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# Appellate Review Functions of The Staff Judge Advocate

By Major Kenneth J. Hodson, JAGC, and First Lieutenant Paul D. Hess, Jr.,  
JAGC-USAR, Judge Advocate General's School

To a casual observer it might appear that the provisions of the Uniform Code of Military Justice relating to the review of records of trial after they have been forwarded to the Office of The Judge Advocate General affect only the personnel of that office and the Court of Military Appeals. This conclusion would not be entirely correct. An experienced staff judge advocate estimated recently that the appellate review provisions of the Uniform Code of Military Justice had substantially increased the military justice workload of his office. He explained: "Under the 1920 and 1948 Articles, my work on a case was practically finished when I forwarded the record of the trial to The Judge Advocate General. Under the Code, forwarding a record to The Judge Advocate General is but one of the intermediate steps in the disposition of a case; we can't write it off as a completed case until after we have performed a number of additional duties involving the appellate rights of the accused."

The purpose of this article is to outline briefly some of the duties of a staff judge advocate with respect to an accused whose record of trial has been forwarded to The Judge Advocate General. Although based on the Uniform Code of Military Justice, the discussion reflects practices and policies followed in the Army. No mention will be made of those functions of a staff judge advocate that relate to revision proceedings, rehearings, or new trials.

Under the Articles of War, appellate review was completely automatic. Under the code, it is partly automatic and partly dependent upon the action of the accused. The code also provides for appellate representation of the accused before boards of review and the Court of Military Appeals. These appellate agencies are located in Washington, and, as a practical matter, the appellate defense counsel furnished by the Government are stationed in Washington. Only in rare instances may the accused confer personally with his appellate defense counsel, as no authority exists for the issuance of temporary duty orders for travel to Washington for this purpose. As a result, it is necessary to provide the accused with counsel in the field to advise him of his appellate rights and to assist him in exercising those rights. It is in this field of military justice that the staff judge advocate has been assigned new duties and responsibilities that were not his under the Articles of War, for he ordinarily must furnish such counsel and must supervise the performance of his duties.

## Duties Related to Appellate Action Before a Board of Review

The defense counsel is required to advise the accused of his appellate rights immediately after any sentence is adjudged by a general court, or a bad conduct discharge is adjudged by a special court. At this stage of the proceedings, the principal appellate right of the accused with which we are concerned

in this discussion is his right to counsel before a board of review in the event his case is reviewed by a board of review. Obviously, the defense counsel cannot, with any degree of certainty, advise him that his case will, or will not, be referred to a board of review. Although a case in which the sentence, as approved by the convening authority, affects a general or flag officer or extends to death, dismissal, punitive discharge, or confinement for one year or more is automatically referred to a board of review, the convening authority usually has not taken his action on the case when the defense counsel advises the accused of his appellate rights. Thus, although the adjudged sentence may be such as to require review by a board of review, the defense counsel usually does not know whether the approved sentence will require this review. Conversely, although the sentence adjudged by a general court-martial may not require automatic review by a board of review, it may be referred to such a board by The Judge Advocate General. The result is that a case involving an adjudged sentence of punitive discharge, confinement for one year, and total forfeitures will not necessarily be reviewed by a board of review (e.g., if the convening authority approves only confinement and partial forfeitures for six months), whereas a general court-martial case involving a sentence of partial forfeitures, adjudged against a private, may be reviewed by a board of review (if The Judge Advocate General, under Article 69, so directs).

Almost all commands in the Army use a previously prepared form in advising the accused of his appellate

rights. Although a standard form has not yet been adopted for use throughout the Army, the form used ordinarily consists of two parts. The first part indicates that the accused has been advised--

(1) of his right to representation before a board of review if his case is reviewed by such a board;

(2) of his right to petition the Court of Military Appeals for a grant of review within 30 days after he has been served with a copy of the board's decision--except in a case in which The Judge Advocate General refers the record to the board under Article 69;

(3) of his right to counsel to assist him in preparing his petition to the Court of Military Appeals and during the review, if the same be granted;

(4) of his right to petition The Judge Advocate General for a new trial in a proper case.

The only part of the advice upon which the accused must act at this stage of the proceedings relates to his desire for appellate representation before a board of review in the event the record of trial is reviewed by such a board. Thus the second, and more important, part of the form is a statement, over the signature of the accused, as to whether or not he desires appellate representation before a board of review and, if he desires such representation, a statement of any errors or other matters that he wishes to urge as grounds for relief.

After the appellate representation form is completed and signed, it is transmitted to the staff judge advocate, who attaches it to the record of trial.

As a number of cases are not re-

viewed by a board of review, it might appear that the completion and filing of the appellate representation form in each case in which there is a possibility of such a review would be a waste of time. A consideration of all factors shows, however, that use of the form in each such case has many advantages. First, filing the statement with its accompanying assignment of errors with the convening authority serves the purpose of pointing out to the convening authority the alleged errors in the case; it may thus serve substantially the same purpose as a brief prepared by the defense counsel under Article 38c. Second, if the case involves a sentence not affecting a general officer or extending to death, punitive discharge, or confinement for one year or more (i.e., one that is not automatically reviewed by a board of review), the assignment of errors assures a means of inviting the attention of the Examination Branch of the Military Justice Division, Office of The Judge Advocate General, to the alleged errors. Third, if the case is one that is automatically reviewed by a board of review or if it is referred to a board by The Judge Advocate General under Article 69, the board may proceed to review the record of trial immediately and need not delay consideration of the case pending receipt of information as to the accused's desire for appellate counsel.

The system is not harmful to the accused, as he and his counsel usually will know as much about the desirability of securing appellate counsel at this early stage of the proceedings as they will know a month or two months later.

When counsel for the accused concludes that the proper means of securing redress for the accused is a petition for a new trial, he should assist the accused in the prompt preparation and filing of the petition.

#### **Duties Relating to Appellate Action By the Court of Military Appeals**

In any case that is reviewed automatically by a board of review under Article 66b, the accused has a right to petition the Court of Military Appeals for a grant of review. He must file his petition within 30 days after he has been served with notice of the decision of the board of review. To insure expeditious completion of the appellate review in the case, it is important that the accused be served promptly with the decision of the board of review. Service of the decision on the accused is accomplished by the staff judge advocate of the command in which the accused is located. It is important, therefore, that the location of the accused be known by The Judge Advocate General so that he can transmit the decision promptly to the proper command.

In any case involving an approved sentence that is forwarded to The Judge Advocate General, the convening authority's initial action provides for the accused's confinement or temporary custody. If practicable, the accused should be retained in the command of the convening authority who forwarded the record of trial to The Judge Advocate General until completion of appellate review in the case. Among the advantages in so retaining the accused are that it simplifies revision proceedings and rehearings and ordinarily assures more expeditious service upon the

accused of the decision of the board of review.

When the retention of the accused in his "home" command is impracticable, the accused may be transferred. If, in a case that is forwarded for review by a board of review under Article 66b, the accused is transferred before he is notified of the decision of the board of review, the convening authority who ordered the transfer is required to notify The Judge Advocate General promptly. No standard form or method of notification has been adopted for use in all cases. For example, when a major overseas commander in the Army returns a prisoner to the United States before service of the decision of the board upon him, the proper convening authority forwards to The Judge Advocate General a copy of the report that is made to the Provost Marshal General in such a case. A transfer from one general court-martial jurisdiction to another within an overseas command is radioed to The Judge Advocate General by the transferring command.

After a board of review has published its decision, a copy thereof is transmitted to the proper convening authority for delivery to the accused. The accused's receipt therefor, or a certificate of service upon him, is transmitted by expeditious means to The Judge Advocate General. At the time the service is made, the accused is also advised of any right he may have to petition the Court of Military Appeals for a grant of review and of his right, in such a case, to appellate counsel. It is customary in the Army for qualified counsel to serve the notice of the decision upon the accused. This counsel explains the

accused's rights to him and, after conferring with him and considering the record of trial and the decision of the board, advises the accused whether he should petition the Court of Military Appeals for a grant of review. If it is determined to file such a petition, this counsel assists the accused to prepare the petition and its accompanying assignment of errors and brief.

To insure uniformity in the preparation of such petitions in the Army, The Judge Advocate General has furnished staff judge advocates with a standard form of petition that is to be used in each case. This form follows that prescribed in Rule 18 of the Court of Military Appeals, but a new subparagraph 1b has been inserted. This subparagraph requires the accused to state whether he wants The Judge Advocate General to designate appellate defense counsel to represent him in processing the petition and during the review, if the same be granted, or to state that he desires such designated counsel to represent him in association with his privately retained counsel (giving his name and address) to the extent desired by the latter.

In the Army, if the accused determines that he will not file a petition for a grant of review, he may, at any time before the expiration of the 30-day petition period, waive his right to prosecute such an appeal. The waiver must be signed personally by the accused and also by a witness-- usually the counsel with whom he has conferred. An acceptable waiver may be in the following form:

"I, the undersigned accused, having received a copy of the decision of the

board of review in the above entitled case on ..... 19 ....., and having been advised as to my rights to petition the Court of Military Appeals for a grant of review with Ft. George G. Meade, Md. respect to any matter of law within thirty days under the provisions of the Uniform Code of Military Justice, Article 67c, and the Manual for Courts-Martial, United States, 1951, paragraph 100c(1)(a), and having consulted with counsel, and having been informed that the sentence as affirmed in the Office of The Judge Advocate General may be ordered into execution either after the expiration of said appeal period unless such petition is filed or after my signing of this waiver, and having determined that I do not desire to petition for or prosecute an appeal to the Court of Military Appeals, hereby waive any rights which I now or may at any future time have under Article 67 of the Uniform Code of Military Justice to effect such appeal. Dated this.....day of ....., 19...."

The accused may revoke a waiver of the type indicated above by filing a petition for review within the 30-day appeal period. The advantage of the waiver is that when it is filed with the convening authority, he is authorized to publish supplementary court-martial orders, if any are required, promulgating the results of the affirming action. The waiver must accompany the copies of the supplementary order that are forwarded to The Judge Advocate General. If the waiver is revoked by the accused by the filing of a timely petition for a grant of review, any supplementary orders previously published must be rescinded.

## Duties Related to Completion of Appellate Review

Except in new trials and in cases in which the Secretary of the Department or the President has taken final action, the convening authority in whose command the accused is located usually publishes the supplementary orders, if any are required, promulgating the results of the affirming action in the case.

Supplementary orders are not necessary if the initial court-martial order in the case executed or suspended the entire sentence and the record was not reviewed by a board of review or, if reviewed, the board of review affirmed the findings and the sentence without modification. Thus supplementary orders are not necessary in a case in which appellate review consisted *only* of an examination of the record under Article 69. Nor would such orders be necessary in a case involving a bad conduct discharge, partial forfeitures, and confinement for six months, if the punitive discharge were suspended and the confinement and partial forfeitures ordered executed, and the board affirmed the findings and sentence without modification. In the latter case, however, the convening authority would be required to forward to The Judge Advocate General the waiver by the accused of his right to petition for a grant of review or a notice that the accused had failed to file such a petition within 30 days after he was served with the decision of the board of review.

When supplementary orders are required, they may not be published until appellate review has been completed. The time of completion varies

considerably, depending upon the sentence and the action of the accused.

When the sentence or findings have been modified by a board of review, but the accused does not have a right to petition the Court of Military Appeals for a grant of review (a case forwarded to a board of review under Article 69), and The Judge Advocate General does not certify the case to that court, the supplementary orders may be published by the convening authority when he is advised of the decision of the board of review.

In a case in which the accused fails to exercise his right to petition the Court of Military Appeals for a grant of review and The Judge Advocate General does not certify the case to the court, the convening authority may publish the supplementary orders (1) when the accused waives his right to petition the court for a grant of review or (2) when he fails to file with the convening authority a petition for a grant of review within 30 days after he has been served with the decision of the board of review.

In a case in which the accused has petitioned the Court of Military Appeals for a grant of review, the convening authority may publish the supplementary orders when he has been advised that the petition has been denied. If the petition is granted or the case is certified to the court by The Judge Advocate General, he may publish the orders when he is advised of the decision of the Court of Military Appeals and of any new decision of the board of review made in pursuance thereof.

Ordinarily the supplementary orders contain only the results of the affirming action, including any clem-

ency action taken by The Judge Advocate General under AR 600-345. However, under those regulations, a general court-martial convening authority in whose command the accused is located may mitigate, remit, or suspend any part of an unexecuted sentence other than a sentence extending to death or dismissal, or affecting a general officer or an accused who is confined in a United States disciplinary barracks or an institution under the control of the Attorney General. Although such clemency may be announced by publication in a separate court-martial order, it may also be published in the supplementary orders promulgating the results of the affirming action in a case. Similarly, if the requirements of Article 72 with respect to vacation of a suspension have been met, a previously announced suspension could be vacated in the supplementary orders promulgating the results of the affirming action.

#### **Miscellaneous Problems That May Arise Pending Completion of Appellate Review**

*Commission of other offenses.*--If prior to completion of appellate review in a particular case the convening authority discovers that the accused has committed offenses other than those included in the record of trial, he will, of course, consider the propriety of referring charges alleging those offenses to a court-martial for trial. If any part of the sentence being reviewed was suspended, he may also consider the propriety of initiating action to vacate the suspension. In a particular case, however, appropriate disposition of the newly discovered offenses may

be accomplished by forwarding a copy of the charges and allied papers or the report of a formal investigation of the alleged offenses to The Judge Advocate General. Such action would be appropriate, for example, in the case of an officer already sentenced to dismissal when trial of the newly discovered offenses would probably not result in a sentence more serious than dismissal. The information as to the new offenses would be of value to the Secretary of the Army in determining to what extent he should exercise his clemency powers in the pending case. Likewise, in a pending case in which The Judge Advocate General may exercise clemency powers under AR 600-345, information of newly discovered offenses would be considered by him in determining whether he should remit, mitigate, or suspend any portion of the sentence affirmed by the board of review.

*Vacating the suspension of a sentence.*--Except with respect to the suspension of a dismissal, which may not be vacated until after approval by the Secretary of the Army, a general court-martial convening authority may vacate the suspension of any sentence. Before he can vacate the suspension of a bad conduct discharge or a sentence adjudged by a general court-martial, there must have been a formal hearing of the alleged violation of probation by an officer having special court-martial jurisdiction over the accused. This hearing must be held in the presence of the accused, and the accused is entitled to be represented by counsel. It is customary in the Army for the preliminary stages of this hearing to be conducted by an officer appoint-

ed for that purpose by the officer exercising special court-martial jurisdiction. Thereafter, if he deems vacation of the suspension to be warranted or if the hearing was ordered by higher authority, the special court-martial authority holds a formal, final hearing in person. At this hearing, he gives the accused and his counsel, if one is requested, an opportunity to object to the report of the preliminary hearing and to submit additional matters. After the formal part of the hearing is concluded, if he deems vacation of the suspended sentence to be warranted or if ordered to do so by higher authority, the special court-martial authority forwards the report of the hearing with his recommendation thereon to the officer exercising general court-martial jurisdiction over the accused. Except in a case involving a sentence of dismissal, if the general court-martial authority decides to vacate a suspension, he publishes the appropriate court-martial orders and forwards copies of them together with one copy of the report of the formal hearing to The Judge Advocate General. If the prospective vacation of suspension relates to a sentence of punitive discharge or confinement for one year or more, the general court-martial authority may not promulgate the orders vacating the suspension until the appellate review of the case is complete.

*Unauthorized absence of the accused.*--A number of cases have arisen since the effective date of the code in which the accused was absent without authority at the time the service of the decision of the board of review was attempted. In such a case, The Judge Advocate General

of the Army prescribed the following procedure:

(1) The officer attempting service executes (in duplicate) a certificate of attempted service of the decision, showing the date and place service was attempted and the fact that the accused could not be served by reason of his escape or other unauthorized absence. The certificate is supplemented by an authenticated extract copy of a guard or morning report (in duplicate) showing the escape or other unauthorized absence of the accused. The certificates and extract copies are forwarded to The Judge Advocate General together with two copies of the board's decision and attached notification, and the remaining copies are retained in the command.

(2) If the accused returns to military control at his proper station within the 30-day appeal period, a copy of the decision is served upon him. If the accused is returned to military control and held elsewhere, a copy of the decision is transmitted to that station for service upon him with the request that his proper station be notified promptly of the fact of service and also of any petition or waiver executed by the accused. In either case, the notification to the accused of his right to appeal is modified to limit the appeal period to 30 days *from the date of attempted service*. The accused's receipt for a copy of the decision is forwarded expeditiously to The Judge Advocate General.

(3) If at the termination of the 30-day appeal period the accused has not returned to military control, or has returned to military control and

has failed to petition for a grant of review, or if during the appeal period he has returned to military control and has waived his right to petition for a grant of review, action is taken in the same manner as though the accused had been served personally on the date of attempted service. In the absence of official notification to his proper station, it is presumed that the accused has not returned to military control elsewhere.

Although the hearing to determine whether a suspension of a sentence should be vacated is usually required to be in the presence of the accused, several cases have arisen under the code in which the accused was absent without authority but in which it was deemed appropriate to vacate a suspension of an existing sentence. In such a case, The Judge Advocate General has advised that the hearing could take place in the absence of the accused but only after qualified counsel to represent the accused had been appointed by the officer exercising *general* court-martial jurisdiction. The report of the hearing in such a case should contain as an inclosure a duly authenticated extract copy of the guard or morning report or the certificate of an officer showing that the accused was absent without authority at the time of the proceedings.

*Death of accused.*--When the death of an accused occurs prior to the completion of appellate review in his case, the court-martial proceedings are abated. If such death occurs after the initial promulgating order has been published, a supplementary order is published abating the proceedings and restoring all rights, privileges, and property of which the accused may have been deprived. It

may be noted that if the accused may not be submitted even though dies after appellate review has been the time limitation for filing such completed, a petition for a new trial a petition has not expired.

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## ANNOUNCEMENT OF 1952 ANNUAL MEETING

The annual banquet of the Association will be held on Tuesday, September 16, 1952, at the University Club, San Francisco, California. The dress for the banquet will be informal. The annual business meeting of the Association will be held at 4:00 p.m., Wednesday, September 17, 1952, also at the University Club. Advance reservations may be placed now by application to Col. Henry C. Clausen, 315 Montgomery Street, San Francisco 4, California.

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The Journal is your magazine, If you have any suggestions for its improvement or for future articles, please bring them to the attention of the Editor. We invite members of the Association to make contributions of articles for publication in the Journal. Publishability of any article submitted will be determined by the Editor with the advice of a committee of the Board of Directors composed of Lt. Col. Reginald Field, Col. William J. Hughes, Jr., Col. Charles L. Decker, USA, Capt. George Bains, USN, and Brig. General Herbert M. Kidner, USAF.

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

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Please advise the headquarters of the Association of any changes in your address so that the records of the Association may be kept in order and so that you will receive all distributions promptly.

# War Powers of the President

By Dr. Walter H. E. Jaeger\*

There are two major sources of the war powers of the President: the Constitution of the United States and various acts of Congress. The constitutional powers may be subdivided into two major functions, aside from the authority that the President exercises by virtue of his office and the separation of powers. Separation of powers results in the three coordinate branches--the legislative, defined in Article I of the Constitution; the executive, defined in Article II; and the judicial, defined in Article III.

It is sometimes forgotten that each of these branches may interpret the Constitution. Of course, the judiciary has in a sense the greatest responsibility for the interpretation of all laws, whether constitutional or statutory. Nevertheless, upon occasion the President has not hesitated to differ even with the Supreme Court's interpretation of the Constitution; and there is truly nothing that the Supreme Court can do about the Executive's refusal to follow a Supreme Court decision. Upon occasion, courts have handed down decisions and the Executive has said: "The court made the decision. Now let the court enforce it."

So the executive power is, in a sense, elastic and there are two major interpretations of what the Presidential power actually is. We have the "strong arm" theory, propounded by Messrs. Wilson, Roosevelt (The-

odore), and Roosevelt (Franklin)--a firm grasp on the Presidential reins. That was the theory they had: "We will do what we see fit and take full responsibility for it." That is full realization of the executive power.

Of course there is, in a sense, some justification for this view in the Constitution, for Article II starts right out by stating: "The executive power shall be vested in the President"--period. Ah! But what is the executive power? That would seem to be what the President wants to make it, for he, too, is entitled to interpret this organic document that we call the Constitution.

Then there is the doctrine of limited Presidential power advocated by William Howard Taft and the Supreme Court. That doctrine says: "Only those things that are definitely indicated in the Constitution as being part of the Presidential prerogative may be included in the executive power." So there you have in a sense a conflict; and the conclusion that you reach, as you examine the precedents and as you examine the constitutional history of the country, is that the extent of the executive power will depend on the personality of the man who is in the White House at the time.

A reason for this that has been suggested is that there is no definition of "executive power" to be found in the Constitution. There are, however, certain duties with which

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execution of the laws.

If he is charged with the execution of the laws, how far may he go in carrying out this responsibility? Is his power, then, overriding insofar as limitations are concerned, since he has sworn to carry out the laws faithfully and diligently?

Is he limited in this? He is limited by certain express provisions. The Constitution guarantees a republican form of government to the various States constituting the Federal Union. Should an attempt be made to establish a monarchy in one of the states, the President would be responsible for restoring a republican form of government. There seems to be no indication of a serious inclination of any of the States to establish a monarchy, even though they do have visits from royalty.

In Article II, there is also a statement to the effect that the President is to take care that the laws be faithfully executed. So there is a rather broad statement again--take care to see that the laws are faithfully executed--which gives him quite a bit of discretion and some degree of latitude.

It has been said, and repeated (and no article on this subject would be complete without it) that the domain of the executive power in time of war constitutes a sort of dark continent in our jurisprudence, the boundaries of which are undetermined.

Let us think about that statement for a minute. "Dark continent, the boundaries of which are undetermined." In short, that is one way of saying that the President will determine to a considerable extent what his powers are during wartime.

Actually the belief is growing

among political scientists and students of constitutional law that there are actually no limits to the President's power during wartime, for he has the responsibility of maintaining and preserving the nation. He is finally the number one man in the entire chain of officials with complete responsibility to the people. That is why he has been elected (among other reasons, no doubt).

So, to review very briefly the two fundamental conflicting theses: according to Messrs. Roosevelt and Roosevelt, whatever is not expressly denied by the Constitution is within the Presidential power; the Taft and Supreme Court doctrine states that whatever is not granted to the President under the Constitution, expressly or by implication, must be deemed as being denied. The latter interpretation is consistent with the Tenth Article of amendment.

Lincoln had his own interpretation; and he acted for some ten months before he submitted any legislative proposals to the Congress. He acted in the interest of internal security and the preservation of the Union. There is a message Lincoln sent to the Congress from which a very brief quotation follows: "These measures, whether strictly legal or not, were to be popular demand and public necessity. It is believed that nothing has been done beyond the Constitutional competence of Congress."

"Popular demand and public necessity." In other words Lincoln felt that he had the people--when he said "the people" he meant the majority of the people-- behind him at the time that he took these steps.

Furthermore, he felt that the measures he took were essential. One

thing seems certain: He did borrow certain congressional powers to achieve the results.

Article I, Section 8, very clearly declares it to be a congressional power to raise armies and to provide and maintain a navy. That is a congressional power. Abraham Lincoln didn't wait for Congress to debate the issue. He proceeded to increase both the Army and the Navy. Technically, this was a congressional power. Yet, under the duty to preserve the union, he thought that clearly in an emergency situation such as the one confronting him he had that power.

He likewise suspended the writ of habeas corpus, which previously had only been done during wartime. Yet at the outset of the War Between the States he refused to admit that there was any war. However, the Supreme Court subsequently, in deciding the so-called Prize Cases having ascertained and determined that the Executive had proclaimed a blockade, could not help concluding that there must have been a state of belligerency, because blockades are distinctly identified with war and with belligerent rights. So, in spite of himself, President Lincoln had a war.

Examined in the light of history, the Philadelphia Convention was in essence a compromise throughout. A very serious argument arose as to whether or not there should be one legislative body, with the same number of representatives from each state, or whether there would be two houses. Eventually a compromise was reached whereby, as you well know, the larger states would have a proportional representation yet the smaller states would have equal represen-

tation in the other body.

The framers of the Constitution were definitely aware that unity of command, speed of decision, and freedom from debate to settle cases were necessary. There was realization that in time of emergency there had to be some unity of command, because the speed requisite to meeting an emergency is not provided by the Congress. It has long been known that large bodies move slowly. Therefore, the Constitution contains a definite provision for an Executive with ample power to take such measures as are necessary to safeguard and preserve the Union. By designating the President the Commander-in-Chief of the Army and Navy, the necessary concentration of authority was achieved; or so the framers of the constitution believed.

Now, by reference to past practices, customs, and usages, statutes, judicial decisions, and international law, the development of the executive power will be described. The executive power, especially the war power, of the President has certain basic and underlying constitutional provisions. These will be stated very briefly.

As Commander-in-Chief of the armed forces the President has a wide latitude of action and a broad discretionary power. Next, he has the power of pardon and clemency. It should be realized that if that power were carried to the ultimate, the President could virtually nullify the legislative and judicial functions. Congress would enact a law. A person would be tried before a court and found guilty. Next day he would be pardoned. Thus the legislative and judicial functions, insofar as the criminal laws and punishment are

concerned, would be nil. It is inconceivable that an executive would set those two functions so completely at naught, but under the Constitution it is possible.

The President conducts the foreign relations of the United States. Also domestic relations, as critics from time to time have discovered. Since the decision of Mr. Justice Sutherland in the Curtiss-Wright case a very definite understanding has been reached as to how broad his power to conduct foreign relations is, and how great is the Presidential responsibility in that connection. Too, the President has the power and the authority, in fact the duty, to recommend legislative measures to the Congress. He likewise calls Congress into session when special sessions are needed. He has the duty and the authority to execute the laws. He can suspend the writ of habeas corpus in time of grave emergency. It is his duty to assure a republican form of government to each state.

Under Article VI the President has the treaty-making power, which is an essential part of the conduct of foreign relations. Here a very important distinction must be made that is all too often misunderstood by laymen, and, for that matter, even by lawyers. That is the distinction between the legislative power of Congress, which makes its laws pursuant to the Constitution, whereas Article VI of the Constitution expressly declares that treaties are to be made under the authority of the United States and there is nothing said about any Constitutional limitation.

Perhaps the outstanding case which demonstrates this difference, and

which will reduce this from the abstract to the concrete is the case of *Missouri v. Holland*, sometimes known as the migratory bird case. Canada and the United States were in agreement to protect our feathered friends of a migratory nature. It was thought that the Congress could achieve this by statute. Congress enacted the statute. However, its constitutionality was soon challenged, and challenged very successfully, because immediately the Supreme Court wanted to know by virtue of what constitutional provision the statute was enacted, inasmuch as there was no provision that could be pointed to as having any direct or indirect bearing on migratory birds. The poor birds got shot just the same as before.

Then some resourceful character decided that, after all, the treaty-making power was something else again. Canada and the United States entered into a treaty, the Migratory Bird Treaty. I am inclined to believe that the ducks and other migratory birds that were involved were quite oblivious to all of these negotiations. But many of them are here today because of the treaty.

A case came to the Supreme Court in which the validity of this treaty was challenged. This time, the Supreme Court made it very plain that the treaty-making power of the United States was not circumscribed by constitutional limitations, unless the guarantee of a republican form of government constitutes such a limitation.

The case history, following *Missouri v. Holland*, which relates the development of the executive power, would include, among the leading or land-

mark cases, the Prize Cases, which have been referred to, an Ex Parte Milligan, wherein the Supreme Court definitely challenged the authority of the President to establish a military commission for the trial of civilians in non-belligerent, peaceful areas. It is believed that today Ex Parte Milligan has been superseded by the recent case of the German saboteurs, In re Quirin, a 1942 decision, sustaining the conviction of the saboteurs who landed on our shores to do their worst. They got it.

And finally there is the moot case of the United States v. Montgomery-Ward, which is a fascinating case. In the Montgomery-ward case, Mr. Sewell Avery did not subscribe to the presidential interpretation of the executive power. He apparently concluded that the War Labor Board had considerably exceeded its power in telling Sewell Avery how to run his business with respect to his employees. So he would have none of it. That represented a very serious challenge, because, if Sewell Avery could get away with it, there would certainly be others to follow. So the President by executive order directed the Secretary of Commerce to take over Montgomery-Ward, and mentioned the actual chattels, the choses in action, and everything pertaining to the property rights.

The Secretary of Commerce, as a true executive, turned the job over to the Under Secretary, Mr. Taylor. Taylor moved in with the documents and an attorney from the Department of Justice to Sewell Avery's office and announced that on behalf of the government, they were taking over possession. Of course, immediately Sewell Avery didn't take this

lying down; he took it sitting down and was carried out in a chair.

Now arose a very serious legal question: Did the President have the power to seize Montgomery-Ward, or did he not? The United States District Court, which first had this problem thrown at it, said: "Oh, no. The President hasn't any power in this case. What does Montgomery-Ward do? What is the function of Montgomery-Ward? A mail order house, where females order through the mails. What relation has this to the prosecution of the war?"

This was December, 1944. The situation was a little dark. There was a Bulge in our lines in Europe. The Philippines were being invaded. How seriously did Montgomery-Ward's business affect the national economy? In other words, what effect would a strike by Montgomery-Ward employees, which was threatened, have on the prosecution of the war? That is a basic question.

The answer lies in a determination of whether or not the President could say: "In my capacity as Commander-in-Chief, in my capacity as Chief Executive, charged with the security and preservation of the nation, I must seize Montgomery-Ward, because failing to do so would seriously impede and seriously obstruct the prosecution of this magnificent effort, which may mean that the nation will perish if the war is not successfully prosecuted."

The District Court decided that Montgomery-Ward was not sufficiently significant in the war economy to justify the action of the President. But the Circuit Court of Appeals reversed the District Court and said: "Upon the showing of the

Government of the nature of the business of Montgomery-Ward, and the further statement to the effect that with the war situation being what it is, a very important part of the entire war effort is the zone of the interior or the civilian economy, because continued production is essential to the maintenance of the troops at the front." So the Court said definitely that the executive order was legal, was constitutional, and was properly executed. Immediately thereupon, Sewell Avery and Montgomery-Ward applied to the Supreme Court for a writ of certiorari. But the Supreme Court was lucky. The necessity for occupying Montgomery-Ward's premises ceased, Sewell Avery moved back in, the troops moved out, and the Supreme Court said: "It is now a moot question. No decision is required".

Now where are we who study constitutional law? We have our choice. There is the District Court and there is the Circuit Court. Eventually, I suppose, the Supreme Court will be called on to decide it, or it will have been decided by the Executive that he has that power and he will use it perhaps when the emergency will be of such a nature that no one will be able to question the significance of any part of production, or distribution even, to the civilian economy at war.

And that appears to be the ultimate conclusion one is driven to, that we are forced to arrive at, namely, that the tremendous acceleration in the tempo of warfare has almost eliminated that concept of a zone of interior. Heretofore, there has always been the vital question: Is there any emergency condition in the area over

which the Presidential power is being exercised? In fact, when the Japanese clearance decree was issued, the West Coast was simply declared to be a theater of operations. Being a theater of operations, it could be cleared; and the Commander-in-Chief's words were actually the law. That theory was sustained as part of our constitutional law.

So the next question is: In a future conflict would not the entire country be deemed a theater of operations? If that is so, then the Commander-in-Chief's word is law. The President must have all the power necessary to prosecute a war to the very ultimate goal. This power is inherent in the job that he has. It must be attendant upon the responsibility that legally and constitutionally devolves upon him. To argue otherwise would be to say that he could save the Constitution and lose the country. But that doesn't sound like common sense; surely the founding fathers and the framers of the Constitution had no such thought in mind.

A brief summary of the foreign relations power includes: Treaty making, recognition of foreign states, governments, and the state of belligerency. Naming an envoy to a new government is sufficient. That constitutes recognition. Or he may withhold recognition. It will be recalled that constituted government, so-called, of the Soviet Union was not recognized *de jure* for a long time. That is an example of the executive function of conducting foreign relations. Likewise the President may recall or dismiss diplomatic agents. There are many instances of the exercise of this authority in our

history. One of the most famous and well-known to all of us was the Citizen Genet case during Washington's administration.

Then the President has the power to make executive agreements. Mr. Theodore Roosevelt was one of the first to hit upon this device. He made a hip pocket agreement (*modus vivendi*) with the Dominican Republic in 1905, which was carried on until 1907. Apparently convinced that the Senate would not approve it if he submitted the treaty for approval, Theodore Roosevelt did not submit it to the Senate at all until the composition of that body had changed to such an extent that the necessary action would be taken. There are other executive agreements. One which received the sanction of the courts is found in the case of *Watts v. United States*, where a form of *modus vivendi* or executive agreement had been made between the United States and Great Britain concerning the administration of San Juan Island, off the Northwest Pacific Coast. That reached the federal court, and the federal court sustained the executive's power to enter into this agreement. Since then, this power has been exercised to a ever-increasing extent.

Briefly summarized, the military power includes the Commander-in-Chief's authority to decide the general direction of military operations of the Army, Navy, and Air Force; and the appointment and dismissal of commanders. There have been recent instances of that. There is also the proclamation of martial law, when in the President's judgement that step becomes imperative, and the establishment of military govern-

ments is entirely in the Executive's hands. There are certain hostile measures short of war that may be taken by the President. Thus it has been said that using the naval forces on land or sea in protecting the potential or inchoate interests of the United States is a Presidential function; Latin America and China afford repeated instances. In fact, intervention has almost become traditional, or had at one time become traditional, in Mexico, Nicaragua, Haiti, and the Dominican Republic, to mention just a few; and then China, of course, and now Korea. These are examples of "hostile measures short of war."

Constitutionally, a state of war in the United States, requires a Congressional declaration to that effect. In international law no such declaration is necessary, according to the famous opinion of the noted British jurist, a long-time judge of the Prize Court, Sir William Scott in *The Nyade*. Sir William Scott said, in effect: "It does not require any defensive action by the party being attacked to achieve a State of war. The mere attack by one state upon another creates a state of war." That is the international concept.

Constitutionally, however--and from this numerous consequences result--unless the Congress actually declares war, we have something short of a full-fledged war. Whether it be termed a police action or an emergency is not of great consequence. In the Constitutional sense, it can not truly be war. But a point that is not too well understood is this: There is no requirement for a declaration of war in order to enable the President to defend this country. That is his

duty. He doesn't require any formal legislative action for that.

Another point in conclusion: Congress has many powers as enumerated in Article I, Section 8; but Congress has also seen fit, and repeatedly, especially in the immediate past, since, say, 1933 or so, to delegate increasingly broad powers to the President. Briefly, from Article I, Section 8, they are: To raise and support armies, to provide and maintain a navy, to declare war, grant letters of marque and reprisal, to provide for calling forth the militia to execute the laws of the Union, and to suppress insurrection and repel invasion. These have been specifically delegated to the President by statute.

Congress has also the constitutional authority to make rules for the government and regulation of the land and naval forces. Quite recently this power has been exercised by the legislature in the enactment of the Uniform Code of Military Justice, which became effective on the 31st of May 1951.

There has been exhibited a clear

tendency to recognize the necessity for tremendous speed of decision caused largely by the tremendously accelerated speed of communications, speed of attack, atomic weapons, and all the other newer devices that make war what it is, that demonstrate the tremendous capacity of humanity for self-destruction. That speed of decision can only be achieved where one person has the definite responsibility and the final authority. Constitutionally, the chief executive's office has now developed to that point where there are virtually no limitations on the Presidential power in time of war and even in time of extreme national emergency.

He must execute the laws. He must preserve the Union. Should the occasion arise, he must preserve the guaranteed constitutionally republican form of government. Therefore the President, not merely in his capacity as Commander-in-Chief, but by virtue of being the repository of the executive power, has all the necessary authority required to carry on the defense and protect the security of the United States.

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Use the Directory of Members when you wish local counsel in other jurisdictions. The use of the Directory in this way helps the Association perform one of its functions to its membership and will help you. You can be sure of getting reputable and capable counsel when you use the Directory of Members.

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The back pages of this issue contain a supplement to the Directory of Members, November 1950, and the supplement previously published in the March and July 1951, issues of the Journal.

## Book Review:

**Military Jurisprudence, Cases and Materials.** Rochester: Lawyers Co-operative Publishing Company, 1951. pp. xxxiv, 1343. \$12.50.

A much neglected field of legal writing was tapped by Lawyers Co-op when, with the co-operation of a group of officers of the Judge Advocate General's Corps of the Army, this one-volum library of military law was produced. *Military Jurisprudence* basically is a collection of cases with editorial comment at a minimum. Only in the most extensive law library could one find all of the original sources from which the material has been reproduced.

The book is by no means confined to cases involving military justice, as some might gather from the title. The scope covers multiple facets of problems which concern the Armed Forces. It supplies indispensable material on the rights, powers, interests, and responsibilities of the serviceman.

Although to some extent tailored to the needs of the judge advocate or legal officer of the Armed Forces, it would seem that the work will be of immeasurable value to any lawyer "rubbing shoulders" with the military establishment. Since the included cases are everyday tools of the judge advocate and of appellate military tribunals, a "red face" on the nonmilitary lawyer will be obviated by recourse to *Military Jurisprudence*, insuring that the leading case upon a point has not been overlooked.

A few of the twenty-seven chapter titles will indicate the broad coverage of the book: Limitations

Upon Military Authority, Relation of the Military to Civilian authority Enlistment and the Resulting Status, Criminal and Civil Liability Arising from Performance of Military Duty, Effect of Alleged Irregularities Pertaining to Trial, International Law, and The Law of War.

Considering in more detail, for example, the chapter entitled Limitations Upon Military Authority, it is found that Sub-headings include Civil Rights, Conflicts Between Army Regulations and Statutes, Army Regulations as Binding, Uniformity of Application of Army Regulations, etc. An example of the editorial treatment is that found under the sub-heading Civil Rights, where it is stated:

The constitutions of some of the states provide that the military authority shall be kept in strict subordination to the civil authority except in time of emergency, but this is not specifically stated in the Federal Constitution. However, the Supreme Court has considered the matter in several of its opinions from *Raymond v. Thomas*, infra, to *Duncan v. Kahanamoku*, with a pertinent statement by Field, J., in *Dow v. Johnson*, infra.

The *Raymond* and *Duncan* cases are reprinted substantially in full, and this is followed by a passage from *Dow v. Johnson* and references to legal periodicals for further comment.

The brevity of the editorial com-

ment and caveat has permitted the inclusion of a substantially greater number of cases than will be found in the usual law-school casebook, and has enhanced *Military Jurisprudence* as a working tool for the practicing lawyer.

In all, approximately 230 cases are reprinted substantially in full, with brief passages from the opinions of some 280 other cases. The usual topical analysis is found in the table of contents. There is a table of cases and a citator, and a 28-page index all

of which will prove of extreme value.

Although not exhaustive in scope, the lawyer whose business is concerned in any way with military law, here will find, in one volume, practically all of the important expressions of civilian courts upon military matters which have been in litigation.

ROBERT P. TOMLINSON,  
1st Lt, JAGC,

HERBERT R. BURRIS,  
1st Lt, JAGC-USAR

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## The Annual Meeting

The 1952 annual meeting of the Association will be held in San Francisco during the week of the A. B. A. convention. The annual dinner will be held on the 16th of September and the annual business the day following. Col. Henry Clausen is Chairman of the committee on arrangements. More details will be announced in future issues of the Journal.

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It is proposed that a new Directory of Members be prepared and printed in November, 1952. Members in good standing for the year 1952 will be included in this Directory. It is important, therefore, that you pay 1952 dues so as to be included in this Directory, and that the Association has your correct current address so that you will be properly listed.

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Please advise the headquarters of the Association of any changes in your address so that the records of the Association may be kept in order and so that you will receive all distributions promptly.

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## Recent Decisions of the U. S. Court of Military Appeals

By Robert H. Threadgill\*

The last issue of the Journal carried notes on the first decisions of the U.S. Court of Military Appeals. Between the date of that issue and 27 February 1952, the Court has issued opinions in twenty cases. Fourteen of these cases came to the Court on Petition of the accused and arose out of Army Courts Martial trials. Four cases were certified to the Court by The Judge Advocate General of the Navy, one certified by The Judge Advocate General of the Air Force and one certified by the General Counsel of the Department of the Treasury pursuant to UCMJ Art. 67 (b) (2). Seventeen opinions were unanimous; there were dissents filed with three opinions. Boards of Review were affirmed in twelve cases; reversed in eight cases. There were reversals in five cases arising out of Army Courts Martial on Petition of the accused. There were two reversals in the four cases certified by The Judge Advocate General of the Navy and the case certified by The Judge Advocate General of the Air Force was reversed. It must be remembered that the cases discussed here represent merely a portion of the work accomplished by the Court, as many petitions are considered and denied a hearing.

In *U. S. v. Carmen A. DeCarlo* (No. 32, decided December 28, 1951), the accused was convicted of unpremeditated murder of a Korean national. The important question of the appeal was the admissibility of a dying declaration of the murdered Korean, who, knowing he was in extremis stated that the shooting was an accident. The difficulty comes with the interpretation of the rule of evidence which holds that the statement, to be admissible, must be such as would be

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competent were the declarant testifying as a witness on the stand. This would exclude mere opinions and conclusions based on hearsay or on collateral facts. However, in the present case, the Court of Appeals decided that the declaration was a concise summation of facts and circumstances known to the declarant. He had been talking to the accused and watching the accused's actions at the time of the shooting. Therefore, his declaration was not simply conjecture. As a collective statement of fact, based on his own observations, it was admissible as not violative of the opinion rule.

In *U. S. v. Curtis E. Brooks* (No. 18, decided December 28, 1951), the accused was convicted of desertion with intent to avoid hazardous duty in violation of Article of War 58. The important issue on appeal was whether the specification was required to contain an allegation that the offense was committed in time of war. Article of War 58 provides:

"Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct."

The pertinent part of Article of War 28 states:

"Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter."

Contention was made that Article

of War 58 states two separate offenses: desertion in time of peace, and desertion in time of war. Therefore, the existence of war or peace becomes a material element of the offense and must be particularly alleged in the specification. The Court, however, did not agree with this contention and found that the articles set out only two offenses—desertion and attempted desertion. The other phrases referring to wartime and peacetime merely prescribe the extent of permissible punishment. Therefore, the Court concluded that the existence or non-existence of a state of hostilities is not a necessary element of the offense of desertion and need not be specifically alleged.

In *U. S. v. Jesse E. Monge* (No. 9, decided January 8, 1952), the accused was convicted of larceny. The question on appeal was whether a confession received in evidence over defense objection was voluntary and admissible. The pertinent facts are that at 0400 on the night of the larceny the accused, being suspected, was pulled from his bed by two soldiers and a military policeman, made to lie on the floor, and a bayonet was held at his back. In this situation, he confessed to the crime. Later during the afternoon he was questioned by an agent of the Criminal Investigation Division who warned him that he need make no statement and that anything he might say could be used against him. However, the agent did not say that any prior involuntary confession could not be used against him. At this time the accused again confessed to the larceny.

Courts tend to view confessions with some suspicion because a confession is probably the most effective

proof in the law, and law enforcement officers sometimes use threats or promises to obtain confessions from innocent parties. Therefore, the rule has been adopted that involuntary confessions will not be admissible as evidence against the accused. Also the burden is on the prosecution to prove that the confession was voluntary, i.e., that the accused possessed, at the time of the confession, "mental freedom" to confess or deny participation in the crime. In this case the Court of Appeals decided that the question of voluntariness is for the trial court, and its decision should be upheld if supported by substantial evidence. Although the case was complicated further by the prior involuntary confession, this did not per se invalidate the subsequent confession. It was merely an additional factor for the trial court's consideration in determining the question of voluntariness. Here the court decided that there was substantial evidence to support the finding that the second confession was voluntary.

*U. S. v. Johnnie S. Sapp* (No. 14, decided January 8, 1952) presents practically the same situation and question as the Monge case. The Court again ruled that the question of voluntariness is for the trial court, and its decision must be upheld if supported by substantial evidence, even though the appellate court would have ruled otherwise. Therefore, it affirmed the ruling that the prior improper influence which forced the first and involuntary confession had terminated by the time of the second confession. However, in this case the prior involuntary confession was also introduced into evidence, and the law member instructed the court to disre-

gard it as evidence of guilt. The defense contends that the mere introduction of it into evidence constituted prejudicial misconduct by the trial counsel, the latter knowing that the accused was beaten prior to his admission of guilt. The court overruled this saying that there is no rule imposing on the prosecution a duty to withhold evidence of a confession where a question may arise as to its voluntary nature. It is a question of fact to be determined initially by the law member and finally by the entire court.

In *U. S. v. Lexie J. Davis* (No. 29, decided January 11, 1952), the court-martial's trial judge advocate and the defense counsel were neither members of the Judge Advocate General's Corps nor members of the bar of any federal court or of the highest court of a state. The question presented to the Court of Appeals is whether the record must affirmatively show that a member of the Judge Advocate General's Corps, or an officer admitted to the bar of a federal court or of the highest court of a state of the United States, was not available for appointment as defense counsel pursuant to the provisions of Article of War 11, 10 U.S.C.A., Section 1482. The article provides that the appointing authority shall appoint counsel from these categories, if they be available. The court decided that the availability of the specially qualified officers was a determination resting exclusively within the discretion of the appointing authority and his determination shall be final. He need not make any affirmative showing of the unavailability of attorney-officers, but rather it is for the party challenging the

validity of the proceedings to establish the availability of such officers.

In *U. S. v. Edward A. Carter* (No. 159, decided January 18, 1952) after the accused had been voted guilty, upon a plea of guilty, the trial counsel read to the court the personal data shown on the charge sheet and evidence of previous convictions. He asked the accused if he had any objections, and his counsel answered "No". Neither the original service record, a certified copy thereof, nor any other document was offered in evidence, and no further action was taken to prove the conviction. The sentence was in excess of the maximum permitted, unless the court considered the statement made as proof of the convictions.

The questions before the Court of Appeals were: (1) Were the previous convictions proved into evidence? (2) Did the accused waive his right to question the competency of the statement? and (3) Were the accused's rights substantially prejudiced? The court answered the first two in the negative and the third in the affirmative. On the first question the best evidence rule requires that the original document itself (or a duplicate original) be introduced into evidence. The record in no place indicated what was the instrument from which the trial counsel was reading, nor whether it was competent to come within the official document exception to the hearsay rule. It is possible, of course, to use secondary evidence, in place of the original, if no objection is made. There are various ways to present secondary evidence, but an unsworn statement by counsel has never been among

them. Therefore, the government failed to prove the prior convictions.

In regard to the second question even though the accused made no objection to the statement, and by so doing waived his right to complain about what was said, this did not prevent him from objecting to subsequent proceedings. He had the right to expect that after the document was read, it would be introduced into evidence, at which time he could object to its competency. The Court of Appeals said that while the record shows the accused understood his right to object to the statement made by the trial counsel, it does not, and could not, show that he clearly understood he was waiving his objection to the introduction of evidence to sustain the statement, because no offer was then suggested and none has ever been made.

The third question was answered simply by saying that since the accused neither waived his right to assign insufficiency of the evidence as error, nor stipulated that the statement made by trial counsel could be considered as evidence of the previous convictions, then it follows that the sentence exceeds the limits permitted by the manual, and an excessive sentence constitutes substantial prejudice to the accused's rights.

U. S. v. John J. Zimmerman (No. 261, decided February 7, 1952) presents the same problem as the Carter case, with one additional complication. Attached to the record of trial was an extract from the service record of the accused showing three prior court-martial convictions, although no document was offered or received in evidence. The Court ren-

dered the same decision as in the Carter case, saying that this failure to prove the prior convictions was prejudicial.

In U. S. v. Ance Mounts (No. 73, decided January 31, 1952) the accused was convicted of committing an unnatural sex act with a four and one-half year old boy. The victim's mother was at a party when the victim's twin brother rushed in excitedly and told his mother about his brother's experience. The mother immediately went home and questioned the victim. The children did not appear at the trial, but the mother testified as to what the children had told her. The accused made a voluntary confession which was introduced into evidence, and other soldiers testified that the accused was in the area where the act was alleged to have taken place and about the same time the act allegedly took place. This was the only evidence produced at the trial.

Of several issues before the Court the controlling one was the admissibility of the mother's testimony. The Manual for Courts-Martial provides that an accused cannot be legally convicted upon his uncorroborated confession, and the testimony of the other soldiers is certainly too vague to establish the corpus delicti. Therefore, to convict the accused properly, the mother's testimony must be admissible to corroborate the confession. Obviously her testimony is hearsay. However, it seems that it should be let in as an exception to the hearsay rule, either as part of the *res gestae* or as a spontaneous exclamation. The Court considered the rule and its exceptions and decided that the testimony was inadmissible. The statements of the victim were calm and

deliberate and made in response to his mother's questions. Therefore, it was not spontaneous. The statements by the victim's brother were classed as a spontaneous exclamation, but were inadmissible because there was no independent evidence to lay the groundwork for it. This exception can be used only when there has been independent evidence of the existing event. Since there was none, this testimony was not admissible, and the accused was improperly convicted.

In *U. S. v. Charles S. Uchihara* (No. 60, decided February 4, 1952) the Court affirmed its decision in the case of *U. S. v. McCrary*, ..... USMA....., saying that the trial court could take judicial notice of the facts pertaining to the military situation of an accused deserter, and that this judicial notice could supply the missing intent necessary to establish the corpus delicti and corroborate a confession. Chief Judge Quinn dissented as he did in the *McCrary* case, saying that if the trial court intends to take judicial notice of these facts, it should indicate that fact in the record, so that the appellate court will clearly understand the basis for the trial court's decision. He does not want the court to plug loop-holes in deficient prosecution cases by the expedient of judicial notice.

In *U. S. v. Charles E. Isbell* (No. 21, decided February 5, 1952) the Court of Appeals disposed of several assignments of error concerning the admissibility of certain testimony by stating that they were either invited or not objected to, that they were not prejudicial, and that they were of no material importance. A more important issue involved the question of impeaching a witness by the party

who called the witness. Generally speaking, this is not allowed, although there are two exceptions. Where the witness is indispensable and hostile, the party who must call him to prove a necessary fact may also impeach him. Secondly, where a witness has surprised the party calling him, the party may so state and then impeach the witness.

*U. S. v. Crosby O'Neal* (No. 25, decided February 7, 1952) is an important case in which the Court of Appeals sets out its interpretation of the principle that the trier of fact, in order to convict, must be convinced that the accused is guilty beyond a reasonable doubt. The majority opinion adopts the so-called "reasonable hypothesis" rule which requires that the evidence must exclude every reasonable hypothesis save that of guilt, and if the evidence is as consistent with innocence as it is with guilt, then the accused must be acquitted. A corollary effect of this rule is that if a reasonable inference other than that of guilt may be drawn from the evidence, a trial court should direct for the accused, and in a proper case an appellate court should reverse a conviction. This is the rule used by a number of courts today. In the dissenting opinion Judge Latimer adopts a different interpretation, which is also used by a number of courts, and which seems to be the better-reasoned rule. He says that if there is some substantial evidence in the record which permits the court-martial to conclude the accused is guilty beyond a reasonable doubt, then the appellate court is not permitted to reverse because it might or can draw a different conclusion. He cites *Curley v. United States*, 160 F.

2d 229, which very clearly discusses the confusion surrounding the different interpretations of the principle. In this case the Court stated: "If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. . . . The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind." After reviewing other cases Judge Latimer concludes, ". . . I would not test the sufficiency of the evidence to determine whether I might conclude there was some hypothesis upon which the accused might have been found innocent, but rather I would weigh it to determine whether the inferences which the court-martial could have reasonably drawn from the established facts and circumstances were within the permissible limits accorded to those bodies which pass on questions of fact."

In *U. S. v. Melvin A. Shull* (No. 45, decided February 18, 1952) the Court of Appeals splits again, as it did in the O'Neal case, over the question of the sufficiency of the evidence to sustain a finding of the trial court. The majority again states that the evidence must exclude every reasonable hypothesis except that of guilt. Judge Latimer again dissents saying that all facts favorable to the finding should be considered, and from those it should be determined whether there

is sufficient evidence from which a court-martial could find the accused guilty beyond a reasonable doubt.

In *U. S. v. Wilbert J. Meyer* (No. 84, decided February 8, 1952) the Court was confronted with a problem involving statutory interpretation. The accused deserted the service of the U. S. Coast Guard on April 24, 1948. The issue before the Court was whether the desertion was during war-time or peace-time. On July 25, 1947 Congress by Joint Resolution terminated the war for certain purposes and in relation to designated statutes. Certain articles included in this Resolution were those relating to the death penalty for wartime desertion and other wartime offenses. The articles under which accused was convicted were not included in the Resolution, and because of this defense counsel contends that the accused should have been charged with wartime desertion instead of peacetime desertion. The difference is that with wartime desertion the Statute of Limitations begins to run at the time of the desertion, while in the peacetime offense the Statute does not begin to run until the end of the accused's enlistment. The Court decided that the intent of Congress was to terminate the war in relation to this offense for all the services, including the Coast Guard, and that the omission of the Articles under consideration was merely an oversight. Therefore, the accused was properly convicted of peacetime desertion.

In *U. S. v. Claud Junior Goodman* (No. 16, decided February 11, 1952) the accused was convicted of premeditated murder, and the Court of Appeals was asked to review the record

to see if there was sufficient evidence to establish the corpus delicti and to support the finding of premeditated murder. The rule on establishing the corpus delicti is stated in the Manual as follows: "If unlawful homicide is charged, evidence of the death of the person alleged to have been killed, coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule. . . ." The Court reviewed the evidence and decided that the corpus delicti was sufficiently established. The other problem concerned the premeditation of the killing. The Court stated that premeditation need not exist for any particular length of time, and decided that the trial court could properly have found premeditation from the facts before it.

In *U. S. v. Dale Eugene May* (No. 241, decided February 13, 1952) the charge, upon which the accused was tried, was not sworn to before an officer of the armed forces authorized to administer oaths. The Code provides: "Charges and specifications shall be signed by a person subject to this code under oath before an officer of the armed forces authorized to administer oaths. . . ." The question was whether this deprived the court of jurisdiction. The Court of Appeals said that this was an error of form, and since it was not objected to at the time, then the error is considered waived. Since the error is not prejudicial, the court's decision is affirmed.

*U. S. v. Donald L. Marcy* (No. 260, decided February 13, 1952) presents practically the same question as the foregoing *May* case. In this case additional charges were added to a previously prepared charge sheet,

without swearing to such additional charges, as required by the Code, while in the *May* case, the charge was sworn to before an officer not authorized to administer oaths. The Court of Appeals said in view of the dual requirement that a charge be sworn to before an officer authorized to administer oaths, it sees no substantial difference between a failure to swear, or the swearing before an officer not authorized to administer an oath. Since this was a procedural error and no timely objection was made, it was considered waived. And since the error did not affect the substantial rights of the accused, it was not prejudicial and did not require that the lower court's decision be reversed.

In *U. S. v. Russell L. Williams* (No. 133, decided February 21, 1952) the important question before the court was whether the instructions by the law officer on the elements of the offense charged were correct as a matter of law. The accused was found guilty of desertion with the intent to remain absent permanently. The law officer instructed the court on the elements of the offense, and stated that the elements of the offense known as desertion were the absence and the remaining absent as alleged; and that the accused ". . . intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such place, or to avoid hazardous duty, or to shirk important service as alleged; . . ." Obviously, this was error. The obligation of the law officer was to instruct the court as to the elements of the particular offense charged, not to advise the court as to alternative standards sufficient for conviction.

The services have repeatedly ruled that it is reversible error to charge one type of desertion and permit the court to find guilt of a different type involving another intent. Although there was no objection to the charge by the defense counsel, this error substantially prejudices the rights of the accused, and therefore the decision of the trial court must be reversed.

In *U. S. v. Marine Jackson* (No. 141, decided February 26, 1952) the accused was convicted of being AWOL from January 1, 1951 to March 7, 1952. However, on January 15, 1951 he was convicted of a minor offense by a summary court-martial, which knew his correct name, service number, and organization, but did not know his true status as an absentee. The issue is whether this temporary exercise of army jurisdiction constituted a legal termination of the AWOL status which originally commenced on January 1, 1951. The Court said it did not. The summary court was set up in large cities to prosecute minor offenders on the spot, for military convenience and to insure prompt and effective enforcement of military discipline. It did not have time to send the accused back to his parent organization or to hold him in custody until it could get information about the accused from his unit. Therefore, since the summary court did not know his true status as an absentee and was too far from his organization to find out his status, this exercise of transitory military jurisdiction did not terminate his unauthorized absence.

*U. S. v. George Arnold Branch* (No. 131, decided February 26, 1952) presents a factual situation which is

practically identical with the Jackson case, above. The question is whether accused's unauthorized absence status was terminated by the fact that the accused was convicted by summary court martial during his absence. The Court reaffirmed its decision in the Jackson case saying that since the accused failed to disclose to the summary court his status as an absentee, the court did not know, nor by the exercise of reasonable diligence could it have known, of the accused's status. Therefore, there was no legal termination of accused's absence by this transitory exercise of military authority.

In *U. S. v. Alphonso Rhoden* (No. 153, decided February 26, 1952) the accused was found guilty of willfully disobeying a lawful command of a superior officer and committing an assault with intent to do bodily harm by use of a dangerous weapon. The law member's instructions to the trial court failed to include reference to "willful" disobedience in the first charge and to the "use of a dangerous weapon" in the second one. The instructions as given stated the elements of lesser included offenses and were therefore prejudicial to the accused because they did not cover every essential element of the crimes charged. There may have been sufficient evidence to convict accused of the lesser included crimes covered by the instructions but not of the crimes alleged in the charges and specifications. And since he was found guilty of the greater crimes, which carry heavier sentences, this constitutes substantial prejudice to the rights of the accused.

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# WHAT THE MEMBERS ARE DOING

## CALIFORNIA

Capt. Horace Geer, formerly of JA Section, 6th Army Headquarters, Presidio of San Francisco, has recently been relieved from active duty, having completed his tour as a recalled reservist. He is presently Assistant Corporation Counsel, City of Tacoma, Washington.

Lt. Col. Walter Tsukamoto has returned from FECOM and is in charge of Military Affairs, JA Section, 6th Army Headquarters.

Maj. James P. Healey, Jr., has recently returned to 6th Army Headquarters to take over the Military Justice Section, after having spent 42 months in Japan. His last assignment was Staff Judge Advocate, Headquarters Northern Command at Sendai, Japan. -

Maj. Ralph Herrod, formerly Chief of Military Affairs, Fort Ord, has been transferred to Salzburg, Austria.

## DISTRICT OF COLUMBIA

John A. O'Donnell, formerly Commissioner, U. S.-Philippine War Damage Commission, and Attorney, Bureau of Motor Carriers, Interstate Commerce Commission, has announced recently opening of offices for the general practice of law in the Bowen Building, 821 - 15th Street., N. W.

At the meeting of the local members of the Association in Washington on March 31st, Col. Joseph A. Avery was elected President of the group. Brig. Gen. Robert L. Copsey, Special Assistant to Chief of Staff for Air Force Reserve Affairs gave the principal address on the subject of the reservist's place in national defense.

## ILLINOIS

Donald P. Cheatham, formerly of Mexico City, Mexico, has recently become associated with the firm of Singer, Stern & Carlberg, in the practice of international patent and trademark law, with offices at 14 East Jackson Boulevard, Chicago.

## INDIANA

Vern W. Ruble, Bloomington, called a Breakfast Meeting of the Indiana members of the Association coincident with the Mid-Winter Meeting of the Indiana State Bar Association on January 26, 1952, at the Claypool Hotel, Indianapolis. Col. William L. Doolan, Jr., Headquarters 10th Air Force, addressed the group on the latest changes in Military Justice and led an interesting discussion thereon. By Resolution adopted at this meeting, Vern W. Ruble, one of our most active State Chairmen, received a vote of thanks from the members "for arranging the Breakfast Meetings in connection with the Indiana Bar Association Mid-Winter Meeting and for his unselfish efforts in promoting the affairs of Judge Advocates residing in the State of Indiana".

## KANSAS

Olin B. Scott of Winfield is presently in Addis Ababa, Ethiopia, on contract as Principal Adviser to the Ministry of Commerce and Industry of the Ethiopian Government, from where he reports that "it is an exceedingly interesting experience rivalled only by a year in Paris in J. A. Office, Seine Section, in 1945 and 1946".

Martin R. Glenn of Louisville on January 1st became a partner of the firm of Wyatt, Grafton & Grafton, with offices in the Marion E. Taylor Building.

#### MARYLAND

Howard H. Conaway, a member of the law firm of Frank & Oppenheimer, with offices in the First National Bank Building, Baltimore, was recently elected First Vice President of the Baltimore Bar Association.

Sherman S. Cohen, Silver Spring, who is an attorney for the Civil Aeronautics Board, teaches law for the National University School of Law, and also lectures on Business Administration at the American University.

Lt. Col. Maurice Parshall, formerly of Baltimore, now living in Detroit, Michigan, is Technical Advisor of the Bureau of Internal Revenue with offices at 1580 National Bank Building, Detroit. Col. Parshall served as a Major in the Army Finance Department during the war in New Guinea and the Philippines and is now a Lt. Col. USAFR.

John B. Wright, former Washington, D. C. attorney, has established law offices in association with Mr. George B. Woelfel at 9 School Street, Annapolis, for the general practice of law.

#### MASSACHUSETTS

Lawrence M. Kearns of Boston is co-author of "Labor Relations Guide for Massachusetts," which is a prac-

tical digest of State and Federal labor laws and regulations in one compact volume, published by Little, Brown & Company.

#### MICHIGAN

Maj. Harold T. Watson of Detroit is one of the amateur crew of five lawyers of a 72' yawl, Escapade, which has established an outstanding racing record. Since being brought from the East, Escapade has been entered in thirty races of which she has been first to finish twenty-four times, second twice, and third four times. Maj. Watson has crewed on her in twenty-nine of those thirty races. Escapade has raced twice in the Miami to Nassau event, 1950 and 1952, and in the Newport-Bermuda races of 1948 and 1950, in which she was twice third boat to finish in a fleet consisting of most of the best yachts in the country. She is entered for another try at Bermuda honors this coming June. Col. Yates G. Smith, also of Detroit, has sailed on Escapade in a number of her important races.

Percy J. Power of the Detroit Curling Club was recently elected President of the Ontario Curling Association. During a dinner which was part of the club's gala opening, Detroit curlers presented Mr. Power with a suitably engraved curling-stone-shaped gavel. Complimentary remarks by Frank McDonald, Hamilton, Ont., and Judge Archibald Cochrane of Brampton, Ont., extolled the virtues of the new president. Fourteen of the living past presidents of the Detroit club attended the tribute to Mr. Power in a group.

## MINNESOTA

Judge Leslie L. Anderson of the Minneapolis Municipal Court was appointed by Governor C. Elmer Anderson to the Hennepin county district bench effective January 10, 1952. Judge Anderson, who was senior judge on the municipal bench, has two arts degrees from University of Minnesota and his law degree from Harvard. He was in private practice for 17 years and was a former member of the law firm of Stinchfield, Mackall, Crouse & Moore. He served with the Air Force during World War II, finishing his tour of duty as a Major in the JAGD.

Judge Anderson formerly taught at Minneapolis College of Law, was appointed by the supreme court as first chairman of the State Bar Review panel and is a member of the supreme court advisory committee on rules. He was chairman of Governor Youngdahl's citizens mental health committee. He is a board member at Phyllis Wheatley House, Minneapolis Youth Center and a panel member of the American Arbitration Association.

Anderson is a member of the Hennepin County, Minnesota State and American Bar Associations.

## NEW HAMPSHIRE

Samuel Green of Manchester is presently Judge Advocate General for the National Guard of New Hampshire as a Lt. Col., having acted as such since his return from active duty in 1947.

## NEW JERSEY

Julius R. Pollatschek of Union has been elected National Judge Advocate

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of the Amvets at their convention in Boston.

## NEW YORK

The members of the 1568th Judge Advocate General Corps Training Center honored Col. Arthur Levitt, their Commanding Officer, at a testimonial dinner on January 28, 1952, in recognition of his appointment by the Mayor of the City of New York as a member of the New York City Board of Education. The regular training assembly of the 1568th was in conjunction with the dinner. Col. D. Hottenstein, the Army Staff Judge Advocate for the First Army, spoke at the dinner, and Capt. Meyer Poses, conducted a discussion on Military Government.

The 1568th is composed of attorneys who practice or reside in the New York metropolitan area, and who hold army reserve commissions in the Judge Advocate General Corps.

Col. Levitt is a member of the New York law firm of Gates, Levitt & Notkins, and is Chairman of the civilian defense effort in Kings County.

Earl Q. Kullman has become a member of the firm of Kirlin, Campbell, & Keating, with offices at One Twenty Broadway, New York City.

Robert Granville Burke has recently announced the removal of his offices to 420 Lexington Avenue, New York 17, N. Y., where he will continue in the general practice of law, and in matters relating to state and local taxation.

## OREGON

Ben G. Fleischman, Portland, has removed his office from the Henry

Building to Suite 608, American Bank Building, S. W. Morrison and Sixth Avenue.

### SOUTH CAROLINA

Lt. Col. Norbert A. Theodore now holds the position of District Counsel for the South Carolina District of the Office of Price Stabilization with his office in Columbia.

### WASHINGTON

The Washington members of the Association have elected Maj. Victor D. Lawrence the President of their group and are holding regular meetings.

The Honorable Ward Roney, Presiding Judge of the Superior Court, King County, Washington, was called on recently to administer the oath of admission to the bar of the State of California to Lt. Richard H. Desmond, who after having passed the bar examination and before taking the qualifying oath, was assigned for duty at

Ft. Lawton. A ceremony was arranged for the occasion at which Col. Albert E. Sheets of Sacramento, who has known Lt. Desmond many years, introduced him to the Court. In addition to Col. Sheets, there were present on the occasion Maj. Victor D. Lawrence, Seattle, and the following officers from the Seattle Port of Embarkation: Maj. Robert O. Hillis, Logansport, Indiana; Maj. Philip F. Biggins of Washington, D. C.; Capt. Marvin E. Helon of Fresno, California; the following officers from Ft. Lawton were also present: Capt. Matthew C. Beck of Portland, Oregon; 1st Lt. Joseph G. Ansel, Philadelphia, Pennsylvania, and CWO Eugene P. Neill of Dallas, Texas. Following the ceremony, all the officers gathered in the Judge's chambers for a session of reminiscences.

### ALASKA

William H. Olsen has removed his offices from the Loussac-Sogn Building to 718 Fifth Avenue, Anchorage.

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The Journal is your magazine. If you have any suggestions for its improvement or for future articles, please bring them to the attention of the Editor. We invite members of the Association to make contributions of articles for publication in the Journal. Publishability of any article submitted will be determined by the Editor with the advice of a committee of the Board of Directors composed of Lt. Col. Reginald Field, Col. William J. Hughes, Jr., Col. Charles L. Decker, USA, Capt. George Bains, USN, and Brig. General Herbert M. Kidner, USAF.

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

## SUPPLEMENT TO DIRECTORY OF MEMBERS OF NOVEMBER, 1950

*Note:* This is not a cumulative supplement, but is to be used with the supplement contained in Bulletin No. 7, March, 1951; Bulletin No. 8, July, 1951, and Bulletin No. 9, November, 1951, of the Judge Advocate Journal.

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Your professional successes, important cases, new appointments, political successes, office removals, and new partnerships are all matters of interest to the other members of the Association who want to know "What The Members Are Doing." Use the Journal to make your announcements and disseminate news concerning yourself. Send to the Editor any such information that you wish to have published.

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