to be within the scope of the *Posse Comitatus Act*.

It appears that Judge Bogue's decision has sufficiently narrowed the scope of the *Posse Comitatus Act* so as to permit the department of defense to continue to lend effective assistance to civilian law enforcement agencies. If, however, on appeal, Judge Bogue's opinion is overturned or broadened to the scope of the opinion of the *Banks* and *Jamillo* decisions, consideration will be given to recommending corrective legislation.

That concludes my report. I hope I have given you an idea of the problems faced by our corps and the programs that we have underway to solve them. I look forward to working with your organization and hope to continue the fine relationship that we have maintained in the past.

# The Address of the Honorable René J. Marin to JAA at Montreal

Judge René J. Marin\* of the Canadian judiciary on leave from the bench pending his service as Chairman of a Commission of Inquiry in the Royal Canadian Mounted Police and as a member of the Law Reform Commission of Canada addressed the members of the Judge Advocate Association at the Annual Banquet at the Black Watch Armory, Montreal on 11 August 1975. His address on the Challenge of the Judiciary in the Seventies follows:

Let us say how honored we are, my wife and I, with the invitation to dine with you on the occasion of your stay in Montreal and I am extremely grateful for the invitation to address you.

Our two countries have a long history of friendship and good relations; all of us, Canadians, extend to you, on the occasion of your bicentennial, our warmest wishes of success and prosperity. Our country is much younger; we celebrated our first century of existence in 1967. We, nonetheless, celebrate this year a very important centennial; that is, the first century of existence of the Supreme Court of Canada. On this occasion, I have been asked by the Chief Justice of the Supreme Court of Canada, the Right Hon-

ourable Bora Laskin, to extend to you his warmest greetings and wishes for a pleasant stay in this country.

A few moments ago, I was referring to the harmonious relationship between our two countries and I cannot avoid pursuing that point for a few seconds and relate to you an amusing incident arising out of a visit by the late Prime Minister of this country, Lester B. Pearson, with your former President Johnson at the famous L.B.J. Ranch, deep in the heart of Texas. His visit came within a week of a similar state visit by Harold Wilson, the Prime Minister of England. Mr. Pearson, in his memoirs as yet not published, describes his arrival at the Western White House. Being a career diplomat, he was formally dressed in morning suit, a bowler hat and grey gloves. He was met at the ramp by a congenial President of the United States who had decided to dress as a Texas cattleman in ranch clothes for the occasion. The initial mild shock sustained by our Prime Minister was accepted lightly until the President of the United States referred to Mr. Pearson as "my old friend from Canada, Mr. Wilson"; being the accomplished diplomat, our Prime

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\* Judge Marin is a Colonel, Judge Advocate Reserve, of the Canadian Forces.

Minister did not mention the incident until late that evening when your President was watching the 10 o'clock news. As was the custom of your late President, at news time, he ordered the usual four televisions to be turned on so he could get every network's version. He wanted to see it all. While our Prime Minister, as did others, knew what was coming, the President did not. He listened to the day's news only to hear himself refer to Mr. Pearson as Mr. Wilson. Your President was reported dismayed at his slip and he immediately apologized profusely to the Prime Minister who was sitting to his right, suggesting that the recent visit of Mr. Wilson may have been a contributing factor but Mr. Pearson quickly said to him, "No need to apologize, Senator Goldwater, I fully understand". For the rest of the visit, "Senator Goldwater" was not allowed to forget his performance.

There are many historical notes to that visit which demonstrate that our two countries have always enjoyed a very relaxed and congenial relationship. In fact, during that visit, matters of common interest in External Affairs were discussed at 5 o'clock in the morning in the kitchen of the L.B.J. Ranch when a sleepless Canadian Minister of External Affairs went down for a glass of warm milk only to be met by the President of the United States who had gone down for the same purpose. As they both watched the sunrise, they were able to discuss, over the next two hours, all joint questions of mutual interest

in the field of External Affairs and then devote the balance of time to the serious business of sight-seeing on the ranch and attending various Bar-B-Q.

Referring to our Prime Minister's insistence on wearing his morning suit to visit your President brings to mind an interesting anecdote which our former Prime Minister used to tell with much amusement:

"It seems that two English schoolboys had been perennial enemies throughout their studies in an English boarding school. Both of them became famous, each in his own way, one becoming the Archbishop of Canterbury and the other becoming the Admiral of the Fleet; while each knew what the other person's career was, they had not met again. One day, the Archbishop spotted his arch enemy, the Admiral of the Fleet, waiting on the platform of a railway station in England, resplendent in his full uniform of Admiral of the Fleet. The Archbishop approached him mischievously and said,

'Porter, porter, would you please tell me what time is the next train to Brighton'.

The Admiral, though at first shocked, looked at the Archbishop who had become rather heavy because of his advancing years and his indulgence in the best of foods and without feigning any signs of recognition, snapped,

'Lady, if I were in your condition, I certainly would not be travelling by train'."

During the last four years I have been on leave from the Bench, either in my capacity with the Law Reform Commission of Canada, or as Chairman of a Commission of Inquiry in the Royal Canadian Mounted Police. In that last capacity, I have had the opportunity to travel abroad, in the United Kingdom, Continental Europe, the Scandinavian Countries, and in several states of your country, and to observe the problems in the administration of justice in these jurisdictions.

During my remarks, this evening, I intend to touch on some of our mutual problems in the field of the administration of criminal justice and, more specifically, the challenge of the judiciary in the seventies. As you know, our countries have witnessed a vast increase of serious crimes in recent years.

Containing criminal activity has been the concern of our two countries in recent years and with some alarm, we have watched the same persons repeating crime after crime. One would have to be extremely pessimistic to suggest that this uneasiness about mounting crime is limited to our two countries since we have every evidence that communist China, the Soviet Union, East Germany and other Iron Curtain Countries face exactly the same challenge and are searching for solutions.

There are as many explanations to this increased criminality as

there are psychologists, sociologists and criminologists; Emile Durkheim, a French sociologist of the latter 19th century, wrote that,

"Crime is an essential feature of a developing society and a predictable by-product of rapid social change."

Surprisingly, this theory, almost a century old, has been adopted by Columbia's Robert Merton, Harvard's Seymour Lypst and recently, Harvard's Government Professor James Q. Wilson in his book "Thinking about Crime".

I am quite unprepared to discuss the causes of crime in their learned fashion since your discipline and mine do not necessarily lend themselves to such sophisticated rationalization of criminal behavior. One could blame the increase in crime to the amount of violence on television, on broken homes, on poor environment and a number of other reasons.

It would be much too comfortable, on the other hand, to suggest that the offender is merely a by-product of the home environment or of the society in which he lives, since it would be by-passing the person and absolving him of every obligation he may have in an organized society such as ours. The repudiation of personal guilt by an individual once he has been convicted, under due process, of a crime and his accusation that he is a by-product of society in which he lives or his home environment is, in many cases, avoiding the real issues; it avoids the acceptance of guilt which

is necessary before an individual is able to accept that the penalties which may include incarceration are the sanctions of society which must be carried through and that he alone, in many cases, can avoid further sanctions by improving his own pattern of behavior instead of expecting society to do that on his behalf. The increase in criminality is due to no one specific factor; the blame must be distributed.

Our criminal justice system, however, must bear some blame for not dealing effectively enough with the increasing crime rate and the general failure to curb crime in our two countries. It is not unusual to have the police blame the higher courts, the courts blaming the police and tagging our present system as being inadequate. The dilemma may go on unless we embark upon a concerted effort to resolve a very thorny and difficult problem. An illustration of this rotating blame can be seen in the Los Angeles Police Annual Report for 1974, where blame is placed on higher court judges for an increasing crime rate while in subsequent interviews, the courts blamed the police and the prisons for the increasing crime rate. Likewise, the Commissioner of New Scotland in England charged that the law courts of his country with failing to upgrade themselves and the rules under which they operate. The same applies in Canada. To an extent, all are correct, all aspects of our criminal justice system must bear reform and this includes reform from the time of arrest of the

individual to the release of the individual from incarceration, if it is imposed.

The criminal justice system, however, is quite unable to reform itself unless our laws are reformed and revised. Packer, in his book "The Limits of Criminal Sanctions" suggests that such crimes as gambling and public drunkenness, prostitution, obscenity and homosexuality between consenting adults can be removed from our statutes books. In Canada, we have started removing from our statutes some of these so-called victimless crimes. All criminal laws are federal and in our ten provinces, the offences of homosexual acts between consenting adults, drunkenness and vagrancy have been removed from the Criminal Code. We are seriously considering the removal from our laws of the offence of obscenity, except as it affects young adults and the display of obscene material in public places. Changing these laws may also give police more time to detect crimes involving violence. Cases involving morality tend to consume an undue amount of time for court disposal and result invariably in fairly light sentences which do not appear one way or the other to curb the conduct of those involved, nor to make the practice less attractive to those who wish to get involved in these activities.

In support of the pressure for reform in crimes of morality, it must be accepted that the laws in our statutes books do not necessarily ensure a moral level of conduct in our fellowmen. We must

also learn to cope with dissent, providing such dissent is expressed in a lawful manner. A society's tolerance of dissent and mere conformity may prove to be a sign of maturity in a nation.

Many are those who argue that criminal behavior should only be that behavior which results in harm to other persons in an organized society. I cannot but have a great deal of sympathy for this proposition.

Our biggest challenge, however, is the improvement of the judicial process. We have not, in Canada, accepted the broad concept of exclusion of evidence because of the methods employed in securing that evidence. Indeed, the Supreme Court of Canada has opted for a middle of the road policy, more tailored on the English system than the American exclusionary rules. The same applies to statements obtained from accused persons. We have felt secured, so far, in applying discipline to the offending officer instead of withdrawing the evidence from the courts. Whether this will prove to be a wise course of conduct is a matter for history to determine.

The Attorney-General for Canada recently introduced legislation modifying our laws of evidence in rape and related sexual offences. Sensitive to the fact that many victims have remained silent rather than go through the ordeal of the court process, the new law would,

1. allow the victim's identity to be preserved by a total ban on publishing her name;

2. allow the victim to get a change of venue to maintain her anonymity;
3. shelter the victim from a wholesale attack on her character and conduct with other men by giving the presiding judge the discretion to allow or disallow such questions;
4. removing the need for corroboration thus allowing the same standard of proof as with other crime, namely, proof beyond a reasonable doubt.

We feel that this can be accomplished, keeping in mind the rights of the accused.

Far more fundamental, however, is the fact that we shall have to examine thoroughly the aspect of training and selection of judges. The selection of judges cannot be entirely left to hazard. In this country, since 1968, the province of Ontario has, to all intents and purposes, divested itself of the final discretion in appointing judges by giving a veto to a judicial council. The Attorney-General proposes a list of candidates for judicial appointments; the list is then submitted to a panel composed of judges and barristers who, after examining each candidate, will suggest to the Attorney-General which candidates are best suited for the appointment. It may be one of several solutions possible for the future but I can assure you that the results of this type of selection have, so far, been gratifying. The names of federal appointees are, likewise, submitted to the Canadian

Bar Association for comment by the Minister of Justice prior to the appointment being finalized.

Continental Europe, by tradition, has trained lawyers for judicial appointments; judicial training is now used in France, Germany and Scandinavian countries. It may be that this method is far more radical than is required but it is certainly a method to prepare a barrister for the challenge of becoming a judge. While pre-training at an early age and selection for the judicial profession may not be necessitated, I certainly would envisage that in the next ten years in Canada a person accepting a judicial appointment and the security of tenure which attaches to judicial appointments in Canada will have to undergo judicial training after his appointment as a condition to presiding as a judge. Periodically, now, our judges return to seminars in order to extend their training and knowledge of the law and other disciplines, including psychology, sociology and law.

It has often been said by lawyers that judges are the worst administrators; as a judge, perhaps I would have to admit quickly to that shortcoming. Because our judicial duties necessitate that we should sit a minimum of six hours a day, it is obvious that we must have the support of proper administrative staff who will not only administer the courts but look after such matters as case load, proper flow of cases through our courts, the reallocation of cases if a court becomes vacant

or if a plea of guilty is entered. As such, a properly trained administrator can oversee the total administration of criminal justice within that area. There are disadvantages to this: judges, and many of them indeed, fear justifiably that administrators could make decisions which may affect the judicial process. However, because of rather disastrous past experiences where judges have spent as little as 2½ hours to 3 hours a day presiding in court, we can no longer afford the luxury of not having professionally trained administrators who will look after a proper flow of cases and proper distribution of case load. Early in 1976, at least two provinces will have such administrators and we shall carefully monitor the success of that improvement.

There is a further matter of deep concern to both our countries and that is the matter of plea bargaining. It is reported in the United States that 90% of criminal trials are cleared by plea bargaining which means pleading to a lesser offence in order to avoid a trial on a more serious offence. In Canada, in excess of 70% of our cases are dealt with this way. Such short cut in the administration of justice has led to a considerable amount of cynicism and not without justifiable cause. Many have suggested that the reason for plea bargaining is the conviction in cases where the prosecution has poor cases and, as such, would never have been able to obtain a conviction. I would feel that such an excuse is

without substance since there should never be a conviction unless there is supportive evidence. I am more concerned about the other aspect of plea bargaining, namely, that serious criminals have necessarily been let off much too lightly in circumstances where a serious penalty ought to have been imposed. One of the most serious objection to plea bargaining is the fact that it does not have the appearance of justice and secondly, that in many cases, a hardened criminal is able to determine the term of incarceration which he may serve.

In Canada, we have come very close to a total ban on plea bargaining but have abstained from it. In cases involving personal violence or involving personal injuries, trial judges have been encouraged to refuse to accept a reduced plea without first hearing the evidence of the victim, a few witnesses and that in open court, not in Chambers.

In the United States, certain experiments have been tried which would lead to both parties attending a private session prior to trial in order to determine what reduced plea, if any, ought to be received. I suggest that in each case at least some effort has been made to alleviate the problem of plea bargaining. Additional solutions must be pursued with more vigor than we have been willing to express in the past. Our failure to move in that area will separate us radically from the people we must serve.

It is somewhat with hesitation that I touch upon sentencing as a

matter which would assist us in overcoming some of the problems in the criminal justice system in the mid-70s. The United States, in some states, at least four to my knowledge, have experimented with sentencing boards. In Canada, we have rejected sentencing boards as unworkable and impracticable because of the length of time it would take to impose a sentence and because of the potential disparity in sentences. It is unfortunately unrealistic to suggest to you that in Canada we shall ever have complete uniformity in the field of sentencing; it is not the offence which is being punished but rather the individual who has committed the offence. The sentence must be tailored to the individual not the crime. We are watching, with a great deal of interest, the changes in the United States initiated by President Ford who recently endorsed a so-called "flat time sentencing process" as a means of bringing about certainty in the field of sentencing.

While there is no doubt that certainty is perhaps the best assurance of proper deterrence, we have not yet, in Canada, been satisfied that this method holds the key to our problem in the field of sentencing; it appears that we shall, for the time being, deal with offenders as either first offenders or recidivists.

While we have, to a large extent, examined with a great deal of interest your volunteer probation program in the States, we have been cautious in implementing it in Canada. We are keenly aware of the tremendous opportunities which

exist to rehabilitate and save a first offender. For that reason, we have adopted and are cautiously experimenting with the system of diversion which, to an extent, is tailored upon your program for first offender aimed at rehabilitating the offender before trial. Our diversion system in Canada is premised on the fact that it is perhaps better not to put a person through a trial in a less serious offence. We have youthful offenders, in petty crimes, acknowledge guilt and impose certain conditions in lieu of trial as opposed to bringing them to trial. We have been aware, for some years, that the trial process is not necessarily the best way of adjudicating guilt or innocence; many accused have looked upon our adversary system as a zero sum game where one has to be acquitted to win the game. Very slowly, we are experimenting

with new ideas on diversion to steer young persons away from crimes.

The field of criminal law has undoubtedly undergone a turbulent time. The next few years will also be difficult but we, in this country like yourselves, are quite confident that we can reform our criminal law to the point where the challenge of the 70s will not be a lost experience; we will have been enriched as a result of having survived. Our democracy, like yours, is not perfect. On the other hand, it is not a fragile form of government; it will certainly not be destroyed by the criminal element. The challenge is with us to do what we can in this time of need to improve our attitudes and methods, and therefore, our resolve to overcome crime and to keep the incident of criminal behavior within controllable proportions.



# Professional Responsibility and the Military Law

John J. Douglass \*

The question has been posed whether the Code of Professional Responsibility applies to the military lawyer. Like many inquiries, these words do not frame the essential question, for the inquiry is rather, what should be the ethical code for the lawyer in uniform. Does the Standard vary because he does have a uniform? In fact, should there be any reason why the Code of Professional Responsibility should not govern the attorney commissioned in the armed services just as it does every other member of the bar? Surely the day has long passed when the military lawyer must convince his brothers at the bar that he is, in fact, practicing law, and if he is practicing the profession of law albeit in a military community, is there something about that community or his practice that separates him from the bulk of American lawyers insofar as his ethical responsibilities are concerned? Is there a different standard of conduct to which he subscribes, and if so, what is that standard and why should the mili-

tary lawyer be selected for such special attention?

An examination of the lawyer commissioned in the armed forces reveals no peculiar factors which should lessen his standards. His education parallels that of his civilian counterpart. He took the same oath upon admission to the bar as did every other attorney. He is required to be the equal of the civilian bar in education, examination, and oath because the statute creating the position of a judge advocate or legal specialist requires that he be admitted to practice before the highest court of a state. Surely the mere fact that his costume differs from his civilian colleagues does not set him apart at least on an ethical basis.

The duties performed by the judge advocate clearly make him eligible to be considered a general practitioner of the law. In the course of his career, he probably performs more varied legal duties in more varied legal fields than does his brother in civvies. He prosecutes and defends, he counsels, he

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\* Dean, National College of District Attorneys. Colonel, JAGC, USA-Retired. Formerly Commandant, The Judge Advocate General's School. This article is taken from a presentation to the Young Lawyers Section, A.B.A. at the 1974 meeting in Honolulu.

advises, he briefs, and he negotiates. The client served may be the State, an individual or an agency, and he serves these clients in the fields of criminal law, personal legal assistance, contracts, torts, international law, administrative law, litigation, real estate, and patents, to list a few. Significantly, the General Practice, Administrative Law, International Law, and Criminal Law sections of the ABA have military law committees, and the ABA maintains three separate Standing Committees on military legal matters.

Employment by the federal government and the fact of payment from public funds is not a significant characteristic, for the United States employs literally thousands of attorneys who advise, litigate, and otherwise perform legal duties for the government, its agencies, and individuals. The lawyers employed by OEO, Justice, U. S. Attorney's offices, and as general counsel of dozens of federal agencies all meet this characteristic. The very existence of the Federal Bar Association testifies to the magnitude of federally employed and funded lawyers in the United States.

To some, a distinguishing factor of significance is the military superior-subordinate relationship which, it is asserted, can somehow be a bar to a high standard of integrity for the military lawyer. There is a concept abroad that the lawyer in uniform is unlike the civilian attorney, and will face an hourly wrestling match with his

conscience. There exists, somehow, a belief that the military lawyer is faced regularly with military orders that preclude observance of the Canons and the Ethical Considerations of the Canons. This problem particularly seems to bother the newly commissioned JAG officer before reporting to his first station. He is convinced that he will be given orders, particularly by a non-lawyer commander, that will require him to violate his oath, condemn an innocent man to long imprisonment and generally destroy the integrity of the court system. This belief is usually centered around that nebulous term "command influence" without characterizing it as *unlawful* or *illegal*. Anyone really familiar with the day to day operation of the system recognizes that instances of unlawful command influence are highly unusual and even more unusual when related to a lawyer's actions. Anyone who is conversant with the system will admit that the opportunity does exist for the exercise of unlawful command influence both by lay commanders and lawyer superiors. The very existence of such a possibility demands not a lesser standard of integrity by the lawyer in uniform, but rather meticulous attention to the spirit and letter of the Code of Professional Responsibility that the system of justice within the military not be subverted. The military lawyer must observe the highest code of professional conduct as the bulwark against any attack on the system.

The military legal system is not really so unique in this regard as to set it apart from other segments of the bar. Similar problems face such diverse groups as the OEO attorney or the general counsel of a corporation. One has only to read the current literature to be aware of the disputes between OEO attorneys and their non-lawyer and lawyer superiors over any number of legal and non-legal problems. Corporate counsel are not so vocal in setting forth their in-house controversies but the existence of such problems is likely. The problem for the lawyer arises out of Canon 5 requiring an attorney to exercise independent professional judgment on behalf of a client. The fact that counsel and superiors are in dispute does not, however, *ipse dixit* create a Canon 5 problem, however, for most disagreements do not arise in the area of *professional judgment* which is the key to the Canon and the Ethical Considerations thereunder. All too often questions of priorities of work, office facilities, business policy (or military strategy and tactics), become the areas of dispute which attorneys relate to professional judgment and are issues on which they have no more knowledge or expertise (and perhaps less) than that of the superior. Lawyers tend to have an opinion on any given subject and try to surround it with an aura of professionalism. Their appellation of *professional judgment* does not make it so, and particularly does not make it a matter for Canon 5.

Often the critics of the military

legal system and some more inexperienced military lawyers express the view that the Uniform Code of Military Justice or, more likely, the military efficiency report (fitness report) are somehow more chilling on the professional integrity of a military lawyer than promotion, partnership or power motivations are for the non-military lawyer. Real life experience does not support the view that commanders so interfere with legal efforts as to impinge on professional honesty. From the viewpoint of the old fuds in uniform, the young lawyers are far from being chilled in expressing independent judgment—are quick to express opinions—often with a minimum of support of legal preparation. In any event, the author is unaware of even few threats of use of the Code as a club and of no cases in which judge advocates have been actually tried by court martial for violations of orders involving legal opinions. It is impossible to determine whether lowered efficiency ratings for military lawyers have resulted from failure to trim one's sails to the wind from above. No rater would ever admit to such action and most disputes over ratings usually appear to turn on personality or non-professional controversies.

If there were any doubt of the application of the Code of Professional Responsibility to the military lawyer, it would be resolved by the formal opinion 336 of June 3, 1974, "A lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary

rules of the Code of Professional Responsibility." Even if one were to accept the outmoded myth that a military lawyer does not really act in the practice of law while performing in the military, his actions are governed by the Code of Professional Responsibility insofar as professional *status* is concerned. The opinion states, in part, "It is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities, individual or personal activities, and activities as a judicial, governmental, or political official." E. C. 1-2 expresses the philosophy, "The public should be protected from those who are not qualified to be a lawyer by reason of a deficiency in moral standards." Such a philosophy obviously applies to one who, by law, may not be commissioned in the military service to practice law unless he is admitted to practice before the highest court of his state.

One of the obvious problems in the use of the Code of Professional Responsibility by military lawyers is that in the preparation of the Code and in subsequent commentaries, the writers and students of the Code seem to overlook the fact that almost 4000 American lawyers serve in uniform. Of the 137 Ethical Considerations, for example, only 5 references are made to publicly employed attorneys and these are generally aimed at the elected official, or more specifically, at the prosecutor. When the Federal Ethical Considerations were drafted by the Professional Ethics Com-

mittee of the Federal Bar Association in 1972 and 1973, that group did not overlook the federal employee and, as a matter of fact, was specifically concerned with applying the Code of Professional Responsibility to the federal lawyer. A member of the military services was a member of the committee who included military input into the Ethical Considerations of the Code as applied to the Federal Bar.

In an unpublished manuscript of Captain Fred Lederer of the Judge Advocate General's School, discussing the Federal Ethical Considerations of the Federal Bar Association, he complains, in effect, that if the Code applies to the military lawyer, that no advice has been given to this group when faced with an ethical problem. This, however, is really not a complaint against the Code but it is part of the problem that is faced by every lawyer. What do I do to follow the Code when I find that I have an ethical confrontation? There is a tendency for the attorney in uniform to hide behind his inability to "resign" which is the recommended last ditch step for other government lawyers as set out in the Federal Ethical Considerations, FEC8-2. There are, however, many available steps for the judge advocate long before he reaches this point. There is the entire hierarchical system which permits almost unending upward appeal of one's professional judgment. The truth is, in fact, that too often the military lawyer fails to prepare in writing a brief setting out his position but uses, instead,

the lazy system of oral complaint unhampered by research and legal considerations. As noted, the records do not show a military lawyer tried by court martial for failure to follow improper legal guidance. To the contrary, most personnel officers, at least in this day of the volunteer Army (and volunteer forces generally) would accept a resignation or relief from active duty as a viable alternative in a real case of confrontation with the Code of Professional Responsibility. Certainly the conscience of a lawyer is as important in 1974 as it was during the Viet Nam War when the services permitted the resignation from legal positions of those who were conscientious objectors to the conflict in Viet Nam. The real solution for any attorney and the one which is most often effective, is simply to stand up and express a reasoned legal viewpoint and to do so with the integrity expected of a member of the bar.

The areas wherein the problems arise for lawyers in uniform are really not unique. The prosecutorial problem of moving forward with the case in which he has little faith is faced by every assistant district attorney or prosecutor. Likewise, the defense counsel with a crowded calendar and too many accused to defend is faced by every public defender in the United States. Only recently those responsible for defending accused indigents in New York were limited to 40 cases each, a load far greater than is expected or found for most military defense counsels. The private legal advice

of military lawyers is not any more restricted than it is for OEO lawyers. The legal assistance guidelines of the military services specifically refer to the Code of Professional Ethics and these can be used as justification for the independent judgment of the attorney and particularly for the right to handle the case in the zealous manner expected of a member of the bar. There are no more limited pro bono opportunities for military than for any corporate lawyer. For both, it is a question of finding time to perform such work and making the request to the superiors to be made available to do so. Likewise, a military lawyer is given far greater opportunity to revise the law as required by the Canon than are perhaps many of his civilian counterparts. He is constantly being urged to write and has innumerable outlets to publish and is urged to join in the work in professional organizations. Unfortunately, too few of those attorneys in uniform take the opportunity to participate with their civilian counterparts in professional legal organizations and too few who are, indeed, capable of doing so contribute to the improvement and revision of statutes particularly in the area of military law. Independently submitted papers on military law reform with indepth research seldom are made available, and instead, the profession is treated to letters to the editor and ill-considered complaints about particular situations.

The difficult question is the unspoken issue in the area of profes-

sional responsibility, that of loyalty to the client just as there should be loyalty to the client if the client is a corporation or an individual. Loyalty, however, should not be a cover for the failure to support the ethical standards of the Code of Professional Responsibility. The evidences in recent years of loyalties subverting ethics is far too notorious to require discussion and, unfortunately, much of this improperly directed loyalty has been found in government attorneys. The problem for the military lawyer is to exhibit his loyalty within the Code of Professional Responsibility and to be willing to expose immorality, but likewise, to be willing to back off when the issues in dispute are not ethical questions, but merely questions of policy established for the good of the agency or more particularly for the military force to which he belongs.

It is time that the military bar joining together spends some considerable time studying the Code of Professional Responsibility and perhaps issuing a set of acceptable military legal considerations just as there are federal considerations. Clearly the military lawyer does

need advice as to how to meet a particular situation and how to relate the Code to his rather unusual occupation. Secondly, the military lawyer ought to subject himself to the same disciplinary control that the civilian bar purports to observe. It is well known and understood that the bar's own discipline has been ineffective and the statements by Chief Justice Berger and others attests to this failure, but if the bar's own discipline has been ineffective in clearing out those who cannot meet the standard required, the internal discipline of the military bar has been even less so. There are some cases where it is believed that judge advocates have been released to inactive duty and permitted to return to private practice on the basis of their inability to follow the Code of Professional Responsibility. This, however, is hardly a solution for it merely changes such an individual's clientele from uniform to civilian clothes and turns such a rascal loose on society, so to speak. It must be recognized that not all cases of unethical conduct are subject to criminal action, but all cases of unethical conduct should be subject to some sort of disciplinary action.

## BI-CENTENNIAL ISSUE OF JAJ

A Bi-Centennial issue of the Judge Advocate Journal is now at the printers. Look for its publication on or about July 4, 1976.

# THE MILITARY CRIMINAL TRIAL

or "Who Says SJA Conferences Don't Inspire Lawyers?"

Background: Some five or six years ago during a SJA Conference in Heidelberg, upon hearing a briefing officer misuse a term, Colonel James Macklin JAGC-Ret. arose to plead an impassioned "point of order" that JA attorneys should, of all people, use the proper terms and that the plural of "court-martial" is "courts-martial" and not "court-martials." The following dialogues occurred:

Looking back, it wasn't too bright,  
to offer the following by Charlie White—

"There was once a Judge Advocate named Jim,  
To whom the letter must always be prim.  
The etymology of a word,  
Was all that he heard,  
While his court-martials acquitted at whim."

VII Corps, it raved, VII Corps it did roar,  
In 8 days time it evened the score.  
Not once but twice, thrice and four!

"There once was a court named martial,  
To which all JAG's were partial,  
They treated it fine  
In singular time,  
but in multiples it came out awful."

"There once was a JAG from USAREUR,  
Whose grammar grew looser and looser.  
One court-martial was easy,  
But more made him queasy,  
The plural—he couldn't produce her."

"Courts-martial don't have to explain  
their acquittals—as fact will remain.  
But if JAG's to their shame  
can't get the right name,  
then all have a right to complain."

"Any competent JAG, I would guess,  
Can discuss a court-martial with finesse.  
Now it's sad, but it's true,  
When they talk about two,  
They don't know where to set down their "s"."

The moral is clear, we shouldn't guffaw.  
Especially in a morass like criminal law.  
To solve the problem, we went to the Hun,  
but there our trouble had just begun.

"das Wehrdienstgericht—die Wehrdienstgerichte" (disciplinary courts of the Federal Republic of Germany) for disciplinary proceedings against soldiers and for proceedings involving complaints by soldiers; they consist of "Truppendienstgerichte" as courts of first instance and the "Wehrdienstsenate" (Military Service Panels) at the Supreme Administrative Court as appellate courts.

Jurisdiction over criminal offenses—other than military offenses—committed by soldiers is exercised by ordinary German courts. The establishment of "Wehrstrafgerichte" has been provided for (in the Basic Law) only in a state of defense as well as with respect to members of the Forces stationed abroad or on a war-ship. In that event the highest court of appeals will be the German Supreme Court. However, the Statute providing for the actual establishment of the "Bundeswehrstrafgerichte" has not yet been enacted."

"A possible solution—  
albeit it thin,  
Would be to convert  
'das court-martial'  
to 'die court-martialen'."

Some captains observed the marvelous fight  
and contributed two verses  
to clarify what's right.

"There was a young Major from Virginia,  
Who insisted on getting his barbs inia.  
When corrected in spelling,  
he responded by telling  
That spelling's a matter of opinia."

"The plural of court-martial Webster says  
Can be spelled one of two ways.  
Thus, all can rejoice,  
Each man has his choice  
When dillying with sillying word plays."

Our research done—  
Our plate is clean  
Now all know what we mean.  
All the blood—wiped off the floor.  
Nay controversy—forever more.  
From General JAG to privates "green,"  
All will say "courts-martial" and  
"Articles 15"!



"I'm the kind of a person who likes to be in the middle of things," says General James V. Jones, USA, Judge Advocate General. "I'm a 'doer' and I like to get things done."

# PAST PRESIDENT ALBRIGHT SELECTED FOR ADMIRAL

Captain Penrose Lucas Albright, JAGC, USNR, of McLean, Virginia, has been selected for promotion to the grade of Rear Admiral, JAGC, USNR effective 1 July 1976. He engages in the private practice of law in Arlington, Virginia.

Captain Albright accepted an appointment as Midshipman, Merchant Marine Reserve, in the United States Naval Reserve in December 1943, and was enrolled as an engineering cadet in the United States Merchant Marine Cadet Corps program. Following basic training at San Mateo, California, he was assigned to the T-2 tanker, SS MISSION SAN CARLOS and served from April to December 1944 in Pacific and Atlantic War Zones. He graduated with honors for scholastic attainment from the U.S. Merchant Marine Academy in January 1946. At the same time he was appointed ensign, USNR.

Thereafter Captain Albright alternately sailed as an engineering officer aboard American flag tankers and attended the George Washington University Law School, Washington, D. C., graduating in June 1949.

Following law school, Captain Albright was admitted on examination to the bars of Kansas and the District of Columbia and was em-

ployed as a legislative assistant by the Honorable Andrew F. Schoepel, United States Senator from Kansas.

In December 1949, Captain Albright was ordered on extended active duty in the U.S. Navy aboard the U.S.S. CORAL SEA (CVA-43) where he served in the engineering department and as legal officer. In the summer of 1950 he attended the six-week course at the Naval Justice School, Newport, R.I., graduating at the top of his class. Aboard the USS Coral Sea, then LTJG Albright provided the ship's legal guidance through the transition from the Articles for the Government of the Navy to the Uniform Code of Military Justice. His shipboard service was subsequently used as an example to obtain legal billets on large combatants for junior naval officers of the Judge Advocate General's Corps.

Captain Albright was transferred to the Office of the Judge Advocate General of the Navy in January 1952 where he remained until voluntarily released from active duty at the end of 1956. During this period he became recognized as an expert in the legal aspects of separation, retirement and promotions. Among other things he was responsible for the first comprehensive re-

vision of regulations pertaining to disability evaluation proceedings whereby due process requisites were strengthened and the processing time substantially reduced. The latter led savings to the Navy of several million dollars per year.

Upon release from active duty, in 1957 Captain Albright entered the private practice of law. Presently, a partner in Mason, Mason and Albright, he also participates in a second firm, Mason, Albright and Stansbury, of Chicago, Illinois. He is a member of the bars of the District of Columbia, Kansas, Illinois and Virginia, and of the U.S. Court of Military Appeals, the U.S. Court of Claims, the U.S. Court of Customs and Patent Appeals and the U.S. Supreme Court. He is a member of the American Bar Association, the Federal Bar Association, bar associations of D.C., Virginia, and Arlington County, the American Patent Law Association, the American Judicature Society, and the Judge Advocates Association, having served as national president of the latter 1965-66.

Captain Albright has held various positions in the Naval Reserve Association and Reserve Officers Association. He has also been active in the United States Merchant Marine Academy Alumni Association primarily in legislative matters. This association presented him in 1971 the Alumni Meritorious Service Award as the only alumnus so honored in that year.

In January 1957, Captain Albright became a member of Naval Reserve Law Company 5-11 of

Washington, D.C., the largest of its type in the country. He has continued to serve in this unit holding various positions including that of Commanding Officer in FY 1969-70. He testified before Congressional Committees on subjects within his expertise which included testimony in the legislation hearings leading to the Military Justice Act of 1968. His recent active duty for training has included tours at the Naval War College, the Office of the Judge Advocate General of the Navy, and a speaking tour for the Naval Advisor, Assistant Secretary of Commerce for Maritime Affairs.

During 1971, Captain Albright was awarded the Legion of Merit primarily for assistance provided on active duty for training and otherwise for outstanding service in expediting the legal review and processing of revised disability separation and retirement regulations, and for other activities as a Naval Reserve Officer. Reportedly, this was the first award of its type presented a Naval Reservist for performance other than on extended active duty.

In early 1973, Captain Albright was assigned as counsel to a Navy/Maritime Administration Policy Planning Group established by the Chief of Naval Operations and the Maritime Administrator to increase cooperation between the U. S. Navy and the American Merchant Marine in the interests of national defense. In this capacity, Captain Albright has been particularly active in the reestablishment of the Merchant Marines Naval Reserve, for

which he received a CNO commendation, and in the recent establishment of a merchant vessel location reporting system.

Further, in late 1973, Captain Albright was assigned to the staff of the Director of Naval Reserve Law Programs and in January 1975 was designated Deputy Director, Naval Reserve Law Programs, Manpower and Support Activities.

In addition to the foregoing, in April 1974, Captain Albright was detailed as Commanding Officer of the newly formed OJAG-706, a Selected Reserve unit designated for mobilization in the Office of the

Judge Advocate General of the Navy.

Captain Albright holds a Bachelor of Science degree from the U.S. Merchant Marine Academy, Kings Point, N.Y., a Bachelor of Arts degree from Southwestern College, Winfield, Kansas, and Doctor of Jurisprudence degree from the George Washington University Law School.

Captain Albright is married to the former Caridad Carballo M. of Santiago, Dominican Republic. They have three sons, Penrose and Luis who are attending college and Eric, a junior in high school.



# New England Chapter JAA Meets

The New England Chapter met at the Harvard Club of Boston on 12 December 1975. Major General Lawrence H. Williams, The Assistant Judge Advocate General of the Army, was the guest speaker. Col. Robert L. Halfyard presided at the meeting. The new officers elected at the meeting were Capt. Paul Cummings, President; Colonel Thaddeus Buczko and Capt. Robert H. Costello, Vice Presidents.

The members present at the meeting, many with their ladies, included LTC Jason Aisner, COL Richard R. Baxter, COL Charles E. Black, MAJ Karnig Boyajian, COL Philip A. Brine, Sr., COL Thaddeus Buczko, CPT Robert H. Costello, CPT Paul Cummings, CPT Gerald D. D'Avolio, COL Sherman

Davison, MAJ James G. Dolan, Jr., COL Emidio DiLoreto, LTC Benjamin F. Forde, Jr., MG James V. Galloway, LTC Richard D. Gilman, CPT John J. Guinane, COL Robert L. Halfyard, COL Thomas L. Hederson, Jr., LT Ronald J. Itri, MAJ Robert Jordan, LTC Richard P. King, CPT Robert K. Lamere, Hon. Francis J. Larkin, COL John W. Lynch, MAJ Peter F. Macdonald, LTC Robert M. Murphy, LTC Francis C. Newton, Jr., MAJ Francis O'Brien, LTC Lenahan O'Connell, BG Harold N. Read, LTC Neil J. Roche, CPT Frank J. Scharaffa, CPT Edward J. Shagory, CPT Mitchell J. Sikora, CPT Stephen M. Snyder, LTC Lee S. Tennyson, CPT Gerald E. Wilson and COL Corydon Wyman.

# Recertification

There has been a current trend followed by some State Bar Associations to seek the enactment of laws or regulations providing for mandatory continuing legal education (CLE) as a condition for retention of membership in the bar. This requirement is generally referred to as Recertification.

Minnesota and Iowa now require fifteen hours of continuing legal education annually as a prerequisite to a member of the bar of those States renewing his license to practice.

Colonel Charles M. Munnecke, during the past year, has served as chairman of this Association's Committee on Recertification. His committee has been keeping abreast of the CLE and recertification developments in the several states. The committee, on behalf of the lawyer on active duty in the military services, has been urging the states to make provision in their rules for non-resident courses to meet the recertification requirement. In this connection, Colonel Munnecke has been working with a joint committee of U.S. Government lawyers on recertification requirements. The joint committee is com-

posed of representatives of the TJAG offices of the Army, Navy and Air Force, the Federal Bar Association, the Civil Service Commission, the Attorney General and, of course, the Judge Advocates Association. This joint committee has been successful in securing for recertification purposes acceptance of non-resident courses which are conveniently available to the lawyer living beyond the state of his admission because of the situs of his Federal employment.

Currently, the joint committee is keeping in close contact with the bar associations in the following seven states: Idaho, Kansas, Maryland, New Mexico, Utah, Washington and Wisconsin, all of which have proposed rules in various stages of development related to Continuing Legal Education and Recertification. It has also established liaison in the other states so as to be kept advised of developments in this area in those other states.

If JAA's Committee on Recertification can be of assistance to you, contact Colonel Munnecke whose office is in the Southern Building, 15th & H Sts. N.W., Washington, D.C. 20005.

# The 1976 Annual Meeting—Atlanta

The thirty-third Annual Meeting of the Judge Advocates Association will convene in Atlanta at 3:00 P.M. on Monday, 9 August 1976 at a place to be announced when assigned by ABA.

The Annual Dinner will be held on the evening of 9 August at the Officers' Club, Fort McPherson, in Atlanta with reception and cocktails at 7 and dinner at 8. Dress will be informal. Reservations forms will be sent all members with the annual election mailing about 1 July, but members should note and reserve the date, and they may assure themselves of reservations by writing to the Association's offices now.

The guest speaker at the Annual Dinner will be the Honorable Richard C. Wiley, General Counsel of the Department of Defense.

This Association will co-sponsor with ABA's International Law Section, Committee on the Law of the Armed Forces, and the General Practice Section, Committee on Military Law, a program on the Law of War on Wednesday 11

August from 2 to 5 P.M. in the Confederate Room of the Peachtree Plaza Hotel. The moderator will be MG Harold R. Vague, USAF and the panelists and their subjects will be:

Professor W. T. Mallison, Jr., George Washington University—*Protection of Civilians in Time of War*; Mr. George Aldrich, Deputy Legal Adviser, U.S. Department of State—*Establishing Legal Norms Through Multilateral Negotiations*; Brigadier Sir David Hughes-Morgan, Legal Adviser, UK Ministry of Defense—*The New Law of Geneva*; Mr. Richard C. Wiley, The General Counsel, Department of Defense—*US Defense Department Programs to Insure Compliance with Laws of War*; Judge Albert T. Fletcher, Chief Judge, US Court of Military Appeals—*Individual Responsibility for Compliance with the Laws of Armed Conflict*; and, Professor Dean Rusk, University of Georgia Law School—*State Responsibility for Compliance with the Law of Armed Conflict*.

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## In Memoriam

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

Cpt. Stuart N. Arkin, AUS-Hon.-Ret., California  
Maj. Samuel F. Beach, AUS-Hon.-Ret., District of Columbia  
Col. Franklin P. Berry, USAR-Ret., New Jersey  
LCol. William C. Brewer, USAR-Ret., Virginia  
Col. Charles F. Brockus, USAR-Ret., Missouri  
Col. Michael M. D'Auria, USAR, New York  
LCol. Howard W. Duke, USAFR, Florida  
Col. Charles F. Going, AUS-Hon.-Ret., California  
LCol. George H. Hafer, AUS-Hon.-Ret., Pennsylvania  
Col. Leonard R. Hanover, AUS-Hon.-Ret., New York  
Col. Frederick Howard Hauser, USAR-Ret., New Jersey  
RAdm. Wilfred A. Hearn, USN-Ret., Virginia  
Col. Norman P. Herr, USAR-Ret., Florida  
Cpt. George P. Hines, AUS-Hon.-Ret., Texas  
Cpt. Seymour Hozore, AUS-Hon.-Ret., New York  
Col. Warren C. Jaycox, USAFR-Ret., District of Columbia  
Col. J. Fielding Jones, USMCR-Ret., Virginia  
Cdr. R. M. Keiser, USN-Ret., California  
LCol. Peter Krehel, USAFR-Ret., Pennsylvania  
LCol. Benjamin H. Long, AUS-Hon.-Ret., Michigan  
LCol. H. H. McCampbell, Jr., AUS-Ret., Tennessee  
Maj. Carlton F. Messinger, AUS-Hon.-Ret., New York  
Mr. George W. Nilsson, AEF, WWI, California  
Col. Harold K. Parsons, USAR-Ret., Ohio  
Col. Burton K. Philips, USA-Ret., Missouri  
Cpt. Robert E. Quinn, USNR-Ret., Rhode Island  
Col. Robert A. Ralston, USAR-Ret., Indianapolis  
MGen. Franklin P. Shaw, USA-Ret., Virginia  
Col. Arthur J. Shaw, Jr., USAF-Ret., Arizona  
Col. John McI. Smith, USAR-Ret., Pennsylvania  
Col. Edward L. Steven, USA-Ret., Virginia  
LCol. Sanford M. Swerdlin, USAFR, Florida  
LCol. Richard Thorgrimson, AUS-Ret., Washington  
Cpt. William F. Walsh, USAFR-Ret., Texas

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

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## Judge Advocates Association Files Brief Amicus Curiae

A case pending in the U.S. Court of Appeals for the Fifth Circuit raises the question of whether an ordinary client-attorney relationship exists between personnel obtaining legal services and Judge Advocate lawyers who provide legal assistance in the Armed Forces. The case seemed of sufficient importance to the Legal Assistance Program for this Association to file a brief amicus curiae in an appeal from the judgment of the United States District Court for the middle district of Alabama, *Woods vs. Covington County Bank, et al.*

A Naval reserve Judge Advocate, on active duty for training, gave assistance to an ex-POW who had lost considerable sums of money invested in questionable bond issues. After the reservist's release

from active duty he was asked and agreed, with permission of the Navy TJAG, to continue representation of the ex-POW. The District Court disqualified the lawyer because it considered he had violated Canon 9 of the Code of Professional Conduct in accepting professional employment in a matter in which he had substantial responsibility while he was a public employee.

In a brief filed by Donald D. Chapman, President of the Association and Francis J. Mooney, Jr. of the New Orleans bar and a member of the Association, the position is taken that the attorney-client relationship in the military's Legal Assistance Program is essentially no different than the attorney-client relationship in civilian practice. This position is held to be essential to the Armed Forces Legal Assistance Program.

### *What The Members Are Doing . . .*

#### CALIFORNIA:

LTC. Harold E. Heinly of Santa Ana has announced the removal of his offices for the general practice of law to the Crocker Bank Building, 1200 N. Main Street, Colonel Heinly's firm is Fike, Loughran, Heinly, Osterhout & Trebler.

#### COLORADO:

COL. Smith W. Brookhart of Denver announces the opening of offices for the practice of law at Lakeside National Bank Building, 4704 Harlan Street, Denver, in association with Dale E. Miller.

**DISTRICT OF COLUMBIA:**

BG. Thomas H. King and Col. Maurice A. Biddle with whom Col. Charles A. Munnecke is associated in the practice of law have been joined by LTC. James LaBar and BG. John E. Everhard. King & Biddle have offices in the Southern Building.

BG. Benton C. Tolley, Jr. recently announced his withdrawal from the law firm of Larson & Tolley to accept the position of Vice President and Trust Officer of American Security & Trust Company in Washington.

**FLORIDA:**

MG. James S. Cheney formerly TJAG Air Force has entered into the practice of law with Thomas F. Mattox with offices at 101 Shannon Avenue, Melbourne Beach, Florida.

**ILLINOIS:**

LTC. Norman S. Esserman recently announced the removal of his offices for the practice of law to 77 West Washington Street, #707, Chicago. The firm's name is Esserman & Diamond.

**MASSACHUSETTS:**

Albert F. Cullen, Jr. has become a member of the firm of Nessen & Csaplár with offices at One Winthrop Square, Boston.

**NEW YORK:**

Samuel G. Rabinor of Jamaica, as attorney for the plaintiff in a

medical malpractice case recently negotiated a court approved settlement of \$725,000. In his spare time Rabinor is village judge of Woodsburch, deputy police commissioner and member of the Board of Standards and Appeals in Woodsburch.

**TEXAS:**

COL. Harold Gill Reuschlein, formerly Dean of Villanova School of Law, is now Distinguished Professor of Jurisprudence at St. Mary's University, San Antonio School of Law.

**VERMONT:**

LTC. Osmer C. Fitts of Brattleboro recently announced his firm of Fitts & Olson had acquired two new partners. Their offices are at 16 High Street.

**VIRGINIA:**

CAPT. Allan L. Kamerow of Alexandria has opened offices for the practice of law at 4660 Kenmore Avenue, Alexandria. His firm, Kamerow & Kamerow, also has offices at 1025 Vermont Ave. N.W., Washington, D.C.

**WASHINGTON:**

LTC. Wheeler Grey of Seattle recently announced the change of name of his firm to Jones, Grey and Bayley, the addition of partners and associates and the removal of the offices to 14th Floor, Norton Building, Seattle.

# JUDGE ADVOCATES ASSOCIATION

## Officers for 1975-76

DONALD D. CHAPMAN, Virginia .....	<i>President</i>
WILLIAM S. FULTON, Virginia .....	<i>First Vice President</i>
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MARTIN E. CARLSON, Maryland .....	<i>Secretary</i>
CHARLES M. MUNNECKE, Virginia .....	<i>Treasurer</i>
KENNETH J. HODSON, D. C. ....	<i>Delegate to ABA</i>

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