

# MILITARY LAW REVIEW

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## PREFACE

This pamphlet is designed as a medium for the military lawyer, active and reserve, to share the product of his experience and research with fellow lawyers in the Department of the Army. At no time will this pamphlet purport to define Army policy or issue administrative directives. Rather, the *Military Law Review* is to be solely an outlet for the scholarship prevalent in the ranks of military legal practitioners. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

Articles, comments, and notes treating subjects of import to the military will be welcome and should be submitted in duplicate to the Editor, Military Law Review, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia. Footnotes should be set out on pages separate from the text, be carefully checked prior to submission for substantive and typographical accuracy, and follow the manner of citation in the *Harvard Blue Book* for civilian legal citations and *The Judge Advocate General's School Uniform System of Citation* for military citations. All cited cases, whether military or civilian, shall include the date of decision.

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# A NEW LOOK AT THE LAW OF WAR: LIMITED WAR AM) FIELD MANUAL 27-10

By Captain Gordon B. Baldwin\*

“Lawyers and legal complications are inappropriate on a battlefield.”—  
General George C. Marshall, Jr.<sup>1</sup>

## I. A LAW OF WAR?

General Marshall's assertion was merely another way of repeating the old adage, “you have to fight the enemy, not sue him.” This, of course, may be quite true, but it does not follow that law has no place at all in a modern war. Clearly, the role of law on a battlefield is by no means certain and one risks being dubbed naive who refers to a “law of war” with the same sense of security as he refers to the law of crimes. Nevertheless, the existence of a law of war is proclaimed in a recent Army Field Manual 27-102 as well as in many international conventions to which the United States is a party.<sup>3</sup> Furthermore, rules of war have been referred to in the memoirs of contemporary war leaders, at least to the extent that they have recognized that methods of war are not without limitation. Works of fiction purporting to portray reality even refer to rules of war. Anyone who has seen the recent renowned motion picture “*Bridge On the River Kwai*” has become aware of the existence of Geneva Conventions. Whether a law of war has existed in prior conflicts is of practical interest to us today because of the question whether “laws of war” will have any role in a future conflict. Another look at laws of war is called for in view of the increasing emphasis on the notion of “limited war.” It is the purpose of this article to suggest that the laws of war as they have been traditionally expounded may offer some guidance and thus play a modest role in achieving the restraint demanded by a limited war policy.

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<sup>1</sup> Testimony before the Senate Committee on Military Affairs, July 1941, cited in Payne, *The Marshall Story* 130 (1951).

<sup>2</sup> FM 27-10, *The Law of Land Warfare*, Jul 1956 (hereinafter cited FM 27-10). See also Nav. War. Info. Pub. 10-2, *Law of Naval Warfare*, Sep 1956.

<sup>3</sup> DA Pam. No. 27-1, *Treaties Governing Land Warfare*, 7 Dec 1966.

## 11. A LIMITED WAR POLICY

Eminent strategists and analysts of military power now refer to the possibility of "limited war."<sup>4</sup> This implies a deliberate hobbling of national capabilities with a view toward inducing the enemy to hobble himself to a like degree for the purpose of avoiding mutual annihilation.<sup>5</sup> Limited war requires a nation's leaders as well as its commanders in the field to impose upon themselves an unprecedented degree of restraint. Mutual annihilation has not in the past been an appreciable risk—it is today, and national efforts have been made to avoid this kind of chance. In view of the vast growth of destructive capacity and the existence of reoccurring crises during the past several years, we may observe a tendency to reject the suggestion that this country can anticipate either universal peace on the one hand or, on the other, all-out nuclear warfare. Instead, a third possibility is envisaged, the so-called limited war. This may be defined as war "in which the belligerents restrict the purposes for which they fight to concrete, well-defined objectives that do not demand the utmost military effort of which the belligerents are capable and that can be accommodated in a negotiated settlement."<sup>6</sup>

Osgood, a leading advocate of the limited war concept, has pointed out that "rules of mutual restraint cannot be established merely by an effort of will, as one might determine the rules for a game of sport."<sup>7</sup> Precisely how this self-restraint is to be exercised and what rules of conduct will be deemed operative to achieve it is not any clearer than the suggestion that the means of war be proportionate to the end.<sup>8</sup> Certainly a limited war policy would require the military commander to make a searching analysis of every proposed operation in the light of the political objectives implicit in a limited war policy. He should take no action unless it is deemed compatible with basic policy in order to avoid an appreciable risk of mushrooming conflict. Such limitations as the conflict re-

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\* Kissinger, *Nuclear Weapons and Foreign Policy* 132 et seq. (1957) (hereinafter cited as Kissinger); Gavin, *War and Peace in the Space Age* (1968).

<sup>5</sup> Brodie, *Book Review*, 10 *World Politics* 112 (1957).

<sup>6</sup> Osgood, *Limited War: The Challenge to American Strategy* 2 (1957) (hereinafter cited as Osgood). It is understood that the latest draft of FM 100-5, *Field Service Regulations, Operations*, Sep 1964, devotes some space to the new concept of limited war.

<sup>7</sup> Osgood 76.

<sup>8</sup> Professor Osgood has suggested two general rules as prerequisites for limiting war: "One is that the 'belligerents must be prepared to conduct war in accordance with well-defined, limited political objectives, susceptible to accommodation; the other is that they must be prepared to limit the means by which they strive to attain these objectives, so that the means of war will be proportionate to the ends.'" *Id.* at 62.

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quires must derive at the outset from the political objectives of the belligerents. If the opposing belligerents are major world powers, it would appear that a limited conflict would not be possible unless both sides tacitly accepted a restricted manner of warfare; but if one side of the struggle were a major power and the other side did not include a major power, limited conflict could be achieved if the major power unilaterally decided to restrain itself. A limited war by definition implies a limited effort by one or both participating sides and requires the military commander to avoid an appreciable risk of all-out war, for a decision to wage total war is a political and not a military matter. This effort might take the form of avoidance of massive retaliation through strategic air power,<sup>9</sup> it might involve an all-out effort in only a small sector, or it might involve the kind of stalemate that characterized the latter portion of the Korean War. Conceivably, a limited war might involve merely an avoidance of some nuclear weapons. In any case, the restrictions in warfare would result in a benefit to mankind in general as well as to the belligerents.

Justification for a military policy that accepts the risk of limited war and requires of military commanders a high degree of restraint can be found in the function of a nation's armed force. This is simply that military power should always be subordinate to national policy. In the use of armed force as an instrument of national policy, it is a prime rule that no greater force should be employed than is necessary to achieve the objectives toward which it is directed.<sup>10</sup> Von Clausewitz expressed the desirability for moderation in the use of military force in these words :

"The smaller the sacrifice we demand from our adversary, the slighter we may expect his efforts to be to refuse it to us. The slighter, however, his effort, the smaller need our own be. Furthermore, the less important our political object, the less will be the value we attach to it and the readier we shall be to abandon it. For this reason also our efforts will be lighter. Thus the political object as the original motive . . . will be the standard alike for the aim to be attained by military action and for the efforts required for this purpose."<sup>11</sup>

The limited war doctrine accords with this established principle in that it rejects the notion that political goals are obtainable **only** through the total defeat of an enemy armed force and the **utter** destruction of his will to resist.<sup>12</sup> To achieve control over the op-

<sup>9</sup> See Green & Burt, *Massive Retaliation: Salvation or —?*, 84 U. S. Naval Institute Proceedings 23 (1958).

<sup>10</sup> Osgood; similarly, Kissinger 145.

<sup>11</sup> von Clausewitz, *On War* 9 (Jolles transl. 1943), cited by McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 Yale L. J. 771, 796 (1958).

<sup>12</sup> It has been suggested by some analysts that Red China might be willing to risk a total war. See Victor Zorza in the *Manchester Guardian Weekly*, 16 Oct 1958, p. 4, c. 2.

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posing belligerents' land and people is not a necessary requisite of limited war. Accordingly, military theorists now have recognized that although methods of destruction have become more efficient, they have not necessarily become more advantageous. A clear-cut victory is not required because the limited war concept postulates that mutual devastation which risks annihilation is **undesirable**.<sup>13</sup>

Some of the limitations implicit in the doctrine are not necessarily imposed by political considerations alone. Weapons considered appropriate in an all-out war are not necessarily the most effective from a purely military point of view. General Gavin described this in his observation that :

“. . . A thermonuclear-equipped B-52 can contribute little more to the solution of a limited local war than a 155-mm gun can contribute to the apprehension of a traffic violator.”<sup>14</sup>

This does not mean, of course, that nuclear warfare is precluded by a limited war policy. It does mean that if nuclear weapons are contemplated, they must be sufficiently small in their effect to permit their use without an appreciable **risk** of Armageddon. Whether or not this is impossible is a controversial **matter**.<sup>15</sup>

There is ample evidence that military leaders can exercise restraint in their use of weapons. Self-imposed limitations on the use of weapons for the purpose of limiting the impact of the conflict can be observed in recent practice. Although two nuclear weapons were used during World War II, they were not used during the Korean conflict. Perhaps this was in part motivated by the fear of retaliation, General Bradley reports in his memoirs how concerned the commanders of Overlord were that the Germans might use gas against the Normandy bridgehead.<sup>16</sup> No gas was **used** by either

<sup>13</sup> Garthoff, *The Only Wars We Can Afford*, Army, Nov 1947, pp. 42, 48. *But cf.* testimony before Congress of General MacArthur who, while he gave expression to his distaste for the institution of war, indicated that war must be fought to a clear-cut victory. Osgood 35; *Hearings before the Committee on Armed Services and Committee on Foreign Relations, Senate, Military Situation in Far East*, 82d Cong., 1st Sess., pt. 1, at 223-24, 302 (1951).

<sup>14</sup> Gavin, *War and Peace in the Space Age* 128 (1958); Cagle, *A Philosophy for Naval Atomic Warfare*, 83 U. S. Naval Institute Proceedings 249, 257 (1957).

<sup>15</sup> In a speech before the National Press Club, Vice Admiral Charles R. Brown, at one time the commander of the 6th Fleet, is reported to have said: "I would not recommend the use of any atomic weapon no matter how small when both sides have the power to destroy the world." N. Y. Times, 8 Oct 1958, p. 12, col. 3. On the other hand, it has been authoritatively stated by the Secretary of State that small nuclear weapons are being perfected for the purpose of helping to limit war in the event of hostilities. *Zbid.* The most extensive examination of this problem is in Kissinger 174-202.

<sup>16</sup> Bradley, *A Soldier's Story* 279 (1951); see also Churchill, *The Grand Alliance* 425 (1950).

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side although it has since been reported that the German chemists had discovered and produced a gas far more effective than any in the hands of the Allies. Apparently, the fear of retaliation was a factor in achieving the restraint and consequent moderation of warfare that it was believed at the time humanitarian principles required.<sup>17</sup> Furthermore, the military value of gas was not believed particularly decisive at that time. It is hard to evaluate what effect, if any, the Washington Treaty of 1922<sup>18</sup> and the Geneva Protocol of 1925<sup>19</sup> had on the decision not to use gas. The Washington Treaty, which never became effective because of the lack of French ratification, prohibited "the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or devices." The Geneva Protocol, ratified by Germany but not by the United States, extended the scope of the Washington Treaty's prohibition to bacteriological warfare. Germany in 1939 indicated that it would obey the 1925 Protocol on the basis of reciprocity.<sup>20</sup> During World War II, Germany was not prone to follow international obligations unless they were buttressed by solid advantages, and one might speculate that it was these military considerations rather than a respect for law that played the decisive role in avoiding the use of gas.<sup>21</sup> Thus, an example of where military advantage and humanitarianism dictated the same results.

### III. THE NEED FOR RULES

A military commander generally does not wish to be a major policy maker. He thinks of himself as a soldier, not as a politician. Conversely, the wise politician does not wish to usurp the prerogative of a soldier and dictate with any precision the tactics

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<sup>17</sup> President Roosevelt threatened retaliation if Germany used gas, and stated that the weapon "has been outlawed by the general opinion of civilized mankind." 8 Dep't State Bull. 507 (1943). Recent reports indicate that the Army has under study a gas which would have no permanent effects but would temporarily paralyze the victims' power to resist. N. Y. Times, 4 Dec 1958, p. 23, col. 1. Such a weapon could hardly be termed "illegal"!

<sup>18</sup> 3 Malloy, Treaties 3116, par. 38, FM 27-10.

<sup>19</sup> 94 League of Nations Treaty Series 65, par. 38, FM 27-10.

<sup>20</sup> Stone, Legal Controls of International Conflict 553-554 (1954).

<sup>21</sup> The war crimes trials revealed that the military advantages in adherence to rules of war was closely studied by Germany. In 1945 Hitler is reported to have requested the opinion of Jodl and Doenitz whether the Geneva Conventions of 1929 should be denounced. Jodl and Doenitz on 20 and 21 February 1945 expressed the view that the disadvantages of such an action outweighed the advantages. The Conventions were not denounced. Nazi Conspiracy and Aggression, Opinion and Judgment (of the International Military Tribunal) 141, 150 (G. P. O. 1947). See also text of Opinion and Judgment reproduced at 41 Am. J. Int'l L. 172 (1947).

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to which a soldier should adhere. To achieve military success, considerable discretion must be vested in the commander in the field, and accordingly, while the use of a large-scale nuclear bomb or another weapon of mass destruction may be the product of a political decision, the use of other weapons within the scope of prior political decisions is a matter for the military expert.

The soldier needs guidance, however, and if limited war is deemed to supply an alternative policy, to avoid falling into a morass of indecision respecting the propriety of contemplated tactics resulting from a lack of political guidance, the laws of war as they have been expounded may be helpful. These laws were not intended to unduly hamper military operations, but on the contrary have been formulated with respect for the needs of the battlefield. Their purpose was to limit war. Thus, the Preamble to the Fourth Hague Convention of 1907 Respecting the Laws and Customs of War on Land states :

“[T]hese provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations . . . .”<sup>22</sup>

The military's demands are explicitly recognized by the Hague Regulations;<sup>23</sup> but while recognizing their importance, limitations propounded suggest that other interests are worthy of equal consideration. The war crimes trials following World War II indicated that the Hague Conventions were deemed more than mere pious declarations. In a limited war, humanitarian interests may be worthy of even greater support and it is the function of law to define them more sharply. There is no reason to believe that a war could be lost because of insistence on abiding by the rules of war, but on the contrary good military reasons for adherence to their mandates can be cited.<sup>24</sup> Several specific examples may be illustrated.

In the economic sphere, for example, prisoners of war have been found to be a valuable source of labor, although their use in direct support of the war effort is precluded. Not only can they work to support themselves but their efforts may be of vital assistance to the civilian economy of the detaining power. Considerable restric-

<sup>22</sup> Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 18 Oct 1907, 36 Stat. 2277, T.S. No. 539, DA Pam No. 27-1, 7 Dec 1956, p. 5 (emphasis added).

<sup>23</sup> The Regulations are annexed to Hague Convention No. IV, note 22 *supra*, and will hereinafter be cited as Hague Regulations.

<sup>24</sup> In this section, credit for some of the thoughts expressed should be given to Captain Hugh E. Reynolds, Jr., Indiana National Guard. See also The Judge Advocate General's School, Associate Advanced Officer Course, Civil Affairs, International Conflicts 273-282 (1956).

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tion on their use exists to be **sure**,<sup>25</sup> but the experience of World War II indicates that the labor of these victims of war can be successfully and humanely exploited within the scope of law. Whether prisoners of war may be used for otherwise restricted purposes when they volunteer is debatable because of the provisions of Article 7 of the Geneva Prisoner of War Convention of 1949 which states that "prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them . . ." <sup>26</sup>

<sup>25</sup> Art. 50, Geneva Prisoner of War Convention, provides: Besides work connected with camp administration, installation, or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes: (a) agriculture; (b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery, and chemical industries; public works and building operations which have no military character or purpose; (c) transport and handling of stores which are not military in character or purpose; (d) commercial business, and arts and crafts; (e) domestic services; (f) public utility services having no military character or purpose. Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78. T.I.A.S. No. 3364, par. 126, FM 27-10.

<sup>26</sup> Par. 87, FM 27-10. A similar prohibition in other Geneva Conventions refers to civilian persons and the wounded and sick. Hanson Baldwin has suggested that a construction of the Geneva Convention that would always preclude the employment of prisoners of war for military work details is undesirable. N. Y. Times, 12 Aug 1966, p. 3, col. 4; *contra*, reply by Professor Baxter, Letter to the Editor, N. Y. Times, 18 Aug 1966.

An argument that prisoners of war may volunteer for prohibited work can be made on the basis of the *travaux preparatoire* of the Geneva Conventions. Article 60 of the Final Draft states that "prisoners of war may be *compelled* to do only" certain specified work. The use of the word "compelled" as opposed to the word "employed" in the first paragraph of Article 60 is particularly significant. As originally introduced by The International Committee of the Red Cross, the first paragraph of this article provided that prisoners of war could only be "obliged" to do certain work. Subsequently, the words "employed on" were substituted for the words "obliged to" but no change in meaning was intended. Vigorous exception to this amendment was taken at the Geneva diplomatic conference by the delegate from the United Kingdom, Mr. Gardner, who stated that the amendment in question completely altered the meaning of the article in that the new wording thus prohibited the prisoner from "volunteering to remove mines, or for any other form of work not specified in the Article." He therefore proposed reverting to the words "obliged to." During the discussion on the proposed change, it was noted that the word "obliged" would permit prisoners to volunteer. With the implication of the difference in the wording in mind, the delegates, by a fifteen to six vote with five abstentions, decided to revert to the original wording. Subsequently, as a drafting change, the word "compelled" was substituted for the word "obliged."

On the other hand, it was the opinion of The Judge Advocate General of the Army during World War II that prisoners of war would not be permitted to volunteer for labor specifically prohibited by the 1929 Geneva Conventions. This result was reached through a construction of the Convention's provisions which were deemed mandatory upon

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During World War II although considerable dispute existed as to the scope of permissible work and several opinions of The Judge Advocate General of the Army on this matter were rejected, the following directive was eventually agreed upon :

"[Prisoners of war may be employed in] any work outside the combat zones not having a direct relation with war operations and not involving the manufacture or transportation of arms or munitions or the transportation of any material clearly intended for combatant units, and not unhealthful, dangerous, degrading, or beyond the particular prisoner's physical capacity . . . ." <sup>27</sup>

This permitted prisoners of war outside the combat area to transport supplies other than arms and munitions although the goods might eventually be used by combatants. Strict adherence to the Geneva Conventions of 1949 may encourage the acquisition of this valuable source of labor.

Other economic benefits can be secured if the adversary is not left in a totally desolate land. Where the goal of warfare is total occupation, it is advisable to permit the inhabitants to rebuild their country in order that they may support themselves. Two thousand years ago a policy of moderation toward conquered adversaries was in a large measure responsible for the success of Roman armies in Gaul, Roman rule was not deemed harsh, and extensive advantages to the Empire were secured by avoiding wholesale desolation of most conquered areas. The same policy of moderation to secure economic benefits might obtain today.<sup>28</sup> The political objectives of war do not normally require utter destruction, and accordingly adherence to rules precluding unnecessary destruction of property may be highly beneficial. Furthermore, the Geneva Conventions of 1949 thrust upon an occupying power the responsi-

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the states, and were designed to protect the individual. Lewis & Mewha, *History of Prisoner of War Utilization by the United States Army, 1776-1945*, p. 113 (DA Pam No. 20-213, 24 Jun 1955). If this construction was correct, one wonders whether the new Geneva Conventions were designed to be more or less restrictive?

<sup>27</sup> Lewis & Mewha, *supra* note 26, at 89. A Prisoner of War Employment Reviewing Board was established composed of a special assistant to the Secretary of War and representatives of TJAG and TPMG. It made rulings with respect to permissible and prohibited work. See *id.* at 114.

<sup>28</sup> See, *e.g.*, DA Pam. No. 20-261a, *The German Campaign in Russia; Planning and Operations*, 22 Mar 1965, p. 21 (reporting that an economic survey by the German Army indicated that the occupation of the Soviet Union would be beneficial only if the civilian populations were induced to remain and cooperate).

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bility for the relief of the inhabitants of an occupied country.<sup>29</sup> It is the first time such a responsibility has been thrust upon an occupying power by conventional law, and this task may be achieved more easily if the inhabitants are left with resources with which to support themselves.

Military reasons for the moderation implicit in the laws of war are several.

(i) Reciprocal treatment of one's own victims may be secured. Thus, General Eisenhower reported a 1945 conversation with Marshal Kukov of the Soviet Army in which the Marshal was startled by reports of American difficulties in properly caring for German prisoners of war. Eisenhower replied :

"Well, in the first place my country was required to do so by the terms of the Geneva Convention. In the second place the German had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing."<sup>30</sup>

If both belligerents refrain from a particular action involving the use of force, presumably there will be a benefit to both sides. Unless the benefit is disproportionate to an extreme, the gain in terms of limiting the impact of war may be considerable. It does not follow, however, that where reciprocity is not secured, one may ignore the admonitions of the law. In *United States v. von Leeb* the tribunal held that "the fact that the enemy was using prisoners of war for unlawful work as the defendant testified does not make their use by the defendant lawful but may be considered in mitigation of punishment."<sup>31</sup>

Where the scope of a purported rule is unclear, lack of reciprocity may be evidence that the alleged rule is no longer in effect. Thus, the Nurnberg Tribunal did not assess a penalty against Admiral Doenitz for waging indiscriminate submarine warfare in violation of the Naval Protocol of 1936.<sup>32</sup> Hitherto, it was believed that submarines should adhere to the same rules as surface ships. The defense alleged that these rules were observed by German sub-

<sup>29</sup> Art. 65, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug 1949, T.I.A.S. No. 3365, DA Pam No. 27-1, 7 Dec 1956, p. 152, par. 384, FM 27-10, provides in part: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

<sup>30</sup> Eisenhower, *Crusade in Europe* 469 (1949). To these remarks Zukov reportedly replied: "But what did you care about men the Germans had captured. They had surrendered and could not fight any more." *Ibid.*

<sup>31</sup> 11 Trials of War Criminals 587 (G.P.O. 1950).

<sup>32</sup> See 2 Hackworth, *International Law* 690-695 (1941); 6 *id.* 466 (1943). See also Bishop, *International Law* 607-608 (1953). For the rule deemed presently effective, see par. 503b(3), Nav. War. Info. Pub. 10-2, *Law of Naval Warfare*, Sep 1955.

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mariners until it was disclosed to them that British merchant vessels were being armed and were attacking submarines on sight. Thus it was argued that they lost their protected status. Furthermore, Doenitz argued that the United States Navy pursuant to orders from Admiral Nimitz carried on unrestricted warfare against Japan in the Pacific, and this was evidence of the ineffectiveness of the rule, and permitted the Germans to act in a like manner. Although the opinion of the International Military Tribunal is ambiguous, the significance of the case is that Doenitz under these circumstances was not held responsible.<sup>33</sup>

**State** practice sometimes indicates that lack of reciprocity will not be regarded as requiring reprisals, and that good reason for adhering to the rules of war may still exist. A striking example of a declaration to abide by the rules of war in the face of many breaches is the Soviet note of 27 April 1942, issued in response to many instances of German war crimes. In April 1942, the Soviet Union was hard pressed and it is unlikely that any statement would have been issued unless military advantages were clearly foreseen.

"[T]he Soviet Government true to the principles of humanity and respect for its international obligations, has no intention, even in the given circumstances, of applying retaliatory repressive measures against German prisoners of war, and continues, as heretofore, to observe the obligations undertaken by the Soviet Union with regard to the regime for war prisoners specified by the Hague Convention of 1907, which was likewise signed but so perfidiously violated in every one of its points by Germany." <sup>34</sup>

(ii) Humane treatment of prisoners of war and other war victims may induce the enemy to desert or at least to fight less ferociously. Adversaries in hopeless positions may be more willing to surrender where they can anticipate the minimum treatment required by the Geneva Conventions of 1949. When the besieged can only expect atrocities, they are less likely to compromise or surrender.

(iii) A less unfavorable reaction from inhabitants of occupied territory may be anticipated where the rules of belligerent occupa-

<sup>33</sup> Nazi Conspiracy and Aggression, Opinion and Judgment (of the International Military Tribunal) 140 (G.P.O. 1947).

<sup>34</sup> 7 Trial of the Major War Criminals 358 (Nuremberg 1947). Conversely, Hitler when being hard pressed in 1945 considered declaring the Geneva Conventions no longer binding on Germany. He was dissuaded. Bullock, Hitler, *A Study in Tyranny*, c. XIV (1952). On 7 March 1955, a Soviet note to the Netherlands declared that the USSR "recognizes the Hague Conventions and Declarations of 1899 and 1907 ratified as they were by Russia, inasmuch as these Conventions and Declarations do not run contrary to the United Nations Charter, and providing that they were not either amended or superseded by any subsequent international agreement to which the USSR is a party—such as the Geneva Protocol of 1925 . . . and Geneva Conventions of 1949 on the Protection of War Doctrines."

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tion are followed. Many observers are inclined to believe that if Hitler's invading armies in 1941-43 had treated the Ukrainians and the White Russians more moderately and in accordance with Geneva Conventions and Hague Regulations, it would have been possible to avoid the open hostility of the inhabitants. Guerrilla units sprang up in the Ukraine to harass German forces; with the support of these people, traditionally anti-Soviet, the complexion of the war in Russia might have been different. The Germans treated the Latvians somewhat better and were able to secure considerable help from those people. Several Latvian regiments fought against the Russians with some success.<sup>35</sup> The military value of the Geneva Conventions of 1949 was emphasized by Secretary of the Army Brucker who testified before a Senate Committee:

"[T]he fair and just treatment of such persons as the inhabitants of occupied territory has been found, as a matter of military experience, to contribute to success in battle by providing those conditions of order and stability which permit a belligerent to devote its real efforts to the defeat of the enemy armed forces."<sup>36</sup>

(iv) Napoleon is said to have remarked, "Nothing will disorganize an army more or ruin it more completely than pillaging." The discipline and organization of an army that knows no restriction in dealing with conquered peoples is well known. The requirements of international law supply additional support for the prohibitions against looting and pillaging in domestic military law set forth in Articles 99(6) and 103(b) (3) of the Uniform Code of Military Justice. Captured property is not to be appropriated by individuals, but is subject to disposition only pursuant to provisions of the Hague Regulations and the Geneva Conventions of 1949.<sup>37</sup> All these international law mandates are compatible with the needs of a modern army in restraining itself and maintaining discipline.

(v) Military efficiency may be encouraged by abiding by the rules of self-restraint implicit in the laws of war. Psychological

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<sup>35</sup> 2 *Latvju Enciklopedija* (Latvian Encyclopedia) (Stockholm 1952-1953). On the formation and operations of the Latvian Legion (Die Lettische SS Freiwilligen Legion), 1943-1945, see pp. 1288-1322. On the last days of the Legion in the "Fortress of Courland" (Kurzemes Cietoksnis), consult pp. 1127-1173. Reference supplied by Mr. Zigurds Zile, University of Wisconsin Law School.

<sup>36</sup> *Hearings Before Senate Committee on Foreign Relations on Geneva Conventions for the Protection of War Victims*, 84th Cong., 1st Sess. 10 (1956).

<sup>37</sup> Article 47 of the Hague Regulations forbids pillage. Par. 397, FM 27-10, notes 22 and 23 *supra*. See pars. 293-417, FM 27-10; Downey, *Captured Enemy Property: Booty of War and Seized Enemy Property*, 44 Am. J. Int'l L. 488 (1950). Numerous unpublished opinions of The Judge Advocate General of the Army deal with complex questions of title to so-called captured properties. See, for example, JAGA 1954/4881, 26 May 1954, and cases therein cited.

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reasons for adherence to the laws of war can be suggested. S. L. A. Marshall in his book *Men Against Fire* (pages 78–79) notes a reluctance of American infantrymen to kill. The author attributes this to pacific influences of civilian life which cause the fear of aggression to become a basic factor of the normal man's emotional makeup—and therefore not capable of being removed by intellectual reasoning such as “kill or be killed” or by intensive training in the mechanics of firing a weapon. Medical Corps psychiatrists in World War II discovered that fear of killing rather than fear of being killed was the most common cause of battle failure in the individual.

“It is therefore reasonable to believe that the average and normally healthy individual—the man who can endure the mental and physical stresses of combat—still has such an inner and usually unrealized resistance toward killing a fellow man that he will not of his own volition take life if it is possible to turn away from that responsibility. Though it is improbable that he may ever analyze his own feelings so searchingly as to know what is stopping his own hand, his hand is nonetheless stopped. At the vital point, he becomes a conscientious objector, unknowing.”<sup>38</sup>

If Marshall's observations are correct, it would be advisable for every commander in the field to take whatever actions are necessary to make necessary killing less repugnant to the fighting man. The customs and rules of law developed to restrain barbarity may supply a helpful psychological impetus to do this, for it is well known that a contrary pugnacity appears under certain circumstances, particularly where a sense of justice and right motivates the combatant.<sup>39</sup> That the laws of war may supply a psychological motivation to do battle is borne out by the opinions of some otherwise humane authorities who suggest that one way to deter war is to make the resort to it so horrible that war will henceforth

<sup>38</sup> Quincy Wright in his study of war has similarly recognized the need for a body of rules to minimize the conflict between allowance of violence and the necessity for combat: “When the state says you must go to war for reason of state, but the church says, ‘Thou shalt not kill,’ or ‘The meek shall inherit the earth,’ a body of doctrine becomes necessary to reconcile the two commands, and this must be drawn from sources as broad as the religion. Since the fundamental ethical norms are usually as broad as the civilization, rules to serve this function must be deduced from these norms.” 1 Wright, *A Study of War* 157 (1942).

<sup>39</sup> Professor Osgood, while recognizing the deep pacificity of the American, has suggested that a contradictory pugnacity also exists. “There broods in the American minds the fighting spirit that recalls the days when the United States was a bumptious young nation trying to prove itself to the world, as well as the more recent days when the populace boasted that the country never lost a war.” Osgood 34.

While this observation is borne out by the facts, it may be suggested that American pugnacity seems to flourish best where there is a strong sense of righteousness and legality and if a higher mission is to be accomplished. Where that sense of justification is lacking, there has been much dissent; *e.g.*, in New England during the War of 1812 and

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be unthinkable. Thus, by implication the laws of war are assumed to make war more palatable to participants.

Military tradition teaches that in some circumstances resort to war and combat is laudable. Accordingly, pride in the profession of a soldier is encouraged. This pride may be enhanced with an observance of traditional customs of war. Rules of war, although not essential to the conduct of war itself, are compatible with the ethics of the soldier's profession and may do much to make an individual a better fighting man. Disregard of the principles of humanity and moderation may lead that individual eventually to a profound sense of shame, and he may even react strongly to the discipline of the armed force. The individual who disregards principles of humanity and moderation may even adapt himself to the barbarity of uncontrolled anarchy that the absence of law engenders. He may become in every sense anti-social and be less likely to be amenable to legal restrictions from any source. Of course this is undesirable in a modern army, and laws of war may do much to control the danger of a retreat to barbarism.

Limited war imposes a heavy psychological burden on the nation as a whole. The doctrine may be so unique that modern man may be unable to accommodate his efforts to it. In Western civilization, abhorrence of violence has become deeply engrained, and particularly in the United States it has taken only the most shattering events to shake the community out of lethargy into pugnacity. However, fighting qualities once tapped flow with little restraint until total victory is achieved, and it may well be asked in light of this whether anything less than a complete national effort would receive great public support. In a society valuing peace and security, it is asking a great deal when one requires belligerency for ideals embodying something less than national survival. Adherence to the limiting principles of the laws of war may encourage the populace to support a limited war effort.

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during the Mexican War. Max Lerner in his monumental study *America As a Civilization* (1957) notes at page 909 that, although Americans are loathe to jeopardize their normal pursuit of profits, careers, and happiness, "when they are forced into a war, there is an intensity of recoil from their initial indifference. It is as if they had to over-compensate for their earlier lack of feeling by the total absorption with the war. And this in turn is reinforced by the irrational blood urge which, once set in motion, transforms the American (and especially the civilian at home) into a fire-breathing enthusiast."

Shakespeare's famous lines support the dichotomy more eloquently:

"In peace there's nothing so becomes a man  
As modest stillness and humility;  
But when the blast of war blows in our ears,  
Then imitate the action of the tiger;  
Stiffen the sinews, summon up the blood,  
Disguise fair nature with hard-favour'd rage: . . ."

Henry V, Act II, Scene I.

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## IV. LAW AND WAR—THREE VIEWS

Several different notions of law and its relation to war may be noted. Each view is significant in that it reflects opinion presently held with respect to the role of law in war.

### A

The first view, which has several variations, has been expressed most forcefully in Cicero's famous words, "*inter arma silent leges.*"<sup>40</sup> In view of the almost unbelievable ferocity observed in recent wars, many eminent authorities have concluded that although a law of war may have existed in a bygone era no such subject is worthy of study today.<sup>41</sup> These critics in short conclude that to expect to find law in a future conflict is a delusion.

It does not take much research, however, to determine that appalling as the massacres of World War II were they were at least matched by atrocities of the early Greeks and Romans.<sup>42</sup> It is as hard to conclude from this evidence that man is less humane today than he was two hundred years ago as it is to conclude that he is now more prone to adopt humanitarian principles. The Ciceronian view does receive some support if one observes the casualty figures for European wars of the past several centuries,<sup>43</sup> indicating the

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Total casualties (000's omitted).	31	68	167	285	863	3,454	14,635	3,845	24,035
Per 1,000 popula- tion.	2	5	8	10	15	37	33	15	54

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increasing scope of war in recent centuries. War law has not been shown to have appreciably reduced either the resort to war or the percentage of casualties. It is, therefore, not surprising to read Professor Osgood's words :

'We commonly assume that force is least objectionable morally, as well as most effective practically, when it is exercised with a minimum of violence—preferably in the case of police power, when it is implied rather than directly exercised—when it is exercised legitimately, that is, in accordance with the general consent and approval of society. . . . However, *the same procedures for moderating, controlling and channeling force in socially sanctioned directions do not exist among nations where the bonds of law, custom, and sympathy are frail and rudimentary.*'<sup>44</sup>

By this he urges only that law in the international arena is not like law as it is defined in the domestic sense. That they differ factually is obvious, but whether they differ in theory will depend on how one defines law. That problem is one which has occupied international jurists for centuries.<sup>45</sup>

The doctrine of *Kriegsraison geht vor Kriegsmanier* expressed in a pre-World War I German manual was but a short way from Cicero's maxim. Although subsequent research has indicated that this doctrine, translated "necessity in war overrules the manner of warfare," was overrated<sup>46</sup> and that the maxim was not actually considered as being expressive of a basic military policy, the German justification of 4 August 1914 for the invasion of Belgium sounds suspiciously like an application of *Kriegsraison*. Herr von Bethman-Holweg at that time stated :

"Necessity knows no law. Our troops have occupied Luxemburg, and, perhaps, have already entered Belgian territory. Gentlemen, that is a breach of international law. . . . We have been obliged to refuse to pay attention to the reasonable protests of Belgium and Luxemburg. The wrong—I speak openly—the wrong we are thereby committing we will try to make good as soon as **our** military aims have been attained. He who is menaced, as we are, and is fighting for his all, can only consider how he is to hack his way through."<sup>47</sup>

The doctrine of *Kriegsraison* would permit a military commander in the field to regard all the limitations expressed in conventional law as mere expressions of moral authority, and **he** could override any supposed rules of war on the ground that not only military survi-

<sup>44</sup> Osgood 16 (emphasis added).

<sup>45</sup> For the best brief discussion see Williams, *International Law and the Controversy Concerning the Word "Law,"* 22 Brit. Y.B. Int'l L. 146 (1945).

<sup>46</sup> Von Glahn, *The Occupation of Enemy Territory* 13-14 (1957); but see 2 Oppenheim, *International Law* 232 (7th ed., Lauterpacht 1952).

<sup>47</sup> 2 Wheaton, *International Law* 168 (7th ed., Keith 1944); *Report of Commission on Responsibilities, Paris Conference 1919.*

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val required it, but also military success.<sup>48</sup> The absolute defense of “military necessity” was discredited by the post World War II war crimes trials. In *United States v. List*,<sup>49</sup> the court stated that “the rules of International Law must be followed even if it results in the loss of a battle *or even a war.*” Field Manual 27-10 drafted in the light of this and similar holdings provides:

“ . . . . Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.”<sup>50</sup>

At many points in the Hague Regulations and the Geneva Conventions, reference is made to such qualifications as “imperative military necessities,”<sup>51</sup> “as far as military considerations permit,”<sup>52</sup> “unless absolutely prevented,”<sup>53</sup> “except in case of absolute necessity,”<sup>54</sup> and similar phrases. The existence of these references permitting varying degrees of flexibility means neither that the laws of war do not exist nor that they are so flexible as to be meaningless. Instead, it would be only sensible to construe their broad references as embodying a concept of reasonableness, difficult of definition to be sure, but nevertheless present as a limitation.<sup>55</sup>

Some who conclude that no law of war exists reach this result by confusing rules of war with rules of sportsmanship. They cite references to principles of chivalry,<sup>56</sup> which can still be found in the treatises as well as in the Army manual; and being frequently experienced in modern warfare, they resent any implication that war can be considered a game. The opinion of many members of the armed forces in this respect is exemplified by a recent writer who stated :

“All competitions have one advantage: there are rules. Obeying rules is called sportsmanship. Losing gracefully is called sportsmanship. On

<sup>48</sup> Stone, *Legal Controls of International Conflict* 352 (1954).

<sup>49</sup> 8 L.R. *Trials of War Criminals* 34, 67 (1949) (emphasis added).

<sup>50</sup> Par. 3a, FM 27-10.

<sup>51</sup> Art. 8, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug 1949, T.I.A.S. No. 3362, par. 16, FM 27-10.

<sup>52</sup> *Id.* art. 12. See also art. 23(g), Hague Regulations, DA Pam No. 27-1, 7 Dec 1956, *supra* notes 22 and 23.

<sup>53</sup> Art. 43, Hague Regulations, DA Pam No. 27-1, 7 Dec 1956, *supra* notes 22 and 23.

<sup>54</sup> *Id.* art. 54.

<sup>55</sup> See note 11 *supra*.

<sup>56</sup> 2 Oppenheim, *International Law* 226 (7th ed., Lauterpacht 1952), where the influence of Christianity and chivalry are cited as being responsible for rules moderating the cruelty of war. Par. 4 of FM 27-10, *The Rules of Land Warfare*, War Dept. 1940, referred to principles of chivalry. Par. 3 of the successor manual, FM 27-10, *The Law of Land Warfare*, Jul 1956, refers to the principles of “humanity and chivalry.”

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the battlefield there is only one rule, destroy the enemy . . . once you enter the combat zone, forget sportsmanship.”<sup>57</sup>

The writer would not be likely to find much disagreement with his proposition. Until the 19th century wars, a good deal of battle involved hand-to-hand combat. This added a personal aspect to war which encouraged the kind of ethics now considered more typical of a western movie or a TV show, where we find that to fight fair one must not shoot ones opponent in the back, one must not fire until fired upon (let the other fellow draw first), and an ambush is regarded as a scurvy trick. Some of these notions survive in a most rudimentary form, but their survival is for reasons other than “sportsmanship.” Thus, Article I of Hague Convention III requires that hostilities must not be commenced without previous and explicit warning, & the theory being that in order to fight effectively one must know one’s enemy. It is a relic of feudalism to confuse the modern law of battle with principles of chivalry which may continue to exist in **only** the most limited **form**.<sup>58</sup> The comic incident at the battle of Fontenoy in 1745 is a relic of medieval **pagentry**.<sup>60</sup> Nevertheless, all the niceties may not have disappeared for as Winston Churchill observed on one occasion, “after all when you have to kill a man it costs nothing to be **polite**.”<sup>61</sup> This, however, does not appear to be an application of any principle deemed binding.

<sup>57</sup> Randle, *How Do You Get That Pride?*, Army, Jun 1958, p. 56. Similarly, Prince Andrew’s bitter words at Boradino might well have been said 100 years later: “Not take prisoners . . . that by itself would quite change the whole war and make it less cruel. As it is we have played at war—that’s what’s vile. We play at magnanimity and all that stuff. Such magnanimity and sensibility are like the magnanimity and sensibility of a lady who faints when she sees a calf being killed. She is so kindhearted that she can’t look at blood but enjoys eating the calf served up with sauce. They talk to us of rules of war, of chivalry, of flags of truce, of mercy to the unfortunate and so on. It’s all rubbish.” Tolstoy, *War and Peace* 864 (Maude transl., Simon & Schuster ed.).

<sup>58</sup> Par. 20, FM 27-10. The drafters of this provision undoubtedly had in mind the Japanese attack against the Russians in Port Arthur in 1904. The same provision was cited by Churchill in his declaration of war against Japan following the attack on Pearl Harbor.

<sup>59</sup> The courtesies exchanged between the captured general and his conqueror may provide an example. See Young, Rommel, *The Desert Fox* (1950); *contra*, Eisenhower, *Crusade in Europe* (1949). Some captured German officers apparently expected to receive all the chivalrous courtesies upon capture. See Bradley, *A Soldier’s Story* 313 (1951).

<sup>60</sup> At this affair, the *Gardes Francais* left their positions contrary to orders, apparently because it was considered dishonorable to fight from cover. They met the advancing British troops in an open field at a distance of about 30 paces, where their commander insisted that the British fire first. Sheean, *A Day of Battle* (1938); 9 *Encyclopedia Britannica* 453 (14th ed.); *The Judge Advocate General’s School, Associate Advanced Officer Course, Civil Affairs, International Conflicts* 306 (1956).

<sup>61</sup> Churchill, *The Grand Alliance* 611 (1950), on the occasion of a note to the Japanese Ambassador on 8 December 1941 informing him that war existed between the United Kingdom and Japan. The note ended “I have the honor to be, with highest consideration, Winston S. Churchill.”

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The view that law and war are totally incompatible must be rejected by necessity. Law and war should not be deemed incompatible unless it is the objective of war to annihilate the possibility of further coexistence with one's adversary. Few wars, if any, have this as their real **objective**,<sup>62</sup> and a limited war by definition rejects it. It seems axiomatic that international law presumes the possibility of the coexistence of competing nations and **systems**. In short, the function of law in the world society may be considered as "facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in **common**."<sup>63</sup> Heretofore, a substantial part of men's efforts has been devoted to war, and if international law ignores this state of affairs it ignores what has been one of the chief pastimes **of the race and** leaves the consequences of war to the mercy of unmitigated barbarism. Quincy Wright in his examination of the wars of mankind has observed :

"War has been the method actually used for achieving the major political changes of the modern world, the building of nation-states, the expansion of modern civilization throughout the world, and the changing of the dominant interests of that civilization."<sup>64</sup>

The possibility of war continues to exist in the modern world; if law is to have a place in international life, it must **accomodate** this risk.

Furthermore, the view that law and some kinds of war are incompatible must be rejected. Until quite recently, no legal **significance** was attached to whether or not a particular belligerent was engaged in "just" or "unjust" **war**,<sup>65</sup> insofar as the application of war law was concerned. It was hitherto accepted that because war was a mode adopted to achieve national objectives the laws of war should always be applied regardless of the motives of the parties. Following World War I, a recrudescence of a distinction made by **Hugo Grotius** between "just" and "unjust" wars appeared<sup>66</sup> accompanied by a strong sense of international morality that has placed limits on the propriety of nations' resort to force.

<sup>62</sup> McDougal & Feliciano, *supra* note 11, indicate the infrequency in which such totally unlimited objectives have been sought. They cite the destruction of Carthage by Rome as the only true example. There is no reason to believe that the Romans would not have settled for less destructive measures if they would have achieved an end to the Carthaginian threat. The Romans were principally concerned with the political and commercial competition of the Carthaginians. After over one hundred years of intermittent struggle, this competition was ended by the total destruction of the main city.

<sup>63</sup> Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616, 621 (1949).

<sup>64</sup> 1 Wright, *A Study of War* 260 (1942).

<sup>65</sup> 2 Oppenheim, *International Law* 233 (7th ed., Lauterpacht 1952).

<sup>66</sup> See Stone, *Legal Controls of International Conflict* 13-14, 299 (1964).

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The Kellogg-Briand pact,<sup>67</sup> the war crimes trials, and the UN Charter<sup>68</sup> gave expression to this sentiment. In an effort to limit the resort to war, attention to controlling war through law was neglected and instead prohibitions against war itself were constructed. All conflict was not prohibited, but certain conflicts were deemed violative of international law. Some leading commentators have advocated that legal consequences flow from this dichotomy. Lauterpacht has stated in his treatise:

“ . . . In so far as war has ceased to be a right . . . fully permitted by International Law, an illegal war . . . can no longer confer upon the guilty belligerent all the rights which traditional International Law . . . conferred upon the belligerent. Ex *injuria jus non oritur* is an inescapable principle of law. At the same time, in view of the humanitarian character of a substantial part of the rules of war it is imperative that *during the war* these rules should be mutually observed regardless of the legality of the war.”<sup>69</sup>

According to this view, the provisions of the Geneva Conventions protecting prisoners of war might be observed during hostilities, but, assuming the proponents of the “legal war” were victorious, the mandates of the Convention protecting civilian persons would not be deemed binding at the conclusion of the war. The law of belligerent occupation according to this thesis might be substantially modified at that time.

If law is to have any efficacy in a world prone to settle differences by war, it is evident that any distinction between laws of war applicable to an illegal war and those applied to a legal war must be rejected. War has not been eliminated, and the origin of several recent conflicts, notably the Korean affair, can be traced to an “illegal” resort to hostilities. Such a construction would only induce the illegal belligerent to fight even harder to avoid the threatened hardships of a peace unmitigated by an assurance of legality and would not encourage the alleged illegal belligerent to adhere to any of the so-called “humanitarian” principles during combat. Surely such a result is not compatible with the doctrines of limited war.

A just-unjust war dichotomy can also be found in Soviet legal theory. Lenin wrote :

“ . . . Above the interests of the individuals perishing and suffering from the war must stand the interests of the class. And if the war serves the interests of the proletariat . . . and secures for it liberation

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<sup>67</sup> Pact for the Renunciation of War as an Instrument of National Policy, 27 Aug 1928, 46 Stat. 2343.

<sup>68</sup> See art. 2(8), (4).

<sup>69</sup> 2 Oppenheim, International Law 217-218 (7th ed., Lauterpacht 1962). See also authorities cited by Kunz, *The Laws of War*, 60 Am. J. Int'l L. 313, 317-318 (1966). Compare with Lauterpacht, *The Limits of the Operation of the Law of War*, 30 Brit. Y.B. Int'l L. 206 (1953).

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from the capitalist yoke, and freedom for struggle and development, —such a war is progress, irrespective of the victims and the suffering which it entails.”<sup>70</sup>

Consequently, certain wars are deemed “just wars.” Says one Soviet authority :

“ . . . The very character of these wars excludes the possibility of the violation of the generally accepted laws and customs of war, excludes every form of atrocity [by the Soviet Union] ; for the aims of these wars is the defense of the peoples and not their suppression toward which the imperialists aspire and for the sake of which they resort to every form of crime.”<sup>71</sup>

It is a strange doctrine which confers legality by definition. Wars such as that against Poland and Finland in 1940 are deemed just. A changing Soviet attitude may be indicated by the fact that the USSR in recent years has made a strong point of ratifying all international conventions pertaining to the laws and customs of war and insisting that other countries abide by the laws and customs of war regardless of a claim that the war is just. Strong Soviet comments were directed against the adoption by several American commentators of a “just-unjust war” distinction.<sup>72</sup> Perhaps, insofar as the application of rules of war are concerned, the “just-unjust war” concept in the Soviet Union as well as in the United States will “wither on the vine.”

### B

A second point of view on the laws of war might be described as an opposite of the first. It would define the laws of war in such a way as to imply that they are certain and without ambiguities. Thus, Cardinal Newman once wrote: “war has its laws; there are things which may fairly be done, and things which may not be done.”<sup>73</sup> A more modern authority has stated :

“The conduct of modern warfare is governed by certain rules and regulations, called the laws of war, which are principles acknowledged as binding by the majority of civilized states.”<sup>74</sup>

Both commentators by these words imply a certainty which is by no means accepted in practice. In a recent article, Professors

<sup>70</sup> 6 Lenin, *Sebraniye Sochineniye* (selected works) 457.

<sup>71</sup> Romashkin, *Voyennye Prestupleniya Imprializma* 12–13 (Moscow 1963).

<sup>72</sup> See comments by Kulski, *The Soviet Interpretation of International Law*, 49 *Am. J. Int'l L.* 518, 532–533 (1955), on recent articles in *Sovetskoye Gosudarstvo i Pravo* which in turn commented upon the *Report of Committee on Study of Legal Problems of the United Nations, 1952 Proceedings of the Am. Soc. Int'l L.* 216–220. For current study of Soviet attitudes toward international law, see Triska & Slusser, *Treaties and Other Sources of Order in International Relation: The Soviet View*, 52 *Am. J. Int'l L.* 699 (1958).

<sup>73</sup> Oxford, *Dictionary of Quotations* 363 (2d ed. 1953). The words were written in 1864.

<sup>74</sup> Von Glahn, *The Occupation of Enemy Territory* 1 (1957).

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McDougal and Feliciano take issue with this traditional attitude toward the law of war as being misleadingly simple. They describe this as a view characterized by an :

“ . . . . over optimistic faith in the efficacy of technical legal concepts and rules, [which] is exemplified in the continued emphasis, evident in much of the contemporary literature of the law of war, on normative-ambiguous definitions and formulations and in the common underlying assumption that certain predetermined ‘legal consequences’ attach to and automatically follow—independently of policy objectives, factual conditions and value consequences as perceived by determinate decision-makers—from such definitions and formulations,”<sup>75</sup>

The theory McDougal and Feliciano thus deplore is a familiar one. It is similar to the “slot-machine” theory of law exemplified by the great 18th century codification of civil law undertaken under Frederick the Great of Prussia where the final product contained some 28,000 sections. It was the theory of this code that the task of the judge was to determine the facts and then simply fit them into the prepared pattern. It was believed that a perfect and complete system of law could be worked out and published as a set of rules. This assumption that a code could be explicit enough to answer all man’s problems was supported in our own tradition by Jeremy Bentham and John Austin.<sup>76</sup> The objective of the code was to preclude the judge from exercising any legislative powers, for the tyranny of the courts was feared more than the mandates of the legislator.

The laws of war, however, have never been precise. The opinion of the Nurnberg war crimes tribunal recognized this when it observed the source of war law by stating :

“ . . . .The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. *This law is not static, but by continual adaption follows the needs of a changing world.*”<sup>77</sup>

The significance of the last statement must be emphasized, for it leads us to a third major view of the laws of war.

### C

The MacDougal-Feliciano analysis presents the third approach.<sup>78</sup> Their study of “the Process of Coercion” and “the Process of Deci-

<sup>75</sup> McDougal & Feliciano, *supra* note 11, at 774-775.

<sup>76</sup> Pound, *The Spirit of the Common Law* 170 ff. (1921); Pound, *Sources and Forms of Law*, 22 *Notre Dame Law. J.* 71-72 (1946).

<sup>77</sup> *Nazi Conspiracy and Aggression, Opinion and Judgment (of the International Military Tribunal)* 51 (G.P.O. 1947) (emphasis added). The United States Military Tribunal in the I. G. Farben trial recognized the existence of “grave uncertainties concerning the laws and customs of war.” See Kunz, *The Laws of War*, 60 *Am. J. Int’l L.* 313, 328 (1956).

<sup>78</sup> McDougal and Feliciano, *supra* note 11.

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sion" involved in international affairs leads them to be sceptical of the immediate utility of a collection of rules. They state **with respect to the rules of war** :

" . . . . Observers have too often assumed that it is the function of inherited legal rules to point definitively and precisely to certain pre-ordained conclusions. The difficulty with this assumption is that it seeks to impose too great a burden upon man's frail tools of thought and **communication** and an impossible rigidity upon both the processes of decision and social change. The fact is that the rules of the law of war, like other legal rules, are commonly formulated in pairs of complementary opposites and are composed of a relatively few basic terms of highly variable reference. The complementarity in form and comprehensiveness of reference **of** such rules are indispensable to the rational search for and application of policy to a world of acts and events which presents itself to the decision-maker, not in terms of neat symmetrical dichotomies or trichotomies, but in terms of innumerable gradations and alternations from one end of a continuum to the other; the spectrum makes available to a decision-maker not one inevitable doom but multiple alternative choices. The realistic function of those rules, considered as a whole, is, accordingly, not mechanically to dictate specific decision but to guide the attention of decision-makers to significant variable factors in typical recurring contexts of decision, to serve as summary indices to relevant crystallized community expectations and, hence, to permit creative and adaptive, instead of arbitrary and irrational, decisions." 79

Overoptimistic faith in the utility of rules is not a trait likely to be found in either a successful military leader or a competent legal **advisor**.<sup>80</sup> McDougal and Feliciano correctly emphasize the principle that it has never been the function of a principle of law or military tactics to point the way to a specific result with catechistic certainty. Attempts to do this have failed. A code of warfare does not exist; but even if one did its history would not be likely to be different from any other code. Over the years it would be in many of its parts require amendment, glosses, and constructions made necessary by changed conditions that might well make it almost unrecognizable from the **original**.<sup>81</sup>

Nevertheless, some principles and fairly precise rules of war are, for the reasons heretofore given, badly needed by commanders in the field and attempts to formulate them should be made. To this writer, the McDougal-Feliciano analysis is deficient in one **respect**; namely, they do not accord sufficient weight to the desirability for specific rules where the decision-maker is a military com-

79 *Id.* at 814-815.

80 The historian Arnold Toynbee cites several instances where an apparently superior force relying on traditional rules or techniques has fallen before a more enterprising foe: Goliath before David, Phillip II of Spain's Armada before England, and Napoleon III of France before Prussia. 4 Toynbee, *A Study of History* 466-467 (1939).

81 The history of Article 1384 of the French Civil Code is a famous example of the way in which a code may develop to accommodate new interests.

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mander in the field. A commander is unlikely to be either equipped or inclined to go through the process of evaluation that the McDougal-Feliciano analysis would require of him.<sup>82</sup> Nor is he likely to receive much guidance from the political decision-makers because they may be too far away to make the immediate judgment that is required, or their preconceived directions are too vague and non-committal. Moreover, political decision-makers may be unwilling to abide by any **rules** of warfare. One may view with some scepticism the creative decisions of some military commanders evidenced by incidents during World War II. Can it not be argued that some of the foregoing alleged violations of the laws of war would have been less likely to occur if the nature of the rules had been thoroughly understood by the defaulting commanders, and explicit directions construing the rules had been made available by prior directives from military rather than political sources? For example, Brigadier Desmond Young in his biography of Rommel describes the ingenuity of General Cavallero of the Italian Army who sought to appease Rommel's requirements for gasoline by shipping it to the Afrika Corps in double-bottoms fitted in hospital ships. This was deemed by Rommel a violation of the laws of war even at that time. Although the Italian general might have been ingenious enough to argue that the Xth Hague Convention of 1907 was not binding on the belligerents because all parties to World War II had not ratified it and that hospital ships could be so used, this argument would probably be insubstantial in view of the general principle of international law which limits the use of hospital ships to transporting the wounded, sick, and shipwrecked.<sup>83</sup> Hospital ships were in some respects deemed sanctuaries for others however, and it is reported that another imaginative Italian general,

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<sup>82</sup> The McDougal-Feliciano analysis reminds one of the objections of the great German jurist, Carl Friedrich von Savigny, to a codification of German law in the 19th century. He objected to the proposed code for essentially three reasons: first, that the growth of the law was likely to be impeded or diverted into inadvisable directions; second, that a code was likely to embody the intellectual and moral notions of the draftsmen which might not prove their worth; and third, that codifications of the past had not succeeded. See discussion in Pound, *Sources and Forms of Law*, 22 Notre Dame Law. 1 (1946); Von Mehren, *The Civil Law System* 22-24, 31-34 (1957).

<sup>83</sup> See the rule codified in Article 30 of the Geneva Convention for the Amelioration etc. of the Wounded and Sick at Sea, T.I.A.S. No. 3363, DA Pam No. 27-1, 7 Dec 1956, p. 57, which supersedes Article 4 of the Xth Hague Convention of 1907. See also 2 Oppenheim, *International Law* 502-503 (7th ed., Lauterpacht 1952); Young, Rommel, *The Desert Fox* 159 (1950). Rommel is reported to have exclaimed: "How can I protest against British interference with hospital ships when you do things like that?"

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frightened of flying the Mediterranean, took passage in a hospital ship as a stretcher case. He was removed, unwounded, at Malta after the British insisted on inspecting patients aboard the ship. These and many other violations of the rules of warfare demonstrate creative thinking, but it is doubtful whether this kind of activity ought to be encouraged by the absence of clear prohibitions implementing international law.

Where the laws of war are not specific, the commander in the field is likely to be at a loss in interpreting them with any hope of consistency or accuracy. Do the laws of war, for example, prohibit the use of the enemy uniform as a ruse, and if a person is captured wearing an enemy uniform is he entitled to the protections of a prisoner of war? A precise answer to this has eluded many authorities who have considered the **problem**,<sup>84</sup> and consequently authoritative guidance is needed in the shape of a definite rule. Field Manual 27-10 supplies it.<sup>85</sup> If the manual is mistaken, it should be changed, but the change should properly come through some process of decision insulated in some degree from the heat of battle. At the same time, it is the task of those who give expression to the principles and rules to realize the limitations inherent in their attempts to be precise and to reformulate again and again what are believed to be the proper mandates. The lesson of the foregoing examples is that it is futile to expect any substantial attention to be devoted to the laws of war unless the commanders in the field are made thoroughly aware of their usefulness and of their impact. It is not enough to ratify the international conventions. Implementing directives are needed, and Field Manual 27-10 is a start. Definite rules have their place if a limited war is deemed

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<sup>84</sup> General Bradley adopts the traditional position that their use in combat is a violation of law. Bradley, *A Soldier's Story* 467 (1951). Cf. **U.S. v. Skorzeny**, 9 L.R. *Trials of War Criminals* 90 (1949), wherein German Officers of the 150th Panzer Brigade were charged with entering combat with U. S. Army uniforms. The defense, among others, was that the uniforms were discarded before they engaged in combat. There is some doubt as to the rationale of the acquittal, but this defense was of great significance. *But see*, Jobst, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?*, 35 Am. J. Int'l L. 436 (1941), where it is concluded that the use of the enemy uniform is a violation of war law.

<sup>85</sup> Par. 64, FM 27-10, provides under the heading "National Flags, Insignia, and Uniforms as a Ruse": "In practice, it has been authorized to make use of national flags, insignia, and uniforms as a ruse. The foregoing rule (*HR, art. 23, par. (E)*) does not prohibit such employment, but does prohibit their *improper use*. It is certainly forbidden to employ them during combat, but their use at other times is not forbidden."

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possible, although complete specificity is unlikely to be achieved on the field of battle.<sup>86</sup>

One criticism of Field Manual 27-10 is that in the interest of brevity it was apparently decided not to comment extensively on many provisions of the Geneva Convention of 1949. Extensive studies of each of the articles of the Geneva Conventions were made in connection with the submission of the Convention to the Senate for advice and consent, but these studies were not published. The hearings before the Senate Foreign Relations Committee took hardly more than half a day, and the senators were preoccupied with the issue of whether pre-1905 users of the Red Cross emblem could continue to use the emblem as their trademark.<sup>87</sup> Many other potentially controversial issues which might well be more significant were not discussed by the senators in the time allotted. Consequently, the hearings and the committee report are very general and do not contain a detailed analysis. They were not so intended because it was the task of the Senate Committee only to note the significant changes in what was already considered binding by the United States. An integration of the Geneva Conventions into the panorama of war law was not attempted at that time, thus leaving difficult questions to be dealt with either by the commander in the field or by an authoritative manual. Where complex legal questions are involved, the already burdened staff judge advocate may have neither the time nor the tools to make an analysis even if the questions were referred to him. Hence he and the commander must refer to 27-10; and where the manual affords no guide, they may be without assistance.

### V. A SEARCH FOR PREDICTABILITY

#### A. *The Nature of "Law" in the Laws of War*

The Army manual accepts the proposition that binding laws of war exist. It recites many treaty provisions, but makes its unique contribution by offering interpretations and glosses. Field Manual

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<sup>86</sup> Study of the Geneva Conventions of 1949 is required by military regulations issued in accordance with a common article of the four conventions. See Article 127 of the Prisoner of War Convention, a provision common to all four 1949 Geneva Conventions. The program of instruction will be incomplete, however, unless the study of the Geneva Conventions is supplemented by a continuing examination of other aspects of the laws of war. The Geneva Conventions should not be viewed as isolated phenomenon.

<sup>87</sup> *Hearings before Senate Committee on Foreign Relations on Geneva Conventions for the Protection of War Victims*, 84th Cong., 1st Sess. (1955). For a discussion of the results, see Baxter, *The Geneva Conventions of 1949 before the United States Senate*, 49 Am. J. Int'l L. 550 (1955).

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**27-10** was reissued in the light of World War II and the Geneva Conventions of 1949, but its ancestry can be traced back to the famous General Orders 100, Instructions for the Government of Armies of the United States in the Field, of 1863. This early ancestor was highly influential, and in the next 90 years it was imitated by many countries. By the end of World War II, all major powers had issued regulations of a similar nature.<sup>88</sup> The American manual reflects a good deal more than the peregrinations of scholars over ancient battlefields for it endeavors in its interpretations of the law to take into account the military experience accumulated in recent wars. Because the manual gives but limited attention to the question of how the laws it describes will be enforced,<sup>89</sup> it may be helpful to point out that the theory of law implicit in the manual is in accord with that expressed by Sir Frederick Pollock who defined law as "a rule conceived as binding."<sup>90</sup> This view is in contrast to the Austinian theory of law which defines law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."<sup>91</sup> The Austinian definition supplies a description of the form in which law is often given, but in the international forum the definition appears deficient for it does not describe what seems to have occurred.<sup>92</sup> The Pollock hypothesis criticizes the Austinian notion on the ground that the latter does not explain the binding force of rules so recognized in spite of the fact that no "command" from a higher authority exists. For example, many of the so-called laws of war are not based upon a treaty or convention to which the United States is a party, but according to the Army manual are the product of a body of "unwritten or customary law . . . firmly established by the custom of nations and well defined by recognized authorities on international law."<sup>93</sup> The Fourth Hague Convention of 1907,<sup>94</sup> for example, is said not to have become binding according to its terms because of its "general participation" clause indicating that the convention was not binding unless all participants to the con-

<sup>88</sup> See Stone, *Legal Controls of International Conflict* 548 (1954).

<sup>89</sup> See pars. 495-511, FM 27-10.

<sup>90</sup> Pollock, *A First Book of Jurisprudence* 26 (5th ed. 1923). See also Goodhart, *English Law and the Moral Law* 19 (1953).

<sup>91</sup> Lecture No. 1, 1 Austin, *Jurisprudence* 86 (5th ed., Campbell 1885).

<sup>92</sup> See Brierly, *The Outlook for International Law* 4-5 (1944), who described international law as "the sum of the rights that a state may claim for itself and its nationals from other states, and the duties which in consequence it must observe towards them." *Id.*, at 5.

<sup>93</sup> Par. 4b, FM 27-10.

<sup>94</sup> *Hague Convention No. IV, Respecting the Laws and Customs of War on Land*, 18 Oct 1907, 36 Stat. 2277, T.S. No. 539, and its annex the famous *Hague Regulations*, 36 Stat. 2295, T.S. No. 539. See DA Pam No. 27-1, 7 Dec 1956.

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flict were parties to the agreement.<sup>95</sup> In spite of this, its provisions were deemed of great importance during the war crimes trials following World War II, and in some instances its provisions were explicitly deemed effective. The International Military Tribunal for the Far East stated :

“ . . . Although the obligation to observe the provisions of the [Hague] Convention as a binding treaty may be swept away by operation of the ‘general participation clause’, or otherwise, the Convention remains **as** good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation.”<sup>96</sup>

In *United States v. von Leeb*,<sup>97</sup> a war crimes tribunal indicated that although certain provisions of the 1929 Geneva Convention for the Protection of Prisoners of War were not expressive of international law as between Germany and the Soviet Union because the latter was not a party to the Convention, other provisions primarily dealing with ill treatment and neglect of prisoners of war were to be deemed “an expression of international law as accepted by the civilized nations of the world.” Thus international obligations **were** found although not directly traceable to any “command.” The Austinian theory of law is neither helpful nor accurate in the international arena ; it is in fact misleading.<sup>98</sup>

Sanctions for the enforcement of international law during time of war are often considered non-existent. Nevertheless, the offended country is not always required to stand helpless in the face of repeated violations of international standards. International conventions supply a standard with which to measure an opponent’s conduct, and the fear of retaliation has been a force in restraining

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<sup>95</sup> Art. 2, *supra* note 94.

<sup>96</sup> *Official Transcript of the Judgment of the International Military Tribunals for the Far East* 65.

<sup>97</sup> 11 Trials of War Criminals 462, 532 (G.P.O. 1950).

<sup>98</sup> The words of Glanville Williams, *International Law and the Controversy Concerning the Word “Law,”* 22 Brit. Y.B. Int’l L. 146, 162 (1945) are worthy of emphasis here.

“The answer to the argument that ‘consequences’ can be drawn from the definition of ‘law’ is the same as before: such consequences are only consequences as to the use of words. For instance, if ‘law’ be construed as a command, the consequence will be that international law will not **be** called ‘law’; **but** this will not in itself wipe out the body of rules that are now accepted for determining the conduct of States. It is true that if the phrase ‘international law’ be replaced in current usage **by** some such phrase as ‘international custom,’ these international rules may lose some of the respect in which they are now held. But this consequence will not follow merely from the definition of law **as a** command. It will follow from the fact that the word ‘law’ is nowadays more highly charged with a certain kind of emotion (namely, the emotion of unquestioning obedience) than the word ‘custom.’ ”

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some nations from actions of questionable legality,<sup>99</sup> although less stringent methods of securing compliance are possible.<sup>100</sup> Traditionally, reprisals are considered an available mode of enforcement. The use of reprisals was greatly restricted by Article 13 of the Prisoner of War Convention and Article 33 of the Civilians Conventions,<sup>101</sup> and the field manual embraces the changes.<sup>102</sup> One comment on the field manual's treatment of this touchy subject may be in order, however, to illustrate how comments are needed to clarify the obligation of the law. The purpose of a reprisal according to the manual is to induce "future compliance with the recognized rules of civilized warfare," it is not to punish past misbehavior, although it is past behavior which raises the conditions prerequisite to a reprisal. Accordingly, it would be logical to require that any action taken as a reprisal be given publicity to the end that the enemy be made aware of its obligation to abide by the rules. This requirement was noted in several of the war crimes trials,<sup>103</sup> and in the absence of publicity it was indicated that the reprisals could not be considered lawful. The manual might properly be amended to note this requirement.

Sanctions in domestic law may supply some enforcement of international law. The existing jurisdiction of courts-martial and perhaps even military commissions may be sufficient to punish most infractions. The jurisdiction of a United States court-martial over a member of the armed forces is clear, and presumably no problem in sustaining its jurisdiction over the person of prisoners of war would be encountered.<sup>104</sup> How war crimes would be punished if committed prior to capture or by enemy personnel not reduced to prisoner of war status is not disclosed by the Army manual. Troublesome questions of jurisdiction not resolved by an application of general international law remain to be settled.<sup>105</sup>

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<sup>99</sup> See text between notes 15 and 21 *supra*.

<sup>100</sup> See par. 495, FM 27-10.

<sup>101</sup> Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949*, 47 Am. J. Int'l L. 590 (1953).

<sup>102</sup> Par. 497, FM 27-10.

<sup>103</sup> Trial of Rauter, 14 L.R. Trials of War Criminals 89, 123, 126 (1949); Trial of Flesch, 6 *id.* 111, 115 (1948); Trial of Bruns, 3 *id.* 15, 19, 22 (1948).

<sup>104</sup> See Articles 82, 84 and 102, Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949, pars. 158, 160, 178, FM 27-10; arts. 2(a), 18, 21, UCMJ.

<sup>105</sup> See pars. 506b, 607, FM 27-10. The field manual clearly is compatible, however, with the international war crimes practice developed after World War II. See par. 505d, FM 27-10. One may ask, however, whether national military commissions such as tried General Yamashita (see *In the Matter of Yamashita*, 327 U.S. 1 (1946)) could properly be used in the light of Article 102 of the Geneva Prisoner of War Con-

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The Geneva Conventions do not purport to establish any authoritative list of crimes but they do describe a number of **acts** denominated as “grave breaches.”<sup>106</sup> The word “breaches” was used instead of “crimes” in the Geneva Conventions because the draftsmen of the convention did not intend to enact international penal law, although they were fully cognizant of the war crimes trials of both World Wars which supply authority for the existence of international criminal law.<sup>107</sup> Efforts to establish an international criminal court have failed and give no promise of immediate success. Sanctions therefore must generally be sought in domestic law.

### B. *Vagueness, Ambiguity and Obsolescence*

An observer of the laws of war may be troubled by their ambiguity and incompleteness. He may wonder also how provisions drafted in the light of 18th and 19th century warfare can be appropriate in a nuclear-missile war, for some prohibitions of 1907 vintage now seem ludicrous. The Hague Declaration of 18 October 1907, prohibited, for example, the “discharge of projectiles and explosives from balloons or by other methods of similar nature.”<sup>108</sup> Because of these obvious deficiencies, the critic may **look** no further and neglect any further investigations of war law. He fails to realize that **sometimes** the ambiguities were designed, and that obsolete provisions may reflect the existence of interests still worthy of protection.

Some ambiguity must be anticipated in the laws of war because they were designed with a view toward accommodating the interests of belligerents in military requirements on the **one** hand, and humanitarianism on the **other**.<sup>109</sup> Where ambiguities are pres-

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vention (par. 178, FM 27-10) which states that “a prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power . . . .” Quære, could a **military commission** such as that which tried General Yamashita try a member of the United States armed forces for any offense?

<sup>106</sup> See Article 82 of the Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949, T.I.A.S. No. 3364, par. 158, FM 27-10.

<sup>107</sup> Id. art. 130, par. 502b, FM 27-10.

<sup>108</sup> The prohibition was based on the recognized need to distinguish between combatants and non-combatants and restrict suffering to those participating in the conflict. It was assumed at the time that air bombardment would be so inaccurate as to be indiscriminate. Furthermore, it was drafted at a time when the military significance of large industrial centers employing tens of thousands of civilians was not fully appreciated. This declaration was not observed.

<sup>109</sup> For example, see Article 22 of the Hague Regulations of 1907, par. 33, FM 27-10, supra note 94, which provides that “the right of belligerents to adopt means of injuring the enemy is not unlimited.” This doesn’t mean much unless the commander is aware of the values and policies reflected by the provision of the manual (see pars. 2 and 3) and the political goals of the nation.

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ent, it is realistic to expect that the construction adopted on the field of battle is likely to be that which confers the greatest immediate benefit to the decision-maker. An ambiguity, it should be understood, results in a delegation of discretion to the commander in the field, which he shall exercise unless a more precise mandate is preconceived and becomes part of the commander's instructions. The commander in the field has no other rational choice where options are left to his decision than to take that course which promises the greatest military success. That is his mission and he would be unfaithful to his trust if he did not so act. The draftsmen of the Hague Conventions probably intended by their references to military necessities that this discretion be exercised within the limits prescribed. Where political objectives are deemed of greater moment than tactical success, the commander must be so informed either by a direct order or by a set of guiding rules. For some of these he may refer to the restrictions recited in manuals such as 27-10. Otherwise, he is left to his own devices. It may be significant to observe that where directives from the political leaders are deemed contrary to international law the commander in the field may even take the risk of ignoring their mandate. This is what Field Marshal Rommel did when confronted with Hitler's famous order to deny prisoner of war treatment to commandos and instead give them no quarter. Marshal Rommel is reported to have read the order and decided not to publish it on the ground that it would aggravate the conduct of the war.<sup>110</sup>

### C. Negative Character of *the Rules*

Paragraph 3 of the Army manual states that "the law of war places limits on the exercise of a belligerent's power."<sup>111</sup> Thus, the manual indicates that it is the role of war law not to confer certain privileges, but to preclude the exercise of certain powers. The rules propounded are essentially prohibitive upon both individuals and

<sup>110</sup> Young, Rommel, *The Desert Fox* 153-154 (1950).

<sup>111</sup> Emphasis supplied. Par. 3a states:

"a. *Prohibitory Effect.* The law of war places limits on the exercise of a belligerent's power in the interests mentioned in paragraph 2 and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.

"The prohibitory effect of the law of war is not minimized by 'military necessity' which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity."

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states.<sup>112</sup> The validity of this proposition can be borne out by noting the way in which conventional international law in this field was formed and the purposes it was designed to accomplish. The Declaration of Paris of 16 April 1866, one of the first international conventions pertaining to war law, prohibited several practices including privateering and the seizure of non-contraband neutral goods. It was limited to several very specific prohibitions. The Geneva Convention of 1864 was designed to prohibit inhumane treatment of the wounded and sick of opposing armies, and many of its provisions formed the basis for later multilateral agreements culminating in the several Geneva Conventions of 1949 for the Protection of War Victims.<sup>113</sup> The 1949 Conventions contain many provisions couched in positive form, but their import is nevertheless to place important limitations on the manner in which a belligerent can treat prisoners of war, the wounded and sick, and civilians. Within the limits posed and those of international law, belligerents could act as they wished. The Hague Conventions of 1907 likewise contain numerous prohibitions. In the Hague Regulations we find, for example, that Article 23 states that it is “especially forbidden”:

- a. To employ poison or poisoned weapons ;
- b. To kill or wound treacherously individuals belonging to the hostile nation or army;
- c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;
- d. To declare that no quarter will be given;
- e. To employ arms, projectiles, or material calculated to cause unnecessary suffering ;
- f. To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

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<sup>112</sup> The International Military Tribunal at Nurnberg’s now classic statement is: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Nazi Conspiracy and Aggression, Opinion and Judgment (of the International Military Tribunal) 53 (G.P.O. 1947).

<sup>113</sup> For literature on these conventions, see particularly Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L. Q. 40 (1950); Gutteridge, *The Geneva Conventions of 1949*, 26 Brit. Y.B. Int’l L. 294 (1949); Lauterpacht, *The Problem of the Revision of the Law of War*, 29 Brit. Y.B. Int’l L. 360 (1952); Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 Am. J. Int’l L. 462 (1951); Yingling & Ginnane, *The Geneva Conventions of 1949*, 46 Am. J. Int’l L. 393 (1952); S. Exec. Rep. No. 9, Geneva Conventions for Protection of War Victims, 84th Cong., 1st Sess. (1955). The *travaux preparatoires* are: Final Record, Diplomatic Conferences of Geneva (Federal Political Dept., Bern 1949). An unpublished article by article analysis by an *ad hoc* State-Defense-Justice Department working group, although unofficial, is deserving of study. It is filed in the Office of The Judge Advocate General of the Army as JAGW 1955/311, 6 Jun 1955.

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g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

h. To declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."<sup>114</sup>

This is one of the most significant parts of the Hague Regulations. Over a half century later, its simply-stated provisions are still deemed binding. Other international conventions are equally prohibitive in their effect. The oft-cited Geneva Protocol of 1925 was designed to prohibit gas warfare, for example, and it has been suggested with some vehemence today that nuclear warfare be likewise prohibited by an international agreement.

Notwithstanding these specific limitations, it is sometimes said that war confers rights on belligerents and that certain authority can be exercised pursuant to the law of war. Thus McDougal and Feliciano state that military necessity "may be said to authorize such destruction, and only such destruction, as is necessary, relevant and proportionate to the prompt realization of legitimate belligerent objectives."<sup>115</sup> It is by no means certain that the concept of military necessity authorizes anything. The notion of military necessity is merely expressive of the needs of the commander in the field. In its application, it is an aid in defining the limits of a belligerent's activities. Conventional international law makes it abundantly clear that military necessity supplies a means of defining what constitutes "unnecessary" destruction of life and limb. With this understood, the above definition appears correct.

The war crimes trials supply further authority for the negative form of the laws of war. As a result of several of those trials, the following conduct was declared contrary to international law notwithstanding a claim of "military necessity":<sup>116</sup> requiring prisoners of war to perform unlawful labor;<sup>117</sup> trying spies and other suspected persons without trial;<sup>118</sup> seizing property without compensation;<sup>119</sup> requiring civilians to be slave laborers;<sup>120</sup> denational-

<sup>114</sup> DA Pam No. 27-1, 7 Dec 1956, p. 12. See note 94 *supra*.

<sup>115</sup> McDougal & Feliciano, *supra* note 11, at 826.

<sup>116</sup> See par. 504, FM 27-10, for an enumeration of some war crimes.

<sup>117</sup> Nazi Conspiracy and Aggression, Opinion and Judgment (of the International Military Tribunal) 165 (G.P.O. 1947); *U. S. v. Milch*, 7 L.R. Trials of War Criminals 27 (1948).

<sup>118</sup> Trial of Sandrock, 1 L.R. Trials of War Criminals 35 (1947); Trial of Buck, 5 *id.* 39 (1948); *cf.* *U.S. v. Krupp*, 10 *id.* 69 (1949).

<sup>119</sup> Opinion and Judgment, *op. cit.* *supra* note 117, at 68 *et seq.*

<sup>120</sup> *Id.* at 72 *et seq.*

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izing inhabitants of occupied countries;<sup>121</sup> infringing upon the rights of civilians in occupied territories<sup>122</sup> guaranteed by the Hague Regulations;<sup>123</sup> and violating armistice or surrender terms. Truly it can be said that experience indicates that war law is "prohibitive law."<sup>124</sup>

This emphasis on the negative aspect of the rules of war is important in that it enables us to understand better the nature of war law. It is consistent with the suggestion that many legal concepts are understandable only if one recognizes their defeasible nature.<sup>125</sup> Frequently, what purports to be a positive principle is in reality only the product of an attempt to correlate a collection of negative rules. The conclusion of this thesis is that we are apt to mislead ourselves by conferring authority on the alleged synthesis. This analysis has been successfully applied in other areas of the law and its application to the law of war has been suggested.<sup>126</sup>

A large body of customary and conventional law exists in this negative form. The Army field manual recites much of it, and perhaps to achieve an understanding of the negative aspect of the rules is as far as a student of the law of war can go with any degree

<sup>121</sup> *U.S. v. Greifelt*, 13 L.R. Trials of War Criminals 1 (1948).

<sup>122</sup> Opinion and Judgment, *op. cit. supra* note 117, at 62. Article 46 of the Hague Regulations states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected." DA Pam No. 27-1, 7 Dec 1956, p. 16. See note 94 *supra*.

<sup>123</sup> See Stone, Legal Controls of International Conflict 644 (1954).

<sup>124</sup> See *U.S. v. List*, 8 L.R. Trials of War Criminals 34, 66 (1949).

<sup>125</sup> Hart, *The Ascription of Responsibility and Rights*, 49 Proceedings of the Aristotelian Society (n.s.) 171 (1948-49). See also Hughes, *Criminal Omissions*, 67 Yale L. J. 590, 606 (1958). Hughes comments on Professor Hart's thesis. "So a contract will be binding unless there is undue influence, unless there is fraud or unless there is fundamental mistake. But we attempt to summarize these conditions which may defeat a contract by an affirmative statement that consent must be free and full. So in the criminal law, an act will be criminal unless the accused was insane, acted under mistake of fact or, perhaps, was coerced. We tend to forget the reality of this set of exemptive circumstances and impose upon them what Professor Hart calls a 'spurious unity' by stating generally that the accused's act must be 'voluntary,' or that it must be 'intentional' or 'reckless.'"

<sup>126</sup> Baxter, *So-Called 'Unprivileged Belligerency'; Spies, Guerrillas and Saboteurs*, 28 Brit. Y.B. Int'l L. 323 (1951); Baxter, 1953 Proceedings of the Am. Soc. Int'l L. 119. Baxter writes: "The propriety of statements that international law confers a 'right' to resort to war and to exercise 'belligerent rights' is highly questionable, and it is probably more accurate to assert that international law has dealt with war as a state of fact which it has hitherto been powerless to prevent. Animated by considerations of humanity and by the desire to prevent unnecessary suffering, states have nevertheless recognized limits on the unfettered power which they would otherwise actually enjoy in case of war." 28 Brit. Y.B. Int'l L. 323-324.

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of predictability. Our problems become complex and often confusing when we try to extrapolate new rules from the collection of negatives which have been conferred upon us by customary and conventional law. The merit and the disadvantage of this analysis is that it makes it more difficult to find international law where authorities are scarce or narrowly restricted.

The danger in attempting to construct positive rules from the collection of negative precepts which the law of war embodies is that it may lead to conclusions which have little connection with reality and rules which receive even less acceptance on the part of nations. For example, some discussions concerning the legality of nuclear weapons arrive at rigid conclusions of law due to a misunderstanding of the "prohibitive" nature of such war law as we already have. On the basis of inferences from these negative rules, some conclude that the use of nuclear weapons is probably illegal.<sup>127</sup> State practice does not substantiate this conclusion.

### D. *The Rules Applied to Weapons*

An examination of the legality of any weapon should open with the observation that almost every new weapon is initially called violative of international law.<sup>128</sup> Thus, a Lateran Counsel in 1139 attempted to preclude the use of the crossbow by declaring its use to be "deadly and odious to God."<sup>129</sup> As against heathens and heretics, however, its use was deemed neither deadly nor odious. History reveals that medieval Europeans paid scant attention in their internecine battles to this attempt to limit warfare. Similarly, "the flame thrower,"<sup>130</sup> explosive bullets,<sup>131</sup> dum-dum bullets,<sup>132</sup> and the use of asphyxiating and deleterious gasses has been condemned from time to time by law makers. Nevertheless,

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<sup>127</sup> Freeman & Yaker, *Disarmament and Atomic Control: Legal and Non-Legal Problems*, 43 Cornell L. Q. 236, 254-256 (1957).

<sup>128</sup> Baxter, *The Role of Law in Modern War*, 1953 Proceedings of the Am. Soc. Int'l L. 90, 91, who cites the observation of Dr. Francis Lieber to this effect.

<sup>129</sup> See Nussbaum, *A Concise History of the Law of Nations* 25 (1947).

<sup>130</sup> See 2 Oppenheim, *International Law* 340 (7th ed., Lauterpacht 1962). The opinion is based on the proposition that the weapon causes "unnecessary suffering." *Quaere*, where its use is restricted to places where other weapons are ineffective and an opportunity to surrender has been offered.

<sup>131</sup> Declaration of St. Petersburg, 11 Dec 1868, renounced the use of projectiles weighing less than 400 grams (1 ounce) which were either explosive or filled with inflammable substance.

<sup>132</sup> Hague Declarations of 29 Jul 1899 which forbade the use of bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions.

<sup>133</sup> Notes 18 and 19 supra.

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in spite of efforts to make illegal the indiscriminate use of certain new weapons, it is an obvious fact that no weapon which has real military value has ever been successfully prohibited. More successful have been attempts to limit the use of the weapon where the limitation is compatible with the goals of the belligerent. The argument that is most frequently voiced concerning the alleged illegality of nuclear weapons is much the same as the arguments posed against the use of prior weapons, that is that their use violates the spirit of conventional law in effect in the preatomic era. The reasoning is developed from a consideration of the Hague Declarations and Regulations of 1899 and 1907 as they pertain to the prohibition of ejecting explosives from balloons; the proscription of "poisonous" weapons, as that phrase was used in the Hague Regulations; the use of weapons causing "unnecessary suffering"; the Geneva Protocol of 1925 (unratified by the United States); and the declaration of St. Petersburg.<sup>184</sup> Furthermore, it is alleged that radioactive fallout impinges upon the interests of neutral nations in freedom of the seas and air. These critics could cite testimony indicating that much of the heavy bombing during World War II was militarily ineffective, and conclude that nuclear weapons may cause "unnecessary suffering and unnecessary destruction." For example, several Navy men have expressed a decided bias against the kind of results achieved through strategic bombing, presumably including the results achieved through the two nuclear bombs used against Japan. One rear admiral in 1949 during the "New Look" debates stated:

" . . . . We consider that strategic air warfare as practiced in the past and as proposed in the future is militarily unsound and of limited effect, is morally wrong and is decidedly harmful to the stability of the post war world."<sup>185</sup>

On the other side of the ledger, a strong case can be made indicating that the use of nuclear weapons in World War II appreciably shortened the war and saved the lives of untold thousands on both sides who might otherwise have died during an assault on the home islands.<sup>186</sup> Moreover, one expert has argued that the Korean conflict might have had a different and more favorable complexion if small-yield nuclear weapons were dropped by naval aircraft in lieu of conventional bombs. Conventional methods failed

<sup>184</sup> See Freeman & Yaker, *Disarmament and Atomic Controls: Legal and Non-Legal Problems*, 43 Cornell L. Q. 236, 255 (1957).

<sup>185</sup> Cagle, *A Philosophy of Naval Atomic Warfare*, 83 U.S. Naval Institute Proceedings 249, 257 (1967).

<sup>186</sup> See reported remarks of the President of Hiroshima University who allegedly stated that the invention of the nuclear bomb probably saved "500,000" Japanese lives. 1953 Proceedings of the Am. Soc. Int'l L. 120-121.

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in several major instances to achieve militarily desirable results : TNT failed to sever seven Yalu River bridges; rail and road communications to the North Korean forces were not decisively cut; and hydro-electric installations in North Korea were left in operation, in spite of bombing with traditional weapons.<sup>187</sup>

The argument for illegality encounters the difficulty already mentioned in attempting to construct a positive rule precluding the use of a specific weapon on the basis of several negative propositions drafted to restrict only certain limited types of weapons. The argument appears to reflect a reaction to war that so frequently follows a violent conflict. It neglects to consider the fact that nuclear weapons of varying kiloton yields have formed the principle basis of American military power for several years. This reliance on nuclear weapons has legal significance because the laws of war were drafted in the light of military necessities and were by no means intended as a substitute for disarmament. Not one of the weapons prohibited by positive law was deemed to form the backbone of any single nation's military might; if it had been, its use would not have been prohibited. Limitation of weapons to achieve disarmament is an entirely separate matter which in the past has been dealt with in separate international agreements, not in the conventions dealing with the protection of war victims.

The problem of the illegality of nuclear weapons should be solved not merely by extrapolating from old rules but by measuring their propriety in terms of the basic questions underlying all prior prohibition of weapons. Does it cause unnecessary suffering? Is the advantage to be gained commensurate with all the disadvantages? The quality of the explosive is not as significant as its force, its target, the political aims of the belligerents, its effect upon non-belligerents. Thus McDougal and Feliciano conclude :

" . . . . The rational position would appear to be that the lawfulness of any particular use or type of use of nuclear and thermonuclear weapons must be judged, like the use of any weapon or technique of warfare, by the level of destruction effected—in other words, by its reasonableness in the total context of a particular use." <sup>188</sup>

Desirable as a pat answer to the legality of a weapon may be, never has such certainty been achieved. The best that can now be done is point out the factors applicable to a decision.

### E. *Purposes of the Law of War*

In an area of international law where deliberate ambiguities were left in conventional law in order to secure any agreement at all, it is futile to expect a high degree of predictability. Agreement

<sup>187</sup> Cagle, *supra* note 135, at 257 *et seq.*

<sup>188</sup> McDougal & Feliciano. *supra* note 11, at 831.

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between nations can be secured on only the very broadest terms. It is therefore not surprising to find that somewhat vague humanitarian references characterize such agreement as has been reached. Complementing these mandates, the doctrines of limited war, as well as the principle of economy of force, lead us to the most elementary kinds of statements. Thus, we find that paragraph 2 of Field Manual 27-10 summarizes as well as any other source the purposes of the law of war.

“The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and un-written. It is inspired by the desire to diminish the evils of war by:

*a.* Protecting both combatants and noncombatants from unnecessary suffering;

*b.* Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and

*c.* Facilitating the restoration of peace.”

These simply stated purposes which receive international legal sanction through the Preamble to the Fourth Hague Convention of 1907, law relating to the conduct of hostilities, the four Geneva Conventions of 1949 as well as customary international law, are compatible with the doctrines of “limited war.” The effectiveness of war law is thus left to the practice of nations, and manuals such as 27-10 become significant evidence of what state practice is or should be.<sup>139</sup>

## VI. CONCLUSION

War has always been “limited” by a set of rules agreed upon and observed by the combatants for reasons of self-preservation and humanitarianism. It is therefore not unreasonable to suppose that a war erupting in our nuclear age would be much more sharply limited in scope by the adversaries in order to avoid world conflagration and consequent world destruction. In such a conflict, a law of war based upon the exercise of mutual restraint would become even more important than in the past.

As pointed out by McDougal and Feliciano, the law of war is not a static collection of immutable rules but is rather a com-

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<sup>139</sup> Paragraph 1 of the field manual states:

“This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.”

See *U.S. v. List*, 11 Trials of War Criminals 769, 1237 (G.P.O. 1950), wherein the tribunal stated that although “army regulations are not a competent source of international law” they are valuable evidence of custom and practice.

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pendium of policy determinations by decision-makers in a war context—cold to hot. A military commander, however, is not in a position to make policy decisions. His mission is to win battles, not to determine independently the extent to which he should restrain his efforts for the sake of humanitarianism and the preservation of civilization. Therefore, he and his legal adviser must be supplied with reasonably clear and definitive restrictions upon the exercise of his powers of destruction of the enemy. Army Field Manual 27-10 is a constructive step in this direction.

The laws of war deserve further study and far more implementation. The effectiveness of war law, being a matter of state practice, is largely left in the hands of the armed forces, and it therefore deserves the particular attention of judge advocates. If commanders become aware of the impact of the law as well as the value of the law, there can be progress in achieving a rule of law. Although this is not “the best of all possible worlds,” an effective law of war could help to make it more bearable.

# WHO MADE THE LAW OFFICER A "FEDERAL JUDGE"?"

By Major Robert E. Miller\*\*

Since the enactment of the Uniform Code of Military Justice (UCMJ),<sup>1</sup> the law officer of a court-martial has been referred to as the counterpart of "a civilian judge of the Federal system."<sup>2</sup> This comparison has conferred upon the law officer more than a descriptive label; it has been used as the basis for the award of powers and, concomitantly, imposition of limitations, not expressly prescribed in the Uniform Code.

Who was it that made the law officer a Federal judge?

## I. WAS IT CONGRESS?

The legislative history of the UCMJ is contained in some 1400 pages of congressional committee hearings,<sup>3</sup> reports,<sup>4</sup> and debate.<sup>5</sup> It was drafted by a special committee appointed for that purpose. One objective was to establish a code of military justice<sup>6</sup> which, for the first time in our history, would provide a single system of military justice for all our armed forces.<sup>7</sup> Another aim was to

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<sup>1</sup> Act of 5 May 1950, 64 Stat. 108, codified into positive law, 10 U.S.C. 801-940 (1962 ed., Supp. V).

<sup>2</sup> U.S. v. Biesak, 3 USCMA 714, 722, 14 CMR 132, 140 (1954).

<sup>3</sup> *Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498, 81st Cong., 1st Sess. 666-1307 (7 Mar to 4 Apr 1949)*, hereinafter referred to as *House Subcommittee Hearings*; *Hearings Before a Subcommittee of the Committee on Armed Services, United States Senate, on S. 857 and H.R. 4080, 81st Cong., 1st Sess. 1-334 (27 Apr to 27 May 1949)*, hereinafter referred to as *Senate Subcommittee Hearings*. H.R. 4080 was a "cleaned up" version of H.R. 2498.

<sup>4</sup> *Full Committee Hearings on H.R. 4080, House of Representatives, Committee on Armed Services, 81st Cong., 1st Sess. 1326-1364 (27 Apr 1949)*, hereinafter referred to as *House Full Committee Hearings*; H.R. Rep. No. 491, 81st Cong., 1st Sess. 1-110 (28 Apr 1949), hereinafter referred to as H.R. Rep. No. 491; S. Rep. No. 486, 81st Cong., 1st Sess. 1-40 (10 Jun 1949), hereinafter referred to as S. Rep. No. 486.

<sup>5</sup> *E.g.*, 96 Cong. Rec. 6719-6744 (1949); 96 Cong. Rec. 1292-1310, 1412-1417, 1480-1447 (1960).

<sup>6</sup> *E.g.*, Enacting Clause of UCMJ; H.R. Rep. No. 491 at 2; S. Rep. No. 486 at 1.

<sup>7</sup> H.R. Rep. No. 491 at 2; S. Rep. No. 486 at 2.

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insure the maximum amount of justice within the framework of a military organization.<sup>8</sup> The hearings and debates on the UCMJ are filled with comments on and criticisms of excesses of command influence<sup>9</sup> over courts-martial in World War II. This was the third time that command control was one of the most troublesome problems confronting Congress in its efforts to revise our military justice system.<sup>10</sup> Despite Congress' desire to limit command influence,<sup>11</sup> the legislators did realize that commanders must retain some command control in military justice matters.<sup>12</sup>

Many who were familiar with the proposed UCMJ conceived of the law officer as a major deterrent to excessive command influence.<sup>13</sup> He was referred to as the person who would insure a fair trial.<sup>14</sup> But these concepts were ancillary to the frequently recurring comment that the law officer would be similar to a civilian judge.

Although the law officer is mentioned in 11 UCMJ articles,<sup>15</sup> the "law officer as a judge" concept is rooted in the texts and

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<sup>8</sup> Remarks of then Secretary of Defense James Forrestal before the House Subcommittee Number 1 of the House of Representatives Armed Services Committee. *House Subcommittee Hearings* 597.

<sup>9</sup> *E.g.*, references cited in notes 3 and 5 *supra*, particularly 95 Cong. Rec. 5721, 5723, 5725, 5726 and 5727 (1949).

<sup>10</sup> *House Full Committee Hearings* 1332; H.R. Rep. No. 491 at 7; 95 Cong. Rec. 5721 (1949). See *U.S. v. Littrice*, 3 USCMA 487, 490, 13 CMR 43, 46 (1953).

<sup>11</sup> *E.g.*, ". . . we have included numerous restrictions on command," *House Full Committee Hearings* 1332; H.R. Rep. No. 491 at 7; "We have tried to prevent courts martial from being an instrumentality and agency to express the will of the commander." *Senate Subcommittee Hearings* 38; "And we want the services to be on notice that we are watching to see whether there is going to be undue influence." *Senate Subcommittee Hearings* 307; "Among some of the provisions designed to prevent interference with the due administration of justice are . . ." 96 Cong. Rec. 1356 (1950). See 95 Cong. Rec. 1431 (1949) for critical comments on prior command abuses.

<sup>12</sup> *E.g.*, "We have preserved these elements of command in this bill," H.R. Rep. No. 491 at 7, wherein are listed several of the command prerogatives which the UCMJ vests in commanders. See *U.S. v. Littrice*, 3 USCMA 487, 490, 13 CMR 43, 46 (1953).

<sup>13</sup> *E.g.*, *House Full Committee Hearings* 1332; H.R. Rep. No. 491 at 7; *Senate Subcommittee Hearings* 38, "To make the action of courts martial and the procedure for review free from his [the commander's] influence, we have set up an impartial judge for the court martial . . ."; 96 Cong. Rec. 1356 (1950), "Among some of the provisions designed to prevent interference with the due administration of justice are the following . . . the law officer, . . ."

<sup>14</sup> *House Full Committee Hearings* 1328-1329.

<sup>15</sup> Articles 1(12), 6(c), 16(1), 26, 29(b), 37, 39, 41(a), 41(b), 42(a), 51, and 54, UCMJ.

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legislative history of Articles 26<sup>16</sup> and 51.17 Despite lengthy testimony and spirited debate concerning the status and duties of the proposed law officer who would replace the law member, Articles 26 and 51 were enacted without any change in the draft articles originally submitted to Congress.

### A. *Explanations by Professor Morgan and Mr. Larkin*

Professor Edmund Morgan was the most persistent and vocal advocate of the law officer as a judge concept. He was chairman of the committee which prepared the original draft bill; he discussed salient aspects of the proposed bill at House of Representatives and Senate subcommittee hearings; and he was present in an advisory capacity during part of the congressional debate. He, more than any person, sought to interpret and give substance to Articles 26 and 51. His remarks are the ones usually cited by the Court of Military Appeals when that Court refers to the congressional intent to make the law officer comparable to a civilian judge. His views certainly were not the only views though, and the writer is of the conviction that other opinions concerning the proposed

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<sup>16</sup> Article 26 reads as follows :

"(a) The authority convening a general court-martial shall detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General of the armed force of which he is a member. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

"(b) The law officer may not consult with the members of the court, other than on the form of the findings as provided in section 839 of this title (article 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court."

<sup>17</sup> Article 51 reads in part as follows:

" . . . .  
"(b) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, is final and constitutes the ruling of the court. However, the law officer may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.

"(c) Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court. . . ."

Article 39 (consultation with court in absence of accused and counsel) and Article 41 (challenges) are perhaps the next two most important Articles with respect to the judge concept of the law officer, but they did not figure prominently in the legislative history.

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status for the law officer were given short shrift by the Court of Military Appeals when that Court sought and found what *it* thought was congressional intent with respect to the law officer.

The Morgan committee was split down the middle on the problem of the law officer's status. Army and Air Force representatives wanted to retain the law officer **as** a court member who would retire, deliberate, and vote with the court. These two services had had experience with the law member required by the Articles of War. On the other hand, the Navy representative thought the legal arbiter of general courts-martial should be more like a civilian judge who does not act as judge and juryman.<sup>18</sup> Professor Morgan shared this view. Secretary of Defense Forrestal resolved the dispute by adopting the phraseology advocated by Professor Morgan and the Navy. The draft Articles **26** and **61** came to Congress in their present form by this unilateral determination made by the Secretary of Defense.<sup>19</sup>

The split on the law officer was one of three issues on which the Morgan committee could not agree.<sup>20</sup> This split, and the way in which it was resolved, was explained to Congress by Secretary of Defense Forrestal,<sup>21</sup> Mr. Elston,<sup>22</sup> Mr. Larkin,<sup>23</sup> Professor Morgan,<sup>24</sup> and Senator Kefauver.<sup>25</sup> It would seem from the foregoing that Congress' passage of Articles **26** and **61** of the UCMJ without amendment was an informed decision based upon a clear intent to separate the law officer from courts-martial members. But is this a sound premise from which to conclude that Congress really did intend that the law officer would be like a civilian judge in other respects? Recourse to testimony and debate suggest that it was not so clear.

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<sup>18</sup> The Navy did not have an officer comparable to a law member or law officer.

<sup>19</sup> Secretary Johnston, **who** succeeded Forrestal, indicated to Congress his *genera*l approval of the draft UCMJ in a letter printed in 96 Cong. Rec. 1355 (1950). 'See 96 Cong. Rec. 1361 (1950), where Senator Kem suggested that Secretary Forrestal's decision may have stemmed in part from his Navy loyalties carried over from his earlier office as Secretary of the Navy. A spirited discussion between Senator Kem and Senator Kefauver on the Secretary's decision contrary to the recommendation of two of the three major armed services is contained in 96 Cong. Rec. 1361-1362 (1950). See Secretary Forrestal's statement in *House Subcommittee Hearings* 698.

<sup>20</sup> *House Subcommittee Hearings* 598.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.* at 1162.

<sup>23</sup> *Id.* at 1153; *Senate Subcommittee Hearings* 160.

<sup>24</sup> *Senate Subcommittee Hearings* 66, 308.

<sup>25</sup> 96 Cong. Rec. 1359, 1360, 1361 (1960).

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Article 26 separates the law officer from the court-martial members. Article 51 invests him with the power to make interlocutory rulings, and it imposes a duty to instruct the court on the law of the case and on certain other prescribed matters. Article 51 gives substance to the more general language of Article 26, and the dependence of these two articles on each other makes consideration of each article in isolation difficult and non-productive.

Some of the excerpts which follow in this article indicate that many legislators did not fully comprehend either the separate purposes of or the relationship between Articles 26 and 51. Consequently it is not always possible to ascertain the exact intent of their remarks. Professor Morgan told the House subcommittee that the law officer “will now act *solely as a judge* and not as a member of the court, which becomes much like a civilian jury.”<sup>26</sup> He made this statement in a preliminary explanation of the effect of Article 26 at the first formal meeting of the subcommittee. Later he qualified this when he said “[T]he law officer now becomes *more nearly* an impartial judge in the manner of civilian courts.”<sup>27</sup> Note the way in which Article 51 is injected by implication. He characterized courts-martial as “a system which resembles the independent civilian court”<sup>28</sup> with counsel and a trial judge who will be “independent of **command**.”<sup>29</sup> In response to Representative Brooks’<sup>30</sup> request for “behind the curtain reasons” for departure from the Army law member system, Professor Morgan said:

“Well, the fundamental notion was that the law officer ought to be as near like a civilian judge as it was possible under the circumstances. . . . We felt that whatever influence that judge exercised should be on the record.”<sup>31</sup>

He later made the same statement to a Senate subcommittee.<sup>32</sup>

Professor Morgan also told the Senate subcommittee that “the rules on interlocutory motions are made by the law officer who acts as a **judge**,”<sup>33</sup> but this analogy was weakened by his subsequent explanation that the law officer’s rulings were not final on all inter-

<sup>26</sup> *House Subcommittee Hearings 602* (emphasis added).

<sup>27</sup> *Id.* at 603, during discussion of Article 51, UCMJ (emphasis added).

<sup>28</sup> *Id.* at 606.

<sup>29</sup> *Zbid.*

<sup>30</sup> Chairman, House Armed Services Committee Subcommittee No. 1, which conducted the House hearings on the UCMJ.

<sup>31</sup> *House Subcommittee Hearings 607*. Professor Morgan expressed the opinion that a law member who deliberated with the court would become like a professional jurymen and thereby increase greatly the number of convictions. Query: unfairly?

<sup>32</sup> *Senate Subcommittee Hearings 35, 36, 38*. See also *id.* at 40 where he said, “**Now**, the law officer really acts like a judge,” but he did not elaborate.

<sup>33</sup> *Id.* at 40.

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locutory questions in the same way that a civilian judge's ruling would be, and :

"Of course, at common law, or under common law, you know the judge would direct a verdict if there was no evidence sufficient to support the findings, but we don't give this law officer that much authority . . . [because of later reviews required]."<sup>34</sup>

In the instructional field, Professor Morgan said the law officer would charge the court **as** a jury is charged :

" . . . He must charge the court on the elements of the offense, on the burden of proof, and the presumption of innocence. He must cover at least these points so that he acts like a judge, and the court is in fact, just like a jury."<sup>35</sup>

Finally, in response to a question by Senator Kefauver, Professor Morgan said concerning the Morgan committee split over the law officer :

"[O]ne member of the committee wanted the law officer to be a member of the court and judge on the facts, as a member of the court. Another one of them thought he might go back with them and answer such questions as they gave him, and as they wanted to ask him during the discussions, as I remember. The other two members thought that he ought to be just like a judge, and that was the decision that was made by the Secretary [of Defense Forrestal]."<sup>36</sup>

But Secretary Forrestal merely explained that there was a committee split on the law officer and that he resolved it.<sup>37</sup> He did *not* say he intended to have the law officer "act just like a judge." Apparently Professor Morgan's explanation, quoted at note 36 *supra*, was not complete or fully considered because just one month later he gave a somewhat different version of the committee split and its resolution. The colloquy follows :

"Senator KEFAUVER. . . . We will pass on to the next thing. I believe it is the law officer, Professor Morgan.

Professor MORGAN. Well, *the dispute on that is merely as to whether the law officer should go back with the court*—

Senator SALTONSTALL. And vote as a member of the jury, so-called.

Professor MORGAN. And vote as a member of the jury.

The Under Secretary of the Navy . . . wanted them to be just like a judge and not go back to deliberate with the court.

<sup>34</sup> *Id.*, at 41. But he may instruct a court that it violates its oath if it does not return a finding of guilty where a guilty plea has been entered, see *U.S. v. Lucas*, 1 USCMA 19, 24, 1 CMR 19, 24 (1951). See also *U.S. v. Strand*, 6 USCMA 297, 20 CMR 13 (1955) where the law officer reserved decision on motion until after a finding of guilty had been returned and then he dismissed a specification. Query whether his action would have been held reversible error if he did in fact direct a finding of guilty? What if he directed a verdict and the court returned a finding contrary to his direction? Quite possibly the accused would receive any benefit but the government could not appeal, even if the law officer had abused his discretion or completely exceeded his powers.

<sup>35</sup> *Senate Subcommittee Hearings* 41.

<sup>36</sup> *Id.*, at 57.

<sup>37</sup> *House Subcommittee Hearings* 598.

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The Air Force said, ‘Well, we would prefer to have him go back with them, but that everything he does back with the court must be put on record,’ so that therefore you would have to have a reporter present at the deliberations of the jury, so to speak. The Army wanted him to vote in closed session.

Well, that did not seem workable to me or to Mr. Kenney, so *on the question of the law officers’ going back there was a split*, and Secretary Forrestal decided with us; . . . that we ought not to have him go back.”<sup>38</sup> This issue over whether the law officer should “go back with the court”<sup>39</sup> is certainly not the same as whether he “ought to be just like a judge.”<sup>40</sup>

Mr. Felix Larkin<sup>41</sup> had worked closely with Professor Morgan on the draft UCMJ, and their concepts of the law officer’s role were similar. However, Mr. Larkin’s explanations, like those of Professor Morgan, leave some doubt as to exactly what he proposed. One of his explanations arose from a discussion of Article 39, UCMJ, which provides that only members shall be present during closed sessions but that the law officer may go into closed session for the purpose of putting findings in proper form. Mr. Larkin apparently confused this with the more general Article 26 problem of whether the law officer should retire, deliberate, and vote with the court.<sup>42</sup> Then, when Article 26 came up for subcommittee consideration, Mr. Larkin was asked to explain why the draft UCMJ proposed to remove the law officer from court membership.<sup>43</sup> His approach was somewhat different from Professor Morgan’s. He put the problem and its resolution in these words :

“ . . . . In studying the whole problem of what kind of a legal arbiter there should be on general courts the committee was split on the ideal manner of providing the functions of this legal arbiter. . . . The question turned on what his functions would be. The ultimate decision . . . was made by Mr. Forrestal, that *the legal arbiter should rule on questions of law on the trial in the same way the Army law member does at the present time*, but that he should not retire with the court and continue to act as a judge insofar as he instructs the court in closed session and thereafter act in effect as a juror in that he votes on the findings and sentence.

“*The idea principally was to make the law officer more similar to the judge in a civilian court . . . and further for the first time to put on the record in open court the instructions that he does give the court . . .*”<sup>44</sup>

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<sup>38</sup> Senate Subcommittee Hearings 308 (emphasis added).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Id.* at 57.

<sup>41</sup> Then assistant general counsel in the Office of the Secretary of Defense. He was chairman of the 15 man working committee which assisted the Morgan committee. He had no vote.

<sup>42</sup> House Subcommittee Hearings 1023–1024.

<sup>43</sup> *Id.* at 1152.

<sup>44</sup> *Id.* at 1153 (emphasis added). He said, “It is a difficult problem. . . . Inasmuch as no one knows what goes on, however, behind the closed doors and the elements of the crime and the law of the case are not preserved for the record, it is just impossible to tell whether erroneous law is given or not.” *Ibid.*

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In short, and despite the reference to civilian judges, the thrust of his explanation was that the committee wanted the law officer to do in open court what the law member had done in closed session so his remarks and instructions would be preserved for **review**.<sup>45</sup> Second, it did not want him to be a juryman.

Senator Kefauver also asked Mr. Larkin to explain to the Senate subcommittee the Morgan committee split on the law officer.<sup>46</sup> Mr. Larkin made it clear that all committee members agreed on the necessity for a “legal arbiter”<sup>47</sup> who would rule on the evidence and instruct the court. He said the **Army**, Navy, and Air Force had concluded he should rule with finality on evidence during the course of the trial. The actual dispute then, according to what Mr. Larkin told the Senate subcommittee, was “on the functions [of the law officer] at the time the court retired.”<sup>48</sup> Mr. Larkin then reviewed the background of the dispute somewhat as he had done for the House subcommittee, and he concluded :

“ . . . Secretary Forrestal . . . resolved it in favor of the law officer concept, the concept akin to the civilian judge concept; that this legal arbiter should have final say on the ruling with respect to evidence throughout the course of the trial; he should instruct the court on the record . . . and that he should not then become juryman . . . .”<sup>49</sup>

The above, in epitomized form, relates the efforts of Professor Morgan and Mr. Larkin to explain to the Senate and House of Representatives subcommittee the intended duties and status of the law officer.

While it is true that they referred to the law officer as being just like or similar to a judge, their remarks hint that they thought the law member, too, was much like a judge. Their explanations can be reduced to three propositions: (1) The law officer’s rulings on interlocutory matters will be final with certain limited exceptions.<sup>50</sup> (2) The law officer’s instructions must be in open court and on the record. Unlike the law member, the law officer must instruct on the elements of the **offense**.<sup>51</sup> (3) The law officer cannot be a **juryman**,<sup>52</sup> and he cannot consult with the court in closed session except for one specified **purpose**.<sup>53</sup>

UCMJ Articles 26 and 51, which impose the above listed duties on the law officer, are similar in many respects to their respective

<sup>45</sup> *Ibid.* See also *Senate Subcommittee Hearings* 160.

<sup>46</sup> *Senate Subcommittee Hearings* 159.

<sup>47</sup> *Id.* at 160.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Art. 51(b), UCMJ.

<sup>51</sup> Art. 51(c), UCMJ.

<sup>52</sup> Art. 26(b), UCMJ.

<sup>53</sup> Art. 39, UCMJ.

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precursors, Articles of War 8 and 31. A brief comparison will emphasize these similarities:<sup>54</sup> *First*, the general qualifications of the law officer and the requirement that one be appointed to each general court-martial<sup>66</sup> are essentially the **same** as those prescribed for the law member in Article of War 8 except for the Article of War 8 proviso that the court-martial could not vote in the absence of the law member. This difference is set out in Article 26(b), UCMJ, which *precludes* the law officer from voting with the court-martial or consulting with its members in closed session. *Second*, the law officer’s duties on challenge questions are the same under Article 51(b), UCMJ, **as** were the law member’s under Article of War 31 except that the law officer does not participate in closed session deliberations and voting on challenges. The law officer has less power and control over challenge matters in this respect than did the law member. *Third*, the law officer’s authority and duty, and the finality of his rulings<sup>56</sup> on interlocutory questions, are expressed in terms almost identical with those of Article 31 except that Article of War 31 permitted the law member to consult with the court in closed session before making his ruling. *Fourth*, the law officer’s duty to instruct the court before findings<sup>57</sup> is identical with that prescribed for the law member<sup>58</sup> except for the additional UCMJ provision that the law officer must also “instruct the court **as** to the elements of the offense.”

This brief comparison of the law officer-law member duties as prescribed in the UCMJ and Articles of War also suggests that the basic changes envisioned by Articles 26 and 51 of the Uniform Code of Military Justice were to take the law member off the court and to deprive him of a jurymen’s duties, to put all of the law officer’s instructions to the court on the record for appellate review, and to require the law officer to instruct the court on the elements of the offense.<sup>59</sup>

The only additional affirmative duty placed on the law officer was to instruct the court on the elements of the offense. It is quite probable that the law member usually gave instructions on the elements to the court in closed session. Why then all the sweeping generalizations by Professor Morgan and Mr. Larkin about making the law officer more like a judge? A concise and clear explanation

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54A reading of Articles of War 8 and 31 and Articles 26 and 51, UCMJ, would be helpful at this point. See notes 16 and 17 *supra*.

55 Art. 26(a), UCMJ.

56 Art. 51(b), UCMJ.

57 Art. 51(c), UCMJ.

58 Art. of War 31.

59 Compare these with the summary of Professor Morgan’s and Mr. Larkin’s proposals in text at notes 50 through 53 *supra*.

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of the specific differences between the proposed UCMJ and the Articles of War on these points would have made the differences between the two offices more understandable than general references to judgeship. Query whether the results would have been different if the proponents of the law officer had been made to define their terms instead of being permitted to speak in generalities which were inadequate and sometimes misleading when specific aspects of the UCMJ were under consideration.

Considerable space has been devoted to Professor Morgan's and Mr. Larkin's remarks because they performed important functions in the UCMJ drafting process and because they were held out as "experts," as it were, on the objectives sought to be obtained through the UCMJ and the law officer. They had unequalled opportunity to put their views before Congress, and what they said must certainly have influenced Congress in its action. Regardless of the weight the drafters of the Manual<sup>60</sup> and the Court of Military Appeals have accorded to their remarks, they are not necessarily expressive of congressional intent. Before conclusions on this law officer as a judge concept can be accepted with certainty, recourse must be had to other testimony presented to the legislators and to what the legislators themselves said.

### *B. House of Representatives Subcommittee Hearings*

The House subcommittee held hearings for almost five weeks and called 28 witnesses to comment on the proposed UCMJ. The two most discussed subjects were command influence and the role of the law officer. Witnesses were split on the law officer as markedly as the Morgan committee had been. Most of these witnesses were lawyers, many had been judge advocate officers, and several represented veterans' and bar groups. How did they feel?

Arthur E. Farmer, who represented the War Veterans Bar Association, told the House subcommittee :

" . . . . The modification of the duties of the present law member of a general court-martial, so as to make him in effect the judge and the other members of the court the jury . . . is greatly to be commended."<sup>61</sup>

General Riter spoke on behalf of the American Legion. He wanted to get rid of the president of the court-martial and give the law officer rank by virtue of his office. He was deeply concerned about

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<sup>60</sup> *E.g.*, Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951 p. 69, wherein some of the general language of Professor Morgan and Mr. Larkin was quoted as the basis for saying the law officer is like a civilian judge.

<sup>61</sup> *House Subcommittee Hearings* 646. These remarks were directed toward the effect of Article 26, UCMJ.

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command influence.<sup>62</sup> He characterized use of a law member as the “military aspect”<sup>63</sup> or approach, and by inference he indicated that the law officer position would be analogous to the civilian judge. He said :

“ . . . I personally prefer to have the law member out of the deliberative session. . . . [but] there is a very decided opinion among the civil lawyers who are interested in military justice that the law member should enter the deliberative assembly of that court.”<sup>64</sup>

Colonel William A. Roberts<sup>65</sup> had similar views :

“ . . . with respect to the suggestion that the law member should participate in and vote with the court. I very decidedly disapprove of any suggestion. That would be reverting to the same thing you had before, reverting to command channels, . . . it would be most important that he not be a member of the court and not vote.”<sup>66</sup>

Witnesses who wanted the law officer to retire with the court advanced various reasons for their positions. The Reserve Officers’ Association was concerned about command influence. It thought the law officer should be designated by The Judge Advocate General. The Association took the position that the law officer should retire and vote with the court. This attitude seems to have been predicated on the Association’s assumption that the law officer would not be like a judge. Its spokesman<sup>67</sup> explained:

“Our views might be otherwise if the law officer were extended all of the rights, duties and responsibilities of the Federal judge but where he is permitted to rule only on interlocutory questions and instruct on the presumption of innocence and the doctrine of reasonable doubt, and so forth, as set forth in article 50(c) [sic] . . . we feel that the services of this valuable officer will be wasted.”<sup>68</sup>

The National Guard Bureau and the National Guard Association thought the usefulness of the law member would be curtailed by not permitting him to vote or consult with the court members.

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<sup>62</sup> *Id.* at 671–672. On the question of who would replace the president, he said, “Well, let the law member do it. He is the judge,” but he would not have him go into closed session. *Id.* at 672. His main point was to eliminate the senior officer as president, and, inferentially, command influence.

<sup>63</sup> *Id.* at 671.

<sup>64</sup> *Id.* at 672. He felt that in all fairness he should invite the subcommittee’s attention to this division of opinion and clearly indicated his own opinions.

<sup>65</sup> U. S. Air Force Reserve and representative of the AMVETS.

<sup>66</sup> *House Subcommittee Hearings 777*. He added, “We have had experience of the law officers . . . being called out of the court room and given instructions about rules of evidence and other matters. There is no doubt that law officer, with the dignity afforded by this bill, will be a strong individual.” *Ibid.* But query, what in the UCMJ really protects the law officer any more than the law member from influences outside of the court?

<sup>67</sup> Colonel John P. Oliver, JAGC Reserve.

<sup>68</sup> *House Subcommittee Hearings 754–765*.

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He would be similar to a civilian judge but without all the authority.<sup>69</sup>

Colonel Frederick B. Wiener<sup>70</sup> was an adamant proponent of court-martial membership for the legal arbiter of the court. The tenor of his position is illustrated in the following excerpts from his testimony :

“One of the finest provisions of the Elston bill was the requirement of having the lawyer as a law member.”<sup>71</sup>

“ . . . .

“ . . . . I think that the provision to remove the law officer from the deliberations would be very, very detrimental. Now, when you remove him for deliberations, . . . you take out of the deliberations the one man who can make the most helpful contribution to the deliberations. . . . I cannot help but think that the provision removing the law member from the deliberations was not the product of anyone who ever sat on a court . . . .”<sup>72</sup>

“ . . . .

“ . . . . Now you remove him just when he is able to do the most good. It is the analogy, gentlemen, of the jury trial, but the law officer does not have the judge’s power. It is wholly a false analogy. It is a jury trial without the safeguards. . . . Why shouldn’t he sit down with the court and give them the additional assistance which his legal knowledge enables him to give? I think this notion of taking the law member out of the court just at the time when they are about to perform their most important function is the most retrograding step in this bill.”<sup>73</sup>

Lieutenant Colonel Thomas H. King<sup>74</sup> was most worried about the command influence problem. He thought it could best be handled by leaving the law officer with the court. He testified:

“Now the question of the law member sitting with the court. To me it is inconceivable that the law member not sit with the court. We talk about endeavoring to take from command authority the right to control a court. But what do we do? We take the one man who is certified by the Judge Advocate General as qualified to sit on a court and take him out of it. He is the one man who is not subject to command influence if there is any. . . .”<sup>75</sup>

Another proponent of the law member system came from a somewhat unexpected source, Mr. Robert D. L’Heureux, Chief Counsel

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<sup>69</sup> *Id.* at 772. Major General Raymond H. Fleming appeared before the House subcommittee as representative for Major General Kenneth F. Kramer, Chief, National Guard Bureau. See also General Fleming’s similar personal opinions. *Id.* at 775. Another witness, Major Rolla C. Van Kirk, United States Army, was of like opinion. *Id.* at 774–775.

<sup>70</sup> Also then commanding 2930 JAG Service Training Group.

<sup>71</sup> *House Subcommittee Hearings* 783.

<sup>72</sup> *Id.* at 784; quoted favorably in Senate debate on UCMJ at 96 Cong. Rec. 1293–1294 (1960).

<sup>73</sup> *House Subcommittee Hearings* 785.

<sup>74</sup> JAGC Reserve; National Judge Advocate of the Reserve Officers’ Association and president of the District Department.

<sup>75</sup> *House Subcommittee Hearings* 832; quoted favorably in Senate debate on UCMJ at 96 Cong. Rec. 1294 (1950).

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of the Senate Banking and Currency Committee.<sup>76</sup> Much of his testimony was in the form of a written statement he submitted at the time of his appearance before the subcommittee, and he **was** not queried on those matters. He wrote the following comment on **Article 26, UCMJ** :

“Most doubts upon the law arise during the closed session and the law officer is not given the opportunity to confer with the court during that time, under this provision.

“ . . . .

“Under present practice in the Army, the court is closed and a full discussion is had. The law member explains his point fully and often the court agrees with his ruling and the trial proceeds. But now, under this provision, after the objection is made, the court is closed and the law member has to absent himself. The whole court must debate and decide the point without the benefit of having the point of law fully explained to them.

“There is absolutely nothing to gain by disqualifying the law officer from being a member of the court.

“One of the reasons that might have induced the framers of H.R. 2498 to include this provision may have been the analogy to civilian courts where the judge does not sit in on jury deliberations. However, under the civilian-court system, the judge has the power to set aside the verdict **of** guilty if it is contrary to the weight of the evidence, and this is not a power which the law member possesses.

“Furthermore, the analogy fails, because the members of the court-martial are judge and jury. The law officer is not the judge as in a civilian court.” <sup>77</sup>

### C. Senate Subcommittee Hearings

The Senate subcommittee hearings<sup>78</sup> were considerably shorter than those of the House subcommittee, but the Senate subcommittee did have before it the testimony or prepared statements (sometimes both) of some **17** witnesses including Professor Morgan and the Judge Advocates General of the Army, Navy, and Air Force. **Professor Morgan’s** comments on the law officer to the Senate

<sup>76</sup> He had been an enlisted man during World War II; was wounded; was commissioned near the end of the war and did considerable amount of legal **work** in France in 1945–1946.

<sup>77</sup> *House Subcommittee Hearings 820*. See also letter from a Major Davis, **JAGD**, Reserve, which was brought to the attention of the House of Representatives by the Hon. Glenn E. Davis (Wisconsin) and offered to the House subcommittee by Mr. L’Heureux. This letter said in part that removal of the law officer from court membership would cause the accused to “. . . lose the important safeguard of having an informed lawyer present at all times during the deliberations and voting of the court in closed session.” Text of letter set out in *House Subcommittee Hearings 824*.

<sup>78</sup> Reported in *Hearings Before a Subcommittee of the Committee on Armed Services, United States Senate, on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. (1949), hereinafter referred to as *Senate Subcommittee Hearings*.

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subcommittee have already been discussed.<sup>79</sup> Seven of the other witnesses contributed little one way or the other on the law officer problem. Of the remaining nine witnesses, the law member proviso won hands down over the law officer innovation. Four persons who had testified at some length before the House subcommittee on the matter of the law officer also appeared before the Senate subcommittee.<sup>80</sup> For the most part, their latter testimony was reiterative of their former testimony. Some exceptions are noteworthy.

Lt. Colonel King had told the House subcommittee that he would keep the law member as a deterrent to command influence.<sup>81</sup> In his Senate subcommittee testimony, he added an objection to the law officer based on the UCMJ instructional requirements :

“Now, if you will read the instructions which the law member [sic] is required to give to the court, the effectiveness of that is that they could have it read out of a book just as well, and it is a useless and effortless statement, unless he can get in there and advise them as to the essential elements of the crime, as to the matters of evidence; they want to know why he ruled on excluding the evidence or why he permitted certain testimony to come in.”<sup>82</sup>

Colonel F. B. Wiener adhered to his prior view<sup>83</sup> that the law member would be of little value if he were taken off the court. He added: “Now, even if I hadn’t known by whom this bill was drafted, I would have been positive it hadn’t been written by anybody who ever sat on a court.”<sup>84</sup> He also attacked the analogy of the law officer to the trial judge as being erroneous “because the law officer has not got the functions or the powers of a trial judge. . . . [Y]ou are getting a jury trial but without the safeguards of a jury trial.”<sup>85</sup> Neither did he feel that the law officer’s duty to instruct added any significant weight to the analogy:

“In the third place . . . , This bill makes him state the elements of offenses, not anything more, not a full charge . . . .”<sup>86</sup>

Colonel Oliver reiterated his House subcommittee testimony almost verbatim,<sup>87</sup> announced that he subscribed to Colonel Wiener’s remarks,<sup>88</sup> and added, “[W]here you have a trained lawyer as a

<sup>79</sup> See text at notes 26 to 29 and 32 to 40 *supra*.

<sup>80</sup> Colonel John P. Oliver; Lt Colonel T. H. King; General Riter; Colonel Frederick B. Wiener.

<sup>81</sup> See text at note 74 *supra*.

<sup>82</sup> *Senate Subcommittee Hearings* 159. He added: “I have no objection to it if he is going to be a judge, but if he is going to be something that is half and half, why give up to one service which has not had the experience [with the law member] . . . .” *Id.* at 160.

<sup>83</sup> See text at notes 71 and 73 *supra*.

<sup>84</sup> *Senate Subcommittee Hearings* 129.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Id.* at 130.

<sup>87</sup> *Id.* at 148–149. See text at notes 67 and 68 *supra*, commenting on his House subcommittee testimony.

<sup>88</sup> *Id.* at 157.

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law member he does not have the full powers of a district court, and I think that the law member should be permitted to retire and consult with the court . . . , [and vote].”<sup>89</sup>

General Riter had reconsidered Article 26, UCMJ, between the time of his appearance before the House and Senate subcommittees. He told the Senate subcommittee that he had originally considered Article 26 to be unobjectionable. He said he changed his mind because he thought the law member’s closed session participation and vote constituted a safeguard for the accused; therefore, he would retain Article of War 8.<sup>90</sup>

Seven other witnesses gave testimony or submitted statements pertaining directly to the law officer’s status. Three favored his proposed new status. One was Mr. Knowlton Durham, Chairman of the Special Committee on Administration of Military Justice, New York State Bar Association. He wrote that the Association committee had split on whether the law member should retire with the court, and he concluded :

“ . . . . The majority of the committee, however, feel that the proposed change [Art. 26, UCMJ] would elevate the law member, rather than lessen his importance and that, under this provision, he will assume more of the position of an unbiased judge, as in a civilian case . . . .”<sup>91</sup>

A second ~~was~~ The Judge Advocate General of the Navy,<sup>92</sup> who felt that the law officer should not vote because “if he is going to act in a judicial capacity . . . he ought to leave to the other members the fact-finding part of it.”<sup>93</sup> Third, the chairman of the Bar Association of New York City Committee on Military Justice presented that organization’s view that Articles 26 and 51, UCMJ, were particularly sound because the law officer “becomes in effect a judge, with the power to determine all questions of law during the course of the trial on the basis of his specialized knowledge. . . . This is a proper separation of the judicial function and the fact-finding function . . . .”<sup>94</sup>

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<sup>89</sup> *Ibid.*

<sup>90</sup> *Id.* at 184. Compare his House subcommittee remarks commented on in text at notes 62 to 64 *supra*.

<sup>91</sup> *Senate Subcommittee Hearings* 295. He was not present in person and the cited material was taken from his prepared statement which was given to the subcommittee. Similarly, he had furnished a prepared statement to the House subcommittee but there was no comment on the law officer’s position. See *House Subcommittee Hearings* 836–837.

<sup>92</sup> Rear Admiral George Russell, Judge Advocate General of the Navy. The Navy had never had a law member, and the Navy representative on the Morgan committee was the only armed service representative to vote for the change from law member to law officer.

<sup>93</sup> *Senate Subcommittee Hearings* 287.

<sup>94</sup> *Id.* at 300.

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The other four witnesses who gave specific opinions on the law officer status were William J. Hughes, Jr., President of the Judge Advocates Association; Colonel P. G. McElwee, JAGC Reserve; The Judge Advocate General of the Air Force;<sup>95</sup> and The Judge Advocate General of the Army.<sup>96</sup> Colonel McElwee wanted the law officer to be with the court to keep it from going “haywire”<sup>97</sup> or from coming up “with a screwy decision.”<sup>98</sup> He also said:

“In the proposed bill you only have a law officer and he doesn’t sit on the court. *He doesn’t have anything to say.* The court closes and leaves him outside and he isn’t there to see whether they are going off on a tangent and hold them back on the track. . . .

“I think he should be a member and I think it is one of the most important things in military justice.”<sup>99</sup>

Mr. Hughes presented a tabulation of some 645 responses<sup>100</sup> by Judge Advocate Association members to a questionnaire on the UCMJ. The “vote” against depriving the law member of court membership and the right to vote was 512 to 85. On the other hand, 343 out of 522 favored having instructions on the elements of the offense and the rule as to reasonable doubt made a matter of record for appellate review.<sup>101</sup> General Harmon was particularly concerned about weakening the law member’s position through Article 26 :

“ . . . There are a few things about it [UCMJ] that I personally do not like.

“The first one . . . is article 26. . . . I do not like to see the law mem’ber shorn of his powers that he has now. I think he should participate in the deliberations of the court and vote as he does now . . . .”<sup>102</sup>

General Green’s first point of criticism was also directed at Article 26. It was his understanding that the only purpose for taking the law member off the court was to have his rulings on law made of record, both when court is closed and when it is open, and he felt this could be accomplished without impairing the law officer’s usefulness (presumably without taking him off the court).<sup>103</sup> It was his opinion that the proposed Article 26 would deprive the

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<sup>95</sup> Major General R. C. Harmon.

<sup>96</sup> Major General Thomas H. Green, who submitted a prepared statement and also appeared in person.

<sup>97</sup> *Senate Subcommittee Hearings* 125.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Id.* at 126 (emphasis added).

<sup>100</sup> Not all persons responding answered all questions.

<sup>101</sup> *Senate Subcommittee Hearings* 222.

<sup>102</sup> *Id.* at 288.

<sup>103</sup> *Id.* at 261. This was his oral testimony. He also submitted a prepared statement which said the only argument for Article 26 he knew of was to get the *instructions* of record, and then he pointed out that the MCM, 1949, already required this.

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court of needed legal guidance<sup>104</sup> and result in miscarriages of justice.<sup>105</sup> As far as he was concerned, the oft-repeated analogy between the proposed law officer and the civilian judge was more apparent than real,<sup>106</sup> and the proposed new UCMJ provision which “makes the law member a mere figurehead is [not] defensible.”<sup>107</sup>

### D. *Other Hearings and Reports*

Three other documents give some indication as to the importance of the law officer and the nature of his duties. These are, in chronological order, (1) *Full Committee Hearings on . . . H.R. 4080, House of Representatives, Committee on Armed Services, 27 April 1949*,<sup>108</sup> (2) the House of Representatives Committee on Armed Services report on the draft UCMJ, 28 April 1949,<sup>109</sup> and (3) the Senate Committee on Armed Services report on the same bill, 10 June 1949.<sup>110</sup> If repetitions of certain matters are indicia of intent, these three documents should be accorded considerable weight in view of their nearly identical textual comment on matters relating to the law officer. This situation obtained in all major references to the law officer in the three documents. Thus, the reports stated that :

“Among the provisions designed to insure a fair trial are the following: . . . (8) A provision requiring the law officer to instruct the court on the record concerning the elements of the offense, presumption of innocence, and the burden of proof.”<sup>111</sup>

The law officer was also described as one of the “numerous restrictions on command” in the following language :

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<sup>104</sup> *Id.* at 257. “This results in the loss of legal experience and learning during the most critical stage of the proceedings and deprives the court of legal guidance at a time when it most urgently requires such guidance.” (From his written statement).

<sup>105</sup> *Ibid.* “The limitation on the effectiveness of the law member will result in miscarriages of justice both to the detriment of accused persons as well as to the detriment of the interests of the Government.” (From his written statement).

<sup>106</sup> *Ibid.* He wrote: “For example, he [law officer] rules subject to objection by any member of the court on the question of a motion for a finding of not guilty under article 61 . . . . The law officer cannot explain his ruling, defend it, or vote to sustain it. Although under A.W. 31 such a ruling by the present law member is also subject to objection at least he can defend his ruling against the argument of a member who may not be well versed in the law.”

<sup>107</sup> *Ibid.*

<sup>108</sup> Hereinafter referred to as *House Full Committee Hearings*.

<sup>109</sup> H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949).

<sup>110</sup> S. Rep. No. 486, 81st Cong., 1st Sess. (1949).

<sup>111</sup> *House Full Committee Hearings* 1328–1329; H.R. Rep. No. 491 at 4; S. Rep. No. 486 at 2–3; also stated in 96 Cong. Rec. 1355–1356 (1950), and in House of Representatives debate in 96 Cong. Rec. 5720 (1949).

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“[The UCMJ] provides a law officer who must be a lawyer whose ruling on interlocutory questions of law will be final and binding on the court and who must instruct the court on the presumption of innocence, burden of proof, and the elements of the offense charged . . . .”<sup>112</sup>

Statements in each of these documents carefully noted that there had been a few points on which opinions differed, and each of these points was discussed apart from the seriatim comments on the articles. Article 26 was still a subject of disagreement in all three reports. The comments on Article 26 in all three documents were almost identical :

“Article 26 provides the authority for a law officer of a general court martial. Under existing law the Navy has no law officer. The Army and Air Force do have a law officer for general courts martial who, in addition to ruling upon points of evidence, retires, deliberates, and votes with the court on the findings and sentence. Officers of equal experience on this subject are sharply divided in their opinion as to whether or not the law officer should retire with the court and vote as a member. In view of the fact that the law officer is empowered to make final rulings on all interlocutory questions of law, except on a motion to dismiss and a motion relating to the accused’s sanity, and in view of the fact that the law officer will now instruct the court upon the presumption of innocence, burden of proof, and elements of the offense, we feel that he should not retire with the court with the voting privileges of a member of the court. Article 26, in our opinion, contains the appropriate provision on this matter.”<sup>113</sup>

The Senate committee report was identical except for the conclusion which varied in words but not meaning :

“ . . . . it is not considered desirable that the law officer should have the voting privileges of a member of the court. This is consistent with the practice in civil courts where the judge does not retire and deliberate with the jury.”<sup>114</sup>

This conclusion seems to be based upon the fact that the law officer was given the duty to instruct and to make rulings with finality. The recommendations that he be kept **off** the court apparently were premised on considerations springing from Articles 26 and 61, but they are not spelled out with any clear reference to either of the articles. It is noteworthy that the above citation is the only instance in which these documents referred to civilian judges or civilian courts in their comments on the law officer. They are other-

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<sup>112</sup> *House Full Committee Hearings 1332*; H.R. Rep. No. 491 at 7. At 96 Cong. Rec. 1356 (1950), Senator Kefauver said that provisions designed to prevent interference with due administration of justice were incorporated in the proposed UCMJ, and one of these was “. . . the law officer—a competent lawyer—[who] rules on all questions raised at the trial, except on a motion for a directed verdict and on the issue of the accused’s sanity.” See also House of Representatives debate on UCMJ at 95 Cong. Rec. 5721 (1949).

<sup>113</sup> *House Full Committee Hearings 1331*; H.R. Rep. No. 491 at 6. See also House of Representatives debate on UCMJ at 95 Cong. Rec. 5721 (1949).

<sup>114</sup> S. Rep. No. 486 at 6.

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wise silent with respect to the many House of Representatives and Senate subcommittee hearing references to “the law officer who acts like a judge,” who is “as near like a civilian judge as it was possible under the circumstances,” and who is “in effect the judge.”<sup>115</sup>

### E. Senate Debate

The final source of congressional intent may be found in what Congress had to say, and the record shows that the courses of Articles 26 and 51, UCMJ, in the Senate were not smooth. Senator Tobey proposed an amendment to UCMJ Articles 26, 39, and 51 to make these Code provisions the same as in the then-existing Articles of War.<sup>116</sup> He said :

“H.R. 4080 as reported abolishes the law member who has been a most useful member of Army courts martial since 1920 and substitutes for him a figurehead ‘law officer.’ The proponents have convinced the Armed Services Committee that the change is a desirable one on the theory that the law officer is analogous to a judge. . . .

“It is significant that those witnesses who are really familiar with the administration of military justice under the present army system have uniformly scoffed at the analogy.”<sup>117</sup>

He continued :

“To me it is quite obvious that the law officer set up by Article 26 is far from being a judge. A judge can direct a verdict of not guilty without having a member of the jury object and override him. He can sentence the accused; he can set aside a verdict as being against the weight of the evidence and he can grant a new trial. Without those powers he is no more than a referee or an umpire. . . . I suspect that Professor Morgan and the Armed Services Committee have been sold a bill of goods by the services which does not now have a law member. I suspect that the Navy is willing to provide for the appearance of due process by accepting a figurehead law officer, but it does not want a legal conscience present in the closed sessions of the court to deter the expression of sentiments such as Professor Morgan attributes to an anonymous law member.<sup>118</sup> . . . The view of the two services which have had experience with law members has greater weight with me than

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<sup>115</sup> See *e.g.*, *House Subcommittee Hearings 607*; *Senate Subcommittee Hearings 40*; *House Subcommittee Hearings 646*, and many others cited *supra*.

<sup>116</sup> 96 Cong. Rec. 1293 (1950).

<sup>117</sup> *Ibid.* This discussion referred to and cited: General Green, *Senate Subcommittee Hearings 256–257*; Colonel Wiener’s testimony in *House Subcommittee Hearings 784*; Lt Colonel King, *id.* at 832.

<sup>118</sup> The remark referred to was reported in *House Subcommittee Hearings at 607* as follows: “The law member, when he retires with the court, may make any kind of statement to them. And it has been stated—I would not say on how good authority—that frequently when he went back there why he said, ‘Of course the law is this way but you fellows don’t have to follow it.’”

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the patently fictitious theory that a figurehead law officer performs the functions of a judge.”<sup>119</sup>

Senator Kefauver gave the Senate his concept of the law officer in this language :

“ . . . Article 26 provides for a law officer on general courts martial. It is generally agreed that every general court martial should have assigned to it an officer with legal training and experience who will make rulings on interlocutory questions and advise the court on matters of law. There has been some controversy, however, as to the status of this officer —as to whether he is to be a member of the court who retires and votes with the court on the findings and sentence, or whether he is to be more in the nature of a judge with completely independent functions.

“Article 26 adopts the second view and provides for the appointment of what is called a law officer. He can neither vote on the findings and sentence nor retire with the court during its deliberations. In this way he differs from the law member now provided for in the Articles of War. He is an innovation for the Navy, which has never had either a law officer or a law member attached to its courts.

“The judge concept, as contrasted with the member concept, has been supported by all the recent studies of the naval court-martial system. It was recommended by the House Military Affairs Committee in a study made of the Army system in 1946. It has been supported by many of the witnesses appearing before the Senate committee, including the witnesses for the bar association. . . .

“There are two strong arguments for the system adopted in the bill. The first is that the withholding from the law officer of the functions of a juror makes him better able to carry out his judicial functions objectively. The second is that all instructions given by the law officer will be on the record and subject to review. . . .

“In support of the member concept it has been said that the presence of a trained legal expert in the closed sessions is of great value in assuring that justice is done. In answer to this it should be pointed out that under article 51 the court will have the benefit of the law officer’s instructions on the elements of the offense, the presumption of innocence, and the burden of proof, and that the same article does not prevent him from giving further instructions on other appropriate matters.”<sup>120</sup>

Senator Kefauver either forgot to or did not deem it expedient or important enough to point out that the Elston Act did not incorporate the House Military Affairs Committee recommendations<sup>121</sup> for a law officer or that many of the witnesses, including witnesses for bar associations,<sup>122</sup> opposed the law officer concept and recommended retention of the law member. Senator Kem

<sup>119</sup> 96 Cong. Rec. 1294 (1950). He added that his amendment was calculated to restore the law member to the position which he held under the Articles of War. *Ibid.*

<sup>120</sup> *Id.* at 1359 (1950). He did not mention that par. 78*d*, MCM, 1949, required the law member to instruct in open court on the presumption of innocence and burden of proof and that the single innovation was the instruction on elements of the offense.

<sup>121</sup> This committee was the so-called Keefe committee. The Elston Act was not enacted until 1948 whereas the Keefe report was prepared in 1946.

<sup>122</sup> *E.g.*, Mr. Knowlton Durham and William J. Hughes before Senate subcommittee. See text at notes 91, 100 and 101 *supra*.

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pursued the matter to some length in a Senate floor exchange with Senator Kefauver and Senator Saltonstall. This colloquy is one of the few where opposing views are aired together **at** length, and it presents most of the theories which were advocated before Congress. Extracts are set out below :

“Mr. KEM. As I understand, under Article 26 the law officer is not permitted to retire with the other members of the court, or to vote. Is that correct?

Mr. KEFAUVER. That is correct.

Mr. KEM. Under that provision, is not the court deprived of the counsel and advice of the law officer when it might be most needed?

Mr. KEFAUVER. . . . [T]here are two views in regard to that question. . . . [T]his is a compromise between the Navy procedure and the Army procedure, but it so happens that it represents the recommendation, I think, contained in most of the studies of persons who have gone into the problem. . . . [I]t seems to me that following the jury concept in the matter is a pretty safe thing to do. The law officer is distinguished from a member of the court, and he must be a lawyer. He instructs the court on the record. If the court desires additional instructions it has a right to call him in, and the additional instructions are also on the record. The facts of the case are decided by the non-legal members of the court.

There have been many complaints, as the Senator well knows, regarding the law member retiring with the court, with no record being made of what he says. Other persons feel that with his superior knowledge of the law he might unduly sway the members of the court against the person who is being tried.

....

Mr. KEFAUVER. . . . This [UCMJ] is merely getting a little closer to the civilian approach in court-martial proceeding. It approaches the judge idea. I think in its general tendency and general aim the pending bill, while not going overboard in attempting to adopt civilian technique, is an attempt to bring the system a little further into harmony with civilian methods. This method of having the law officer instruct, and what he says appear on the record, and not retire and not vote with the court, is exactly what is done in civilian trials before juries today.

Mr. KEM. Does the Senator recall the language which Major General Green used in dealing with the proposed analogy between the law officer and a civilian judge? . . .

Mr. KEFAUVER. This change does not make him a mere figurehead. General Green is wrong in saying that the law member cannot sustain his ruling.

Mr. KEM. He cannot sustain it when an important decision is being made by the court.

Mr. KEFAUVER. He certainly explains his ruling to the members of the court. He can be as emphatic as he desires. Of course, he cannot go into secret sessions and press the matter further.

Mr. KEM. How can he anticipate what course the argument and the discussion by the court will take when they retire?

Mr. KEFAUVER. I believe the Senator is talking about the facts of the case. Of course, if we are going to say that the position of the law member should prevail, that he ought to be able to retire with the board and argue with them in private, without what he says being on the

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record, in a closed session, we might as well abolish the other members of the court. At present he has only one vote in any event, and it seems that the general view of the Keeffe Board, and of all the other boards, is that we would have at least a better decision on the facts of a case if he acted as in the nature of a judge, rather than as a member.

Mr. KEM. Does not the Senator feel that the court is being deprived of the services of a law officer when the court most needs them?

Mr. KEFAUVER. It depends on the concept. It may be that the judge should retire with the jury and discuss the case during the deliberations. Perhaps courts martial really need a judge to help them decide a case. But we have never operated on that basis in civilian courts. The pending proposal tries to place courts martial on more of a civilian basis.

Mr. KEM. As General Green says, the analogy between the civilian court and the military court is more apparent than real.<sup>123</sup>

....

Mr. SALTONSTALL. . . . [W]e discussed this matter at great length in the subcommittee hearings. We discussed it with Professor Morgan, and I believe our feeling was, after hearing both sides of the argument, that it would be very much more helpful, and in the end would be fairer to the defendant and fairer to the court, to have a lawyer member outside and not going in with the court. The court could always get the legal point of view restated by the lawyer member if it so desired, and have it placed on the record. It was felt that . . . it would be very much wiser and fairer to have the legal side of the differences of opinion all on the record, than to have the lawyer member saying things in private to the court when they were giving the matter their consideration. It was that balance of judgment, the weighing of both those things, which made me, as one member of the committee, feel that the committee's report was correct.

Mr. KEM. Is the Senator proceeding on the theory that the advice and counsel of the lawyer member would be unsound, or that he would overpower the judgment of the other members of the court?

Mr. SALTONSTALL. It is on the same ground on which the distinguished Senator and I have never been permitted to serve on a jury, the idea being, as I understand it, that a trained lawyer sitting on a jury is likely to influence the jury. He may have different points of view from the judge who directed the jury, and therefore it is wise to exclude him. If we are to accept the analogy of the civilian court, I agree that is certainly so, but if we are going to accept that analogy, we would by the same token have to find many faults with the pending bill. I use that analogy in this instance because it was the thing which determined me as one member of the committee, and I think determined the judgment of the committee as a whole.<sup>124</sup>

Mr. KEM. Is not the Senator like the devil who quotes Scripture to his purpose? Is he not insisting on the analogy when it serves his purpose and disregarding it entirely when it does not?

Mr. SALTONSTALL. If the Senator from Massachusetts can quote Scripture for any purpose, at any time, he is very happy.

....

Mr. KEFAUVER. Mr. President, there was controversy about this proposal. The committee did have some difficulty in reaching a decision. We hope the method we propose will work better than did the old method.

<sup>123</sup> See text at note 106 *supra*.

<sup>124</sup> *But see* text at note 129 *infra*.

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We believe the one particular advantage our proposal has over the procedure whereby the law officer retires with the members of the court . . . is that whatever the law officer says will be on the record, so that the reviewing authorities may see what his attitude about the matter was and what he had to say about it. If the law officer retires into executive session with the members of the court, and talks back and forth with them, and votes with them, it is going to be very hard to have on the record his exact position, for purposes of the reviewing officers."

Further discussion between Senators Kem and Kefauver developed the fact that the official position of the Army and Air Force before the Morgan committee favored the retention of a law member who would deliberate with the court. The Navy, who had previously used neither a law member nor a law officer, took a contrary position. The chairman of the committee voted with the Navy.

"Mr. KEM. Would it not be sounder for the Congress to adopt the view of the majority [of the services] rather than the minority in this important matter?

Mr. KEFAUVER. I will say , . . that this is a compromise between the concept, on the one side, of the Navy, which had no law member at all, and that of the Army and Air Force, on the other side, which have a law member. So the compromise provides a law officer for each of the services.

Mr. KEM. Is it not true that the Army and the Air Force both had had experience with the law member and knew what that procedure was like, and to what use the law member could be put, and they liked that procedure and wanted to continue it? The Navy did not know any thing about it and objected to that about which they knew nothing.

Mr. KEFAUVER. The Navy had had experience without the law officer, and they thought they had gotten along very well on that basis.

Mr. KEM. The mere fact that the committee was sitting shows that the Navy had not gotten along too well.

....

Mr. SALTONSTALL. . . . There were only two instances in the whole report as I understand, where the services were not in unanimous agreement. In those two instances Secretary Forrestal made the decision. He made the decision after hearing both sides, and after listening to Professor Morgan. He made the decision in the way it came to the committee. The committee went through the same process again, discussed the question, and after having listened to the discussion and after having listened to the recommendations made by Professor Morgan, came to the same conclusion Mr. Forrestal had reached. That is my memory and my understanding regarding how we reached the decision. We did not reach it on the basis of the minority presentation. We reached it on the decision made by Secretary Forrestal, when there was a difference of opinion between the services.<sup>125</sup>

Mr. KEM. Of course, Secretary Forrestal had recently retired from the position of Secretary of the Navy and was in the corner of the Navy, so to speak. He had had no more experience with the law member than the other representatives of the Navy. On the other hand, the represen-

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<sup>125</sup> *But see* text at note 129 *infra*.

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tatives of the Army and the Air Force had seen the procedure in operation for something like a year.

Mr. KEFAUVER. I may say also . . . that the old Military Affairs Committee of the House had some time back recommended the law officer concept. That committee at that time had jurisdiction over the **Army** and the Air Force only. Anyway, the problem was one of the difficult problems with which the committee had to deal, and the provision in the bill represents the compromise arrived at."<sup>126</sup>

Senator Saltonstall told the Senate that he favored the law officer concept because of the analogy to a civilian court<sup>127</sup> and on the basis of the decision made by Secretary Forrester.<sup>128</sup> This is in considerable contrast to his ratiocination reported in the Senate subcommittee hearings and quoted below :

“Senator SALTONSTALL. Mr. Chairman, I feel—do you want my opinion now?

Senator KEFAUVER. Yes.

Senator SALTONSTALL. My feeling, Mr. Chairman, is simply this: You put that law officer in and have him vote as a juror, I have always felt that in the civilian rule on not having lawyers eligible for members of the jury, that was a good thing, because they got themselves complicated with questions of law. They go off at angles and get away from the facts.

Now, if you have this man going in there, he can argue his case—I mean he can argue with the fellows in there, with the members of the jury, so to speak, and he can influence them; but in the final analysis, if they are men of common sense, they are not going to take his influence if he goes off on some tangent of law that is, perhaps not sensible.

Therefore, I would agree with the feeling that he should not have a vote.

Senator KEFAUVER. And he shall not retire with the court.

Senator SALTONSTALL. Yes, I would like him to retire.

Professor MORGAN. You would want it on the record?

Senator SALTONSTALL. You mean you would eliminate the retiring of the law officer with the court?

Professor MORGAN. I would not retire him with the court, and if they wanted additional advice, he would come in.

Senator SALTONSTALL. I would rather lean the way that he should not be a member of the jury than contrariwise, and if there is a question of whether he should go in with the jury or not, I would stand by the bill and keep him out.

Senator KEFAUVER. That is my feeling about the matter, so the **staff** will write the bill in that way.”<sup>129</sup>

The above discussion began as a consideration of Article 26 of the proposed **UCMJ**, but Article 61 provisions kept slipping in just as they had in committee hearings. However, Senator Kefauver

<sup>126</sup> 96 Cong. Rec. 1359–1361 (1950).

<sup>127</sup> See text at note 124 *supra*.

<sup>128</sup> See text at note 125 *supra*.

<sup>129</sup> *Senate Subcommittee Hearings* 308.

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took time to explain proposed Article 51 to the Senate in this language:

“Another example of uniformity is found in article 51, which covers the question of voting and rulings. As set out by the provisions of the article, the law officer now becomes more nearly an impartial judge in the manner of civilian courts. In addition to ruling on interlocutory questions of law during the course of the trial, the law officer is now required to instruct the court, on the record, before it retires as to the elements of the offense and to charge the court on presumption of innocence, reasonable doubt, and burden of proof.”<sup>130</sup>

Senator Morse was among those who did not feel that the UCMJ would provide a system of justice comparable to civilian systems. It is not clear what functions he thought the proposed law officer would in fact perform, but his statement shows that the UCMJ did not go nearly as far as he would in making military justice comparable to civilian criminal law. He said :

“I find to my regret that H.R. 4080 represents a compromise between justice, as I have always thought we understood it in this country, and a so-called military idea of justice advanced by many honorable and well-intentioned officers of our armed services who, however, feel that justice for the civilian is one thing but justice for a member of this country’s armed services is something different.”<sup>131</sup>

### F. Conclusions

From the above historical materials, a strong argument could be developed that Congress intended to provide for a law member, now denominated “law officer,” whose actions would be recorded and who would not participate in the court’s deliberations. This officer would be “like a Federal judge” only to the extent that the Uniform Code bestowed powers upon him similar to those possessed by Federal judges.

The Court of Military Appeals, however, attached more importance to legislative references to the power of the civilian judiciary. To the Court, those arguing for the law officer concept, and the legislators voting for Articles 26 and 51, intended their analogies to the powers and duties of Federal judges to be more than descriptive of the actual provisions of the legislation.<sup>132</sup>

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<sup>130</sup> 96 Cong. Rec. 1362 (1950).

<sup>131</sup> *Id.* at 1430.

<sup>132</sup> Most of the decisions which compared the law officer with the trial judge were written by the three original judges of the Court. Judge Ferguson’s opinions are in accord with those decisions. He was a senator when the UCMJ was enacted, and he recently said that, as a member of Congress, he is sure that Congress had in mind making the court-martial process like the judicial process with the court being like a Federal district court, the board of review like a Federal circuit court of appeals, and the Court of Military Appeals like the Supreme Court. He added that he thought the law officer was placed in the position of being like the Federal trial judge. (Speech at The Judge Advocate General’s School, Charlottes-

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### II. OR WAS IT THE COURT OF MILITARY APPEALS?

Lawyers often use legal concepts which subsume many rules and principles within a single term. Thus, "inherently dangerous," "reasonable man," and "dangerous instrumentality" are shorthand methods of referring to complexes of related ideas. Legal minds accept and use them as such. At the same time, lawyers recognize they have real meaning only as particular rules are applied to specific facts. In like manner, the phrase "like a Federal judge" comprehends many specific attributes of judgeship. Substantive meaning is imported only to the extent that separate facets of the concept are given effect in individual cases.

The judicial evolution of the law officer began in *United States v. Berry* in 1952.<sup>133</sup> The Court of Military Appeals had just begun its interpretation and application of the UCMJ a few months earlier, and it was relatively unfettered by judicial or administrative precedent.<sup>134</sup> A weaker court might easily have limited itself to the strict letter of its mandate. The Court did not choose so to do.<sup>135</sup> It has endeavored ceaselessly to erect a military judicial structure which will compare favorably with civilian judicial systems. The keystone of that structure at the trial level is now, if it was not originally, the law officer.

The Court's language in the *Berry* case keynoted its consistent approach to the position of the law officer :

" . . . . Basically and obviously the law member, like the judge, is the final arbiter at the trial level as to questions of law. He is the court-martial's advisor and director in affairs having to do with legal rules or standards and their application. He is the external and visible symbol

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ville, Virginia, on 4 February 1958). Chief Judge Quinn recently referred to the efforts of the Court to "make the law officer like a Federal judge." (Informal remarks to lawyers being admitted to the Court of Military Appeals on 20 January 1958).

<sup>133</sup> 1 USCMA 235, 2 CMR 141 (1952).

<sup>134</sup> Brosman, *The Court: Freer Than Most*, 6 Vand. L. Rev. 166, 167 (1953). Paul W. Brosman, late Associate Justice of the United States Court of Military Appeals, was there discussing that Court, and he said the ". . . members are enjoined to select from among the juristic principles of civilian forums only those which it believes . . . to be consonant with the needs of justice as administered against a military background. . . . Certainly the civilian rule must ever furnish the guide in the usual case. It does connote, however, that the judges of the Court of Military Appeals in this respect at any rate—enjoy greater freedom to choose than any I know."

<sup>135</sup> *Id.* at 166. "There is, however, a further opportunity available to the Court's bench—one of infinitely broader implications, yet wholly by-productive in character, and unrelated directly to its relatively narrow subject matter jurisdiction. What I have in mind here has to do with the fair and challenging field it enjoys for enlightened and constructive juridical action as the harvest of its very infancy, and the strikingly unique character of its mandate."

## WHO MADE THE LAW OFFICER A “FEDERAL JUDGE”?

of the law in a process which has long been characterized as juristic and must be genuinely regarded as such.”<sup>136</sup>

The law member in the *Berry* court-martial had permitted the president of the court to usurp certain of his functions, and the Court of Military Appeals was concerned about the problem of command control which had been so much in the forefront of congressional considerations a short time before. The Court observed:

“ . . . . The complete independence of the law member and his unshackled freedom from direction of any sort or nature are, we entertain no doubt, vital, integral, even crucial, elements of the legislative effort to minimize opportunity for the exercise of control over the court-martial process by any agency of command. It follows that any abdication by the law officer of his statutory duties and an attendant usurpation of those functions by the president . . . must be viewed with stern suspicion.”<sup>137</sup>

The Court recognized the existence of certain areas wherein the law officer’s authority on interlocutory questions was circumscribed by the UCMJ,<sup>138</sup> but it considered this not material to its particular concern “with the substance — the gist and kernel—of his place and function.”<sup>139</sup>

Whereas the law member in *Berry*<sup>140</sup> abdicated his statutory duties, the law officer in *United States v. Keith*<sup>141</sup> exceeded his powers by going into closed session of court during deliberation on sentence. There he discussed matters of substance with the court-martial members. This time the Court of Military Appeals searched for congressional intent and found that “Congress emphasized in the Uniform Code of Military Justice its desire to insure against any reversion by the law officer to the participation in the deliberations of the court permitted the law member . . . .”<sup>142</sup> The Court noted the prevalent civilian rule against private communications between a civilian judge and jury and added, almost gratuitously:

“ . . . . No one who has read the legislative history of the Code can doubt the strength of the Congressional resolve to break away completely from the old procedure and insure, as far as legislatively possible, *that the law officer perform in the image of a civilian judge*. This policy is so clear and so fundamental to the proper functioning of the procedural reforms brought about by the Uniform Code of Military Justice that it must be strictly enforced.”<sup>143</sup>

By 1953 the Court had made considerable progress in giving direction and effect to the judge concept of the law officer. Judge

<sup>136</sup> U.S. v. *Berry*, 1 USCMA 236, 240, 2 CMR 141, 146 (1962).

<sup>137</sup> *Ibid.*

<sup>138</sup> “. . . ruling made by the law officer . . . upon any interlocutory question other than a motion for finding of not guilty, or the question of accused’s sanity, is final and constitutes the ruling of the court.” Art. 51 (b), UCMJ.

<sup>139</sup> U.S. v. *Berry*, 1 USCMA 235, 240, 2 CMR 141, 146 (1952).

<sup>140</sup> U. S. v. *Berry*, 1 USCMA 235, 2 CMR 141 (1952).

<sup>141</sup> 1 USCMA 493, 4 CMR 85 (1952).

<sup>142</sup> *Id.* at 496, 4 CMR 88.

<sup>143</sup> *Zbid.* (emphasis added).

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Latimer's<sup>144</sup> somewhat extended remarks at the 1963 Army Judge Advocates Conference provide a candid view of the Court's approach.

" . . . . The system today more closely approximates the civilian jury system. . . . I would now like to discuss the improvements in the performance of the law officers. We are all aware that the Code placed a tremendous burden on them. The legislators gave them a job which requires the qualifications of a top-flight judge, and many new duties were imposed overnight. It has been a difficult readjustment. We on the Court recognize and appreciate that. *We began with the attitude that we should assist in raising the law officer's status to that of a trial judge*, and progress has been made along that line. . . . I hope that we build the law officer up in dignity and strength . . . , I believe that as soon as he commences to realize that he will be supported, he will do a better job. He will not listen to the senior officers on the court, and he will take the law as he finds it, and he will interpret it according to his own best judgment and reason. *The opinions of the Court evidence an attempt to build the law officer up to the status of a judge, as in the Federal system, where he controls the court and presides in a manner similar to that of a civilian trial judge.*"<sup>145</sup>

Shortly after Judge Latimer's speech, the Court of Military Appeals took exception to the use of the word "gobbledegook" by the law officer in referring to digression by counsel on apparent irrelevancies. The Court used this case, *United States v. Jackson*,<sup>146</sup> to assert the power and duty inherent in the law officer to control the proceedings. It added a caveat that he should do so with judicial circumspection :

" . . . . The law officer is not a mere figurehead in the courtroom drama. He must direct the trial along paths of recognized procedure in a manner reasonably calculated to bring an end to the hearing without prejudice to either party. Within the framework of that duty, we have accorded him the right to make restrained comments on the evidence and to avoid cluttering up the proceedings with unnecessary, immaterial, or repetitious questions or issues. However, law officers must be careful to maintain an impartial and scrupulously fair attitude throughout the trial, for their conduct perforce influences the tone of the entire proceeding."<sup>147</sup>

In *United States v. Biesak*, decided in 1954, the Court had to determine whether the law officer had abused his discretion in giving certain instructions on insanity, and it wrote :

" . . . . However, in accordance with our aim to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system, we shall allow him great freedom . . . [to instruct on inferences]."<sup>148</sup>

This was the first instance in which the law officer position was specifically compared to that of a Federal judge.

<sup>144</sup> George W. Latimer, Judge, United States Court of Military Appeals; formerly member of Utah Supreme Court.

<sup>145</sup> Latimer, *Improvements in the Administration of Military Justice*, 1953 Army Judge Advocates Conference 21, *passim* 24-27 (emphasis added).  
<sup>146</sup> 3 USCMA 646, 14 CMR 64 (1954).

<sup>147</sup> *Id.* at 662, 14 CMR 70.

<sup>148</sup> U.S. v. Biesak, 3 USCMA 714, 722, 14 CMR 132, 140 (1954)

## WHO MADE THE LAW OFFICER A “FEDERAL JUDGE”?

Fraternization with court members during the pendency of a trial was cause for partial reversal where the law officer discussed elements of the case with court members and placed civilian defense counsel in a dilemma by the thrust of his questions during the informal out-of-court discussions held in the absence of the accused.<sup>149</sup> The Court reversed the finding of guilty directly affected by the alleged errors without engaging in speculation as to the precise effect of individual errors “in light of the egregious character of the irregularities involved here.”<sup>150</sup> The Court made several “basic conclusions”<sup>151</sup> from the various errors :

“ . . . . One is that the law officer demonstrated unawareness of his overriding, if tacitly expressed, duty to avoid, as much as possible, fraternization with court members and trial personnel during the course of the hearing. . . . [T]here exist certain basic principles which underlie the conduct of trials by court-martial . . . . Not the least of these is that the court’s actions and deliberations must not only be untainted, but must also avoid the very appearance of impurity. . . . We need not—and do not-question the motives of the law officer . . . . The point is that he sadly neglected appearances. The Uniform Code purports to set the law officer apart from court members—much as a judge is set apart from the jury.”<sup>152</sup>

Judge Latimer did not feel that reversal was required, but neither did he condone the actions of the law officer.<sup>153</sup> The choice of the phrase “sadly neglected appearances” might suggest to some that substance was not of too much consequence so long as the form of propriety was observed. Taken in its context, it is apparent that it meant the law officer must observe the substance as well as the form of judicial discretion, decorum, and impartiality out of court as well as in when he deals with members, counsel, or accused. When he is trying a case, the law officer must “steel himself to accept loneliness as his daily diet.”<sup>154</sup>

<sup>149</sup> U.S. v. Walters, 4 USCMA 617, 16 CMR 191 (1954).

<sup>150</sup> *Id.* at 635, 16 CMR 209.

<sup>151</sup> *Id.* at 629, 16 CMR 203.

<sup>152</sup> *Id.* at 629–630, 16 CMR 203–204.

<sup>153</sup> Latimer, *Improvements and Suggested Improvements in the Administration of Military Justice*, 1954 Army Judge Advocates Conference 49, 54. In his reported speech, Judge Latimer said: In this case (Walters) “we were confronted with a situation in which the law officer fraternized with members of the court and failed in some degree to preserve the dignity of his office. I said all I could in behalf of the officer in my dissenting opinion, but I can assure you that the sooner all law officers conduct themselves in accordance with the principles announced in the majority opinion, the sooner will we have a better system. . . . I did not. . . condone the conduct of the law officer . . . . The important lesson to learn from that case is that the law officer must, in addition to becoming a better judge, at least during the time he is trying a case, steel himself to accept loneliness as his daily diet.”

<sup>154</sup> *Ibid.*

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Another 1954 decision, *United States v. Stringer*,<sup>155</sup> discussed the law officer in general terms and concluded that he can declare a mistrial. At this point, the case is particularly revealing for another purpose. It is an unmistakable signpost on a trail which leads the law officer directly to the judge's bench. By the time this case was decided, the "judge concept" of the law officer was firmly established in general terms, and the Court used its former analogy as a basis for finding this new power. Three opinions were rendered in the case, and the language and reasoning of each are worthy of consideration.

Briefly, the facts of the case were these: Certain highly prejudicial remarks were made at the first trial of the accused, and the convening authority directed withdrawal of the charges from the court. The accused was later brought to trial on the same charge and specification. A defense claim of former jeopardy was denied, and the trial proceeded to conviction. The case was appealed to the Court of Military Appeals on two issues: (1) was the accused's plea of former jeopardy properly overruled at the trial, and (2) did the law officer err in admitting the deposition of the victim.<sup>156</sup> Judge Brosman, who wrote the "majority" opinion, did not feel that the second proceeding was precluded by double jeopardy arising from the action at the first trial, but he reversed for inadmissibility of the deposition.<sup>157</sup> Chief Judge Quinn was of the opinion that double jeopardy attached because the convening authority "illegally usurped the duties of the law officer."<sup>158</sup> Judge Latimer felt that double jeopardy had attached because the "withdrawal was arbitrary and legally unfair to the accused."<sup>159</sup>

The case could have been decided without touching upon the authority of the law officer to grant a mistrial. Neither the UCMJ nor the Manual for Courts-Martial give the law officer express power to declare a mistrial;<sup>160</sup> but the UCMJ,<sup>161</sup> by implication, and the Manual,<sup>162</sup> in more direct language, grant substantially that power to a convening authority in cases of "manifest necessity." Therefore, if the Court was to find such authority for the law officer, it would have to find it as an implied rather than an express power.

<sup>155</sup> 5 USCMA 122, 17 CMR 122 (1954).

<sup>156</sup> *Id.* at 126, 17 CMR 126.

<sup>157</sup> *Id.* at 136, 17 CMR 136.

<sup>158</sup> *Id.* at 140, 17 CMR 140.

<sup>159</sup> *Id.* at 148, 17 CMR 148.

<sup>160</sup> Mistrial is not discussed in either the UCMJ or MCM. See *U.S. v. Stringer*, 5 USCMA 122, 142, 17 CMR 122, 142 (1954).

<sup>161</sup> Art. 44(c), UCMJ; *U.S. v. Stringer*, 6 USCMA 122, 143, 17 CMR 122, 143 (1954).

<sup>162</sup> Pars. 56b, 68d, MCM, 1951; *U.S. v. Stringer*, 5 USCMA 122, 130, 17 CMR 122, 130 (1954).

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The opinions of the judges will be considered again later, but certain portions of their opinions relating to mistrial are particularly interesting in view of the final decision. Judge Brosman :

“[I] must confess to substantial misgivings concerning the legislative authorization for this result [authority of law officer to declare a mistrial] . . . However, since my brothers are convinced that the law officer **does** possess the power to declare a mistrial, this ruling must be regarded as constituting the law of the Court.”<sup>163</sup>

Chief Judge Quinn :

“[I]t is clear that the law officer has the same power as a trial judge on the question of declaring a mistrial. . . . The majority admit that the convening authority does not, and probably cannot, properly observe the impact of any prejudicial incident. . . . Nevertheless, they grant him the exclusive right to inject himself into the trial, and decide whether a mistrial should or should not be granted.”<sup>164</sup>

Judge Latimer :

“It is not necessary in this case that we determine the power of a law officer to declare a mistrial. . . . However, the matter has been reached by my associates, so it should be laid to rest. . . . I have no hesitancy in concluding that when Congress decreed that a law officer should rule finally on interlocutory questions arising during the course of a hearing, it did not mean to reserve mistrials from that category.”<sup>165</sup>

Later cases make it clear that the law officer has the power to declare a mistrial, and it is error for him not to do so in a proper case.<sup>166</sup> How did the Court find this power? The answer to that suggests a method the Court might well **use** to give additional judicial powers to the law officer when the right cases come along.

Judge Brosman traced the authority to terminate proceedings without having jeopardy attach, and he concluded that it was vested in the trial judge in most civilian jurisdictions. He **noted** that the convening authority had been granted this power in the military in cases of “manifest necessity.”<sup>167</sup> He then looked to the law officer’s powers and observed: “While all of the members of this Court recognize that, in general, the law officer must be deemed the court-martial’s ‘judge,’ it is undeniable that in some respects Congress *did* create a different role for him—whether we like *it or not.*”<sup>168</sup> He expressed the feeling that “all of the members of

<sup>163</sup> *Id.* at 131, 17 CMR 131.

<sup>164</sup> *Id.* at 139, 17 CMR 139.

<sup>165</sup> *Id.* at 140, 142, 17 CMR 140, 142.

<sup>166</sup> *E.g.*, U.S. v. Patrick, 8 USCMA 212, 24 CMR 22 (1957); U.S. v. Harris, 8 USCMA 199, 24 CMR 9 (1957); U.S. v. Batchelor, 7 USCMA 354, 22 CMR 144 (1956); U.S. v. Richard, 7 USCMA 46, 21 CMR 172 (1956); U.S. v. Smith, 6 USCMA 521, 20 CMR 237 (1955); U.S. v. Carver, 6 USCMA 258, 19 CMR 384 (1955). U.S. v. Stringer is cited as the authority.

<sup>167</sup> U.S. v. Stringer, 5 USCMA 122, 130, 17 CMR 122, 130 (1954).

<sup>168</sup> *Ibid.* (emphasis added).

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this Court appear to agree generally on the desirability of a rule which would permit the law officer to declare a **mistrial**,"<sup>169</sup> but after his examination into the legislative history of the Code he had misgivings concerning a legislative authority for the result. He did not decide one way or the other "since my brothers are convinced that the law officer **does** possess the power to declare a mistrial . . . ." <sup>170</sup>

Chief Judge Quinn, on the other hand, had no difficulty in deciding that the law officer could declare a mistrial. He found this answer in the very statement of the question of whether the convening authority or the law officer could declare a mistrial because of alleged misconduct of a court member. He concluded that it was solely within the law officer's **power**<sup>171</sup> despite the express Manual provisions granting to the convening authority the power to withdraw a case from the court-martial under certain **circumstances**.<sup>172</sup> But he did not stop there. He considered the prior cases in which the law officer had been analogized to a trial judge<sup>173</sup> and concluded:

" . . . Consequently, it would seem that, if the civilian judge, the law officer's prototype, has inherent power to declare a mistrial, the law officer possesses the same authority, unless the Uniform Code directly or by necessary implication deprives him of it. It is appropriate, therefore, to ascertain the power of a civilian judge to declare a mistrial, and the nature of such power."<sup>174</sup>

He found this power to be irrefutably established in a civilian judge, and he wrote: "Since the declaration of a mistrial does not end the proceedings against the accused, its interlocutory nature is virtually **self-evident**."<sup>175</sup> It was a simple step from this to the conclusion that a law officer has the power to rule on interlocutory matters during trial except in specified areas, and "since the declaration of a mistrial is interlocutory, the Uniform Code plainly requires the law officer, not the convening authority, to make the initial ruling."<sup>176</sup> He buttressed his position with certain remarks made during congressional hearings<sup>177</sup> on the UCMJ and concluded that these hearings "should remove any possible doubt as to the authority of the law officer to declare a **mistrial**."<sup>178</sup> The portion of the

<sup>169</sup> *Id.* at 131, 17 CMR 131.

<sup>170</sup> *Zbid.*

<sup>171</sup> *Id.* at 138, 17 CMR 138.

<sup>172</sup> *Pars.* 56b and 68d, MCM, 1951.

<sup>173</sup> Listed in *U.S. v. Stringer*, 5 USCMA 122, 137, 17 CMR 122, 137 (1954).

<sup>174</sup> *Zbid.*

<sup>175</sup> *Id.* at 138, 17 CMR 138.

<sup>176</sup> *Zbid.*

<sup>177</sup> *House Subcommittee Hearings* 1154.

<sup>178</sup> *U.S. v. Stringer*, 5 USCMA 122, 138, 17 CMR 122, 138 (1954).

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hearings cited by Chief Judge Quinn in support of his position was also cited by Judge Brosman to suggest the absence of a clear showing that Congress intended to vest the law officer with power to declare a mistrial.<sup>179</sup> The latter part of the hearings cited by Judge Brosman followed a general discussion concerning the finality of the law officer’s rulings and ended :

“Mr. DURHAM. He [the law officer] would still have the right to rule on a *mistrial*, wouldn’t he?

“Mr. LARKIN. That is right; he has the right. On a motion for a dismissal **or** a motion for acquittal he has the right to rule, but in that case **as** in the case of insanity his ruling is subject to veto by the court.”<sup>180</sup>

The only difference in the quotations by Chief Judge Quinn and Judge Brosman in the *Stringer* opinion is that Chief Judge Quinn did not include Mr. Larkin’s reply. Nor did he advert to the fact that Mr. Durham **was** not an attorney by profession, that he may not have been speaking of mistrial in its technical sense, or that Mr. Larkin’s response suggests that Mr. Larkin was referring to something other than mistrial in the lawyer’s sense.

Judge Latimer’s dictum in support of the mistrial power is based in part on the fact that he could “find no Congressional expression which intimates that the same power does not **vest** in the law officer . . . .”<sup>181</sup>

The short of it is that the whole discussion of mistrial was unnecessary to the decision, and at best it was dictum. The Court thought the law officer should have the power to declare a mistrial, but it also recognized that in some respects Congress did create a different role for **him**.<sup>182</sup> The Court liked the result and it found nothing which would preclude it. Now the mistrial dictum is the principal thing for which the case is remembered. The opinions in the case also suggest that where the Manual and UCMJ are silent on the law officer’s powers, the Court will stretch to find that the power exists, even if no one knew of it **before**.<sup>183</sup>

An excellent opportunity to extend the law officer’s authority by analogy to civilian practice was presented in *United States v. Jones*<sup>184</sup> decided in 1966. There, after considerable testimony had

<sup>179</sup> *Id.* at 131, 17 CMR 131.

<sup>180</sup> *House Subcommittee Hearings* 1154 (emphasis added), quoted in *U.S. v. Stringer*, 5 USCMA 122, 131, 17 CMR 122, 131 (1954).

<sup>181</sup> *U.S. v. Stringer*, 5 USCMA 122, 140, 17 CMR 122, 140 (1954).

<sup>182</sup> *Id.* at 130, 17 CMR 130.

<sup>183</sup> *Id.* at 135, 17 CMR 135. Judge Brosman wrote: “Moreover, although we now rule that the law officer has—since the enactment of the Code—possessed the authority to declare a mistrial, it would appear, in light of the unbroken chain of precedents to the contrary, that he was totally unaware that he did **so**.”

<sup>184</sup> 7 USCMA 283, 22 CMR 73 (1956).

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been adduced, a member of the court mentioned a fact which indicated that the thirteenth Manual ground for challenge<sup>185</sup> was applicable to him. Neither side entered a challenge, and thereupon the law officer excused the member subject to objection by any member of the court and over defense objection. Unlike the mistrial situation where both the UCMJ and the Manual are silent on the law officer's powers, both of these authorities do contain provisions concerning challenges.<sup>186</sup> The Board of Review had recognized the applicability of these provisions and gave them full consideration.<sup>187</sup> The Board sought to determine the power and authority of the law officer. It found the answer in Court of Military Appeals decisions which "equated the law officer to a civilian judge."<sup>188</sup> It concluded that Article 29(a), UCMJ, and paragraph 62a of the Manual were not expressions "of limitation upon the power of a law officer to excuse a court member for cause on his own motion,"<sup>189</sup> and, therefore, the law officer's action was not erroneous.

The Court of Military Appeals did not attempt to support the law officer's action by analogy to civilian trial practice. Rather, the majority thought the law officer's actions were erroneous in view of UCMJ provisions which set out a method for determination of challenges.<sup>190</sup> The majority was further of the opinion that the portion of the Manual's trial procedural guide which indicates that the law officer "may excuse the challenged person 'subject to the objection of any member' -- is contrary to the UCMJ."<sup>191</sup>

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<sup>185</sup> Par. 62f(13), MCM, 1951. It is a general, catch-all ground. Compare par. 62h(2), MCM, 1951, which provides that: "If a member or law officer is challenged for any of the first eight grounds enumerated in 62f, and he admits the fact upon which the challenge is based, or if in any case it is manifest that a challenge will be unanimously sustained, the member . . . will be excused forthwith unless objection or a question is made or raised . . . ."

<sup>186</sup> Par. 62, MCM, 1951. A portion of the paragraph is quoted in note 185 *supra*. Paragraph 62a, MCM, 1961, provides in part that "members of a general or special court-martial . . . may be challenged by the accused or the trial counsel for cause stated to the court." Article 29, UCMJ, provides generally that a court member shall not be excused after arraignment except "as a result of a challenge."

<sup>187</sup> CM 386050, Jones, 20 CMR 438,440-441 (1966).

<sup>188</sup> *Id.* At 441.

<sup>189</sup> *Ibid.* The board of review had said earlier in the opinion that "The question is, therefore, raised whether the language of paragraph 62a is mandatory and denies the law officer the right of making a challenge or is simply directory. The fact that the law officer 'excused' the member rather than 'challenged' him is of no importance . . ." *Id.* at 440.

<sup>190</sup> Art. 41, UCMJ (Challenges); Art. 61, UCMJ (Votings and Rulings); Art. 62, UCMJ (Number of Votes Required).

<sup>191</sup> *U.S. v. Jones*, 7 UBCMA 283, 285, 22 CMR 73, 75 (1966). The majority felt that Articles 41 and 51, UCMJ, allowed a challenged member to

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The decision is not all negative in its approach inasmuch as the Court said the law officer's action did not prejudice the accused. The Court used this case to say that the law officer is authorized to challenge a court member for cause on his own motion even though there is no UCMJ or Manual provision to this effect.<sup>192</sup>

*United States v. Stringer* was the last decision by the original Court membership<sup>193</sup> to delve into the law officer as a judge concept to any depth. All three judges had obviously sought to enhance the law officer's position and to give him authority and discretion to the greatest extent possible. At the same time, they tried to prohibit him from acting in a way which would detract from his judicial position. The appointment of Judge Homer Ferguson to the Court in 1956 left open the question of what stand he would take concerning the law officer's position. His opinions were laid out in detail for the first time in his dissent in *United States v. Mortensen*.<sup>194</sup> It was immediately apparent that he would probably go even further than had Judge Brosman in equating the law officer to a civilian judge. The problems in *Mortensen* were raised by alleged impropriety of the law officer's pre-trial participation in the case when he had certain amendments made to a specification which he deemed insufficient. At the trial, defense counsel sought to have the amendment stricken on motion. The law officer denied this motion after an out-of-court hearing at which he disclosed in full his prior participation in the case, and defense counsel waived his right to challenge him for cause.

The majority and concurring opinions characterized the law officer's actions as “ill-advised activities,”<sup>195</sup> “injudicious behavior,”<sup>196</sup> “misconduct,”<sup>197</sup> and “impropriety,”<sup>198</sup> but they affirmed the conviction because of waiver of right to challenge, lack of prejudice on the basis of the findings, and because the evidence was adequate to support the findings. Furthermore, said Judge

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be excused only after a vote by the court in accordance with the procedures set out in Arts. 51(a) and 52, UCMJ. Art. 29(a), UCMJ, provides that no member shall be absent or excused after arraignment except for physical disability, or as a result of challenge, or by order of the convening authority for good cause. The challenge in Jones was made after arraignment.

<sup>192</sup> *Id.* at 286, 22 CMR 76.

<sup>193</sup> Chief Judge Robert E. Quinn, Judge Paul W. Brosman, and Judge George W. Latimer. Judge Brosman died on 21 December 1955. Judge Homer Ferguson participated in a written decision for the first time on 26 May 1966.

<sup>194</sup> 8 USCMA 233, 24 CMR 43 (1967).

<sup>195</sup> *Id.* at 234, 24 CMR 44.

<sup>196</sup> *Id.* at 236, 24 CMR 45.

<sup>197</sup> *Id.* at 237, 24 CMR 47.

<sup>198</sup> *Ibid.*

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Latimer, the law officer's conduct did not raise the question of statutory disqualification—as distinguished from eligibility—set out in Article 26 (a) of the Code.<sup>199</sup> The majority's remarks on the nature of the law officer's functions used a negative rather than a positive approach. Thus, Judge Latimer said :

“[A] law officer is not authorized to carry out any judicial functions which affect the rights of an accused to a fair trial except that they be in the courtroom and on the record.”<sup>200</sup>

And Chief Judge Quinn wrote :

“ . . . . The worst that can be said of his action is that it indicates a misconception of his judicial functions . . . . ”<sup>201</sup>

Judge Ferguson was much more upset by the law officer's conduct than were the other two judges who had done so much to espouse and develop the judicial role of the law officer. Judge Ferguson thought that the law officer's conduct was so “inherently prejudicial to the substantial rights of the accused as to amount to a denial of military due process.”<sup>202</sup> He used this case as a vehicle to review the Court's development of the law officer and to set out his own views. Although his opinion is a dissent, it serves the two valuable purposes of setting out the judicial evolution of the law officer and of putting Judge Ferguson on record as being a proponent of the law officer-as-a-judge concept.

He emphasized that the Court's action in analogizing the law officer to a judge was not inadvertent :

“A long unbroken line of decisions of this Court eloquently attests to the efforts made to equate the position occupied by the law officer to that held by a trial judge in civilian practice. It was recognized early in the history of this Court that only by such equation could the broad and sweeping remedial changes in the system of military justice envisioned by the Congress in the Code become a reality.”<sup>203</sup>

Judge Ferguson found ample evidence of this congressional intent in “sentiments . . . frequently interspersed throughout the House and Senate Hearings and Reports on the Uniform Code of Military Justice.”<sup>204</sup>

It is interesting to note that of the six UCMJ legislative history passages<sup>205</sup> cited, the first four were made by Professor Edmund Morgan, and in two of them<sup>206</sup> he was careful to point out that

<sup>199</sup> *Id.* at 236, 24 CMR 46; Chief Judge Quinn made substantially the same remark in his concurring opinion at 8 USCMA 237, 24 CMR 47.

<sup>200</sup> *Id.* at 235, 24 CMR 45.

<sup>201</sup> *Id.* at 236, 24 CMR 46.

<sup>202</sup> *Id.* at 238, 24 CMR 48.

<sup>203</sup> *Id.* at 239, 24 CMR 49.

<sup>204</sup> *Ibid.*

<sup>205</sup> He cited: *House Subcommittee Hearings* 607; *Id.* at 1153; *Senate Subcommittee Hearings* 40, 57, 287; S. Rep. No. 486 at 6.

<sup>206</sup> *House Subcommittee Hearings* 1153 and *Senate Subcommittee Hearings* 57.

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there had been a committee split **as** to the proposed status of the law officer. The fifth citation appears to have been directed to the remarks of Admiral **Russell**,<sup>207</sup> who said merely that if the law officer is “going to act in a judicial capacity, which he is, he ought to leave to the other members the fact finding part of it.”<sup>208</sup> Finally, the sixth citation<sup>209</sup> is to a portion of the Senate report which is a general discussion on the proposed Article **26**, UCMJ. The only pertinent remark there was that since the law officer will instruct the court and rule on interlocutory questions, “it is not considered desirable that the law officer should have the voting privileges of a member of the court. This is consistent with the practice in **civil** courts where the judge does not retire and deliberate with the jury.”<sup>210</sup>

The writer suggests that these citations provide a somewhat tenuous base for Judge Ferguson’s view that “one of the primary goals sought to be achieved by the enactment of the Uniform Code of Military Justice was the creation of the position of law officer with duties and functions **comparable** to those of a civilian trial **judge**.”<sup>211</sup> Regardless of the clarity of such intent, Judge Ferguson’s detailed review of prior cases together with his own comments are conclusive evidence of his intent to conform the law officer to the Federal trial judge to the greatest extent practicable. He did not use the term Federal trial judge, but his reference to law officer powers **as** compared to Federal judge powers suggests that this is what he had in mind. His concluding remarks epitomized his opinion and probably that of the entire Court:

“The sum total of all these cases **seeks** for its purpose the sound erection of **a** trial system with the law officer at its apex. It was to elevate the role of the law officer that we clothe him with substantially the same rights, duties, functions, and obligations of a civilian trial judge. . . . From this Court’s very inception we moved in the direction of creating an independent judicial officer who would demean himself with the dignity and stature customarily found in civilian trial judges. In our prior decisions we took great strides in an effort to accomplish this laudable objective.”<sup>212</sup>

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<sup>207</sup> *Senate Subcommittee Hearings* 287. Rear Admiral George L. Russell was The Judge Advocate General of the Navy.

<sup>208</sup> *Ibid.*

<sup>209</sup> S. Rep. No. 486 at 6.

<sup>210</sup> *Ibid.* The cited passage is in the “Discussion of the Bill ” (UCMJ) section of the report which points out those areas in which there had been some disagreement. The House Report (H.R. Rep. No. 491) contains almost the same language at page 6. Compare the House of Representatives and the Senate section analysis of Article 26 (H.R. Rep. No. 491 at 16 and S. Rep. No. 486 at 18). The Senate Report on this Article is a verbatim copy of the House Report discussion, and no suggestion is made that the law officer was to be like a judge.

<sup>211</sup> *U.S. v. Mortensen*, 8 USCMA 233, 238, 24 CMR 43, 48 (1957).

<sup>212</sup> *Id.* at 240, 24 CMR 50.

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A recent affirmation of Judge Ferguson's role of the law officer comments in *Mortensen* is found in *United States v. Renton*<sup>213</sup> where the Court castigated a law officer who had aided in drafting specifications and then sat as law officer in the same case. In the course of its opinion, the Court felt **needed** to write :

" . . . , It was the Congress that created the role of law officer and sought to mold him as nearly in the image of a 'civilian judge as it was possible under the circumstances.'<sup>214</sup> . . . In the very first volume of this Court's decisions, we gave prominence to this Congressional intent by acknowledging the 'complete independence of the law member' and we reversed a conviction where the president of a court-martial attempted to usurp many of his functions and prerogatives.<sup>215</sup> . . . [W]e echoed the sentiment that the law officer was not to be considered a mere figurehead in the courtroom drama and that he must maintain an 'impartial and scrupulously fair attitude throughout the trial.'<sup>216</sup> More recently, . . . we criticized a law officer who, during the trial, abandoned his role as an impartial judge and became an interested party for the Government."<sup>217</sup>

The *Renton* case also points the Court's course in controlling the whole courts-martial process :

"Public confidence in military justice, which is so vital to the successful operation of the military establishment, will prevail only so long as there exists in Court-martial proceedings an atmosphere of complete and unshackled freedom from command direction and partiality. Since the pioneer days of this Court's development, it has eagerly sought, whenever the occasion has presented itself, the opportunity to raise the level of military justice to the high and preferred place where it belongs in our free society. In doing so, we were doing nothing more than carrying out what we considered and sincerely believed to be the intent of the Congress of the United States, as evidenced by its overwhelming adoption of the Uniform Code of Military Justice."<sup>218</sup>

The law officer is but one of the military justice instrumentalities the Court has sought to mold in conformance with its view of congressional intent on military justice. Trial counsel, defense counsel, staff judge advocates, court members, investigating officers, and convening authorities all have undergone metamorphosis through judicial decisions which seek to "raise the level of military justice as to the high and preferred place where it belongs in our free society."<sup>219</sup>

<sup>213</sup> 8 USCMA 697, 25 CMR 201 (1958).

<sup>214</sup> *Id.* at 700, 25 CMR 204, citing *House Subcommittee Hearings*. These are the familiar words of Professor Morgan which the Court had relied on previously in finding congressional intent. See *e.g.*, text at note 205 *supra*.

<sup>215</sup> *Ibid.*, citing *U.S. v. Berry*, 1 USCMA 235, 2 CMR 141 (1952).

<sup>216</sup> *Id.* at 701, 25 CMR 203, citing *U.S. v. Jackson*, 3 USCMA, 646, 14 CMR 64 (1964).

<sup>217</sup> *Zbid.*, citing *U.S. v. Kennedy*, 8 USCMA 251, 24 CMR 61 (1957).

<sup>218</sup> *U.S. v. Renton*, 8 USCMA 697, 700, 25 CMR 201, 204 (1958).

<sup>219</sup> *Ibid.*

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The Court’s early opinions on the law officer emphasized the affirmative judicial aspects of his office. They increased his powers and responsibilities ; they gave him dignity and independence consonant with judicial position. Once this pre-eminence was established, the Court began to emphasize “negative” aspects of his office by proscribing certain pre-trial and post-trial activities. They created a list of prohibited activities, as it were, directed toward assurance that an accused is given a completely fair trial untainted by the appearance of evil or indication of judicial partiality.

### 111. CONCLUSION

During the debates on the Uniform Code, opponents of Article 26 complained that comparisons between the law officer and a civilian judge were misleading since the former was not in truth given the powers of the latter. The Court of Military Appeals has gone a long way toward eliminating the basis for this objection. If Congress failed to create a law officer in the image of a Federal judge, the Court is determined to succeed.



## LACK OF MENTAL CAPACITY TO INTEND— A UNIQUE RULE

By Lt. Col. Peter C. Manson\*

Insanity is a complete defense to an otherwise criminal act because criminal responsibility implies an ability to choose between lawful and unlawful acts. In fact, the fundamental basis of criminal law is that human beings have the power to control their actions. Notwithstanding the deterministic views of some psychiatrists which are incompatible with the idea of free will, the criminal law clings steadfastly to the notion of “a separate little man in the top of one’s head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse.”<sup>1</sup> Old fashioned as it may seem, and regardless of its theoretic validity, this concept of reasoned behavior is essential to the practical administration of justice. The law “is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct.”<sup>2</sup> Although it is realized that individuals vary in the amount of self-control they possess, the criminal law cannot be made to fit the individual weaknesses of each individual wrongdoer. Any attempt to do so would make the law impossible to administer. Fine distinctions must give way to practicality, and the criminal law can describe only in somewhat arbitrary terms that small class of individuals who are so lacking in self-control that they should not be held responsible for their acts.

Except for infants, the only class of individuals who are free from criminal responsibility are those who lack mental responsibility. A majority of the States define a lack of mental responsibility in terms of the M’Naghten rules, that is, knowledge that the act is **wrong**.<sup>3</sup> A minority of the States and a majority of the Federal jurisdictions combine the M’Naghten rules with some **form** of “irrwistible impulse test.”<sup>4</sup> The long established military definition of mental responsibility is in this latter **group**.<sup>5</sup> It is

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<sup>1</sup> Holloway v. U. S., 148 F.2d 666, 667 (D. C. Cir. 1946).

<sup>2</sup> Gregg Cartage & Storage Co. v. U. S., 316 U.S. 74, 79–80 (1942).

<sup>3</sup> Weihofen, Mental Disorder as a Criminal Defense 61 (1964); M’Naghten’s Case, 10 Clark & Fin. 200 (1843).

<sup>4</sup> *Zbid.*

<sup>5</sup> Winthrop, Military Law and Precedents 294 (2d ed. 1920 reprint).

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phrased in terms of whether the accused was, at the time of the offense, so far free from mental disease, defect, or derangement as to be able concerning the particular act charged to distinguish right from wrong and to adhere to the right.<sup>6</sup> This combination of the M'Naghten rules and the irresistible impulse test conforms rather closely to the modern psychiatric view that human conduct is based upon an integration of cognition (knowledge), volition (free will), and emotion.<sup>7</sup> The M'Naghten rules (knowledge of right and wrong) take into consideration cognition and the irresistible impulse test (inability to adhere to the right) relates to volition and, possibly, emotion.<sup>8</sup> It is obvious that this combination provides a more liberal test than that in force in the majority of the States. Nevertheless, it is subject to criticism in its requirement that the individual must be *completely* 'deprived of his ability to distinguish right from wrong and adhere to the right. A partial deprivation is insufficient.<sup>9</sup> It is doubtful that this rigid requirement rests on a sound medical foundation. Psychiatrists have observed that even a most psychotic person responds to orders given by his attendant and, thus, could not be said to be completely unable to know right from wrong and adhere to the right. It is this aspect of the legal test of insanity which gives psychiatrists the most difficulty.<sup>10</sup> It may be that this strict requirement also influenced the Court of Military Appeals in its development of the rule of partial mental responsibility or, as it is now called, *lack of mental capacity to intend*.<sup>11</sup>

Lack of mental capacity to intend means simply that an individual who is suffering from a mental condition may be able to know right from wrong and adhere to the right in a general criminal sense, but may not have the mental capacity to premeditate or entertain a specific criminal intent. Thus, it may have the effect of reducing premeditated murder to unpremeditated murder, and it is a complete defense to those offenses which are based upon a specific criminal intent. The rule is not widely accepted in civilian jurisdictions. About one-fourth of the States have adopted the rule

<sup>6</sup> Par. 120*b*, MCM, 1951.

<sup>7</sup> Overholser, *The Role of Psychiatry in the Administration of Criminal Justice*, 93 J. Am. Med. Assn. 830 (1929).

<sup>8</sup> Model Penal Code, Art. 4 (Tent. Draft No. 4, 1955).

<sup>9</sup> Par. 120*b*, MCM, 1951. The military test is not alone in this respect. It appears that most jurisdictions have the same rigid requirement of complete incapacity. See Model Penal Code, Art. 4 (Tent. Draft No. 4, 1955).

<sup>10</sup> Model Penal Code, Art. 4 (Tent. Draft No. 4, 1955).

<sup>11</sup> This latter term is more descriptive but it should not be confused with the term "lack of mental capacity" which is used in MCM, 1951, as meaning a lack of capacity "to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense." Par. 1200, MCM, 1951.

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insofar as it affects premeditation.<sup>12</sup> Only rarely, if at all, have civilian jurisdictions extended the rule to specific criminal intent offenses.<sup>13</sup>

The rule of lack of mental capacity to intend is not to be found in the Manual for Courts-Martial, nor was it mentioned by the Court of Military Appeals until 1964. In *United States v. Higgins*,<sup>14</sup> the Court stated (by way of dicta) :

“ . . . . Moreover, if an accused person may lessen his criminal responsibility by a showing that he was not able to entertain premeditation, intent, or knowledge due to voluntary intoxication—a condition largely within his own control, and disapproved by society and the law—we would regard as anomalous a refusal to permit a showing that premeditation, intent, or knowledge was or might be wanting due to some mental derangement—usually without the accused’s control. It would seem to follow that if an accused person produces evidence of an underlying mental state, which might have served to affect his intent at the time of the acts alleged, then the law officer should advise the court that its members may properly consider the evidence of mental condition in determining the accused’s capacity to entertain premeditation, intent, or knowledge—when any of these is relevant to an offense charged.”<sup>15</sup>

Later in the same year, the case of *United States v. Kunak*<sup>16</sup> was reversed because the issue of lack of mental capacity to premeditate was raised and the law officer failed to instruct the court that the accused could not be convicted of premeditated murder unless it believed that the accused was mentally capable of premeditation. The next year, 1955, this rule as to premeditation was extended to a specific criminal intent offense in *United States v. Carver*.<sup>17</sup> There it was held that mental impairment, short of insanity, may render an accused unable to form the specific criminal intent to commit robbery. This opinion fully established the rule of lack of mental capacity to intend. The language used therein clearly indicated that the rule would be applicable to any offense requiring a specific criminal intent. There is no doubt that it will likewise be applicable to offenses which require states of mind comparable to specific criminal intent, such as wilfulness or specific knowledge—e.g., knowledge of the possession or use of narcotics. The chief problems seem to be what evidence is necessary to raise the defense of lack of capacity to intend and whether the rule will be extended to offenses requiring only a general criminal intent.

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<sup>12</sup> Weihs, *Mental Disorder as a Criminal Defense* 183 (1954) ; see also dissenting opinion of Judge Latimer in *U. S. v. Storey*, 9 USCMA 162, 25 CMR 424 (1958).

<sup>13</sup> *Ibid.*

<sup>14</sup> 4 USCMA 143, 15 CMR 143 (1954); the rule was also mentioned in *U. S. v. Edwards*, 4 USCMA 299, 15 CMR 299 (1954).

<sup>15</sup> *U. S. v. Higgins*, 4 USCMA 143, 148, 15 CMR 143, 148 (1954).

<sup>16</sup> 5 USCMA 346, 17 CMR 346 (1954).

<sup>17</sup> 6 USCMA 258, 19 CMR 384 (1955).

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It is to be noted that in both the *Kunak* and *Carver* cases there was evidence of mental disease, defect, or derangement. Both accused were shown to be suffering from schizophrenia. In the later case of *United States v. Dummahoe*,<sup>18</sup> on the other hand, the medical testimony did not establish any psychotic or psychoneurotic disorder. The most that was shown was that the accused, who was convicted of premeditated murder, was a volcanically explosive individual and was diagnosed as having an aggressive type of character or behavior disorder. This kind of disorder is known variously as pathologic personality, constitutional psychopathy, or psychopathic personality.<sup>19</sup> It is generally considered to be a defect of character, will power, or behavior, rather than a mental defect, and persons having this disorder are not usually considered to lack mental responsibility.<sup>20</sup> In previous cases, the Court of Military Appeals had been unwilling to allow a character disorder to have the same effect as a mental defect, disease, or derangement.<sup>21</sup> In *Dummahoe*, the issue on appeal was whether a character disorder should be considered by the court-martial for the purpose of determining the accused's capacity to premeditate. The Court stated the issue in these terms: "[W]hile a character or behavior disorder cannot be used as a complete defense to a charge of murder, may it be taken into account as evidence tending to reduce the crime from premeditated to unpremeditated murder?"<sup>22</sup> It was concluded that a character disorder could "affect" one's capacity to premeditate, provided its nature and severity was such that the disorder may have "interfered" with the accused's capacity to contrive and design. Although the opinion clearly held that a character disorder could interfere with, or affect, an accused's capacity to premeditate, it did not state that a character disorder can bring about a complete mental incapacity to premeditate. In other words, the Court may have been concerned only with the effect of a character disorder on the issue of whether or not the accused *did in fact* premeditate; this is a different issue from whether or not a character disorder can cause a mental *incapacity* to premeditate. Furthermore, the opinion does not indicate whether it is limited to premeditation or whether a character disorder may also affect an

<sup>18</sup> 6 USCMA 745, 21 CMR 67 (1956).

<sup>19</sup> Par. 13, Dept. of the Army Technical Pamphlet, TM 8-240, Psychiatry in Military Law, May 1953.

<sup>20</sup> *Ibid.*; par. 120b, MCM, 1951; Weihofen, Mental Disorder as a Criminal Defense 26 (1954).

<sup>21</sup> *E.g.*, U. S. v. Smith, 5 USCMA 314, 17 CMR 314 (1954), holding that a psychopath cannot qualify for exculpation by reason of irresponsibility because he is not deemed to possess a mental defect, disease, or derangement.

<sup>22</sup> 6 USCMA 745, 753, 21 CMR 67, 75 (1956).

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individual's capacity to entertain a specific criminal intent. These issues were raised in the recent case of *United States v. Storey*.<sup>23</sup>

Storey was convicted of offenses requiring a specific criminal intent. There was psychiatric testimony that he was suffering from a character disorder and that although he could distinguish right from wrong and adhere to the right his ability to do so was impaired. The Court stated the question in this way: "May a condition characterized as a character and behavior disorder cause a lack of mental capacity to intend?" It then proceeded to point out why the question would not be answered :

"For this Court, therefore, the question is not one of classification but of effect. We are concerned only with whether credible evidence exists which may properly be considered by the triers of the fact in determining whether an accused lacks the mental capacity to entertain a specific intent or have whatever other state of mind is required for the offense charged. . . . Accordingly, we hold that it is the evidence presented concerning the disorder which raises the issue and not the nomenclature used to classify it."<sup>24</sup>

By using this approach to the problem, the Court evaded the task of determining the legal effect of medical labels. But the more important question of whether lack of mental capacity to intend must be based upon a mental disease, defect, or derangement remained unanswered. It may be quite appropriate for the Court to leave medical diagnosis to the experts in that field, but the legal definition of lack of mental responsibility has long been based upon mental disease, defect, or derangement, as opposed to defects of the moral faculties.<sup>25</sup> The Court's opinion indicates that the accused's lack of mental capacity to intend must have been brought about by a "disorder" or a "mental condition," but it does not mention the term "mental disease, defect, or derangement." If the Court's phraseology is intentional, it may be taken as an indication that the Court believes that lack of mental capacity to intend may be established by something less than a mental defect, disease, or derangement. This result would constitute a departure from the firmly established rules governing insanity as a complete defense. Lack of mental capacity to intend differs from lack of mental responsibility only in degree. In the latter there must be a mental condition which causes an incapacity to know right from wrong or adhere to the right, and in the former there must be a mental condition which causes an incapacity to pre-

<sup>23</sup> 9 USCMA 162, 25 CMR 424 (1958).

<sup>24</sup> Id. at 167, 25 CMR 429.

<sup>25</sup> Par. 120b, MCM, 1961; U. S. v. Smith, 5 USCMA 314, 17 CMR 314 (1964); see Model Penal Code, Art. 4 (Tent. Draft No. 4, 1955). Even the "Durham rule" requires that the offense be the result of a mental disease or defect. *Durham v. U. S.*, 214 F.2d 862 (D.C. Cir. 1954). New Hampshire has a similar test. *State v. Jones*, 60 N.H. 369 (1871).

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meditate or form a specific intent. Both conditions occur through some sort of breakdown in the thinking processes. Therefore, it would be logical to assume that the basic cause of an incapacity to intend should be the same as the basic cause of an inability to know right from wrong or adhere to the right. So long as the law adheres to the requirement of mental defect, disease, or derangement to establish lack of mental responsibility, it would seem that it should require the same mental infirmity to establish lack of mental capacity to intend. Nevertheless, there seems to be a greater possibility that the Court will adhere to its reasoning in the *Storey* case and hold that it is only concerned with whether there is a lack of mental capacity to intend, leaving the cause therefor to the medical experts. The Court could support this view by equating the defense of lack of mental capacity to intend to the defense of drunkenness which does not require any showing of a mental disease, defect, or derangement.

It is to be noted, in this respect, that the defense of intoxication is limited to offenses requiring premeditation or specific criminal intent.<sup>26</sup> Thus far the Court has limited the defense of lack of mental capacity to intend in the same manner. There is dicta in the *Storey* case, however, which raises the question of whether the rule of lack of mental capacity to intend will be extended to include offenses which require only a general criminal intent. The Court stated that it was concerned with whether there is credible evidence which indicates that an accused lacks the mental capacity to entertain a specific intent "or have whatever other state of mind is required for the offense charged."<sup>27</sup>

This statement could be interpreted as adopting a test of insanity based solely upon whether the accused was capable of forming the state of mind, or *mens rea*, required of the offense, whether it be premeditation, specific intent, general intent, or even negligence. Proponents of this test argue that if the essential principle of the defense of insanity is that a person should not be punished for a crime if he did not entertain the state of mind requisite to constitute that crime, then the test should be phrased in those terms rather than terms of right and wrong.<sup>28</sup> A determination of insanity

<sup>26</sup> U. S. v. Roman, 1 USMCA 244, 2 CMR 150, (1952).

<sup>27</sup> U. S. v. Storey, 9 USCMA 167, 25 CMR 429.

<sup>28</sup> Several writers have stated this to be the essential principle of the defense of insanity. *E.g.*, Weihofen, *Mental Disorder as a Criminal Defense* 177 (1954); Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 635, 553 (1917); Hall, *General Principles of Criminal Law* 478 (1947). It is believed, however, that this principle is not the complete basis for insanity. Insanity is also a defense to offenses which do not require any type of criminal intent. In these offenses, the defense appears to be based upon the fact that the accused was not capable of committing a voluntary act, and not upon a lack of intent.

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would be based upon the resolution of the question: Was the accused, at the time of the act charged, suffering from a mental disorder preventing him from entertaining the *mens rea*, or criminal intent, requisite to the crime?<sup>29</sup>

It is highly unlikely that the Court purported to upset long-standing principles<sup>30</sup> regarding legal insanity with a brief sentence. To begin with, the Court's definition of the lack of mental capacity to intend rule is expressly limited to specific intent or premeditation offenses. The rule comes into play only when the accused is suffering from a mental condition which is *not* so severe that he is incapable of knowing right from wrong and adhering to the right in a *general criminal sense*. Furthermore, the Court of Military Appeals has expressed serious doubt on two occasions that it has the power to change the long established military test of lack of responsibility.<sup>31</sup> Such a radical change could only be accomplished by legislation or, at the least, by an executive order of the President.

Since true legal insanity completely relieves the affected individual of criminal responsibility for his actions, the test for such insanity must be couched in more restrictive terms than a rule which merely relieves an accused from additional punishment for possessing a particularly vicious state of mind. Acceptance of a vague, untested standard in place of the present clearly-defined insanity test would be inconsistent with the fundamental principle of our criminal law, namely, that a man is accountable for his actions unless incapable of recognizing or complying with his legal duty. For these reasons, it is concluded that the defense of lack of mental capacity to intend, like drunkenness, will be limited to offenses requiring premeditation, specific criminal intent, or knowledge.

There is another aspect of the *Storey* case which requires comment. The psychiatric testimony established that his condition was one which would produce only an *impaired* ability to form a specific intent and not a *total* inability to do so. The Court held that such evidence was not sufficient to put in issue the defense of lack of mental capacity to intend and, therefore, it was not necessary for the law officer to instruct the court on that issue. The opinion states :

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<sup>29</sup> This test was proposed by Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 536 (1917), and is discussed briefly in Weihofen, *Mental Disorder as a Criminal Defense* 188 (1964).

<sup>30</sup> *Zbid.* The Federal District of the District of Columbia and New Hampshire may be an exception. See note 25 *supra*.

<sup>31</sup> *U. S. v. Smith*, 5 USCMA 314, 17 CMR 314 (1954); *U. S. v. Kunak*, 5 USCMA 346, 17 CMR 346 (1954).

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“ . . . . There must be evidence from which a court-martial can conclude that an accused's mental condition was of such consequences and degree as to deprive him of the ability to entertain the particular state of mind required for the commission of the offense charged. . . . In the instant case there is a complete absence of any evidence showing *lack of capacity to intend*, as distinguished from *an impaired ability to intend*.”<sup>32</sup>

It is ironic that the Court thus grafted onto its rule of lack of mental capacity to intend the same rigidity which no doubt influenced the Court in developing the rule. Just as there is a requirement for evidence of a *complete* inability to know right from wrong or adhere to the right in the defense of lack of mental responsibility, there must be evidence of a *complete* inability to have the mental capacity to intend in order to place that defense in issue.

The chief criticism which has been leveled at the rule of lack of mental capacity to intend is that it is a technical refinement which is legally confusing and medically without foundation. Psychiatrists admit that the effect of a mental condition on an otherwise criminal act is not something which can be precisely measured. They have difficulty in determining the effect of a mental disorder, and often have considerable trouble in reaching an opinion that a mental disorder is such that there is, or is not, an inability to know right from wrong or adhere to the right.<sup>33</sup> It is easy to imagine the much greater difficulty in reaching an opinion that an individual *has* the ability to know right from wrong and adhere to the right in a general criminal sense, but *has not* the mental capacity to premeditate or form a specific criminal intent. The Supreme Court of the United States has not insisted upon this fine distinction,<sup>34</sup> and the majority of jurisdictions deny that it exists.<sup>35</sup> It is reasoned that if the mind is so frustrated by disease *as* to be unable to formulate an intent or to premeditate, it is a mind which is unable to know right from wrong or adhere to the right. By the same token, a mind capable of knowing right from wrong and adhering to the right must be regarded as being capable of entertaining intent and premeditating.

Notwithstanding the general refusal to accept the rule, lack of mental capacity to intend appears to be in harmony with several firmly established common law principles. These are:

(1) A complete inability to know right from wrong or adhere to the right, if brought about by a mental disease, defect, or derangement, is a complete defense to any crime.

<sup>32</sup> 9 USCMA 162, 167, 25 CMR 424,429 (1958).

<sup>33</sup> Glueck, *Mental Disorder and the Criminal Law* 389 (1925).

<sup>34</sup> *Fisher v. U. S.*, 328 U. S. 463 (1946).

<sup>35</sup> See note 12 *supra*. Nevada has recently voiced its denial of the distinction in *Sollars v. State*, 316 P.2d 917 (1957). The Circuit Court of Appeals for DC, after it evoked the Durham rule, refused to apply the rule of lack of mental capacity to intend in *Stewart v. U. S.*, 214 F.2d 879 (D.C. Cir. 1954).

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(2) There must always be proof that the individual did *in fact* have the requisite criminal intent, whether it be premeditation, specific criminal intent, or general criminal intent; and any evidence which is relevant and material is admissible on this issue.

(3) The military law and that of other jurisdictions has recognized that voluntary intoxication may result in an incapacity to entertain a specific criminal intent.

These three principles provide the logical background to the rule of lack of mental capacity to intend. Because the law recognizes that a defect, disease, or derangement may result in a complete lack of mental responsibility, and that intoxication may result in a lack of capacity to premeditate or form a specific criminal intent, the law should also be willing to recognize a mental condition in which an individual has the mental capacity to form a general criminal intent but does not have the mental capacity to premeditate or form a specific criminal intent.

There is another reason why the rule should be accepted. In view of the present level of psychiatric knowledge, one can only speculate as to whether the rule is medically sound. If psychiatry **can** be classified as a science, it is certainly one which is young and growing. **Its** concepts are changing rapidly. Though something has been learned about *how* the human brain functions, *why* it functions as it does is still a mystery. It is for this reason that the law should avoid codifying medical beliefs. The law should hold steadfastly to the fundamental principle of culpability based upon free will, but it should be flexible enough to accept any advances made in scientific knowledge of human behavior. Psychiatry—not the law—must determine whether it is possible for a person to have mental responsibility in a general criminal sense and yet lack the mental capacity to intend. If expert medical testimony shows this to be possible, it would be unjust for the law to deny this defense. On the other hand, if the evidence conclusively shows it is not possible, the law has lost nothing by being liberal enough to allow as a possible defense a matter which cannot be proved.

There is an even more important reason for adopting the rule of lack of mental capacity to intend. As mentioned previously, the military test of lack of mental responsibility combines the M'Naghten rules with the irresistible impulse test. It is a liberal rule, responsive to modern psychiatric thought, and can be criticized only because of its requirement for a *complete* inability to know right from wrong and adhere to the right. So long as this

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rigid requirement exists, there is a special need for the mitigating effect of the rule of lack of mental capacity to intend.<sup>86</sup>

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<sup>86</sup> The Judge Advocate General of the Army has recommended to Congress the adoption of the test of mental responsibility proposed by the American Law Institute. *Annual Report of The Judge Advocate General of the Army, Submitted to the Committees on Armed Services of the Senate and the House of Representatives for the Period January 1, 1957, to December 31, 1957*. The test is phrased in terms of "substantial," rather than complete, inability. Model Penal Code, Art. 4 (Tent. Draft No. 4, 1955).

# HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, UNITED STATES ARMY\*

By Colonel William F. Fratcher\*\*

On July 3, 1775, General George Washington assumed command of the sixteen thousand New England militiamen besieging Boston and established General Headquarters of the Continental Army at Cambridge, Massachusetts. On July 29 the Second Continental Congress, sitting at Philadelphia, elected William Tudor, Esq., Judge Advocate of the Army.<sup>1</sup> An order issued from General Headquarters the following day announced the appointment and directed that the Judge Advocate was "in all things relative to his office to be acknowledged and obeyed as such." In January 1776, "That no mistake in regard to the said articles may happen," the "Judge Advocate of the Army of the United Colonies" was directed in orders from General Headquarters to countersign each copy of the new articles of war. On July 4, 1776, the United Colonies became the United States of America and, on August 10, Congress accorded Mr. Tudor the title of Judge Advocate General and the rank of lieutenant colonel in the Army of the United States.

John Lawrance of New York was appointed Judge Advocate General of the Army on April 10, 1777.<sup>2</sup> During the incumbency of

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<sup>1</sup> The Continental Congress had adopted Articles of War, based on the British Articles of 1774, on 30 June 1775. 2 Jl. Cont. Cong. 111.

William Tudor was born at Boston in 1750. He graduated from Harvard College in 1769, studied law under John Adams, was admitted to the Massachusetts bar in 1772, and practiced law in Boston until the outbreak of war. Colonel Tudor resigned as Judge Advocate General on 9 April 1777, but remained in the service as lieutenant colonel of Henley's Additional Continental Regiment until April 1778, when he returned to Boston and resumed the practice of law. He was afterward a member of the Massachusetts General Court and Secretary of State of Massachusetts. An oration delivered by Colonel Tudor at Boston on 5 March 1779 is printed in Niles, *Revolution in America* 36-41 (1822). Thirty-nine letters from John Adams to Tudor are printed in the Works of John Adams (C. F. Adams ed. 1856) and several are printed in Old South Leaflets, Vol. VIII, No. 179.

<sup>2</sup> Colonel Lawrance was born in England in 1750, came to New York in 1767, studied law in the office of Lieutenant Governor Colden, and was admitted to the New York bar in 1772. In 1775 he married Elizabeth, daughter of Alexander Macdougall, an ardent patriot and later a major general in the Continental Army, and entered the Army as a second

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Colonel Lawrance, the legal staff of the Army came to include the Judge Advocate General, two judge advocates at General Headquarters, and one judge advocate for each separate army and territorial department (Northern, Middle and Southern). The appointments of the judge advocates at General Headquarters were made by the Judge Advocate General and announced in orders. The other judge advocates were appointed by Congress or by the commanding general of the army or department concerned, under authority delegated by Congress. These officers were variously styled "deputy judge advocate general," "judge advocate" and "deputy judge advocate" but the differences in title do not seem to have indicated differences in status or function as the same individual is indifferently referred to by any of the titles. Certain of the judge advocates were given the rank and pay of captains by a resolution of Congress of June 6, 1777, and on December 21, 1779, Congress accorded the Judge Advocate General the subsistence of a colonel and other judge advocates that of lieutenant colonels. Most of these officers retained commissions in regiments of the line while serving as judge advocates and were commonly referred to by the titles of their lineal rank.<sup>3</sup>

Several of the judge advocates who served during the Revolutionary War are noteworthy. Outstanding among these is Captain John Marshall, 15th Virginia Regiment, who was a member of Congress (1799-1800), Secretary of State (1800-1801), and Chief Justice of the United States (1801-1835). Major John Taylor, 1st Virginia Regiment, became a prominent Jeffersonian Democrat, a political writer of note, and a critic of Chief Justice Marshall.<sup>4</sup> Major Joseph Bloomfield, 3rd New Jersey Regiment, was Attorney General of New Jersey (1783-1792), Governor of New Jersey (1801-1812), Brigadier General, U. S. A. (1812-1815), and member of Congress from New Jersey (1817-1821). In 1780 the two judge advocates at General Headquarters were Thomas Edwards, later Judge Advocate General, and Mr. Strong—possibly Caleb

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lieutenant, 4th New York Regiment, in August of the same year. After the war Colonel Lawrance returned to the practice of law in New York City, where he became a distinguished authority on admiralty law and served as a vestryman of Trinity Church, trustee of Columbia College, Regent of the University of the State of New York, and director of the Bank of the United States. He was a member of the Congress of the Confederation (1785-87), New York State senator (1788-90), first member of Congress from New York City under the present Constitution (1789-93), United States District Judge for the District of New York (1794-96), and United States Senator from New York (1796-1800).

<sup>3</sup> See App., 2.

<sup>4</sup> He was born in Virginia in 1753, attended the College of William and Mary, and was admitted to the Virginia bar in 1774. Major Taylor served as United States Senator from Virginia for a number of years.

Strong, Federalist statesman, United States Senator from Massachusetts (1789–96) and Governor of Massachusetts (1800–07 and 1812–16).

In addition to his duties as a staff officer at General Headquarters of the Continental Army, Colonel Lawrance prosecuted at the most important military trials, an example which was followed by General Holt, who acted as eo-prosecutor at the trial by military commission of the Lincoln assassins in 1865, and by General Cramer, who was co-prosecutor with the Attorney General at the trial by military commission of eight German saboteurs in 1942. In the summer of 1778 he was judge advocate of the general court-martial which found Major General Charles Lee guilty of disobedience of orders, misbehavior before the enemy, shameful retreat and disrespect to the Commander-in-Chief. In the following year Colonel Lawrance conducted the prosecution of Major General Benedict Arnold for permitting a vessel to leave an enemy port, closing the shops in Philadelphia, and using public wagons for his own private business. This proceeding, resulting in his being reprimanded by General Washington, embittered General Arnold. In September 1780 Colonel Lawrance was recorder of the board of officers, precursor of the modern military commission, which investigated the case of Major John Andre, Adjutant General of the British Army, and recommended his execution for coming within the American lines in disguise to conspire with Arnold for the surrender of West Point.

Active hostilities having declined, Colonel Lawrance resigned June 3, 1782, and was succeeded in October by his chief deputy, Thomas Edwards.<sup>5</sup> Lieutenant Samuel Cogswell, 9th Massachusetts Regiment, was appointed deputy to Edwards on November 12, 1782. Colonel Edwards continued in office as Judge Advocate General until November 3, 1783. In June 1784 the remnant of the Continental Army was disbanded and the permanent standing army limited to 80 enlisted men and their officers. This tiny force was expanded somewhat in the succeeding years, but no successor to Colonel Edwards was appointed prior to the adoption of the present Constitution.

The Army was reorganized in December 1792 as the "Legion of the United States" and Lieutenant Campbell Smith, IV Sublegion,

<sup>5</sup> Colonel Edwards was born in Massachusetts in 1753, graduated from Harvard College in 1771, and was admitted to the Massachusetts bar. He entered the Army as a private, Massachusetts Militia, in April 1775, was appointed first lieutenant in the 16th Massachusetts Regiment 31 May 1777, and was detailed as Deputy Judge Advocate General by orders of 9 April 1780. After the war Colonel Edwards returned to the practice of law in Boston and served as Secretary of the Society of the Cincinnati, famous organization of the officers of the Continental Army, from 1786 until his death in 1806.

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who had entered the service from Maryland as an ensign of Infantry in March 1792, was appointed "Judge Marshal and Advocate General" on July 16, 1794, by Major General Wayne. This appointment was terminated by another reorganization of the Army, but Smith, then a captain, 4th Infantry, was appointed Judge Advocate of the Army on June 2, 1797, under the Act of March 3, 1797,<sup>6</sup> which had been enacted to prepare the Army for a threatened war with France. The Act of March 16, 1802,<sup>7</sup> established the United States Military Academy at West Point, limited the line of the Army to three regiments, and abolished the office of Judge Advocate of the Army. Captain Smith was, accordingly, discharged from the service on June 1, 1802.

War with England being imminent, Congress, by the Act of January 11, 1812,<sup>8</sup> authorized the raising of ten regiments of infantry, two of artillery and one of cavalry, and provided that there should be appointed to each division a judge advocate with the pay and emoluments of a major of infantry or, if detailed from the line, an addition to his pay of thirty dollars per month and the forage allowance of a major of infantry. The number of judge advocates was raised to three per division by the Act of April 24, 1816,<sup>9</sup> and reduced again to one per division by the Act of April 14, 1818.<sup>10</sup> Sixteen judge advocates served under this legislation.<sup>11</sup> During the War of 1812 they appear to have acted as judge advocates of tactical divisions. After the reversion of the army to a peacetime basis in June 1815, they were assigned as judge advocates of the two great territorial divisions (Northern and Southern) into which the United States was then divided for military purposes and, during the period from 1816 to 1818 when three judge advocates per division were authorized, as **staff** judge advocates of some of the ten districts, later called "departments," into which the Northern and Southern Divisions were subdivided. Of the judge advocates who served during the War of 1812, the best known is the distinguished authority on international law, Henry Wheaton of New **York**, who remained in service for a year after the war as judge advocate of the Third Military District (southern New York and part of New Jersey).<sup>12</sup>

<sup>6</sup> 1 Stat. 507.

<sup>7</sup> 2 Stat. 132.

<sup>8</sup> 2 Stat. 671.

<sup>9</sup> 3 Stat. 297.

<sup>10</sup> 3 Stat. 426.

<sup>11</sup> See App., 3.

<sup>12</sup> Major Wheaton was reporter of the United States Supreme Court for a number of years (every lawyer is familiar with citations to "Wheat."), Professor of Law at Harvard University, Charge d'Affaires to Denmark, and Minister to Prussia.

The Army was reduced from 62,674 officers and men to 12,383 by the Act of March 3, 1815,<sup>13</sup> and further reduced to 6,126 by the Act of March 2, 1821,<sup>14</sup> which made no provision for judge advocates. Major Samuel A. Storrow of Massachusetts, last judge advocate of the Northern Division, and Major Stockley D. Hays of Tennessee, last judge advocate of the Southern Division, were honorably discharged on June 1, 1821, and the Army did not have a full-time statutory judge advocate again until 1849. A judge advocate, usually a line officer, **was** appointed *ad hoc* for each general court-martial and officers were detailed **as** acting judge **advocates** of the major territorial commands (from 1821 to 1837 the Eastern and Western Departments, thereafter the Eastern and **Western** Divisions). Records of trials by general courts-martial were forwarded to the Adjutant General of the Army, who performed **most** of the normal functions of a Judge Advocate General for the small army of the period. Indeed, some of the letters written by Adjutants General of that period, calling attention to irregularities **in** court-martial records, are unpleasantly similar to the “**skin** letters” which emanate from the office of The Judge Advocate General today.

Colonel James Gadsden of South Carolina, a former Inspector General, was Adjutant General of the Army from August 13, 1821, to March 22, 1822, under a recess appointment which was not confirmed by the Senate. Captain Charles J. Nourse, 2nd Artillery, of the District of Columbia, was Acting Adjutant General from May 8, 1822, to March 7, 1825, when Colonel Roger Jones of Virginia, who had once been an officer of the Marine Corps, was appointed Adjutant General of the Army, an office which he held until his death on July 15, 1852. Colonel Jones seems to have been a colorful figure. In 1830, after being found guilty of charges preferred and prosecuted by Captain Robert L. Armstrong, 2nd Artillery, Acting Judge Advocate of the Eastern Department, he was sentenced by a general court-martial to be reprimanded for issuing orders without authority and saying to the Commanding General of the Army, Major General Alexander Macomb, “I defy you, sir ; I defy you !” During the incumbency of Colonel Jones there were published the Army Regulations of 1835, which contained a fine chapter on the procedure of courts-martial,<sup>15</sup> and the Army Regulations of 1841,

<sup>13</sup> 3 Stat. 224.

<sup>14</sup> 3 Stat. 616.

<sup>15</sup> The first paragraph merits quotation :

“The discipline and reputation of the Army, are deeply involved in the manner in which military courts are conducted, and justice administered. The duties, therefore, that devolve on officers appointed to sit as members of courts-martial, are of the most grave and important character — that these duties may be discharged with justice and propriety] it is incumbent

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containing an equally fine description of the duties of a judge advocate.<sup>16</sup>

From 1844 on, Colonel Jones performed his legal functions through an officer on duty in his office detailed as Acting Judge Advocate of the Army. The Acting Judge Advocate of the Army from 1844 through 1846 was First Lieutenant Samuel Chase Ridgely, 4th Artillery, of Maryland.<sup>17</sup> During 1847 the Acting Judge Advocate was Captain Leslie Chase, 2nd Artillery, of New York.<sup>18</sup> Captain John Fitzgerald Lee, Ordnance Department, was Acting Judge Advocate in 1848 and 1849.

The Act of March 2, 1849,<sup>19</sup> authorized the President to detail a captain as Judge Advocate of the Army, with the brevet rank and pay of a major of cavalry. Under this authority, Captain Lee was appointed Judge Advocate of the Army on the date of the act.<sup>20</sup> The records of the office of The Judge Advocate General indicate

on all officers to apply themselves diligently to the acquirement of a competent knowledge of military law; to make themselves perfectly acquainted with all orders and regulations, and with the practice of military courts."

<sup>16</sup> "473 . . . The duties of the Judge-Advocate, intimately connected as they are with the administration of justice in the army are of high importance. To direct prosecutions in the name of the United States; to counsel courts-martial as to the forms of proceedings, and the nature and limits of their authority; to admonish the accused, and guard him in the exercise and privileges of his legal rights; to collect, arrange, and evolve the testimony that may be required, and when circumstances render it necessary, to present the evidence in a succinct and collected form, require, on the part of the person filling such office, intelligence, experience, impartiality, and firmness.

"474 . . . There are also minor duties devolving upon him—such as the preparation, care, and disposition of the record, and the custody and safe-keeping of all papers connected with trials.

"475 . . . To ensure a proper fulfilment of his office, it is necessary that he should, by diligence and study, make himself acquainted with the settled principles of judicial procedure, the military laws and regulations governing the service, and the customs which have been established therein; and without such attention, not only promotive of his own reputation, but of the safety of the particular community with which he is called to act, military jurisprudence can never be established upon a proper foundation.

"476 . . . The attention of the Judge Advocate to all these branches of knowledge, connected with the more immediate duties of his office, is therefore earnestly enjoined, and will at all times be the subject of scrutiny and observation by those to whom the law has committed the revision of the proceedings of military courts."

<sup>17</sup> Graduate, U.S.M.A., 1831. Lieutenant Ridgely was promoted to captain 16 February 1847, and brevetted major 20 August 1847 for gallant and meritorious conduct in the battles of Contreras and Churubusco.

<sup>18</sup> Graduate, U.S.M.A., 1838. Captain Chase distinguished himself in the Battles of Palo Alto and Resaca de la Palma (8 and 9 May 1846).

<sup>19</sup> 9 Stat. 351.

<sup>20</sup> See App., 1(a). Major Lee served creditably in the Seminole War (1835–42). He resigned from the Army and retired to a Maryland farm in September 1862.

that Major Lee reviewed court-martial records and rendered occasional opinions on related subjects during his tenure of the office.<sup>21</sup>

Major General Henry W. Halleck of California was assigned to command the Department of the Missouri in August 1861. As a lieutenant in the Mexican War, he had been Secretary of State in the Military Government of newly-conquered California and was familiar with General Winfield Scott's device of trial by military commission. General Halleck was, moreover, an experienced lawyer and a writer of distinction on international law and the laws of war. Finding the local civil courts ineffective, he proceeded to the trial by military commissions of persons suspected of aiding the Confederacy. Major Lee, as Judge Advocate of the Army, rendered an opinion that military commissions were without authority and illegal.<sup>22</sup> General Halleck came to Washington as General-in-Chief of the Army in July 1862. In the same month Congress superseded the office of Judge Advocate of the Army by reviving that of Judge Advocate General.

<sup>21</sup> Major Lee's position and functions are illustrated by the text of the following letter which he wrote to Brevet Major General John E. Wool, then in command of the Eastern Division, with headquarters at Troy, New York (1MS Op JAG, p 43) :

"I am instructed by the General-in-Chief to invite your attention to that part of the sentence of the General Ct. Martial which convened at Ft. Constitution, N.H. on the 10th ult. approved and ordered to be carried into effect by your Division Order No. 57, current series, which, in the cases of Privates McMahan, Kennedy, Hannever and Smith, directs, '*for the period of one year, a band of iron about the neck with 7 prongs each 7 inches long.*'"

"The General-in-Chief is of opinion, that such a collar from the suffering it seems designed and is certainly capable of causing, would inflict a punishment cruel and unusual, and consequently illegal.

"With this opinion I am directed to convey to you the desire of the General-in-Chief that you will direct the remission of that part of the sentence."

As the wording of this letter indicates, it was written pursuant to the instructions of the General-in-Chief, which seems to have been the usual practice. See remarks of General (later President) W. H. Harrison quoted in Upton, *Military Policy of the United States* 166 (4th ed. 1917). This practice operated as a partial remedy for the Army's lack of a professional lawyer as head of its legal department during the period 1821-1862 because most of the generals-in-chief of that period were learned in the law. Jacob Brown, General-in-Chief from 1815 to 1828, probably studied law, *Jacob Brown*, 18 *Recruiting News* 2 (Jan 1936). Alexander Macomb, General-in-Chief from 1828 to 1841, published treatises on martial law and court-martial procedure. Winfield Scott, General-in-Chief from 1841 to 1861, was a member of the Virginia bar. Henry W. Halleck, General-in-Chief from 1862 to 1864, was a member of the California bar.

<sup>22</sup> Case of Col. Ebenezer Magoffin, C.S.A., 1 MS Op JAG, p 285.

*Renaissance*

Section 5 of the Act of July 17, 1862,<sup>23</sup> directed the appointment of a Judge Advocate General with the rank and pay of a colonel of cavalry, to whose office should be returned for revision the records and proceedings of all courts-martial and military commissions. Section 6 authorized the appointment for each army in the field of a judge advocate with the rank and pay of a major of cavalry, who was to perform his duties under the direction of the Judge Advocate General.<sup>24</sup> On September 3, 1862, Joseph Holt became the fourth Judge Advocate General of the Army and the first since the Revolutionary War.<sup>25</sup> The Act of June 20, 1864,<sup>26</sup> accorded the Judge Advocate General the rank and pay of a brigadier general and created the office of Assistant Judge Advocate General with the rank and pay of a colonel of cavalry, a position which was filled on June 22, 1864, by the appointment of Major William McKee Dunn, Judge Advocate.

Article 65 of the Articles of War of 1806, which were in force until 1874, required confirmation by the President of sentences respecting general officers and, in time of peace, of sentences involving dismissal of an officer or death. In time of war a reviewing authority had power to order the execution of any sentence which did not pertain to a general officer. As the record of trial did not reach his office until after the sentence had been executed, there was nothing the Judge Advocate General of the Army could do, in time of war, to correct an error if the sentence involved death. Section 5 of the Act of July 17, 1862, *supra*, provided that no sentence of death, or imprisonment in the penitentiary, should be executed until approved by the President. This provision had the practical effect of making the Judge Advocate General an appellate tribunal in the most serious cases and, of course, enhanced the importance of his position. The provision, somewhat modified by the Acts of March 3, 1863,<sup>27</sup> and July 2, 1864,<sup>28</sup> was, so far as it re-

<sup>23</sup> 12 Stat. 598.

<sup>24</sup> The last clause became Rev. Stat. § 1201, 10 U.S.C. 63 (1940) and is now 10 U.S.C. 3037(c) (2) (1952 ed., Supp. V).

<sup>25</sup> See App., 1(a). Born in Kentucky in 1807, General Holt practiced law with distinction in Kentucky and Mississippi. He served as Commissioner of Patents from 1857 to 1859, Postmaster General of the United States from 1859 to 1861, and Secretary of War during the hectic last three months of President Buchanan's administration. He supported loyally General Scott's efforts to secure Mr. Lincoln's safety and peaceful inauguration.

<sup>26</sup> 13 Stat. 144.

<sup>27</sup> Sec. 21, 12 Stat. 735.

<sup>28</sup> 13 Stat. 356. As to this and the preceding modification, see Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15, 23 (1949).

lated to death sentences, carried into the Articles of War of 1874 (Art. 105), 1916 (Art. 48) and 1920 (Art. 48). The 1874 Articles did not provide for review by the Judge Advocate General prior to execution of the sentence in cases involving penitentiary confinement, but such review was reestablished by the 1920 Articles of War (Art. 501½).

In a letter of May 2, 1872, General Holt described the duties of his office :

“These duties may be enumerated under five heads :

1. The review and revisal of, and reporting upon, cases tried by military courts, as well as the receipt and custody of the records of the same.
2. The reporting upon applications for pardon or clemency preferred by officers and soldiers sentenced by court-martial.
3. The furnishing of written opinions upon questions of law, **claims**, etc., referred to it by the Secretary of War, or by heads of bureaus, department commanders, etc., as well as in answer to letters from officers of courts-martial and others.
4. The framing of charges, and the acting by one of its officers, in cases of unusual importance, as judge advocate of military courts.
6. The direction of the officers of the corps of judge advocates. . .

“While the review, etc., of military records is specified in the statute law as the most conspicuous duty of the judge advocate general, this is not, in fact, his only important duty. . . . a leading part of these duties, certainly since the establishment of the office in 1862, has been the preparing and furnishing of *legal opinions* upon various subjects of military law and administration constantly arising in the War Department and in the army. . . .

“Of the questions upon which opinions are given by the judge advocate general, some—often at his suggestion—are subsequently submitted to the Attorney General, but the great mass are at once acted upon by the Secretary of War.”

Thirty-three judge advocates were appointed during the war under the Act of July 17, 1862.<sup>29</sup> During the Civil War, seven or eight judge advocates or line officers acting as such were kept on duty in the office of the Judge Advocate General; the other judge advocates had field assignments. Of the Civil War judge advocates, Major John A. Bolles of Connecticut, afterward Judge Advocate General of the Navy, Major Henry L. Burnett of Ohio, who was prominent in the case of *Ex parte Milligan* and afterward an outstanding member of the New York bar and United States Attorney for the Southern District of New York, and Major John A. Bingham of Ohio, member of Congress for 18 years, Minister to Japan for 12, co-prosecutor with General Holt of the Lincoln assassins, and one of the House managers for the impeachment of President Andrew Johnson, are noteworthy. Major John Chipman Gray of Massachusetts is the best known to legal scholars of all the Civil War officers of the department. He was a member of the

<sup>29</sup> See App., 4.

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faculty of Harvard Law School for **44** years, founded the *American Law Review*, wrote *Restraints on Alienation of Real Property* (1883) and *The Rule against Perpetuities* (1886), and became generally recognized as the foremost authority on real property law of his generation.

The Act of July 28, 1866,<sup>30</sup> authorized the permanent retention in the service of the Judge Advocate General and the Assistant Judge Advocate General, and the temporary retention of not more than ten of the existing judge advocates. The Act of February 25, 1867,<sup>31</sup> gave these officers the status of permanent officers of the Regular Army, and the Act of April 10, 1869,<sup>32</sup> fixed the number of judge advocates at eight and authorized the filling of vacancies. The Act of June 23, 1874,<sup>33</sup> abolished the office of Assistant Judge Advocate General and provided that the number of judge advocates should be reduced to four as vacancies occurred, but the corps of judge advocates was restored to its previous strength in 1878.<sup>34</sup> By the Act of July 5, 1884,<sup>35</sup> the composition of the Judge Advocate General's Department (so called from 1884 until 1948) was fixed as follows: one Judge Advocate General with the rank and pay of a brigadier general; one Assistant Judge Advocate General with the rank and pay of a colonel; three deputy judge advocate generals with the rank and pay of lieutenant colonels; and three judge advocates with the rank and pay of majors. This act also authorized the detail of line officers as acting judge advocates of military departments (territorial commands similar to the present army areas) with the rank and pay of captains of cavalry.

After thirteen years as Judge Advocate General, during which period he was brevetted major general and tendered appointments as Attorney General by President Lincoln and Secretary of War by President Grant, both of which he declined, General Holt retired on December 1, 1875. He was succeeded by his assistant, Colonel William McKee Dunn.<sup>36</sup> General Dunn retired January 22, 1881, and was succeeded by Major David G. Swaim of Ohio. In 1884, General Swaim was suspended from rank and duty for a period of twelve years, pursuant to sentence of court-martial, having been found guilty of improper conduct in a business transaction.<sup>37</sup> The

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<sup>30</sup> 14 Stat. 332.

<sup>31</sup> 14 Stat. 410.

<sup>32</sup> 16 Stat. 44.

<sup>33</sup> 18 Stat. 244.

<sup>34</sup> Rev. Stat. §§ 1094, 1198, 1200 (2d ed. 1878).

<sup>35</sup> 23 Stat. 113.

<sup>36</sup> Member of Congress from Indiana, 1859-1863. See App., 1(a) and 5.

<sup>37</sup> Gen. Ct. Martial Order No. 19, Hq. of the Army, 24 Feb 1885; see Swaim v. United States, 28 Ct. Cls. 173 (1893), *aff'd*, 165 U.S. 553 (1897).

unexecuted portion of General Swaim's sentence was remitted late in 1894<sup>38</sup> and he was retired on December 22 of that year.<sup>39</sup> Colonel Guido Norman Lieber of New York, the Assistant Judge Advocate General, was Acting Judge Advocate General from July 22, 1884, to January 11, 1895, when he accepted appointment as Judge Advocate General,<sup>40</sup> which position he occupied through the War with Spain.

The Act of April 22, 1898,<sup>41</sup> authorized the appointment of Volunteer officers for the war with Spain and provided that each army corps should have a judge advocate with the rank of lieutenant colonel. The Act of March 2, 1899,<sup>42</sup> authorized the retention in service of five judge advocates of Volunteers with the rank of major. This legislation resulted in a slight temporary expansion of the department.<sup>43</sup> The strength of the department was fixed by the Act of February 2, 1901,<sup>44</sup> at one Judge Advocate General with the rank of brigadier general, two judge advocates with the rank of colonel, three judge advocates with the rank of lieutenant colonel, six judge advocates with the rank of major, and one acting judge advocate with the rank and pay of a captain, mounted, for each geographical department or tactical division not provided with a judge advocate commissioned in the department. The same act provided that vacancies in the office of Judge Advocate General should be filled by the appointment of an officer of the grade of lieutenant colonel or higher, to hold office for a term of four years, a provision which has been continued in effect substantially by subsequent legislation. The vacancies created by the act were filled by the appointment of former Volunteer judge advocates. The senior colonel under this organization of the department, Thomas F. Barr of Massachusetts, a judge advocate since 1865 and Assistant Judge Advocate General since 1895, was appointed Judge Advocate General on May

<sup>38</sup> Gen. Order No. 66, Hq. of the Army, 3 Dec 1894.

<sup>39</sup> Gen. Order No. 69, Hq. of the Army, 22 Dec 1894.

<sup>40</sup> See App., 1(a). General Lieber was a son of Dr. Francis Lieber, the eminent authority on the laws of war who, as special legal adviser to the War Department, drafted General Order No. 100 of 1863, the basis of the modern law of land warfare. The general became well-known in the Army as the author of Remarks on the Army Regulations (1898), The Use of the Army in Aid of the Civil Power (1898) and numerous articles on military law and related subjects. General Lieber collected a fine library on military law and history which has become part of the library of the Office of The Judge Advocate General. He retired 21 May 1901, and died 25 April 1923.

<sup>41</sup> 30 Stat. 361.

<sup>42</sup> 30 Stat. 977.

<sup>43</sup> See App., 6.

<sup>44</sup> 31 Stat. 748. The number of majors was increased to seven by the Act of 2 March 1913, 37 Stat. 708.

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21, 1901, to enable him to retire as a brigadier general, which he did the following day. The second colonel, John W. Clous, a native of Germany who had enlisted as a private in 1857 and had been a judge advocate since 1886 and brigadier general of Volunteers in 1898 and 1899, was similarly appointed on May 22, 1901, and retired two days later.

The history of the Judge Advocate General's Corps in the nineteenth century is incomplete without mention of the services of Colonel William Winthrop of New York.<sup>45</sup> He prepared the 1865, 1866, and 1868 editions of the *Digest of Opinions of the Judge Advocate General of the Army* and revised and annotated editions of this work in 1880 and 1895. He published the first edition of his monumental treatise, *Military Law and Precedents*, in 1886 and a revised and annotated second edition in 1895. Although the work is obsolete in some respects, it has remained so valuable that the War Department found it necessary to issue reprint editions in 1920 and 1942.

### *Twentieth Century*

Colonel George B. Davis of Massachusetts became Judge Advocate General on May 24, 1901.<sup>46</sup> General Davis was the author of treatises on military law, international law, and the elements of law. He represented the United States at the Geneva conferences of 1903 and 1906 and the Hague Conference of 1907. General Davis was succeeded in 1911 by Colonel Enoch H. Crowder of Missouri.<sup>47</sup> In addition to his duties as Judge Advocate General,

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<sup>45</sup> Colonel Winthrop was an alumnus of Yale (B.A., 1851; LL.B., 1853) and **took** graduate work at Harvard Law School (1853-54). He became a major and judge advocate in September 1864 after creditable service as a line officer, was promoted to lieutenant colonel and deputy judge advocate general in July 1884 and to colonel and assistant judge advocate general in January 1895, and retired in August 1895. 'See Fratcher, *Colonel William Winthrop*, 1 *Judge Advocate Journal* 12 (Dec 1944); Prugh, *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 *A.B.A.J.* 126 (Feb 1956).

<sup>46</sup> See App., 1(a).

<sup>47</sup> See App., 1(a). General Crowder lectured in the University of Missouri School of Law (1886-89), was a member of the commission to determine the capitulation of Manila and the Spanish Army (1898), an Associate Justice of the Philippine Supreme Court (1899-1900), a member of the commission to treat with General Aguinaldo respecting his surrender (1899), legal advisor to the Military Governor of the Philippines, observer with the Japanese Army in the Russo-Japanese War (1904-1907), legal advisor to the Provisional Government of Cuba (1906-1909), and delegate to the Fourth Pan-American Conference at Buenos Aires in 1910. He retired on 14 February 1923, served as Ambassador to Cuba from 1923 to 1927 (Act of 22 Jan 1923, 42 Stat. 1160), and died in 1932. See Lockmiller, *Enoch H. Crowder: Soldier, Lawyer and Statesman* (Univ. of Missouri Studies, 1955).

## HISTORY

General Crowder was Provost Marshal General (which position was equivalent to that of the present Director of Selective Service) from 1917 to 1919. His work as Provost Marshal General kept General Crowder away from the Judge Advocate General's Office during most of the war and the office was headed by Brigadier General Samuel T. Ansell of North Carolina as Acting Judge Advocate General.<sup>48</sup>

The strength of the department was increased by the Act of June 3, 1916,<sup>49</sup> to include one Judge Advocate General with the rank of brigadier general, four judge advocates with the rank of colonel, seven judge advocates with the rank of lieutenant colonel, and twenty judge advocates with the rank of major, in addition to the acting judge advocates authorized by earlier legislation, the increase to be made in five annual increments. The same act provided for the organization of an Officers' Reserve Corps. When the United States entered World War I on April 6, 1917, the department consisted of seventeen officers, four of whom were on duty in the Office of the Judge Advocate General, which had occupied eight rooms in the north wing of the State, War and Navy Building since 1894. The Act of May 18, 1917,<sup>50</sup> provided for war-time expansion of the Army by the appointment of temporary officers in the National Army, the call to active duty of National Guard and Reserve officers, and the temporary promotion of Regular Army officers. The Judge Advocate General was given the rank and pay of a major general by the Act of October 6, 1917.<sup>51</sup> War Department instructions issued in 1918 directed the addition of enlisted men to the Judge Advocate General's Department for service as law clerks in the War Department and in the field,<sup>52</sup> and a proviso to the Act of July 9, 1918,<sup>53</sup> added pursuant to a suggestion made by General Crowder in a memorandum of December 5, 1917, authorized the appointment of Reserve and temporary first lieutenants and captains in the department. By December 2, 1918, the commissioned strength of the department had reached 426 officers, 35 in the Regular Army (1 major general, 4 brigadier generals, 13 colonels, and 17 lieutenant colonels) and 391 in the Officers' Reserve Corps and National Army (7

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<sup>48</sup> See App., 1(b). 2d Lt., Inf., 1899; Maj., JA, Feb 1913. General Ansell resigned from the Army after the war and became a well-known member of the District of Columbia bar.

<sup>49</sup> 39 Stat. 169.

<sup>50</sup> 40 Stat. 76.

<sup>51</sup> Sec. 3, 40 Stat. 410.

<sup>52</sup> Gen. Order No. 27, 22 Mar 1918; Gen. Order No. 66, 12 Jul 1918; Gen. Order No. 83, 10 Sep 1918.

<sup>53</sup> 40 Stat. 853.

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colonels, 39 lieutenant colonels, 245 majors, 60 captains, and 40 first lieutenants)—a far cry from the seventeen of April 6, 1917.<sup>54</sup>

Several of the World War I judge advocates are noteworthy. Colonel Edmund M. Morgan, Colonel Eugene Wambaugh and Major Felix Frankfurter won distinction as members of the Harvard Law Faculty, and Major Frankfurter is now an Associate Justice of the United States Supreme Court. Colonel John H. Wigmore, Dean of Northwestern University Law School, was an outstanding authority on the law of evidence. Major Henry L. Stimson of New York served as a judge advocate in 1917 and thereafter as a line officer. Major Stimson was Secretary of War, Secretary of State, and Governor General of the Philippines. Lieutenant Colonel Patrick J. Hurley of Oklahoma, who served as a judge advocate throughout the war, also was Secretary of War and later a major general in active service. Colonel Charles Beecher Warren of Michigan was Ambassador to Japan and Mexico; and Lieutenant Colonel Nathan William MacChesney, an eminent member of the Chicago bar, wore the full dress uniform of a colonel, Judge Advocate General's Department Reserve, when he presented his credentials as Minister to Canada in 1932. He returned to active duty as a judge advocate in World War II. Brigadier General Hugh S. Johnson became well known as Administrator of the National Recovery Administration. Colonel Guy D. Goff became United States Senator from West Virginia and Major Charles Loring became a justice of the Supreme Court of Minnesota in 1930.

The system of military justice had been the subject of public criticism earlier in the century, and revised Articles of War, drafted under General Crowder's direction, were enacted in 1916.<sup>55</sup> The operation of the system in wartime gave rise to further criticism directed principally toward three points: (1) That the system was almost wholly in the control of line officers without legal training who were frequently harsh and arbitrary; (2) That sentences were excessive and unequal as between commands; (3) That there was no system of appellate review, except in the small class of cases requiring presidential confirmation. Section 1199 of the Revised Statutes,<sup>56</sup> which was based on the Act of July 17, 1862, provided that the Judge Advocate General should "receive, revise, and cause to be recorded the proceedings of all courts-martial." This had long been construed to give the Judge Advocate General no power to do more than to advise a reviewing authority to change his action on a record of trial. In October 1917, a con-

<sup>54</sup> See App., 7.

<sup>55</sup> Act of 29 Aug 1916, 39 Stat. 650.

<sup>56</sup> 10 U.S.C. 62 (1949). See Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15, 24, 39 (1949).

struction of the statute was proposed which would have empowered the Judge Advocate General to act as an appellate court with full power to reverse or modify the action of a reviewing authority. This was disapproved by the Secretary of War, but the object was partially accomplished by General Order No. 7, January 17, 1918, which required reviewing authorities to suspend the execution of sentences of death, dismissal or dishonorable discharge until review of the record by the Judge Advocate General. The reviewing authority was still free, however, to disregard the advice of the Judge Advocate General, and there was continued agitation for statutory reform of this and other features of the system of military justice.

An office memorandum of August 6, 1918, created a Board of Review in the Judge Advocate General's office with duties "in the nature of those of an appellate tribunal," which ~~was~~ to review the records in all serious general court-martial cases. Revised Articles of War enacted in 1920<sup>57</sup> met the criticisms which had been made. The new articles required sworn charges and an investigation prior to reference for trial (A.W. 70); reference of charges to a staff judge advocate for consideration and advice prior to directing trial by general court-martial (A.W. 70); the appointment of a law member on each general court-martial (A.W. 8—suggested by General Crowder); the appointment of defense counsel (A.W. 17); immediate announcement of an acquittal (A.W. 40); and reference of general court-martial records to a staff judge advocate or the Judge Advocate General before action by the reviewing authority (A.W. 46). The new articles also provided for the imposition of maximum limitations on punishment in wartime (A.W. 45—suggested by General Crowder); prohibited the return by a reviewing authority of a record to a court for reconsideration of an acquittal or with a view to increasing the sentence (A.W. 40); and provided a system of appellate review of all general court-martial cases, which incorporated the device of a board of review (A.W. 50½). Sentences rendered during the war were equalized by a Clemency Board in the Judge Advocate General's office.

The Act of June 4, 1920,<sup>58</sup> fixed the strength of the Army's legal department at one Judge Advocate General with the rank of major general and 114 officers in grades from colonel to captain. The 114 officers were to be placed on the promotion list and promoted on an Army-wide basis so that there would not be fixed numbers in any particular grade. Vacancies created by the act were to be filled by the appointment of Reserve, National Guard and temporary

<sup>57</sup> Act of 4 Jun 1920, 41 Stat. 787. See Fratcher, *op. cit. supra* note 66, at 44-55.

<sup>58</sup> 41 Stat. 765.

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officers who had served during the war, and vacancies occurring subsequently by transfer from other branches of the service or by the appointment of Reserve judge advocates. After the expansion of 1920, vacancies were, as a matter of practice, filled by transfers from other branches until 1940. From then until the end of World War II, some 27 Reserve judge advocates were appointed captains, Regular Army. The strength of the department was reduced to 80 by the Act of June 30, 1922,<sup>59</sup> which empowered the President to vary the figure by not more than 30 per cent. This act required the demotion, retirement, and discharge of some officers. The Act of April 3, 1939,<sup>60</sup> authorized increase in the strength of the department to 121 in annual increments over a period of ten years.

Official Manuals for Courts-Martial, prepared under the direction of the Judge Advocate General, were issued in 1895, 1898, 1901, 1905, and 1908. In 1913 these manuals were substituted for the provisions of the Army Regulations governing the procedure of courts-martial. An expanded Manual, including definitions of offenses and rules of evidence, based on the 1916 Articles of War, was issued early in 1917. A revised and enlarged Manual, incorporating the changes made in the system of military justice by the 1920 revision of the Articles of War, was edited by a board consisting of Colonels Walter A. Bethel and John H. Wigmore and Lieutenant Colonel William Catron Rigby, Judge Advocates, and published in 1921. A condensed edition was issued in 1928 and, with minor changes, was in force until 1949. One of the first projects of General Crowder's administration was the preparation by Captain (later Brigadier General) Charles R. Howland, Assistant to the Judge Advocate General, of a *Digest of Opinions of the Judge Advocates General* covering the period 1862-1912. This **work**, which is still a valuable reference tool for every judge advocate, was supplemented by the publication of a digest covering opinions rendered between July 1912 and April 1917. The opinions of the Judge Advocate General rendered between April 1917 and the end of 1919 were published at length, and annotated pamphlets containing digests of the more important opinions and legal rulings of the other agencies of the Government were issued monthly during the war and at greater intervals thereafter. A consolidated *Digest of Opinions of The Judge Advocate General*, covering the period 1912-1930, was published in 1931 and a revised edition, covering the period 1912-1940, was issued in 1942. An annotated compilation of the *Military Laws of the United States* was prepared in

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<sup>59</sup> 42 Stat. 723.

<sup>60</sup> Sec. 8, 53 Stat. 558.

## HISTORY

1915; revised editions were published in 1921, 1929, 1939 and 1949.

Colonel Walter A. Bethel of Ohio, who had served during the war as a brigadier general and judge advocate of the American Expeditionary Forces in France, was appointed Judge Advocate General on General Crowder's retirement, February 15, 1923.<sup>61</sup> General Bethel retired for disability on November 15, 1924, and was succeeded by Colonel John A. Hull of Iowa, who had been judge advocate of the Services of Supply, American Expeditionary Forces in France, during the war.<sup>62</sup> Colonel Edward A. Kreger of Iowa, who had served during the war as a brigadier general and "Acting Judge Advocate General" in charge of the Branch Office of the Judge Advocate General in France, became The Judge Advocate General<sup>63</sup> on November 16, 1928.<sup>64</sup> General Kreger was retired for disability February 28, 1931, and succeeded by Colonel Blanton Winship of Georgia, who had been judge advocate of the First Army in France during the war.<sup>65</sup> General Winship's World War I service was unusual for a judge advocate in that for a time he commanded a force of infantry and, while doing so, earned the Distinguished Service Cross for heroism in action.

Colonel Arthur W. Brown of Utah, who had been acting judge advocate of the United States Expeditionary Forces at Vera Cruz in 1914 and judge advocate of the Third Army in France during World War I, was appointed The Judge Advocate General on December 1, 1933.<sup>66</sup> General Brown retired at the expiration of his term on November 30, 1937, and was succeeded by Colonel Allen W. Gullion of Kentucky,<sup>67</sup> who had served in the Provost Marshal General's Office and as judge advocate of the 3rd Army Corps during World War I and was well known as the trial judge advocate who prosecuted the late Brigadier General William Mitchell, Assistant Chief of the Air Corps. General Gullion was appointed Provost Marshal General of the Army, a position which included both the control of the Corps of Military Police and the supervision of planning and training for military government of occupied territory, on July 31, 1941, and retained this position

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<sup>61</sup> See App., 1(a).

<sup>62</sup> See App., 1(a). General Hull retired 15 November 1928 and served as legal adviser to the Governor General of the Philippines and as an Associate Justice of the Supreme Court of the Philippine Islands from 1932 to 1936. He died 17 April 1944.

<sup>63</sup> The capitalized "The" was added to the title by Gen. Order No. 2, War Dept., 31 Jan 1924.

<sup>64</sup> See App., 1(a).

<sup>65</sup> See App., 1(a). General Winship retired 30 Novem'ber 1933. served as Governor of Puerto Rico from 1934 to 1939 and was recalled to active duty in World War II to serve with the Inter-American Defense Board.

<sup>66</sup> See App., 1(a).

<sup>67</sup> See App., 1(a), He died 19 June 1946.

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until April 1944. He was succeeded as The Judge Advocate General on December 1, 1941, by Colonel Myron C. Cramer of Connecticut.<sup>68</sup>

### *The Second World War*

In 1938 there were 90 judge advocates in active service, of whom 36 were in the Office of The Judge Advocate General and 27 were assigned to the headquarters of corps areas and posts. The others served in various War Department offices and with tactical commands. The outbreak of war in Europe and the possibility of the United States becoming involved stimulated gradual expansion. On July 1, 1940, there were 105 judge advocates in active service, of whom 39 were in the Office of The Judge Advocate General. Retired, Reserve, and National Guard judge advocates were ordered to active duty in 1940 and 1941. By July 1, 1941, there were 190 judge advocates in active service, of whom 100 were in the Office of The Judge Advocate General. By July 1, 1942, the total had increased to 771, 110 officers of the Regular Army, active and retired, 435 of the Officers' Reserve Corps, 81 of the National Guard, 53 detailed from other branches, and 92 with temporary commissions issued under the Joint Resolution of September 22, 1941.<sup>69</sup> The appointment of temporary second and first lieutenants was authorized, and the strength of the corps continued to increase, chiefly through the appointment of temporary officers. On May 31, 1945, there were 2,162 judge advocates in active service,<sup>70</sup> of whom 367 were assigned to organizations of the Army Air Forces.

The 1920 Articles of War (A.W. 501½) empowered The Judge Advocate General to establish additional boards of review in his office and, when so directed by the President, to establish branches of his office with distant commands, each with an Assistant Judge Advocate General and a board or boards of review, authorized to perform for such a command the military justice functions normally performed by The Judge Advocate General and the boards of review in his office. Prior to 1941 there was a single Board of Review in the Office of The Judge Advocate General. By April 30, 1945, there were five boards in the Washington office and nine in

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<sup>68</sup> See App., 1(a). After his retirement on 30 November 1945, General Cramer was recalled to active duty and served as United States member of the International Military Tribunal for the Far East, which tried major Japanese war criminals.

<sup>69</sup> 55 Stat. 728.

<sup>70</sup> 182 colonels, 417 lieutenant colonels, 463 majors, 471 captains, 464 first lieutenants, and 175 second lieutenants. For the general officers, see App., 1(a) and (b).

five overseas branch offices.<sup>71</sup> Between July 1, 1941, and April 30, 1945, 63,093 records of trial by general courts-martial were reviewed in the Washington office and 19,701 were reviewed in overseas branch offices,<sup>72</sup> a total of **82,794** general court-martial records. These statistics as to military justice are indicative of the great burden of work carried by the Corps in wartime. As General Holt pointed out long ago, that work is by no means limited to military justice. There was similar expansion of the load in other fields, notably military affairs, procurement law, litigation, legal assistance, and international law. Statutes authorizing administrative settlement of claims against the United States arising from the acts of Army personnel greatly increased the amount of claims work.<sup>73</sup> After the close of hostilities, the Corps devoted much effort to the prosecution of enemy war criminals<sup>74</sup> and to the defense of habeas corpus proceedings instituted by persons confined under court-martial sentences.<sup>75</sup>

### *The Cold War and Korea*

Brigadier General Thomas H. Green of Massachusetts, who had served during the war as executive to the Military Governor of Hawaii and as Assistant and Deputy Judge Advocate General in Washington, became The Judge Advocate General on December 1, 1945.<sup>76</sup> He was succeeded on January 27, 1950, by Brigadier

<sup>71</sup> A branch office was established at Cheltenham, England, on 14 April 1942, under Gen. Hedrick (App., 1(b)). He was succeeded by Gen. McNeil and the office moved to Paris in 1944. By 1945 it had four boards of review. A branch office was established at Melbourne, Australia, on 11 July 1942, under Gen. Burt. It moved to Manila on 30 June 1945. A branch office was established at New Delhi, India, on 27 October 1942, under Col. Robert W. Brown (App., 1(b)), who was succeeded by Col. W. J. Bacon. A branch office was established at Algiers on 8 March 1943 under Gen. Richmond. He was succeeded by Col. Hubert D. Hoover. (App., 1(b)) It moved to Caserta, Italy, in 1944. A branch office was established at Honolulu on 5 September 1944 under Gen. Morrisette. These branch offices were administratively part of the Washington office, not of the theaters where they were located, which had separate staff judge advocates.

<sup>72</sup> The branch office in Europe established by Gen. Order No. 7, War. Dept., 17 Jan 1918, reviewed 5,122 records of trial by general courts-martial.

<sup>73</sup> Foreign claims, Act of 2 Jan 1942, 55 Stat. 880; noncombat Army operations, Act of 3 Jul 1943, 57 Stat. 372; claims of military personnel, Act of 29 May 1945, 59 Stat. 225.

<sup>74</sup> For the European phase of this work, see Fratcher, *American Organization for Prosecution of German War Criminals*, 13 Mo. L. Rev. 45 (1948).

<sup>75</sup> For the types of questions raised in these cases, see Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 Mo. L. Rev. 147 (1949); Fratcher, *Review by the Civil Courts of Judgment of Federal Military Tribunals*, 10 Ohio St. L.J. 271 (1949); Wurfel, *Military Habeas Corpus*, 49 Mich. L. Rev. 493 and 899 (1951).

<sup>76</sup> See App., 1(a). Since his retirement, General Green has taught law at the University of Arizona.

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General Ernest M. Brannon<sup>77</sup> who had served during the war as staff judge advocate of the First Army in Europe and thereafter as Procurement Judge Advocate. On February 5, 1954, Brigadier General Eugene M. Caffey became The Judge Advocate General.<sup>78</sup> Since January 1, 1957, Major General George W. Hickman, Jr., has been The Judge Advocate General.<sup>79</sup>

From its revival in 1862, the Judge Advocate General's Corps had a strength fixed by statute, consisting of officers permanently commissioned as judge advocates. This ensured that the legal work of the Army was done by a fixed number of professional specialists who devoted their whole careers to the law and was much superior to the system used in other armed services under which officers were shifted back and forth from legal to other types of duty. At the beginning of World War II, the Regular officer strength of the Corps was fixed at 121.<sup>80</sup> The statutory limitations on strength of branches were suspended in 1942.<sup>81</sup> In 1946 the authorized officer strength of the Regular Army was more than tripled and the appointment of wartime temporary officers to fill the vacancies so created was authorized.<sup>82</sup> On January 1, 1948, the Regular Army strength of the Corps was 264 officers. Legislation of 1947 abolished both the statutory fixed strength of the Corps and the system of permanent commissions in it, leaving its size and composition to the discretion of the Secretary of War;<sup>83</sup> but the old system of a strength fixed by statute and permanent commissions was restored by the Act of June 24, 1948.<sup>84</sup> This act changed the name from department to corps and fixed its strength at one Judge Advocate General with the rank of major general, one assistant with the rank of major general, three officers with the rank of brigadier general, and a number of Regular Army judge

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<sup>77</sup> See App., 1(a).

<sup>78</sup> See App., 1(a).

<sup>79</sup> See App., 1(a).

<sup>80</sup> Act of 3 Apr 1939, 53 Stat. 558.

<sup>81</sup> Act of 5 Jun 1942, 56 Stat. 314.

<sup>82</sup> The Act of 13 Apr 1938, 52 Stat. 216, set the officer strength of the Regular Army at 14,726. It was increased to 25,000 and appointments authorized by the Act of 28 Dec 1945, 59 Stat. 663. The officer strength was set at 50,000 by the Act of 8 Aug 1946, 60 Stat. 925, at 51,000 by the Act of 7 Aug 1947, 61 Stat. 883, at 30,600 (in recognition of the creation of a separate Air Force) by the Act of 10 Jul 1950, 64 Stat. 322, and at 49,500 by the Act of 20 Jul 1956, 70 Stat. 584, which also authorized appointments to fill vacancies.

<sup>83</sup> Act of 7 Aug 1947, 61 Stat. 883.

<sup>84</sup> Secs. 246, 247, 249, 62 Stat. 643; reenacted with minor changes by the Act of 28 Jun 1950, 64 Stat. 267, 270; again reenacted as 10 U.S.C. 3036, 3037, 3064, 3072, 3209 (1952 *ed.*, Supp. V). The 1948 Act **was** the first to authorize Regular first lieutenants and general officers (other than The Judge Advocate General) in the Corps.

advocates, in grades from colonel to first lieutenant, not less than one and a half per cent of the authorized officer strength of the Regular Army.

Numerous Reserve judge advocates remained on extended active duty after the close of hostilities in World War II, and others were recalled to active duty during the Korean War (1950-53). The Uniform Code of Military Justice,<sup>85</sup> which became effective May 31, 1951, greatly increased the need for judge advocates by requiring the participation of at least three lawyers (law officer, trial counsel, and defense counsel) in every general court-martial trial, extending the requirement of review by a board of review to every case involving a punitive discharge or confinement for a year or more, and requiring the Army to provide counsel for the Government and the defense before the boards of review and the Court of Military Appeals created by the Code. During the Korean War, it was necessary to have seven boards of review in the Office of The Judge Advocate General. To meet the increased need for junior officers, a system was inaugurated in 1951 under which recent law school graduates are commissioned as first lieutenants in the Army Reserve and called to active duty for periods of three years. As of January 7, 1959, there were 1011 judge advocates in active service<sup>86</sup> and some 2700 Reserve and National Guard judge advocates not on active duty.

When the United States entered World War II, a Judge Advocate General's School was established at Washington with Colonel Edward Hamilton Young as Commandant. It moved to Ann Arbor, Michigan, in 1942 and there, under Colonel Young and his successor, Colonel Reginald C. Miller, prepared training literature and offered short courses to train officer candidates and newly-appointed officers in the duties of judge advocates until its discontinuance in 1946. A refresher course for reserve officers called to active duty during the Korean Conflict was established at Fort Myer, Virginia, in September 1950 under the command of Colonel Young. In August 1951 the School was reactivated as a permanent institution at Charlottesville, Virginia, with Colonel Charles L. Decker<sup>87</sup> as Commandant. Under Colonel Decker and his succes-

<sup>85</sup> Act of 5 May 1950, 64 Stat. 107; since reenacted as 10 U.S.C. 801-940 (1952 ed., *supp.* V). The Uniform Code was drafted by Professor Edmund M. Morgan of Harvard Law School, a lieutenant colonel, judge advocate in World War I. For the effect of the short-lived revision of the Articles of War contained in the Act of 24 Jun 1948, 62 Stat. 627, see Fratcher, *Appellate Review in American Military Law*, 14 *Mo. L. Rev.* 15, 55-68 (1949). The requirement of providing lawyers as counsel was extended to deposition proceedings by the decision in *United States v. Drain*, 4 USCMA 646, 16 CMR 220 (1954).

<sup>86</sup> See App., 8.

<sup>87</sup> See App., 1(b).

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sors, Colonels Nathaniel B. Rieger<sup>88</sup> and John G. O'Brien, the School has offered short courses to train newly-appointed judge advocates and, since October 1952, a nine-months' advanced course for senior judge advocates with a stringent thesis requirement which is already increasing substantially the scholarly publications on military law and related subjects. The advanced course has been accredited by the American Bar Association as graduate training in law worthy of the LL.M. degree. The School has prepared publications to guide law officers and counsel before courts-martial, operated the judge advocate extension courses, and supervised the judge advocate USAR schools, for both of which it publishes texts and lessons. *The Bulletin of The Judge Advocate General of the Army*, issued by the Washington office from 1942 to 1951 to keep judge advocates informed of pertinent opinions of The Judge Advocate General, the boards of review, the Attorney General, the Comptroller General and the courts, has been continued by the School in the form of the *JAG Chronicle Letter* since January 1952. The *Military Law Review*, inaugurated in 1958, is the School's most recent contribution to the literature of military law.

The enactment in 1948 of revised Articles of War<sup>89</sup> necessitated the preparation of the *Manual for Courts-Martial, 1949*, for the Army and the Air Force. The enactment in 1950 of the Uniform Code of Military Justice<sup>90</sup> required the preparation of the *Manual for Courts-Martial, U. S., 1951*, for the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard. These manuals were written by groups of officers working under the direction of Colonel Charles L. Decker.<sup>91</sup> Judge advocates struggled through World War II and the Korean War with a mass of military legislation, some of it archaic and contradictory, which had never been revised and had not been codified since 1878. The tremendous task of revising and codifying all the military legislation in force, including that governing the Navy and Air Force, was accomplished in this decade under the direction of Colonel Archibald King,<sup>92</sup>

<sup>88</sup> See App., 1(b).

<sup>89</sup> Act of 24 Jun 1948, 62 Stat. 627.

<sup>90</sup> Act of 5 May 1950, 64 Stat. 107; since reenacted as 10 U.S.C. 801-940 (1952ed., Supp. V). An extensive study of the legal and legislative basis of the Manual was also prepared and published.

<sup>91</sup> See App., 1(b).

<sup>92</sup> A.B., A.M., LL.B., Harvard. Corp., Inf., D.C.N.G., 19 Jun 1916; 2d Lt., 24 Mar 1917; Capt., JA, 2 Nov 1918; Maj., JA, RA, 1 Jul 1920. During World War II, Colonel King was Chief of the vitally important War Plans (international law) Division of the Office of The Judge Advocate General. He has published numerous articles on military and international law. Colonel King was retired for age in 1942 but has since served on active duty for some thirteen years, probably an all-time record.

a scholarly judge advocate who knew Colonel Winthrop and served under General Crowder. The revised code was enacted as Title 10, United State Code, on August 10, 1956. A revision of the manual, *The Law of Land Warfare*,<sup>93</sup> necessitated by changes in international law during and since World War II, was prepared under the direction of Major General C. B. Mickelwait, then The Assistant Judge Advocate General,<sup>94</sup> and published in 1956. Thus, the Corps is maintaining the high traditions of scholarship in military law begun by Colonel Winthrop nearly a century ago.

The office of Judge Advocate General of the Army was the first legal position to be established under the authority of the United States. It is older by some fourteen years than those of Chief Justice and Attorney General. Now, as in 1776, it represents the will of the American people that soldiers, as well as civilians, shall enjoy equal justice under law. The Judge Advocate General's Corps of the Army bears the heavy responsibility of seeing that the large body of statutes, regulations, and customs governing the military service, both internally and in its relations with the civilian world, is enforced correctly and fairly. It must persuade impetuous officers of the line, impatient of legal restrictions, of the virtues of orderly procedure according to law. It carries the burden of explaining and justifying those peculiar features of military law which are misunderstood and often criticized by the civilian bar and public. To accomplish these difficult tasks, it demands of its members thorough education and training, high standards of scholarship, careful, accurate legal work, and exemplary behavior.<sup>95</sup> Membership in the Corps is a privilege, indeed, a privilege of rendering professional service of a high order to the people of the United States.

<sup>93</sup> FM 27-10, 18 Jul 1956, supplemented by DA Pam 27-1, Treaties Governing Land Warfare, 7 Dec 1956. See Fratcher, *The New Law of Land Warfare*, 22 Mo. L. Rev. 143 (1967). Gen. Order No. 100 of 1863 (note 40, supra) was reprinted by the War Department in 1898. It was superseded by the Rules of Land Warfare, 1914, prepared under the direction of General Crowder. FM 27-10, Rules of Land Warfare, 1 Oct 1940, drafted by Colonel King (note 92, supra), was in force during World War II and the Korean War.

<sup>94</sup> See App., 1(b). Colonel Howard S. Levie, JAGC, and Professor Charles Fairman of Harvard Law School (Colonel, JAGC, USAR) participated in the preparation of this manual.

<sup>95</sup> See letter of Secretary of War Robert T. Lincoln to President Chester A. Arthur, 16 July 1882, quoted in *Swaim v. United States*, 28 Ct. Cls. 173, 176 (1893).



## APPENDIX

### 1. (a) Judge Advocates General of the Army:

- WILLIAM TUDOR, 29 Jul. 1775–9 Apr. 1777; Mass.; A.B. Harvard; JA of the Army, 29 Jul. 1775; Lt. Col., JAG, 10 Aug. 1776.
- JOHN LAWRENCE, 10 Apr. 1777–3 June 1782; N. Y.; 2d Lt., 4th N. Y. Regt., Aug. 1775; Lt. Col., JAG, 10 Apr. 1777; Col., JAG, 21 Dec. 1779.
- THOMAS EDWARDS, 2 Oct. 1782–3 Nov. 1783; Mass.; A. B. Harvard; Pvt., Mass. Mil., Apr. 1775; 1st Lt., 31 May 1777; Dep. JAG, 9 Apr. 1780; Col., JAG, 2 Oct. 1782.
- CAMPBELL SMITH, 16 Jul. 1794–1 June 1802; Md.; Ens., Inf., Mar. 1792; Lt., Judge Marshal and Advocate General, 16 Jul. 1794; Capt., JA of the Army, 2 June 1797.
- JOHN F. LEE, 2 Mar. 1849—3 Sep. 1862; Va.; U.S.M.A.; 2d Lt., Arty., 1834; Capt., Ord., 1837; Acting JA of the Army, 1848; Bvt Maj., JA of the Army, 2 Mar. 1849.
- JOSEPH HOLT, 3 Sep. 1862–1 Dec. 1875; D.C.; A.B. Centre Coll.; Col., JAG, 3 Sep. 1862; Brig. Gen., JAG, 20 June 1864; Maj. Gen., Bvt., 13 Mar. 1865.
- WILLIAM McKEE DUNN, 1 Dec. 1875–22 Jan. 1881; Ind.; A.B. Indiana Univ.; A.M. Yale; Maj., JA, 13 Mar. 1863; Col., Asst. JAG, 22 June 1864; Brig. Gen., Bvt., 13 Mar. 1865; Brig. Gen., JAG, 1 Dec. 1876.
- DAVID G. SWAIM, 18 Feb. 1881–22 Dec. 1894; Ohio; 2d Lt., 65th Ohio Inf., 4 Oct. 1861; Maj., JA, 9 Dec. 1869; Brig. Gen., JAG, 18 Feb. 1881.
- G. NORMAN LIEBER, 3 Jan. 1895–21 May 1901; N. Y.; A.B. S. Car. Coll.; LL.B. Harvard; 1st Lt., Inf., RA, May 1861; Maj., JA, 13 Nov. 1862; Col., Acting JAG, 22 Jul. 1884; Brig. Gen., JAG, 3 Jan. 1895.
- THOMAS F. BARR, 21 May 1901–22 May 1901; Mass.; Maj., JA, 26 Feb. 1865; Col., Asst. JAG, 3 Jan. 1895; Brig. Gen., JAG, 21 May 1901.
- JOHN W. CLOUS, 22 May 1901–24 May 1901; Germany; Pvt., 1857; Maj., JA, 1886; Brig. Gen., USV, 21 Sep. 1898; Brig. Gen., JAG, 22 May 1901.
- GEORGE B. DAVIS, 24 May 1901–14 Feb. 1911; Mass.; U.S.M.A.; Geo. Washington Univ. Law School; Pvt., 10 Sep. 1863; 2d Lt., Cav., 1871; Maj., JA, 10 Dec. 1888; Brig. Gen., JAG, 24 May 1901; Maj. Gen., Ret., 14 Feb. 1911.

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- ENOCH H. CROWDER, 15 Feb. 1911–14 Feb. 1923; Mo.; U.S.M.A.; LL.B., Univ. of Missouri; 2d Lt., Cav., 1881; Maj., JA, 1895; Brig. Gen., USV, 20 June 1901; Brig. Gen., JAG, 15 Feb. 1911; Maj. Gen., JAG, 6 Oct. 1917.
- WALTER A. BETHEL, 15 Feb. 1923–15 Nov. 1924; Ohio; U.S.M.A. ; LL.B. Atlanta Law School ; LL.M., Geo. Washington,; 2d Lt., Arty., 1889; Maj., JA, 15 July 1903; Brig. Gen., NA, 5 Aug. 1917; Maj. Gen., JAG, 15 Feb. 1923.
- JOHN A. HULL, 16 Nov. 1924–15 Nov. 1928; Iowa; Ph.B., LL.B., Iowa; Lt. Col., JA, USV, May 1898; Maj., JA, RA, Feb. 1901; Maj. Gen., JAG, 16 Nov. 1924.
- EDWARD A. KREGER, 16 Nov. 1928–28 Feb. 1931; Iowa; B.S., Iowa State Coll.; Capt., 52d Iowa Inf., 24 May 1898; 1st Lt., Inf., RA, 2 Feb. 1901; Maj., JA, 15 Feb. 1911; Brig. Gen., NA, 18 Feb. 1918; Maj. Gen., JAG, 16 Nov. 1928.
- BLANTON WINSHIP, 1 Mar. 1931–30 Nov. 1933; Ga. ; A.B., Mercer Univ.; LL.B., Univ. of Georgia; Capt., 1st Ga. Inf., May 1898; 1st Lt., Inf., RA, Nov. 1901; Maj. JA, 4 Jan. 1904; Maj. Gen., JAG, 1 Mar. 1931.
- ARTHUR W. BROWN, 1 Dec. 1933–30 Nov. 1937; Utah; LL.B. Cornell; Pvt., Utah Lt. Arty., 9 May 1898; 2d Lt., Inf., RA, Dec. 1899; Maj., JA, 2 Oct. 1916; Maj. Gen., JAG, 1 Dec. 1933.
- ALLEN W. GULLION, 1 Dec. 1937–30 Nov. 1941; Ky.; A.B., Centre Coll.; B.S., U.S.M.A.; LL.B., Univ. of Kentucky; 2d Lt., Inf., 1905; Maj., JA, May 1917; Maj. Gen., JAG, 1 Dec. 1937; Maj. Gen., AUS, 1 Dec. 1941.
- MYRON C. CRAMER, 1 Dec. 1941–30 Nov. 1945; Conn.; A.B., Conn. Wesleyan Univ.; LL.B., Harvard; 2d Lt., Cav., Wash. NG, 1911; Maj., JA, RA, 1 Jul. 1920; Maj. Gen., JAG, 1 Dec. 1941.
- THOMAS H. GREEN, 1 Dec. 1945–30 Nov. 1949; Mass.; LL.B., Boston Univ.; LL.M., Geo. Washington Univ.; Sgt., Cav., Mass. N.G., 26 June 1916; 2d Lt., Cav., ORC, 16 Aug. 1917; 2d Lt., Cav., RA, 24 Oct. 1917; Capt., JA, 22 Dec. 1924; Brig. Gen., AUS, 24 May 1942; Maj. Gen., JAG, 1 Dec. 1945.
- ERNEST M. BRANNON, 27 Jan. 1950–26 Jan. 1954; Fla.; B.S., U.S.M.A.; LL.B., Columbia; 2d Lt., Inf., 1 Nov. 1918; Capt., JA, 6 Sep. 1936; Brig. Gen., AUS, 3 Mar. 1947; Maj. Gen., JAG, 27 Jan. 1960.

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EUGENE M. CAFFEY, 5 Feb. 1954–31 Dec. 1956; Ga.; B.S., U.S.M.A.; LL.B., Univ. of Virginia; 2d Lt., CE, 12 June 1918; Capt. JA, 11 Sep. 1934; CE, 1941–46; Brig. Gen., AUS, 23 Jul. 1953; Maj. Gen., JAG, 5 Feb. 1954.

GEORGE W. HICKMAN, Jr., 1 Jan. 1957 —————; Ky.; B.S., U.S.M.A. ; LL.B., Harvard ; 2d Lt., Inf., 12 June 1926 ; JA, 1 Sep. 1940; Brig. Gen., AUS, 28 May 1964; Maj. Gen., Asst. JAG, 1 Aug. 1956; Maj. Gen., JAG, 1 Jan. 1957.

(b) Other General Officers of the *Corps*:

SAMUEL T. ANSELL; N.C.; B.S., U.S.M.A.; LL.B., Univ. of North Carolina; Brig. Gen., NA, 5 Aug. 1917.

HUGH S. JOHNSON ; Kan. ; A.B., Univ. of California ; Brig. Gen., NA, 16 Apr. 1918.

EDWIN C. McNEIL; Minn.; B.S., U.S.M.A.; LL.B., Columbia; Brig. Gen., AUS, 28 Jan. 1942.

LAWRENCE H. HEDRICK; S.D.; LL.B., Univ. of Missouri; Brig. Gen., AUS, 19 June 1942.

FRED W. LLEWELLYN; Ore.; A.M., Pacific Univ.; Brig. Gen., Wash. NG, 1911; Brig. Gen., AUS, 19 July 1942.

ERNEST H. BURT; Conn. ; B.S., Michigan State Coll. ; LL.B., Yale Univ. ; LL.M., Geo. Washington Univ. ; Brig. Gen., AUS, 1 Dec. 1942.

ADAM RICHMOND; Ia.; A.B.; LL.B., Univ. of Wisconsin; Brig. Gen., AUS, 2 Apr. 1943.

EDWARD C. BETTS; Ala., LL.B., Univ. of Alabama; Brig. Gen., AUS, 15 Sep. 1943.

JOHN M. WEIR; Ind. ; B.S., A.M., LL.B., Stetson Univ. ; Brig. Gen., AUS, 15 Sep. 1943.

JAMES E. MORRISSETTE; Ala.; A.B., LL.B., Univ. of Alabama; Brig. Gen., AUS, 21 June 1944.

WILLIAM R. C. MORRISON; Wash.; LL.B., Univ. of Washington; Brig. Gen., AUS, 18 Sep. 1944; Brig. Gen., ORC, 20 June 1947.

CLARENCE C. FENN; Wis.; LL.B., Georgetown Univ.; LL.B., Univ. of Wisconsin; Brig. Gen., AUS, 13 Feb. 1946.

HUBERT D. HOOVER; Ia.; B.L., J.D., Univ. of California; Brig. Gen., AUS, 27 Feb. 1947; Brig. Gen., RA, 24 Jan. 1948; Maj. Gen., Asst. JAG, 18 Feb. 1949.

RALPH G. BOYD; Mass.; A.B., LL.B., Harvard; Brig. Gen., ORC, 9 July 1947.

B. FRANKLIN RITER; Utah; B.S., Utah State Coll.; LL.B., Columbia; Brig. Gen., ORC, 28 July 1947.

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- FRANKLIN P. SHAW; Ky.; LL.B., McDonald Institute; LL.M., Georgetown Univ.; Brig. Gen., AUS, 23 Jan. 1948; Maj. Gen., Asst. JAG, 27 Jan. 1950.
- JAMES L. HARBAUGH, Jr.; Colo.; B.S., U.S.M.A.; J.D., New York Univ.; LL.M., S.J.D., Georgetown Univ.; Brig. Gen., AUS, 25 Mar. 1949.
- ROBERT W. BROWN; Ark.; A.B., Univ. of Arkansas; LL.B., Geo. Washington Univ.; LL.M., S.J.D., Georgetown Univ.; Brig. Gen., AUS, 26 Jan. 1950.
- CLAUDE B. MICKELWAIT; Idaho; B.S., Univ. of Idaho; LL.B., Univ. of California; Brig. Gen., AUS, 27 Jan., 1950; Maj. Gen., Asst. JAG, 5 Feb. 1954.
- GEORGE W. GARDES; Mass.; B.S., Catholic Univ.; LL.B., Georgetown Univ.; Brig. Gen., AUS, 27 May 1954.
- STANLEY W. JONES; N. Y.; B.S., U.S.M.A.; LL.B., Univ. of Virginia; Brig. Gen., AUS, 25 Sep. 1954; Maj. Gen., Asst. JAG, 1 Jan. 1957.
- CHARLES L. DECKER; Kans.; B. S., U.S.M.A.; LL.B., Georgetown Univ.; Brig. Gen., AUS, 30 Mar. 1957.
- NATHANIEL B. RIEGER; Mo.; LL.B., Univ. of Missouri; Brig. Gen., AUS, 31 Mar. 1957.
- ROBERT H. McCAW; Ia.; LL.B., Creighton Univ.; Brig. Gen., AUS, 1 June 1957.

### 2. Judge Advocates in Service During the Revolutionary War :

- MOSES ALLEN of South Carolina, May 29, 1778 to Sept. 3, 1783."
- JOSEPH BLOOMFIELD of New Jersey, Nov. 17, 1776–Oct. 29, 1778.
- SAMUEL COGSWELL of Connecticut, Nov. 12, 1782–Sept. 3, 1783.\*
- THOMAS EDWARDS of Massachusetts, J.A., April 9, 1780–Oct. 1, 1782; J.A.G., Oct. 2, 1782–Nov. 3, 1783.
- EBENEZER FINLEY of Maryland, July 1780–Jan. 1, 1781.
- JOHN LAWRENCE of New York, J.A.G., April 10, 1777–June 3, 1782.
- JOHN MARSHALL of Virginia, Nov. 20, 1777–Feb. 12, 1781.
- HENRY PURCELL of South Carolina, April 3, 1778–Sept. 3, 1783."
- HENRY D. PURCELL of Pennsylvania, Jan. 29, 1778–Feb. 1779.
- GEORGE SMITH of New York, Oct. 5, 1777–Sept. 3, 1783."

\* Date of termination of service and, in the case of Strong, first name conjectural.

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SAMUEL STIRK of Georgia, 1779–1780.

CALEB STRONG of Massachusetts, 1780–Sept. 3, 1783.\*

JAMES TAYLOR of Pennsylvania, Dec. 26, 1776–April 3, 1778.

JOHN TAYLOR of Virginia, Jan. 24, 1777–Feb. 10, 1779.

WILLIAM TUDOR of Massachusetts, J.A., July 29, 1775–Aug. 9, 1776; J.A.G., Aug. 10, 1776–April 9, 1777.

### 3. Judge Advocates in Service Between 1812 and 1821:

THOMAS GALES, Sept. 26, 1812–Dec. 16, 1814.

EVERETT A. BANCKER of New York, March 18, 1813–June 15, 1815.

PHILIPS. PARKER of New York, April 2, 1813–Oct. 1, 1814.

ROBERT TILLOTSON of New York, April 12, 1813–Oct. 5, 1813.

JOHN S. WILLS of Ohio, May 7, 1813–June 15, 1815.

JAMES T. DENT of Georgia, July 19, 1813–April 14, 1818.

STEPHEN LUSH, JR., of New York, Oct. 5, 1813–June 15, 1815.

RIDER H. WINDER of Maryland, July 9, 1814–June 15, and May 3, 1816–July 23, 1818.

HENRY WHEATON of New York, Aug. 6, 1814–May 9, 1816.

LEONARD M. PARKER of Massachusetts, Sept. 16, 1814–June 15, 1816.

SAMUEL WILCOCKS of Pennsylvania, Dec. 19, 1814–June 15, 1815.

WILLIAM O. WINSTON of Virginia, April 29, 1816–April 14, 1818.

THOMAS HANSON of Maryland, April 29, 1816–April 14, 1818.

JOHN L. LEIB of Pennsylvania, July 9, 1816–Jan. 15, 1817.

SAMUEL A. STORROW of Massachusetts, July 9, 1816–June 1, 1821.

STOCKLEY D. HAYS of Tennessee, Sept. 10, 1818–June 1, 1821.

The officers named in the foregoing list were regularly appointed by the President. Auguste Genevieve Valentin D’Avezac of Louisiana was appointed Major and Judge Advocate of the Army defending New Orleans on December 16, 1814, by Major General Andrew Jackson. He was afterward a distinguished criminal lawyer and Chargé d’Affaires to the Netherlands, 1831–1839 and 1845–1850.

\* Date of termination of service and, in the case of Strong, first name conjectural.

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### 4. Judge Advocates in Service During the Civil War:

JOSEPH HOLT of the District of Columbia, **Col.** and Judge Advocate General, Sept. 3, 1862–June 21, 1864; Brig. Gen. and Judge Advocate General, June 22, 1864–Dec. 1, 1875.

WILLIAM M. DUNN of Indiana, Major and Judge Advocate, Mar. 13, 1863–June 21, 1864; Col. and Assistant Judge Advocate General, June 22, 1864–Dec. 1, 1875.

*Majors and Judge Advocates of Volunteers (act of July 17, 1862) :*

LEVI C. TURNER of New York, July 31, 1862–Mar. 13, 1867.

JOHN A. BOLLES of Massachusetts, Sept. 3, 1862–July 18, 1863.

JOHN C. KNOX of Pennsylvania, Sept. 7, 1862–May 31, 1866.

THEOPHILUS GAINES of Ohio, Nov. 1, 1862–May 31, 1866.

GUIDO N. LIEBER of New York, Nov. 13, 1862–Feb. 25, 1867.

RALSTON SKINNER of Ohio, Nov. 19, 1862–Mar. 20, 1865.

THEODORE S. BOWERS of Illinois, Feb. 19, 1863–Aug. 30, 1863.

WELLS H. BLODGETT of Illinois, Mar. 10, 1863–July 14, 1863.

G. IRWIN WHITEHEAD of Pennsylvania, Mar. 11, 1863–**Aug. 10, 1863.**

WILLIAM M. DUNN of Indiana, Mar. 13, 1863–June 21, 1864.

JOHN MENDENHALL of Indiana, Mar. 17, 1863–Feb. 27, 1864.

JOSEPH L. STACKPOLE of Massachusetts, July 11, 1863–Mar. 30, 1865.

HENRY L. BURNETT of Ohio, Aug. 10, 1863–Dec. 1, 1865.

EDWARD R. PLATT of Vermont, Nov. 2, 1863–July 20, 1865.

ADDISON A. HOSMER of Massachusetts, Nov. 24, 1863–Nov. 28, 1865.

JOHN A. BINGHAM of Ohio, Jan. 12, 1864–**Aug. 3, 1864.**

JOHN C. HENSHAW of New York, Feb. 29, 1864–Sept. 30, 1864.

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JOHN C. CAMPBELL of West Virginia, Feb. 29, 1864–Feb. 10, 1866.

DEWITT CLINTON of New York, May 27, 1864–Feb. 25, 1867.

LUCIEN EATON of Missouri, July 2, 1864–July 17, 1866.

JOHN CHIPMAN GRAY of Massachusetts, July 25, 1864–July 14, 1865.

ELIPHALET WHITTLESEY of Maine, Sept. 1, 1864–June 14, 1866.

SETH C. FARRINGTON of Maine, Sept. 3, 1864–May 31, 1866.

EDWARD L. JOY of Iowa, Sept. 15, 1864–May 7, 1865.

WILLIAM WINTHROP of New York, Sept. 19, 1864–Feb. 25, 1867.

HENRY H. BINGHAM of Pennsylvania, Sept. 20, 1864–July 2, 1866.

JAMES N. McELROY of Ohio, Sept. 26, 1864–Mar. 1, 1866.

HORACE B. BURNHAM of Pennsylvania, Oct. 31, 1864–Feb. 25, 1867.

FRANCIS E. WOLCOTT of Kentucky, Dec. 17, 1864–Sept. 30, 1866.

EDGAR W. DENNIS of New York, Jan. 19, 1865–Feb. 25, 1867.

WILLIAM E. FURNESS of Pennsylvania, Feb. 22, 1865–Oct. 7, 1865.

THOMAS F. BARR of Massachusetts, Feb. 26, 1866–Feb. 25, 1867.

WILLIAM M. HALL of Pennsylvania, Mar. 1, 1865–May 28, 1867.

MAJOR JAMES F. MELINE, A.D.C., of the District of Columbia, was acting as Judge Advocate of the Army of Virginia in July 1862, without statutory authority.

**5. General Dunn Reported on March 1, 1878, That the Organization of the Department Was Then as Follows:**

War Department—BRIG. GEN. WILLIAM M. DUNN, Judge Advocate General.

MAJOR WILLIAM WINTHROP, Assistant to the Judge Advocate General.

MAJOR HERBERT P. CURTIS, Assistant to the Judge Advocate General.

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MAJOR HENRY GOODFELLOW, in  
charge, Claims Branch.

Atlantic Division, New York—MAJOR GUIDO N. LIEBER,  
Judge Advocate.

Department of the Platte, Omaha—MAJOR HORACE B.  
BURNHAM, Judge Advocate.

Department of Dakota, St. Paul—MAJOR THOMAS F.  
BARR, Judge Advocate.

Department of the Missouri, Ft. Leavenworth—MAJOR  
DAVID G. SWAIM, Judge Advocate.

U. S. Military Academy, West Point—MAJOR ASA B.  
GARDNER, Professor of Law.

### 6. Judge Advocates in Service During the War With Spain:

Regular Army—

BRIG. GEN. G. NORMAN LIEBER of New York, Judge  
Advocate General.

COL. THOMAS F. BARR of Massachusetts, Assistant  
Judge Advocate General.

LT. COL. JOHN W. CLOUS of the U. S. Army, Deputy  
Judge Advocate General.

LT. COL. EDWARD HUNTER of Maine, Deputy Judge  
Advocate General.

LT. COL. GEORGE B. DAVIS of Massachusetts, Deputy  
Judge Advocate General.

MAJ. STEPHEN W. GROESBECK of Illinois, Judge  
Advocate.

MAJ. ENOCH H. CROWDER of Missouri, Judge Advo-  
cate.

MAJ. JASPER N. MORRISON of Missouri, Judge Ad-  
vocate.

Lieutenant Colonels and Judge Advocates of Volunteers (act  
of April 22, 1898)—

ENOCH H. CROWDER of Missouri (Maj., J.A., Reg.  
Army), June 22, 1898—Aug. 20, 1899.

EDGAR S. DUDLEY of New York (Capt., A.Q.M., Reg.  
Army), May 9, 1898—Apr. 17, 1899.

FAYETTE W. ROE of West Virginia (Capt., 3rd Inf., Reg.  
Army), May 9, 1898—Sept. 15, 1898.

JOHN A. HULL of Iowa, May 9, 1898—Apr. 17, 1899.

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FREDERICK ASBURY HILL of Connecticut, May 9, 1898–  
June 24, 1899.

CHARLES L. JEWETT of Indiana, May 9, 1898–Feb. 27,  
1899) —

CHARLES HENRY RIBBEL of New York, May 9, 1898–  
June 13, 1899.

LUCIEN FRANCIS BURPEE of Connecticut, July 21, 1898–  
Jan. 1, 1899.

Majors and Judge Advocates of Volunteers (act of March 2,  
1899) —

EDGAR S. DUDLEY of New York (Capt., A.Q.M., Reg.  
Army), Apr. 7, 1899–Feb. 2, 1901.

CHARLES McCLURE of Illinois (Capt., 18th Inf., Reg.  
Army), Apr. 17, 1899–Mar. 1, 1901.

HARVEY C. CARBAUGH of Illinois (Capt., 4th Art., Reg.  
Army), Apr. 17, 1899–Feb. 2, 1901.

JOHN A. HULL of Iowa, Apr. 17, 1899–Feb. 2, 1901.

GEORGE M. DUNN of Colorado, Apr. 17, 1899–Feb. 2,  
1901.

### 7. The Following Assignments of Judge Advocates Were Author- ized on Nov. 5, 1918 :

Station	Maj. Gen.	Brig Gen.	Colonels	Lt. Cols.	Majors	Cpts.	1st Lts.	Total
JAGO -----	1	1	7	4	45	1	1	60
Br. Office, France---	-	1	1	2	6	-	-	10
PMGO -----	-	-	3	4	5	13	-	26
Departments (9)----	-	-	3	1	14	-	-	18
Posts (38)-----	-	-	-	-	38	38	-	76
GHQ, AEF, France--	1	1	1	1	12	1	-	16
SOS in Europe-----	-	-	1	4	8	12	-	25
Armies (2)-----	-	-	2	2	2	-	-	6
Corps (7)-----	-	-	-	7	-	-	-	7
Divisions (58)-----	-	-	-	58	58	-	-	116
C.A. Brigades (14)---	-	-	-	-	-	14	-	14
Ports (2)-----	-	-	-	-	1	2	-	3
Hq., AEF., Siberia--	-	-	-	-	1	-	-	1
Hq., AEF., Mur- mansk -----	-	-	-	-	1	-	-	1
Miscellaneous -----	-	1	3	7	19	1	-	31
								409

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## 8. Judge Advocates in Active Service 7 January 1959:

	<i>Regular Army</i>	<i>USAR</i>	<i>NGUS</i>	
Major Generals.....	2	---	---	
Brig Generals.....	3	---	---	
Colonels .....	118	10	2	
Lt Colonels .....	136	24	6	
Majors .....	87	42		
Captains .....	147	40	3	
1st Lieutenants.....	20	370	1	
	<u>613</u>	<u>486</u>	<u>12</u>	Total—1011

## COMMENTS

JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION — CHARACTERIZATION OF DISCHARGE : A recent pronouncement of the Supreme Court may well unearth a vast new area of judicial inquiry into the conduct and affairs of the military establishment. In a *per curiam* opinion with only a single dissent, the Court held in *Harmon v. Brucker*<sup>1</sup> that, despite a statutory pattern which confers discretionary authority upon the Secretary of the Army to prescribe the type of certificate to be given upon discharge, a discharge certificate based upon the pre-service activities of a serviceman is not authorized. The remarkable feature of the opinion is that, unlike in cases reviewing the exercise of court-martial jurisdiction,<sup>2</sup> the Court was willing to scrutinize the conduct of the military without relying on traditional constitutional objections.

Although the case was a consolidation of two separate actions by Harmon and Abramowitz, the basic facts of the two are so similar that only a discussion of the former is necessary. Harmon was inducted in 1952 and, after being questioned in 1953 and 1954 concerning subversive activities in which he was alleged to have engaged prior to his induction, was assigned to non-sensitive duties. In April 1954, Harmon's case was re-evaluated on the basis of a Department of Defense directive<sup>3</sup> making the security program for civilian government employees applicable to the military. As a result, Harmon was determined a security risk and discharged with an undesirable discharge certificate although his service record indicated that his character and efficiency for the major portion of his service was "excellent." After several fruitless appeals to the Army Discharge Review Board and the Army Board for the Correction of Military Records for an administrative recharacterization of his discharge, Harmon instituted an action in the District Court for the District of Columbia to compel the issuance to him of an honorable discharge certificate. That court held that it had no power to review, control, or compel the granting of particular types of discharge certificates.<sup>4</sup> Despite an intervening recharacterization of the discharge from undesirable to general by the Army Discharge Review Board, the judgment was affirmed by the Court of Appeals, which found neither a statute directing or au-

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1355 U.S. 579 (1958).

<sup>2</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

<sup>3</sup> DOD Dir. 5210.9, 7 Apr 1954.

<sup>4</sup> *Harmon v. Brucker*, 137 F. Supp. 476 (D.C. 1956).

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thorizing judicial review, nor a misapplication of a statute in the process or the substance of the discharge, nor infringement of any constitutional right so as to authorize a review of the exercise of the statutory discretion granted to the Secretary of the Army.<sup>5</sup> On certiorari, the Supreme Court held that the Federal courts have jurisdiction to review an act of a government official which is in excess of his express or implied powers; that statutes authorizing the Secretary of the Army to issue discharge certificates and Army regulations indicating that the purpose of the certificates is to characterize the service rendered limit the Secretary's discretion; and that issuance of an undesirable discharge for pre-service conduct is in excess of the Secretary's statutorily delegated power.

As pointed out in the dissent, Harmon did not contend that there was any restriction on the power of the Army to discharge for any reason it desired. The sole issue involved was the authority of the courts to review an administrative determination by the Secretary of the Army of the characterization of the discharge certificate and, as a necessary corollary thereto, the scope of that review. There are, of course, several related problems of jurisdiction which were not at issue in this case but which have caused other litigants to flounder in their attempts to obtain judicial review of the characterization of their discharges. For example, such tactical errors as a failure to join an indispensable party<sup>6</sup> and a failure to exhaust available administrative remedies<sup>7</sup> have thwarted plaintiffs who have sought a review of the action of the Army in issuing a derogatory discharge certificate.<sup>8</sup>

No attempt will be made in this writing to recount and reconcile the several lower court decisions concerned with the judicial review of the character of a discharge. Suffice it to say that the complexity and the far-reaching implications of the legal problems in-

<sup>5</sup> Harmon v. Brucker, 243 F.2d 613 (D.C. Cir. 1957).

<sup>6</sup> When the action is brought before the discharge is effected, the officer empowered to issue or direct the issuance of the discharge must be joined and it is not sufficient to have as parties defendant those who only recommend action. Bernstein v. Herren, 234 F.2d 434 (2d Cir. 1956), cert. denied, 352 U.S. 840 (1956); Schustack v. Herren, 234 F.2d 134 (2d Cir. 1956). After discharge the Secretary of the Army is an indispensable party. St. Helen v. Wyman, 139 F. Supp. 545 (N.D. Cal. 1956); Marshall v. Wyman, 132 F. Supp. 169 (N.D. Cal. 1955).

<sup>7</sup> Schustack v. Herren, 136 F. Supp. 850 (S.D.N.Y. 1955), aff'd on other grounds, 234 F.2d 134 (2d Cir. 1956); Marshall v. Wyman, supra note 6. Since exhaustion of administrative remedies is not required when the action of the administrative body is alleged to be in excess of its statutory powers, Skinner & Eddy Corp. v. U.S., 249 U.S. 557 (1919), the holding of the Court in the Harmon case would appear to make appeals to the Army Discharge Review Board and the Army Board for the Correction of Military Records unnecessary.

<sup>8</sup> For a more comprehensive analysis of these "threshold" problems see Note, 70 Harv. L. Rev. 533 (1957).

volved were either undetected, avoided, or dismissed rather summarily by the courts which were confronted with them.<sup>9</sup> In the only other case in which the Supreme Court had occasion to consider the precise issue involved in *Harmon*, it decided, on the merits, that the War Department was not required to give plaintiff an honorable discharge, and so decided after solemnly asserting that "whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers, is a question that we need not here determine."<sup>10</sup>

Almost without exception<sup>11</sup> recent decisions of the courts have been concerned with attempts to compel the issuance of an honorable discharge after the receipt of a general or undesirable discharge certificate which had been based on pre-service conduct. It was this factor which enabled the Court to avoid the wide variety of legal theories, including those involving substantial constitutional questions, advanced by the plaintiffs. The Court simply predicated its determination on a seldom used, but potentially significant, doctrine which had been enunciated in *American School of Magnetic Healing v. McAnnulty*.<sup>12</sup> In reiterating this theory, the Court said, "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."<sup>13</sup> With this assertion, the Court then proceeded to construe the statute<sup>14</sup> authorizing the Secretary of the Army to prescribe the form of discharge certificate. It found that this authority was limited by the wording of another statute<sup>15</sup> which granted to the Army Discharge Review Board the power

<sup>9</sup> For an excellent article undertaking to span the many legal issues present in this area see Jones, *Jurisdiction of the Federal Courts To Review the Character of Military Administrative Discharges*, 57 Col. L. Rev. 917 (1957).

<sup>10</sup> *Patterson v. Lamb*, 329 U.S. 539, 542 (1947) (footnote omitted).

<sup>11</sup> The most notable exception is found in the so-called "doctor draft" cases. See, e.g., *Levin v. Gillespie*, 121 F. Supp. 726 (N.D. Cal. 1954) in which a doctor on active duty received an injunction ordering his prompt honorable discharge from the Army.

<sup>12</sup> 187 U.S. 94 (1902).

<sup>13</sup> 355 U.S. at 681432.

<sup>14</sup> Art. 108, Articles of War 1920, 41 Stat. 809, as amended, 10 U.S.C. 652a (1952) (now 10 U.S.C. 3811 (1962 ed., Supp. V)) provided that "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

<sup>15</sup> Sec. 301, Servicemen's Readjustment Act of 1944, 58 Stat. 286, as amended, 38 U.S.C. 693h (1952) (revised and re-enacted effective 1 Jan 1969 as 10 U.S.C. 1653, as added by Pub. L. No. 857, 85th Cong., 2d

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to review the action of the Secretary. In the opinion of the Court, "these two provisions must be given an harmonious reading to the end that the basis on which the Secretary's action is reviewed is coterminous with the basis on which he is allowed to **act.**"<sup>16</sup> Since the Board must base its findings upon "all available records" relating to the discharged member and a proper construction of the word "records" means "records of military service," the type of discharge must be "determined solely by the soldier's military record in the **Army.**"<sup>17</sup> Thus, by the circuitous route of making a determination on the merits the Court concluded that there was jurisdiction in the District Court to review the action of the Secretary of the Army and to grant appropriate relief.

First to be noted is that the Court did not rely on an express statutory grant of power to review such as that found in the general grant of authority to the Federal courts<sup>18</sup> or that conferred by the Administrative Procedure Act.<sup>19</sup> To the contrary, the Court appeared to predicate jurisdiction on some inherent or perhaps even constitutional grant of authority to stem the tide of excessive administrative action.

Secondly, the Court did not find it necessary to mention or reconcile the conflict in the lower courts over the power of the Federal judiciary to review the action of the Secretary of the Army in characterizing the type of **discharge.**<sup>20</sup>

The basic impediment that the Court faced was the doctrine that the courts have no general supervisory power over the actions of the administrative departments of the Government.<sup>21</sup> Among the early cases, the doctrine had found frequent and particular application whenever an attempt was made to review and circumscribe

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Sess. § 13v(2) (2 Sep 1958)) provided that "The Secretary of the Army . . . [is] authorized and directed to establish in the Army . . . boards of review . . . whose duties shall be to review . . . the type and nature of his discharge . . . . Such review shall be based upon all available records of the service department relating to the person requesting such review . . . . Such board shall have authority . . . to change, correct, **or** modify and discharge . . . and to issue a new discharge . . . . [and] the findings . . . [of such board shall be] final subject only to review by the Secretary of the Army . . . ."

<sup>16</sup> 355 U.S. at 582.

<sup>17</sup> *Id.*, at 582-83.

<sup>18</sup> 28 U.S.C. 1331 (1952), as amended, Act of 25 July 1968, Pub. L. No. 554, 85th Cong., 2d Sess. In view of the fact that the amount in controversy must **now** exceed \$10,000 it would appear to be virtually impossible for a dischargee to predicate jurisdiction on this statute.

<sup>19</sup> Sec. 10, Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 (1952).

<sup>20</sup> Compare *Gentila v. Pace*, 193 F.2d 924 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 943 (1952), **with** *Levin v. Gillespie*, 121 F. Supp. 726 (N.D. Cal. 1954).

<sup>21</sup> See *Keim v. U.S.*, 177 U.S. 290 (1900).

the action of the Army in such matters as retirement<sup>22</sup> and discharge.<sup>23</sup> The basis for this doctrine lies in the separation of powers theory and was espoused by the Supreme Court in the early case of *Decatur v. Paulding*.<sup>24</sup> There, the widow of Stephen Decatur claimed the benefits of two statutory provisions enacted on the same day, one granting pensions to widows of naval officers who had died in service and the other a resolution granting a special pension to Mrs. Decatur. She claimed the benefits of both provisions but the Secretary of the Navy, upon the advice of the Attorney General, determined that she was only entitled to elect one of the pensions; whereupon she brought a mandamus action to compel him to pay the additional amount. In refusing to grant relief, the Court even assumed that Mrs. Decatur was entitled to the additional pension and in so doing gave sanction to the principle that where there has been only an erroneous interpretation of the law by its administrator judicial review is generally unavailable. These words of the Court clearly evidence an attitude of judicial deference to executive discretion.

"The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." <sup>25</sup>

Directly in conflict with this principle is what has been called the "presumption of a right to judicial review"<sup>26</sup> enunciated in the McAnnully decision. The statute involved there authorized the Postmaster General to deny the use of the mails to any person he determined, upon evidence satisfactory to him, to be engaged in using the mails for fraudulent purposes. The Postmaster General issued a fraud order which prohibited the plaintiffs from using the mails for the purpose of advertising the benefits to be derived from a proper exercise of the brain and mind to restore one's health. In holding that the Court had jurisdiction to review the action of the Postmaster General, Justice Peckham stated :

" . . . Conceding for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes

<sup>22</sup> See, *e.g.*, *U.S. ex rel.* French v. Weeks, 259 U.S. 326 (1922); Reaves v. Ainsworth, 219 U.S. 296 (1911).

<sup>23</sup> See, *e.g.*, *U.S. ex rel.* Creary v. Weeks, 259 U.S. 336 (1922); Davis v. Woodring, 111 F.2d 523 (D.C. Cir. 1940); Reid v. U.S., 161 Fed. 469 (S.D.N.Y. 1908), writ of error dismissed, 211 U.S. 529 (1909).

<sup>24</sup> 39 U.S. (14 Pet.) 497 (1840).

<sup>25</sup> *Id.* at 516.

<sup>26</sup> Jaffe, *The Right To Judicial Review I*, 71 Harv. L. Rev. 401,420 (1958).

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of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the statutes have not granted him power so to order. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.”<sup>27</sup>

Significantly, the statute was silent on the question of judicial review and there was a complete absence of any legislative history which might evidence an intent to permit review. However, of equal importance is the indication by the Court that **Congress could** authorize the administrator of a law to determine all questions arising under the statute and effectively prohibit any judicial review of his actions, at least in the absence of a constitutional impediment.

The pronouncement of a common law of judicial review in the Federal courts was more firmly stated in *Stark v. Wickard*.<sup>28</sup> Under the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture was authorized to fix minimum prices for the sale of milk by producers to handlers. In regulating these prices, a pool was established into which the handlers made their payments and from which the producers received the minimum price. From this pool were deducted certain payments to cooperatives, and this was the action which was challenged by the producers. Although the statute provided for a review of certain orders of the Secretary of Agriculture, there was no provision for judicial review of this particular action. In determining that the action of the Secretary of Agriculture was reviewable, the Court admitted that “there is no direct judicial review granted by this statute for these proceedings” but then proceeded to find sanction for review in the “existence of courts and the intent of Congress as deduced from the statutes and precedents.”<sup>29</sup> The intent of Congress was found in other sections of the statute which authorized judicial review in

<sup>27</sup> 187 U.S. at 107–108.

<sup>28</sup> 321 U.S. 288 (1944).

<sup>29</sup> *Id.* at 307–308.

circumstances other than the one at hand (which would appear to evidence an intent to preclude rather than grant review) and the silence of Congress with regard to judicial review of this particular action. Of course, the Court acknowledged that this presumption of the right to review may be utilized "only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers."<sup>30</sup> Thus, even though the Court relied on a "presumption of a right to judicial review" it still struggled to find a congressional intent to permit review.

Despite the willingness of the Court in *McAnnulty* and *Stark* to extend generally accepted principles of judicial review of administrative action, the theory of the *Decatur* case recently has received some indirect support. *Perkins v. Lukens Steel Co.*<sup>31</sup> is significant because, although the denial of judicial review was based on the absence of a legal right which would give the plaintiff a standing to sue, the Court made some pertinent observations regarding the reviewability of a determination by the Secretary of Labor. Involved was a statute which provided that those who sell supplies to the Government must agree to pay their employees wages not less than the prevailing minimum wage for persons doing similar work in the "locality." The Court of Appeals held that the Secretary of Labor had erroneously construed the term "locality" to include a larger geographical area than the statute contemplated. It was asserted that the construction of the word "locality" was a plain error of law in interpreting the statute and that the actions of the Secretary were not authorized by law, which was the same argument that was made and upheld in the *McAnnulty* case. In commenting on this allegation, the Court likened the Secretary to an agent who is responsible only to his principal for an erroneous construction of his instructions. Significantly, the Court distinguished *McAnnulty* on the basis of the necessity for an "even and expeditious functioning of Government" in the administration of its purchasing authority and the attendant "confusion and disorder" which could be expected from judicial supervision of administrative procedure.<sup>32</sup> Certainly, the efficient and expeditious administration of the Army, particularly in the area of discharge and characterization of the service rendered, which are matters so important to morale and discipline, is at least as important to the nation as is the purchasing power of the Government. As late as 1953 the Court apparently felt that unless Congress indicated otherwise the administration of the Army should not be scrutinized by

<sup>30</sup> *Id.* at 310.

<sup>31</sup> 310 U.S. 113 (1940).

<sup>32</sup> *Id.* at 130.

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the courts. Specifically, in *Orloff v. Willoughby*<sup>33</sup> the Court refused to review a determination made under the then current law that a doctor was not entitled to a commission. At that time, the Court was of the opinion that “orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”<sup>34</sup> And all this came to pass in a habeas corpus action.

But even assuming the existing vitality of the *McAnnulty* doctrine, the silence of Congress does not always mean that the courts will undertake review of administrative action. This is best illustrated by *Switchmen's Union v. National Mediation Board*.<sup>35</sup> That case involved the Railway Labor Act which had established the National Mediation Board with authority to certify representatives for collective bargaining with the carriers. The Board determined that all yardmen of a particular carrier should participate in an election for a representative and, consequently, the Brotherhood of Railroad Trainmen was elected and certified by the Board. The petitioners had contended that certain yardmen should have been permitted to participate in a separate election to elect their own representative, which presumably would have been the Switchmen's Union. However, the Board was of the opinion that the Act required that all yardmen of a carrier should select a single representative. The statute itself did not provide for judicial review of the action of the Board in certifying a representative. After pointing out that the statute bestowed on the majority of a craft the right to determine its representative, the Court concluded that a review by the courts of the Board's determination was not necessary to protect that right. Particularly pertinent were these words of the Court :

“ . . . Congress for reasons of its own decided upon the method for the protection of the ‘right’ which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.”<sup>36</sup>

Perhaps the best indication of why the Court refused to apply a presumption of reviewability lies in this statement,

“ . . . Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied.”<sup>37</sup>

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<sup>33</sup> 345 U.S. 83 (1953).

<sup>34</sup> *Id.* at 94.

<sup>35</sup> 35320 U.S. 297 (1943).

<sup>36</sup> *Id.* at 301 (footnote omitted).

<sup>37</sup> *Ibid.*

To the Court, history disclosed that Congress had walked slowly with regard to utilizing the judicial process in the settlement of railway labor disputes and had shown a definite preference for conciliation and mediation. Although the Army was required to issue written discharges beginning in 1776, matters relating to the character of the discharge generally have been left to the discretion of the Army. It was not until 1944 that Congress in any way limited this discretion. Even then it was only by way of authorizing the establishment of administrative boards within each of the services to review discharges.<sup>38</sup> Other steps taken were the creation of the Army Board for Correction of Military Records in 1946<sup>39</sup> for the purpose of correcting all military records, including discharges, and thereby relieving Congress of the burden of requests for private legislation, and the procedural requirement of former section 249a of the Armed Forces Reserve Act of 1952<sup>40</sup> which requires a board proceeding, or waiver thereof, prior to the other than honorable discharge of a reservist. The only "right" which Congress created was one to a certificate of discharge, and the machinery it selected for the protection of this right was the Secretary of the Army, the Army Discharge Review Board, and the Army Board for the Correction of Military Records. The "right" to a certificate of discharge only exists by grant of Congress, and consonant with the opinion in *Switchmen's Union* Congress may determine how that right may be enforced.

The irreconcilable conflict between the *Decatur* line of cases and those purporting to follow *McAnnulty* was sharply brought into focus, although in a different context, in *Larson v. Domestic and Foreign Commerce Corp.*<sup>41</sup> The case involved a successful application of the doctrine of sovereign immunity in which, after declaring that the doctrine did not apply when the official was acting unconstitutionally or beyond the scope of his statutory authority, the Court stated:

" . . . It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so,"<sup>42</sup>

<sup>38</sup> Sec. 301, Servicemen's Readjustment Act of 1944, *supra* note 15.

<sup>39</sup> 10 U.S.C. 1652 (1962ed., Supp. V).

<sup>40</sup> 10 U.S.C. 1163(c) (1952ed., Supp. V).

<sup>41</sup> 337 U.S. 682 (1949).

<sup>42</sup> *Id.* at 696.

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Obviously then, there must exist some line of demarcation between the power of an official to make an erroneous decision under the statute he is to administer and his power to make any decision at all. The primary authority granted to the Secretary of the Army was to prescribe the form of the certificate of discharge. If in exercising this authority he makes an erroneous determination, he is still acting within the authority granted to him. Likewise, if he should misconstrue incidental guide lines laid down in the statute in arriving at his decision, he, nevertheless, is acting within the general scope of his authority. And this should be especially true if this guidance happens to be found in a statute establishing an advisory body to assist in a review of his adverse determination. Only if the action is *clearly* beyond any authority intended by Congress should the administrative discretion be disturbed. Lack of statutory power should not be lightly assumed, particularly when broad discretion is the general intent of the statute. Policy contrary to the general scheme of the statute and incompetency in its administration should be left to the official's superiors and the Congress and should not be judicially corrected by assertions of lack of authority.

One additional objection can be made to the decision of the Court in *Harmon*. Almost without exception,<sup>43</sup> the cases relying on a "presumption of judicial review," including *McAnnulty* itself, involved statutes in which Congress was silent as to the finality of the administrative action and in which there was no ascertainable legislative intent to permit judicial review. Furthermore, in *McAnnulty* there was the definite suggestion that Congress could preclude judicial review of any determination reasonably related to the official's statutory power, absent a constitutional objection.<sup>44</sup> It, therefore, would appear that an expression of finality of administrative action should be sufficient to preclude the application of the *McAnnulty* doctrine.<sup>45</sup> It is true that the statute conferring power on the Secretary of the Army to prescribe the form of discharge certificate also is silent as to any reviewability of his action by the courts. However, the Court was quite willing to limit this authority

<sup>43</sup> In *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court entertained a suit in which it was alleged that the commissioner of immigration had erroneously construed the law in refusing admission to an alien. Although the statute purported to make the decision of the commissioner final, the action was a petition for habeas corpus, a form of judicial review in which the courts traditionally have been more willing to review actions of administrative officials where that action restricts personal freedom. See *Burns v. Wilson*, 346 U.S. 137 (1953).

<sup>44</sup> But see *Stark v. Wickard*, 321 U.S. 288, 307 (1944).

<sup>45</sup> But cf. *Estep v. U.S.*, 327 U.S. 114 (1946) where an expression of finality was construed to mean that Congress only intended to cut down on the scope of judicial review.

by the wording of the grant of power to the Army Discharge Review Board. If that statute is to be read *in pari materia* with the grant of authority to the Secretary of the Army, then it must be so read in its entirety. It is there provided that the action of the Board is final subject only to action by the Secretary of the Army.<sup>46</sup> Certainly then, the power of the courts to review the Secretary's action can be no greater than its power to review the action of his advisor, the Discharge Review Board; and if this be so Congress has expressed that degree of finality which should be sufficient to rebut any presumption of reviewability otherwise inherent in a grant of administrative power.

Despite the questionable nature and applicability of the reasoning of the Court in *Harmon* and the undesirable consequences which it has engendered, the doctrine of the case must now be grafted upon the heretofore absolute discretion of the Secretary of the Army. The implications of the case are clear. The *McAnnulty* theory is now applicable to military determinations and it would require a seer to predict in what instances the courts will seek, by statutory interpretation, to restrict the actions of the military to what is claimed to be the limits of their statutory authority. However, within the realm of judicial review of the character of military discharges it may be possible to forecast the eventual outcome of future litigation. The scope of review approved by the Supreme Court clearly is limited to a determination of whether the Secretary of the Army has exceeded his statutory authority. Therefore, determinations of questions of fact are not within the allowable scope of review.<sup>47</sup> Furthermore, unless the courts are able to discover in the vast statutory scheme regulating the administration of the Army some other phraseology which is susceptible to an interpretation further limiting the authority of the Secretary, they will be permitted to find an excess of statutory authority only where the action of the Secretary is based on particular conduct. The mandate of the Court prohibits the Secretary from considering anything other than the records of the individual's military service, and it is in this area that there likely will be further litigation. The import of the decision becomes acutely uncertain when an attempt is made to ascertain the full significance of the phrases "records of military service" and "solely by the soldier's military record in the Army." Obviously this was not intended to encompass all those incidents which become matters of record and are in fact Army personnel records pertaining to the individual. This was precisely the sort of action that was condemned in *Harmon*. On the other hand, does the language of the Court mean that the Army

<sup>46</sup> See note 16 *supra*.

<sup>47</sup> *Gentila v. Pace*, 193 F.2d 924 (D.C. Cir. 1951).

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may only take into account those activities which directly affect the character of the service rendered? This interpretation could raise substantial problems with regard to the characterization of a discharge which is based on conduct occurring while the member was off-duty or on leave or pass. Although this conduct superficially has no relation to the member's military duties, the status of a member on active duty, which is that of a full-time soldier, is so peculiar that anything he does may affect adversely the quality of the military service he renders. To be distinguished is the case of a member of the Army Reserve on inactive duty. In view of the limited nature of the services required of such individuals and the remote effect their purely civilian conduct has on the quality of the military services they render, different considerations may be applicable. From the foregoing, it is evident that the test of "reasonable relationship to military duties" may be subject to varying interpretations and results. Furthermore, it has the decidedly undesirable result of requiring the courts to determine the reasonableness and necessity for certain military duties and the probable effect certain conduct will have on these duties. Such a sweeping interpretation of congressional intent and limitation on the powers of the Secretary of the Army cannot be justified by the decision of the Supreme Court in *Harmon*. Rather, the Court appeared to be more concerned with restricting the action of the Secretary to a determination based on those activities which occurred while the individual was a member of the Army. Although a member of the Army Reserve on inactive duty is, in the broad sense of the term, a member of the Army, even while not performing actual military service, his conduct as a member of the civilian community would appear to be more closely analogous to those pre-service activities of the member on active duty. Therefore, it is suggested that the courts probably will accept as conclusive a determination by the Secretary of the Army that certain conduct which occurs while the member is on active duty, or, in the case of reservists, conduct occurring during scheduled drills or during active duty for training periods, necessarily affects the quality of the service rendered and may properly be considered to constitute a part of his record of military service. The consideration of all other conduct would then fall within the prohibition of the *Harmon* decision.

Administratively, the Army already has had occasion to construe the *Harmon* decision and to consider its application to other factual situations. There appears to be little question that the doctrine of the *Harmon* case is not restricted to cases involving security matters<sup>48</sup> and that it is equally applicable to officers as well as enlisted

<sup>48</sup> SAGA 1958/3839, 8 May 1968.

men.<sup>49</sup> However, in several recent cases<sup>50</sup> the view has been expressed that where the member engaged in pre-service criminal conduct for which he was convicted after entry into the Army, the *Harmon* decision did not prohibit a derogatory discharge based upon the conviction by the civil court. These cases perhaps indicate the existence of another problem area. The rationale of the opinions is that the applicable regulations make the operative fact upon which the type of discharge is based the conviction by the civil court. Since discharge depends upon conviction, which in view of his probable confinement jeopardizes his value to the Army, and not his commission of the offense, the argument is not without some merit. However, it is certain that the courts will not consider themselves bound by broad regulatory language which appears to predicate the type of discharge upon in-service conduct if, in fact, the characterization is based, even in part, on pre-service conduct. Thus, the courts may conclude that since the commission of the offense, which, after all, was the basis for the conviction, occurred prior to entry, the type of discharge was not determined *solely* by the individual's military records but was predicated, in part, upon pre-service conduct.

Despite the refusal of the Court to consider the constitutional issues raised in *Harmon*, it is evident that the case has implications far beyond its immediate result. Perhaps the Court's decision can best be explained by a previously exhibited tendency to contract and expand military authority depending upon whether the sky is a peaceable blue or is darkened by war-like clouds. This objective is understandable and perhaps desirable; but when it is accomplished by a misplaced policy of avoiding constitutional issues, coupled with an unwarranted assumption of jurisdiction by the Federal courts, it becomes bad precedent. The real paradox of the *McAnnulty* principle is that a lower Federal court, which presumably is dependent upon statutory authority for its jurisdiction, may predicate that jurisdiction *solely* on the absence of statutory authority in another branch of the Government. Perhaps the relatively definitive language used by the Court will prevent a broadening of the scope of review in the area of discharge classification. If so, the *Harmon* decision has perhaps produced a desirable result with a minimum of infringement upon the power of the Secretary of the Army to prescribe the character of a discharge. However, the real danger in the opinion lies in its application of the *Mc-*

<sup>49</sup> JAGA 196812723, 27 Mar. 1968.

<sup>50</sup> JAGA 1958/3104, 26 Apr 1968; JAGA 1958/3873, 4 Jun 1968. *But cf.* JAGA 196813839, *supra* note 48, where the type of discharge was predicated on the commission of the offense, which occurred before entry, and the conviction by the civil court did not take place until after discharge.

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*Annulity* theory to military authority generally. Despite a belief by this writer that the theory was erroneously applied in the case, the reasoning **used** by the Court nevertheless may serve as a springboard for judicial review of other military action. A recent indication that the rationale of the *Harmon* decision may be extended to other areas of military administrative discretion can be seen in *Brown v. United States*.<sup>51</sup> Prior to the *Harmon* case, the Court of Claims had asserted a right to review the action of military authorities in order to determine whether the statutory right to retirement benefits had been withheld **illegally**.<sup>52</sup> In addition to relying upon these cases and their questionable rationale, the Court of Claims in *Brown* cited *Harmon v. Brucker* as supporting its claim of jurisdiction, without so much as attempting to show wherein the action of the Secretary of the Army in withholding retirement benefits **was** without statutory authority. Such a liberal application of the *Harmon* decision is indeed disappointing when viewed with the realization that any extensive judicial supervision of military administration and operations may seriously impair the efficiency and effectiveness of the armed services and their ability to perform adequately their assigned missions. It can only be hoped that the inferior Federal courts will realize that they also live in a glass house of limited, statutorily delegated jurisdiction and will temper their opinions with that deference to administrative discretion which is suggested by the principle of separation of government powers. LT. JAMES L. MILLER.

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<sup>51</sup> Civil No. 50362, Ct. Cl., 8 October 1968. See also *Jackson v. McElroy*, 163 F. Supp. 257 (D.C.1958) (review of court-martial action).

<sup>52</sup> See *Friedman v. U.S.*, 158 F. Supp. 364 (Ct. Cl. 1958); *Proper v. U.S.*, 154 F. Supp. 317 (Ct. Cl.1957).

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[AGO 11 (22Jan 59)]

By Order of *Wilber M. Brucker*, Secretary of the Army:

MAXWELL D. TAYLOR,  
*General, United States Army,*  
*Chief of Staff.*

Official :

R. V. LEE,  
*Major General, United States Army,*  
*The Adjutant General.*

Distribution:

*Active Army:*

In accordance with DA Form 12 requirements.

*NG:* None.

*USAR:* (Distribution will be accomplished by TJAGSA.)