

# The Judge Advocate JOURNAL



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## PLEAS OF GUILTY—WHY SO FEW?

By WILLIAM J. HUGHES, Jr., Colonel JAGC, USAR

In the military establishment it is estimated that the accused pleads guilty in less than ten (10) percent of the cases, (except before summary courts). In the federal district courts directly the opposite is true. The actual figures are that for the fiscal year 1950 out of 33,502 defendants convicted in the 86 federal district courts, 31,739, or over 94 percent, pleaded guilty. (Henry P. Chandler, Administrator of the Federal Courts, 37 Va. L. R. 825-846). For the fiscal year 1951 the figures were 34,788 convictions of which 32,734 were based on pleas of guilty. (Rep. Jud. Conf. 1952 p. 162). A wide disparity thus exists between pleas of guilty in the federal courts and in the military system. In the federal courts they are encouraged and in safe hands reach a desirable result. In the military system they are suspect. The archaic shibboleth: "You cannot bargain with this court" still obtains. It is the purpose of the present note to invite military thought to the fact that in any system of justice rightly administered guilty people inevitably, by and large, plead guilty and ought to be encouraged to do so. There is nothing wrong with this as a social objective. A plea of guilty is itself a conviction (*Kercheval v. U. S.*, 274 U. S. 220, 223) and has equal standing with any other type of conviction (*Bankey v. Sanford*, 74 F. Supp. 756, 757).

To look at things basically, it is obvious that if the object of any sys-

tem of criminal justice is to convict the guilty and acquit the innocent the highest tribute to the effective working of that system is that guilty people, realizing the inevitability of the result, come, more and more, to plead guilty. This indicates (a) that the investigative system has functioned properly, i. e. the police have located the right defendant in a real crime; (b) that the courts function properly in that guilty people are normally convicted; (c) that as a result the common-sense thing to do is to plead guilty, in the hope of securing a lesser penalty. It follows that pleas of guilty are the very highest type of evidence that a particular system of law enforcement is functioning effectively and properly. It follows, secondarily, that any obstacle thrown in the way of this end-result is misconceived.

This brings us to a consideration of what actually happens in the civilian system in contrast to the military. The conspicuous fact in the civilian system, well-known to all who have ever been on the inside in its operations, is that pleas of guilty are not only definitely encouraged; they are, and this is the important point, the normal, the natural method of disposition of the vast majority of criminal cases. Any other resultant would mean (a) that in the average case the police have apprehended the wrong man, or (b) that the right man is in the toils but the system itself operates so badly that the defendant figures he stands a

good chance to "beat the rap."

In contrast, in the military system it is the conspicuously unusual thing for the accused to plead guilty. The statistics tell the story: it is less than one in ten. But what are the statistics on military convictions: of those who plead innocent 95 percent are convicted. Hence the utter disparity between actual guilt and the end-result, adjudicated conviction. What is the reason for this disparity? I am satisfied that in the end it is the utter un-realism of the convening authorities, as contrasted with the hard-bitten federal judges who offer substantial but entirely defensible incentives for guilty people to plead guilty. What are these incentives?

The answer, in round terms, is that a defendant who pleads guilty gets a substantial reduction in his sentence. Every lawyer familiar with the operation of the criminal law knows this and trades on it to dispose of the case. Far from being undesirable, this is one of the best proofs of good common sense on both sides. On the side of the defendant it represents his realization of a hopeless contest. On the side of the government it represents a substantially satisfactory disposition of the case. What more can reasonably be desired?

The purists reply: All well and good but there must be no "deal". But the deal is implicit in the deed done. In the federal courts a defendant who pleads guilty can reasonably count on a sentence a third less than if he goes to trial and is convicted. There is nothing wrong

with this. There is a quid pro quo on both sides. Do the purists realize that if it were not for pleas of guilty we would have not 86 federal district courts but 186, or more? Take the 31,739 cases in 1950 wherein pleas of guilty were entered and split them up among the present federal courts. Picture the eventualities of 31,739 separate trials on the merits—the clogged dockets, the discrimination against civil litigation—all the evils of court stagnation. Only a theorist therefore can protest against pleas of guilty. And the theorist has only his shibboleth as his support, that there should be "no bargaining with justice." I sometimes wonder whether the theorists are aware that in English history there has been only one ideal and perfect court; it was composed of the grandees of the kingdom and it operated ideally according to its lights. Some say it created the crimes of perjury, forgery and conspiracy; it extended the boundaries of equity; it had many things to its credit, but it operated without a heart; without the "play in the joints" that Mr. Justice Holmes speaks of. It was called the Court of Star Chamber.

The military antipathy to pleas of guilty, the sacrosanct attitude of convening authorities has worked a very real deprivation of the rights of the accused in that it has effectually deprived the military offender of substantial rights of counsel. When a civilian offender employs counsel the first question is "What is your defense?" If there is no defense the lawyer tells his client so frankly and advises him to plead guilty. The

lawyer tells him he'll do the best he can for him. What this means is that he will assemble the mitigating facts and circumstances of the case, broach the possibility of a guilty plea to the prosecuting attorney, and then discuss frankly what would be a fair sentence. Sometimes, it is true, the prosecuting attorney will refuse to talk, but nine times out of ten he is entirely agreeable to accept, in advance, a guilty plea sometimes to a lesser included offense or to one out of many charges. He will usually concede that the sentence merits some reduction; after all, the defendant has saved the government time and expense and there is no reason at all why this should not be taken into consideration. Sometimes both parties approach the judge and discuss the case frankly across the table. The judge as a rule refuses to bind himself but experienced counsel can usually forecast his probable sentence. After all, there is an agreement on the facts and reasonable lawyers, on and off the bench, act reasonably.

In contrast, what happens in the military establishment? Suppose defense counsel finds he has no defense. What can he do about it? Usually nothing. The accused may ask him about what his prospects are on a plea of guilty but his counsel's only reply is to read him the Table of Maximum Punishments. If defense counsel approaches the prosecution the answer is there's no way to tell what the Court will assess; that it's a hydra-headed body and that no one can tell how they'll look on the

offense. Will he make a recommendation? The answer is usually no, that the custom of the service, or the court or the convening authority, or something nebulous but deadly frowns on such a practice. What about approaching the Staff Judge Advocate? This too is suspect. Usually "the judge" won't bind himself as to what he'll recommend to "the old man". Suppose the convening authority should refuse to accept his recommendations? We all can understand the situation; the resulting embarrassment. What about defense counsel approaching the convening authority? Unheard of; how would he get by the Chief of Staff?

The net result of the whole process is that the accused tells his counsel to get ready for trial. After all, a conviction is not an absolute certainty and why not take the chance? Who can say the accused will get a lighter sentence after a trial than without one? And what about all these review procedures the accused has heard of, all "for free" as a wise Congress has provided;—isn't there a chance of error and reversal on appeal?

Hence the large numbers of trials where there is no real defense but the spurious defense of obstruction. After all, defense counsel is human; he is there to see the accused gets his legal rights; why should he not fight it out all along the line? At least he can prevent himself being criticized for "laying down". Hence the thousands of pages of records filled with technical objections, re-

sulting in irritation of the Court and, in the end, and this is the important point, a sentence substantially heavier than the accused would normally have gotten on a plea of guilty.

It seems clear that something is wrong with such a system. At the very least defense counsel has been deprived of the opportunity to function as he would in a civil court. Yet the Manual for Courts-Martial (par. 48c, p. 68 M.C.M. 1951) states that the duties of defense counsel include those which "usually devolve upon the counsel for a defendant before a civil court in a criminal case." Also military defense counsel must "guard the interests of the accused by all honorable and legitimate means known to the law." And he has the obligation after consultation with the accused to "endeavor to obtain full knowledge of all the facts" and to give the accused his "candid opinion of the merits of the case." (Par. 48f, p. 69 M.C.M. 1951).

Added to all the above, par. 48f of the Manual for Courts-Martial 1951 requires defense counsel to explain to the accused, beforehand and as part of his preparation for trial, the meaning and effect of a plea of guilty and his right to introduce evidence after such plea. These explanations are required regardless of the intentions of the accused as to how he will plead. No such duties are imposed on counsel in civil court trials. So that we have the irony that in the military jurisdiction there are elaborate provisions requiring the explanation of the functions of a plea of guilty, but these are coupled with a method of practice which

renders their utilization almost wholly valueless.

It seems to this writer that the time has come for some military-juridical realism. "Bargaining with justice", "making a deal", "compromise with the criminal law"—these phrases belong to the era of legal hoop-skirts. Many of the States have in recent years exteriorized the whole process by statute which furnishes an opportunity to guilty people to plead guilty with some hope of getting something out of it. Thus in New York it has been long practice to dispose of felony cases by acceptance of a plea of guilty to a lesser included offense. As far back as 1926 over 50 percent of felony indictments in New York City were so disposed of. (Report of Crime Commission, N. Y. Legislature, Doc. No. 23 (1928) p. 48). For a survey of fairly recent practice see Weintraub & Tough, "Lesser Pleas Considered", 32 Journal of Criminal Law, p. 506; see the same Report of the Crime Commission, op. cit., note 4 at p. 49, and Proceedings of the Governor's Conference on Crime, the Criminal and Society (1935) p. 605, et seq. Figures quoted in these surveys show that of a total of 1,336 felony cases 47.8 percent were disposed of by pleas to lesser included misdemeanors. These cases occurred in New York where a state law requires the District Attorney, in such a case, to file a written statement with the court giving his reasons for acceptance of the lesser plea. Parenthetically it may be said that the court in such cases almost never overrules the District Attorney

(Weintraub & Tough, *op. cit.* p. 529). The converse has happened; in *McDonald v. Sobel*, 66 N. Y. Supp. (2nd) 95 the Court accepted a plea to a lesser offense over the direct protest of the District Attorney, who hailed the judge before another court on a mandamus. The latter court sustained the judge.

The practice in lesser included cases is cited as tangible evidence of what is here pointed out. I wish to repeat what every person having anything to do with the criminal law knows: that guilty pleas are the result of proposals, of intelligent approaches of counsel, of discussion between prosecution and defense and often times of further clearance with the court. As Weintraub says: "The average defendant will not plead guilty unless he feels that he is getting the better of what under any circumstances must be for him a bad bargain. (*Op. cit.* p. 529). Just why we should boggle at enlightened self-interest in the administration of justice is a matter of standing wonder. The plain fact is that we can no longer afford full dress trials as the normal mode of disposing of criminal cases. Justice is a human thing and subject to all the frailties of humanity; the perfect system would, paradoxically, be an unworkable system. It is only a series of compromises that makes a system of justice tick. Ride roughshod over the accused and you have tyranny; surround the accused with every imaginable safeguard at every step and you reach disciplinary pa-

ralysis. The growing back-log of cases in the military jurisdiction threatens to reach this stagnation point; if this occurs in time of peace, what will happen in time of war? The Boards of Review are worked to death; so too are Appellate Defense Sections; even with enormously expanded personnel they find it hard to keep up. The Court of Military Appeals is striking manful blows but how seldom can they strike them and how long between blows! Wait until the good G.I.'s (guard-house brand) get fully onto the fact that they have not only the right to compulsory appeals, at government expense, but compulsory certioraris as well, to the CMA.

The only real solution, if the present top-heavy appellate system is to be retained—and the professional military baiters will never permit it to be abolished—is to educate the service into the proper functions of the plea of guilty. It will have to be a thorough education and it's got to start at West Point, or comparable places, where our future generals must undergo a plain-talk course in judicial disillusionment. They've got to be taught that a guilty defendant is entitled to be offered incentives—I put the figure roughly at one-third off the usual sentence—if he pleads guilty. I count as negligible any claim that innocent men will thus be ensnared; the investigatory system has too many protections all along the line. Innocent people don't plead guilt anyway, as any lawyer will testify from a lifetime of uniform experience. It's the guilty people we've got to dispose of

and we can't afford to bankrupt the Army in the process by tying up its personnel in interminable and utterly senseless trials. I favor a realistic indoctrination of convening authorities, trial counsel, defense counsel and military courts in a frank program of cooperating with guilty people who wish to plead guilty. I favor open covenants openly arrived at: that any defendant pleading guilty can reasonably expect less of a sentence than if he pleads innocent and gets convicted. I suggest that any obstacle in the way of that result, be it directive, custom of the service or just plain inertia, be scheduled for prompt and final elimination. I favor a nice new Army (or Air Force) Regulation,

with neat paragraphs leaping lightly from number to letter and back to number again, and festooned with beautifully ordered subdivisions, entitled "Pleas of Guilty." This regulation will deal mightily with the subject under every possible situation (including the Antarctic) and will set forth in no uncertain words the roles of all parties concerned and put this matter on the common sense basis of the federal civil courts. Let me repeat, in case you've forgotten, that in those courts recent statistics show 94 percent of the cases are disposed of on guilty pleas; in the Army the average is nearer 8 percent. Is there any real defense to this disparity?

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## THE JUDGE ADVOCATES ASSOCIATION

The Judge Advocates Association is a national legal society and an affiliated organization of the American Bar Association. Members of the legal profession who are serving, or, who have honorably served in any component of the Armed Forces are eligible for membership. Annual dues are \$5.00 per year, payable January 1st, and prorated quarterly for new applicants. Applications for membership may be directed to the Association at its national headquarters, 312 Denrike Building, Washington 5, D. C.

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# THE ARMED FORCES RESERVE ACT OF 1952

By COLONEL FREDERICK BERNAYS WIENER, JAGC, USAR

The first portion of this paper, published in Bulletin No. 12, October 1952, covered the legislative background of the Armed Forces Reserve Act; the reserve categories and the liability of each for service; indefinite term commissions; active duty agreements; and the common federal commission. The present portion takes up the remaining provisions of the Act that seem to be of general interest.

## *Date of Rank*

Section 216(b), AFRA, provides that "The relative precedence of Reserve officers and Regular officers shall be determined in accordance with their respective dates of rank in grade."

As is well known, the date of rank for reservists in the naval services is that stated in their commissions, while in the Army and Air Force it is that specified by Section 127a(8) of the National Defense Act, viz., date of active duty back-dated by the amount of prior active duty in the same or higher grade. Consequently, since the quoted provision does not redefine "date of rank," it does not change existing law. However, by reason of Sec. 240, AFRA, which provides for duty without pay, which "shall be counted for all purposes the same as like duty with pay," it is possible for an Army or Air Force reservist to accumulate seniority even in lean budgetary years.

## *Promotion*

Sec. 216(a), AFRA, directs the

several Secretaries to establish promotion systems, which shall, insofar as practicable, be similar to those provided for the Regular component of the appropriate armed force—without even lip-service being paid to uniformity among the services. In view of the implementation of this section, it seems worth while to quote some of the significant statutory language: "Promotion policies for officers of reserve components shall be based upon the mobilization requirements of the appropriate Armed Force of the United States in order to provide qualified officers in each grade, at ages suitable to their assignments and in numbers commensurate with mobilization needs. In order that vigorous reserve forces may be maintained, necessary leadership encouraged, and a steady flow of promotion provided, such promotion systems shall provide for forced attrition to the extent necessary."

The Army, late in 1952, promulgated AR 135-135 and AR 135-156 to regulate the promotion of officers of the reserve components not on active duty. (In January 1953, AR 135-157 was issued to cover "Permanent promotion of commissioned officers in reserve grade when serving on active duty"; what follows, however, deals only with promotions while in an inactive status.)

In general, the ARs first cited follow the Army system of the Officer Personnel Act. Regional boards consider officers within zones of consideration to fill vacancies up to the

grade of lieutenant colonel. There is provision for mandatory consideration in those ranks after stated periods of time regardless of vacancies. Due consideration is given age as a substitute for actual service. All promotions to the grade of colonel are made by a single board in the Department of the Army, not in the field, and then only to fill vacancies; and promotions to and in the grade of general officer are made only to fill T/O & E vacancies.

Promotion to first lieutenant is made on the basis of years of service and "qualified"; to captain, major, and lieutenant colonel on the basis of "fully qualified"; and to colonel on the basis of "best qualified." The regulations specifically state that "The extent to which the officer has taken advantage of available means to improve his professional qualifications, such as active and regular participation in scheduled training programs and completion of appropriate extension courses, will be a primary factor in selection."

Promotion is somewhat different for unit and non-unit officers—the latter includes mobilization designees—but in view of the provision for mandatory consideration regardless of vacancies, there is substantial equality.

There are two methods of forced attrition. The first reflects exactly the scheme of the OPA: (a) A second lieutenant found not qualified for promotion is discharged. (b) An officer who fails of selection for captain, major or lieutenant colonel will

be considered again for selection about a year later, and, if he then again fails of selection, will be discharged, or, if eligible therefor, will be transferred to the Retired Reserve. Otherwise stated, two pass-overs and the reservist goes out, just as his opposite number in the Regular establishment is similarly removed from the active list when twice passed over.

Second, Age-in-grade as such is out, but, effective 1 October of this year, all officers below the grade of colonel will be either transferred to the Retired Reserve or discharged upon reaching the age of 55, with similar provision for colonels at age 58. However, all officers who would otherwise be eliminated for age will none the less be continued in an active status if, by age 60 or earlier, they would be able to complete 20 years' service for retirement purposes. A similar saving clause protects those who would otherwise be removed because twice passed over for promotion. There are further details, but the foregoing sets forth the substance of the Army provisions.

The Air Force regulations differ primarily from the Army plan in that there is no provision for mandatory consideration in addition to consideration to fill vacancies. (Promotion in the naval services is a mystery on which I do not even pretend to recite.)

#### *Uniform Allowances*

Sec. 243, AFRA, provides that every individual first commissioned in the reserves will receive an initial

uniform allowance of \$200—unless he has received such an allowance under any earlier law; an active duty allowance of \$100 with respect to more than 90 days active duty performed after 25 June 1950; and a \$50 maintenance allowance for every four years of satisfactory service (i. e., counting for retirement). The details are involved—those affecting the Army have just been published in AR 35-1710, 13 March 1953—but the simple answer for the reservist who has not been recalled is to relax: You can't get the \$200, because presumably you drew the World War II uniform allowance; you are ineligible for the \$100 *ex hypothesi*; and \$50 every four years, hedged about as it is with restrictions, is really not worth fussing about. So—relax.

#### Boards

It is expressly provided (Sec. 254 (a), AFRA) that "All boards convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of members of the reserve components shall include appropriate numbers from the reserve components, as prescribed by the appropriate Secretary in accordance with standards and policies established by the Secretary of Defense."

In actual practice, certainly so far as the Army is concerned, this will involve few changes. Most boards even before the effective date of the Act were so constituted, either under regulations specifically so providing, or else simply because the large number of reservists currently on

EAD made exclusive non-reservist participation impracticable even if it had been desired.

#### Staff Organization

Sections 256-257, AFRA, codify certain arrangements which previously had had only administrative sanction: One Assistant Secretary of Defense, and the Under Secretary or an Assistant Secretary in each Department, are to be designated to have principal responsibility for all Reserve affairs (Sec. 256 (a)). A general or flag officer is to be designated in each service who shall be directly responsible to the Chiefs of Staff of Army and Air Force, CNO of the Navy, and Commandants of Marine Corps and Coast Guard, as the case may be, for reserve affairs (Sec. 256 (a)). And the composition and functions of the Reserve Force Policy Board in the Office of the Secretary of Defense are spelled out in Sec. 257. Inasmuch as the Section 5 Committees of the Army and Air Force and the National Guard Bureau are specifically continued with express statutory prohibition against any curtailment of function, and since neither the Army's Executive for Reserve and ROTC Affairs nor the several Reserve sections and divisions in the Army's General Staff are being abolished, it is obvious that there will be no shortage of staff agencies dealing with the perennial problems of the reservist.

It may be wondered, however, whether the emphasis on staff to the exclusion of a chain-of-command organization specifically charged with responsibility for implementing the

policies agreed upon is really the most workable solution. Up to the effective date of the Act, certainly, with all of the staff agencies busily engaged in formulating and disseminating doctrine, it was observed that, at the grass-roots level—i. e., the Military District in actual operation in the smaller cities—any real impact on the individual reservist had been substantially dissipated by the time the policy had reached him.

#### *Removal of Disqualification*

By virtue of Sec. 237, any member of a reserve component on active duty may be detailed or assigned to any duty authorized by law for personnel of a Regular component; this

supersedes the present provisions restricting to Regulars assignments as PMS & T and as instructors with the National Guard.

#### *Conclusion*

Numerous other provisions that change existing law might be mentioned, but they are probably not of general interest. Only a single other section needs to be noted:

“Sec. 250. There shall be no discrimination between and among members of the Regular and reserve components in the administration of laws applicable to both Regulars and Reserves.”

That I must see.

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## DIRECTORY, 1953

The proof copy of the Directory of Members, 1953, is prepared and will go to the printer on the date of the distribution of this Journal. Your name and address will be listed in the Directory in accordance with the address on the envelope in which you have received this Journal, unless you have heretofore given us other instructions. Changes and corrections can be made in galley proof, so that if your name and address are not correct or in accordance with your wish, it is important you notify us immediately.

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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.

## THE U. S. NAVAL SCHOOL (NAVAL JUSTICE)

The Navy's approach to the problem of education in the field of military justice has been different in concept and execution than that of its sister services. While the Army and Air Force concentrate on training its Judge Advocates, the Navy's School of Justice is aimed primarily at the non-lawyer officer and enlisted man who actually handle the bulk of the Navy's courts-martial below the General Court-Martial level. The reasons for the differences in educational theory and practice reflect the basic differences in methods of operation in the three services. The average Navy command (a ship or small shore station) has no legal specialist (judge advocate) aboard and must depend on unrestricted line officers and enlisted men to administer military justice. The Coast Guard, another sea-going service, has a similar method of operation and its officers and enlisted men, by arrangement with the Bureau of Naval Personnel, are trained at the Navy's School. Marines are also trained there.

The School of Naval Justice was founded in June, 1946 at Port Huemene, California and in 1950 moved to Newport, Rhode Island. The basic purpose and mission of the School and, at the same time the Navy's approach to the problem of legal education, were well expressed by the then Judge Advocate General of the Navy (Vice Admiral O. S. Colclough, USN (Ret.) now Dean of Faculties at George Washington University)

in his dedication address. The Admiral stated:

"It would be a grave mistake to believe that modernization of the Articles for the Government of the Navy, overhauling of procedural rules and the issuance of a new military law manual would guarantee the highest degree of naval justice. Rather, we must all recognize the fact that no system, no matter how well conceived, will be any better than the legal ability of those charged with administering it. . . . The real need in the field of naval justice lies in an increased level of education in all its aspects, including military law and court-martial procedure throughout the Navy. All officers participate one way or another in the many phases of naval justice as part of their regular duties. This participation must be intelligent. Blind adherence to rules not fully understood in the law, as elsewhere, is the evil which education alone can overcome."

Never has a mission stated in a dedication address been carried out with greater singleness of purpose than in the subsequent history of the School of Naval Justice. Since the Uniform Code of Military Justice became law, for instance, the School has trained some 3,000 naval officers and 1,500 enlisted men in the administration of Justice in the Navy. Of the 3,000 officers, only about 15% have been lawyers and considerably less than 10% legal specialists.

All officers receive a concentrated seven weeks course in the elements of Pleading and Procedure and the fundamentals of Evidence. In addition, they receive practical instruction in preparing cases for trial and later in trying them in moot courts. The course in Pleading, commonly referred to as "Charges and Specifications", is, in effect, a course in military criminal law. The Procedure course, on the other hand, concentrates on the "mechanics" of the Uniform Code and the Manual for Courts-Martial which implements it. Finally, the course in Evidence teaches the rules of criminal evidence as interpreted and applied by the Manual for Courts-Martial and ruling military case law. The three courses are coordinated by means of practical workshops and moot courts.

Experience has shown that military justice cannot be administered efficiently unless all links in the justice chain are welded together, to form a coordinated whole. Training of enlisted men in the fields of court reporting and preparation of records is necessary to such efficient administration. To that end, the School of Naval Justice conducts two enlisted courses; one in the basic elements of naval law and the preparation of court-martial records (seven weeks); the other in court reporting (two weeks). It is necessary to take the first enlisted course in order to qualify for the second. The School feels that one can become a much better court reporter when he understands the elements of court-

martial procedure and practice in the Armed Services.

The Court of Military Appeals recognized in its first Annual Report that one of the Achilles' heels of the military justice system is the paucity of court reporters. In order to help solve this shortage of court reporters in the Navy, the School of Naval Justice, after considerable experimentation, established a course in electronic court reporting which bids fair to eliminate the problem. Using a combination of an electronic recorder, a microphone known as a Stenomask, and an intelligent operator, the School can turn out a trained court reporter in two weeks. Experts in shorthand and stenotypy who have taken the course in electronic reporting at the School vow that they will never go back to their old systems of speed-writing. By special request, the School is educating a limited number of Air Force enlisted men in the administration of military justice and electronic court reporting.

Once a year, usually in late summer, a two week course for reserve officers is conducted at the School. This class accommodates some 225 Naval, Marine and Coast Guard officers of varying degrees of education and training. Students are divided into classes according to the degree of their legal education and experience. Instruction ranges from the advanced seminar, for the trained military lawyer, to the fundamentals of military law for the non-lawyer.

The Commander in Chief of the Atlantic Fleet assessed the needs of

the Fleet in the field of education in military law and the part the School plays in meeting that need in the following words:

"The Commander in Chief considers that qualification in military law should be one of the basic qualifications of an unrestricted line officer, and that this qualification should come as early in an officer's career as practicable . . .

Commanding officers of units of sufficient size to permit the convening of a special court-martial should endeavor to have on board a person qualified in the new code. . . . The course in the U. S. Naval School, Naval Justice, located at Newport, Rhode Island, is considered to be the most satisfactory means available for meeting this requirement."

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# NOTES ON RECENT DECISIONS OF THE UNITED STATES COURT OF MILITARY APPEALS

By William D. Bradshaw

The Court of Military Appeals, since its activation June 1, 1951, until March 7, 1953, has received 2,456 cases for action. From Boards of Review of the Army, the Court has received by way of petition 1,792 cases, by certification from The Judge Advocate General, 33 cases, and 13 mandatory appeals. The Court has received from Boards of Review of the Air Force 227 cases by petition and 7 cases by certification of The Judge Advocate General. Boards of Review of the Navy have sent on petition of accused 319 cases and The Judge Advocate General has certified to the Court 72 cases. The Court has received from the General Counsel of the Treasury 9 Coast Guard cases by petition and 3 on certification. Of the total number of cases received and reviewed by the Court, the Court has granted review in 238 cases to date and has handed down in those cases in which review has been granted 223 opinions. As of March 7, 1953, there were approximately 15 cases awaiting further action and the writing of opinions, besides those cases which are on the calendar awaiting oral argument or further processing.

Since the last issue of the Journal,

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the Court has decided the cases which are noted here.

## *Search and Seizure*

In *U. S. v. Florence* (Case No. 207, decided 26 August 1952), the accused was tried on a single charge and specification under AW 93 for theft of military payment certificates from the effects of two deceased soldiers turned over to him for safe-keeping and inventory. The CO suspecting such thefts upon good information had a secret preliminary inventory of the same effects made which compared with the inventory prepared by the accused revealed discrepancies. The accused was ordered to report to the CO who directed him to produce his wallet which upon inspection was found to contain MPC's inventoried in the secret investigation and was not accounted for by the accused in his inventory. The accused was advised of his rights under AW 24 and then admitted the taking of the MPC's from the effects of the decedents. Upon trial by an Army general courts martial, the accused was convicted and sentenced to five years confinement, a DD and total forfeitures, which finding and sentence were approved by the convening authority and the Board of Review. The question before CMA was the validity of the CO's search of the accused's wallet and the seizure of the MPC's and whether the MPC's and the extra-judicial statement of

the accused were properly admitted in evidence. The accused argued that when he produced his wallet and submitted to the search at the request of the CO, his compliance was not voluntary, that the search violated his Constitutional rights and was unreasonable. The Court held the certificates and confession admissible. The Court stated the long recognized proposition of military law that the CO has the authority to make or order an inspection or search of personnel and property under his control; but, without adopting or rejecting the rule, the Court found the search reasonable under the test of civilian practice—stating its belief in the Congressional intention to grant military personnel wherever possible the same rights as civilians. The Court concluded from the record that the CO had sufficient information upon which to predicate a reasonable belief that a crime had been committed by the accused and that, therefore, the order to the accused to report to him was upon probable cause and the search a reasonable incident to the arrest. The Court, therefore, concluded that the evidence obtained by the search incident to lawful arrest was not illegally obtained and was admissible. The Court further held that the accused's confession, after explanation of his rights under AW 24, was not made involuntary solely by reason of its having been obtained contemporaneously with a legal search and seizure.

In *U. S. v. Dupree* (Case No. 364, decided 9 September 1952) the ques-

tion presented was whether failure to object to the introduction in evidence of a package of dope taken from the person of the accused on the basis of unlawful search at the time of trial was fatal to the subsequent effort to raise that question on appeal. The Court, after reviewing the policy foundation for and characteristics and history of the rule, which excludes from evidence the product of an unlawful search, concluded that in the field of military law the principle is nowhere made mandatory by the Uniform Code, but is provided for in the Manual for Courts Martial and that the rule in the military, as in Federal civilian law, has no relation to the trustworthiness of the evidence, is personal in nature and is nothing more or less than an evidentiary rule of exclusion provided for the protection of an individual's right to privacy in his personal property and effects and confers on an individual the right to object at the trial to the reception in evidence of the products of an unlawful search. The Court affirmed the Army Board of Review which affirmed the findings of guilt and sentence, and concluded that the failure to raise the objection at the time of trial waived the right to assert the issue of unreasonable search on appeal.

#### *Confessions*

The Court in *U. S. v. Jones* (Case No. 288, decided 17 December 1952) inquired into the necessity for corroboration of a confession to support a finding of guilty on four specifica-

tions under AW 96 alleging wrongful possession of marijuana and wrongful introduction into station for sale at two different times. With reference to the first event, the accused confessed to having passed a package of marijuana to a sergeant for delivery to a German civilian and the sergeant testified at the trial that he delivered the package unopened as directed. The Court reversed the conviction relating to that event on the ground that there was no testimony that the package contained marijuana except the statements of the accused made to the witness and these alone were not sufficient corroboration of appellant's confession. Moreover, proof of guilt of other specifications was not admissible to prove guilt of these first specified offenses. The Court pointed out the danger of accused being tried in courts martial for a number of often unrelated offenses at the same time and pointed out the need for alertness to the danger of conviction of one offense because of guilt of another. With regard to the second occasion mentioned in the specifications, the evidence showed that the accused, in response to a call instigated by CID for "some stuff", drove to the designated spot whereupon his car was searched and marijuana found. The Court held there was sufficient proof to support the specifications relating to the second event and affirmed the Army Board of Review as to the finding of guilty on those specifications. The contention of multiplicity asserted by the accused was disposed of by the Court

saying that possession of narcotics on the one hand is a separate offense from the introduction of narcotics into a station for sale. The case was remanded to The Judge Advocate General to reconsider the sentence.

In *U. S. v. Colbert* (Case No. 401, decided 3 October 1952), accused was convicted under specifications alleging larceny of a typewriter, AWOL, and making and uttering bad checks. An Air Force Board of Review affirmed the finding and sentence, and on petition to CMA, the questions raised concerned the voluntariness of the accused's confession and whether a confession may be corroborated by stipulations. The confession was signed on December 18, 1950, and not sworn to by accused until January 11, 1951, at which time he was advised of his rights under AW 24. In addition to the explanation of AW 24, the accused was told that if he swore to his confession it should be true and the definition of perjury and the penalty therefor was read to him. There was no evidence of physical abuse, interminable questioning, or subtle compulsion. The Court held the confession admissible, stating that the mere admonition to tell the truth would not vitiate it. The Court said that the word "voluntary" as used in the law was not synonymous with the word "spontaneous"; that voluntariness was a question of fact and that from the record, accused's confession was a product of an entirely free choice. It was further contended that since the only evidence concerning ownership of the typewriter and its value came

in by way of stipulation and that in the absence of this stipulation there would have been insufficient evidence of the corpus delicti to support the confession, the prosecution's case should fall. The Court held the stipulations were properly accepted since they related to testimony and not to facts and bore on the issue, but were not conclusive. With the stipulations there was held to be ample evidence of the corpus delicti and corroboration of the confession.

#### *Double Jeopardy*

U. S. v. Padilla and Jacobs (Case No. 400, decided 19 August 1952) presented a substantial question of double jeopardy to CMA. On 1 May, 1951, accused, Padilla and Jacobs, were allegedly involved in an incident wherein several German civilians were assaulted by a group of American soldiers and as a result, charges of assault to commit robbery were preferred against the accused. On 12 June 1951, they were tried by general court martial and Jacobs was acquitted and Padilla convicted and sentenced to a BCD, 6 months confinement, and forfeiture of \$50 per month for 6 months. The convening authority found that two officers appointed to the Court which tried the accused had not been lawfully appointed, so that the membership of the Court was less than 5, and that the Court had no jurisdiction. The trial was held to be a nullity and both accused were tried again on 6 July 1951 on the same charges and both were found guilty and sentenced to DD, total forfei-

tures, and 4 years confinement. The findings and sentence were approved by the convening authority and affirmed by an Army Board of Review. Jacobs and Padilla constantly maintained that they were subjected to double jeopardy. The two officers whose position on the Court was questioned were appointed by SO 128 to serve on general court martial convened by SO 116 as amended by SO 124. The Court created by SO 116 was under the authority of the Articles of War and the Court appointed by SO 124 was by authority of the UCMJ and not properly an amendment of SO 116. The Court, with differing opinions by each of the Judges, reversed and remanded the case to the Army Board of Review concluding that the two officers whose tenure was in doubt were authorized to sit and that the Court did have jurisdiction and that its findings and sentence were valid, the Court stating the ambiguous order should be construed in the light of surrounding circumstances and that substance rather than form should have the greater weight in the construction of the order appointing the Court. The Court went on, however, to hold that Jacobs, having been found not guilty in the first trial, that finding was binding and, therefore, his trial on 6 July 1951 for the same offense constituted double jeopardy as to him. As to Padilla the Court said Article 44 (b), UCMJ, in prohibiting a second trial for the same offense provides that there is no trial until the finding of guilty has become final after review is com-

pleted. Since there was no completed review of Padilla's first trial, the findings did not become final and, therefore, Padilla could not successfully claim double jeopardy at the second trial. Judge Brosman concluded that the convening authority had the power to order a new trial even though there was an erroneous decision in the area of jurisdiction, but under UCMJ, Article 63 (b) sentence could not be more severe than the original sentence. Therefore, the case was remanded to the Board of Review of the Army to correct the sentence as to Padilla so as not to be in excess of the sentence adjudged at the first trial.

In *U. S. v. Zimmerman* (Case No. 261, decided 6 October 1952), the accused was convicted by SCM on a plea of guilty to specifications of unauthorized absence and missing a movement of his vessel. He was sentenced to receive a BCD and three months confinement. After approval of the findings and sentence by the convening authority, a Navy Board of Review disapproved the findings and sentence because of the failure of the President of the Court to give instructions on the elements of the offense, presumption of innocence, and other similar matters. The Navy Judge Advocate General certified the case to the Court and on 7 February 1952, the Court held that the procedural errors assigned by the Board of Review had not operated to the substantial prejudice of the accused and remanded the case to The Judge Advocate General for reference to

the Board of Review to reconsider the sentence because of prior convictions improperly considered. The Board of Review in reconsidering the case heard oral arguments and then decided that it was precluded from reinstating any part of the sentence by the principle of double jeopardy and that its prior ruling of dismissal must stand. The questions raised on the second consideration of the case by the Navy Board of Review was certified by TJAG to the Court. The Court held that a Board of Review decision clearly based on a matter of law does not possess such finality that it may be assimilated to a court martial finding of not guilty, and that action by a Board of Review reinstating the conviction in accordance with the decision and mandate of CMA and approving such part of the sentence as found correct would not violate Article 44, UCMJ, or the Fifth Amendment. The Court said that no jeopardy had attached when the case was returned to the Board of Review because not until all appellate treatment has been completed and the conviction affirmed had the accused been placed in jeopardy. Therefore, the accused had not once been put in jeopardy because no matter how lengthy the process, and regardless of the number of times a case may pass between a Board of Review and CMA, their sum constitutes one appellate review of the case. The Court further observed that Board of Review action is automatic and taken in behalf of the accused and he could not be prejudiced by appellate review since

he could never be the subject of final action more to his detriment than the original action of the court martial which heard the case.

A situation similar to that in the Zimmerman case arose in *U. S. v. Messenger* (Case No. 310, decided 6 October 1952) where a Navy Board of Review set aside findings of guilty and sentence and ordered the charges dismissed because in its view evidence offered in extenuation and mitigation was inconsistent with a guilty plea to a charge of larceny and because it felt the charge of impersonating an officer in the absence of evidence of benefit to the accused or detriment to some third person by reason of the deception made the offense such a minor one as to have been improperly brought before a special court. TJAG certified the case to CMA which reversed the Board of Review. The Court held that the Board of Review had misconstrued the legal effect of the testimony; that the evidence in mitigation did not deny the theft but merely attempted to show that the property taken was of negligible value. With reference to the impersonation charge, the Court held that the rule laid down by the Board of Review was error, but that such act amounted to conduct adverse to the good order and discipline of the Armed Forces which constituted an offense. The accused contended before the Court that a reversal of the Board of Review in reference of the case to it for further consideration would place him in double jeopardy. The Court decided this

issue against the accused on the basis of the Zimmerman case, *supra*.

*Authority of Board of Review with Respect to Sentence*

In *U. S. v. Simmons* (Case No. 940, decided 31 December 1952), the accused was convicted of desertion and sentenced to a BCD, total forfeiture, and confinement for 18 months. The convening authority approved the finding only to the extent of AWOL and reduced the period of confinement and forfeitures to 6 months and approved the BCD. A Navy Board of Review affirmed the findings as approved, but attempted to suspend the BCD on probation for the period of confinement and 6 months thereafter. TJAG of the Navy certified to CMA the question whether a Board of Review has the authority, as a matter of law, to suspend a BCD for a probationary period. In answering the question in the negative and reversing the Board of Review, the Court explored the historical development of the power to suspend sentences and found that it had been, without exception, vested solely in the reviewing authorities which had the power to order execution of the sentence. The Court found that Boards of Review, from their statutory inception in 1920, have never had the power to order sentences executed and, therefore, never have had the power to order a sentence suspended. The Court found that UCMJ had not expressly conferred such a power but had continued the previous pattern of limiting the power of suspension to the President,

the Secretary of the Department, and the convening authority who may order the sentence executed. The Board of Review could remit a punitive discharge entirely but was powerless to suspend it under a probationary guarantee of continued good behavior.

By general court in *U. S. v. Brasher* (Case No. 499, 20 October 1952) the accused was sentenced to receive a BCD, forfeiture of \$35 per month for 10 months, and confinement for 10 months upon findings of guilty of unauthorized absence and breaking arrest. The convening authority approved. A Navy Board of Review set aside the BCD, but affirmed the remainder of the sentence. TJAG certified the question of the legality of the sentence as affirmed by the Board of Review to CMA. The contention of the defense was that when the Board of Review remitted the BCD, it was required in the same action to reduce the period of confinement and forfeiture so that it would not exceed 6 months. The Court concluded that the sentence that left the Board of Review was illegal and beyond the Board's power to affirm, Judge Latimer dissenting. The Court said that although the UCMJ does not provide the 6 month limitation, the provisions of the Manual are part of the body of the law:

"A court shall not, by a single sentence which does not include dishonorable or bad conduct discharge, adjudge against an accused:

"Forfeiture of pay in an amount

greater than two-thirds of his pay for 6 months."

"Confinement at hard labor for a period greater than 6 months——." The Court interpreted the power of the Board of Review to affirm sentences, or parts of sentences as it finds correct in law and fact, to mean that a Board of Review may affirm a legal sentence only and may not affirm one which is illegal.

The accused in *U. S. v. Flood* (Case No. 77, decided 31 December 1952) was found guilty of AWOL for a 6 month period and sentenced to BCD, confinement for 10 months, and forfeiture for 10 months and reduction in rating from electrician's mate second class to electrician's mate third class. The convening authority approved the findings, but reduced the confinement and forfeiture to 9 months and suspended the BCD. A Navy Board of Review affirmed except for that portion of the sentence reducing accused to electrician's mate third class. Following the Brasher case, the Court concluded that all of the sentence of confinement and forfeiture in excess of 6 months was illegal and with respect to the intermediate reduction in rating, found that the Board of Review's action by reason of a Navy regulation requiring reduction to the lowest grade in any case of unsuspended sentence to confinement for a period in excess of 3 months resulted in the Board of Review increasing the sentence imposed by the court martial. The Court suggested that the Board of Review could have

reduced the period of confinement to a period of 3 months or less thereby leaving the reduction to an intermediate grade outstanding. The Board of Review had no authority to increase the court martial sentence and, therefore, the Board of Review was reversed and the record remanded. A similar question arose in *U. S. v. Smith* (Case No. 874, decided 31 December 1952) where a Navy NCO was convicted of wrongful appropriation. After Board of Review action the sentence as affirmed was confinement for 6 months and forfeiture of \$165 per month for 6 months. The period of confinement required automatic reduction to the lowest grade and the amount of the forfeiture was far in excess of two-thirds of the pay of the grade of seaman recruit. The Board of Review could have either reduced the forfeiture to two-thirds of the pay of seaman recruit or reduced the confinement to 3 months or less whereby accused would retain his rate. The Court reversed the Board.

In *U. S. v. Prescott* (Case No. 812, decided 31 December 1952), accused was found guilty by SCM for AWOL and upon the basis of two previous convictions was sentenced to a BCD, forfeiture for one month, and confinement for 3 months. The sentence as affirmed by the Navy Board of Review provided for confinement for 3 months only. TJAG certified the question of the legality of this sentence to the Court, the question being whether a punitive discharge would be a condition

precedent to adjudging increased confinement and forfeiture under the permissible additional punishment section of the table of maximum punishments. It was argued by the defense that the additional punishment section amounted to an habitual criminal statute, and that as such being the result of a Presidential Executive Order was an encroachment upon the powers of Congress. The Court held that the permissible additional punishment section of the Manual for Courts Martial was not an habitual criminal statute but was within the authority delegated by Congress to the President to fix punishments not in conflict with the UCMJ. The Court held that the permissible additional punishment section was permissive and not mandatory and that the listed punishments were authorized severally and that, therefore, it was not requisite to adjudge a BCD as a condition precedent to the imposition of forfeitures and confinements under that section. The Board of Review was affirmed.

#### *CO as Accuser*

It was contended that the convening authority was in fact the accuser in violation of Article of War 8 in *U. S. v. Jewson* (Case No. 532, decided 29 August 1952). There the Commanding General, Fifth Army, as convening authority directed an investigation of the organization commanded by the accused, and the investigating officer made his report to the Commanding General. Thereafter an Assistant SJA in Headquarters, Fifth Army, signed as accuser the charges and specifications upon

which the accused was tried and convicted. It was contended that since the accuser had secured his information from report sent to the Commanding General that he was only the nominal accuser and that the accuser was in fact the Commanding General. The Court held that the Commanding General was acting in his official capacity in ordering the investigation and was not to be regarded as the accuser in the sense of the article. The case contains a discussion of the law of entrapment and stated the rule to be—"Setting the stage to discover the guilt of one who has conceived his own wrongful plan does not violate the rule against entrapment." Another question presented involved the inadmissibility in evidence of a carbon copy of a transcript of a recording of an interview between the accused and the investigating officer duly certified to be a true copy. It was contended that its admission violated the best evidence rule and the hearsay rule. The Court held that in view of the fact the statement was used for the purpose of impeaching the accused on cross-examination and it was not admitted for the purpose of establishing the truth, it could not be hearsay. With respect to the best evidence rule, the Court averted to the civilian courts historically having been hostile to the admission of written recordings of testimony or conversations on the ground that they are unreliable. The Court held that the exclusion of such evidence was inappropriate to the military justice scene and the exigencies of

the service and announced for the military a rule sanctioning the use of such transcripts in evidence and further held that the carbon copy was admissible as a duplicate original. Again the object of the admission of the transcript was the impeachment of the accused and the matter was collateral to the main issues of the trial and as such, secondary evidence was admissible. The Army Board of Review was affirmed.

The facts of the Jewson case and *U. S. v. Stewart* (Case No. 508, decided 29 August 1952) arise out of the same incident of the alleged showing of lewd and obscene films at a stag party. In the *Stewart* case, the accused major was found guilty of conduct unbecoming an officer and prejudicial to good order and discipline and sentenced to dismissal for having instructed a soldier to deny knowledge of the lewd films procured if called as a witness in an investigation. The films were never viewed by the Court although one of the films was introduced into evidence and there was oral testimony as to their character. The accused contended that the introduction of the film in evidence and the testimony concerning their lewd and obscene character were irrelevant to the issue and improperly influenced the members of the Court. The Court held that the nature of the films was irrelevant, but felt that the admission of the testimony complained of although error was unprejudicial. The accused and one officer testified that the instruction was not given; the soldier testified that he was given

the instruction. The accused argued that there was insufficient evidence to support the finding of guilty; but, the Court held that the problem was solely one of the credibility of witnesses and that that was primarily the concern of the court martial, thus affirming the Army Board of Review.

#### *Military Courts as Courts of the U. S.*

In *U. S. v. Long* (Case No. 464, decided 3 December 1952) six WAC sergeants were found guilty under UCMJ, Article 128 and under Article 134, of committing an assault upon another WAC for having testified at a summary court martial. The specification alleged the offense as a violation of a Federal statute prohibiting the use of threats or force or the injuring of witnesses for having testified before courts of the United States. On review granted by CMA, the Court side-stepped the question whether military courts are courts of the United States and concluded that even if every element of the offense as a "crime and offense not capital" under Clause 3 of the Article was not made out, yet if a violation of either Clause 1 or 2 of the Article is established, that is, disorder to the prejudice of good order and discipline, the conviction should stand. The Court found that intimidation and beating of witnesses before military courts was certainly a violation under Clause 1 and 2 of Article 134 and that the allegation of the Federal statute amounted to no more than surplusage and in no wise prejudicial to the accused.

#### *Challenges*

In *U. S. v. Chaffer* (Case No. 672, decided 15 December 1952) an Army Board of Review reversed a conviction of larceny because the law officer accepted in open session action of the Court as a vote not to sustain a challenge for cause. The defense, after its challenge was denied, peremptorily challenged the member of the Court and he was excused. The Court found that the law officer had failed to follow the procedure outlined in the Manual for Courts Martial and the UCMJ, but then found that the error was not prejudicial. The officer challenged actually did not sit in the trial of the case and the accused had no further challenge for cause or peremptory challenges to the Court that sat in trial of his case. A similar question was presented in *U. S. v. Stewart* (Case No. 656, decided 15 December 1952) where the Board of Review reversed a conviction of robbery upon the same question of challenge ruled upon in open court. In that case, however, the peremptory challenge was not exercised as to the officer who had been challenged for cause. The Court, however, in reviewing the testimony on the challenge found no basis in the challenge and concluded that although the procedure was wrong, there was no showing of prejudice to the substantial rights of the accused.

#### *Instructions*

In *U. S. v. Kubel* (Case No. 229, decided 29 August 1952), accused was convicted of larceny of property

of the United States and the unlawful sale of said property. In the instructions of the law officer the value of the property taken and the intent to deprive permanently, two elements of the crime of larceny, were omitted. The Court, however, in its deliberations specifically found the amount of property taken and its value and found that the property was sold by the accused to another, and thus affirmatively found the elements of the offense upon which the law officer had failed to instruct. The Court, therefore, held that any error in the law officer's instructions with respect to the crime of larceny was nonprejudicial and affirmed the Army Board of Review.

In *U. S. v. Richardson* (Case No. 740, decided 15 December 1952), accused was convicted of robbery, the offense growing out of an altercation and assault and battery committed upon a fellow soldier in which it was alleged the accused took the other soldier's wallet. The accused admitted the assault and battery, but denied the robbery. The law officer failed to instruct on the lesser included offense of assault and battery, which issue CMA held was fairly raised by the evidence and mere reference by the law officer to the Manual for Courts Martial was not sufficient instruction. The Court, therefore, reversed the Army Board of Review.

In *U. S. v. Strong* (Case No. 244, decided 27 August 1952) an Army Board of Review affirmed accused's conviction of AWOL and voluntary

manslaughter. With reference to the AWOL charge, there was a showing that there was a conflict between the testimony of the officer who signed the morning report and the contents of the morning report itself. Because of this conflict, it was urged to CMA that the evidence was insufficient to convict the accused of AWOL. The Court held that the weight of the evidence and the credibility of witnesses was a matter for the trial court to determine and that it could accept the morning report and disregard the conflicting testimony. With respect to the charge of voluntary manslaughter, the law officer at the trial gave incomplete instructions as to the elements of the offense and referred the Court to the Manual for Courts Martial and failed to instruct at all on the lesser included offenses which were fairly raised by the evidence. CMA held that the incomplete instructions, notwithstanding the reference to the Manual for Courts Martial, was error and that the failure to give instruction upon lesser included offenses fairly raised by the defense was error and that these errors were substantially prejudicial to the accused's rights requiring reversal of the action of the Board of Review.

In a case alleging assault with a dangerous weapon in which grievous bodily harm was intentionally inflicted, the law officer's omission of the element of the offense that bodily harm was intentionally inflicted amounted to an instruction embodying only the elements of the lesser

offenses and was held to be prejudicial error in *U. S. v. Wright* (Case No. 1081, decided 20 August 1952).

In *U. S. v. Moreash* (Case No. 715, decided 27 August 1952) accused was tried on a charge of involuntary manslaughter and found guilty of negligent homicide. The Army Board of Review reversed the findings because of the failure of the law officer to instruct the Court on lesser included offenses to the crime of involuntary manslaughter. The evidence revealed no doubt of the unintentional character of the homicide. It was argued that since the accused was found guilty of the lesser included homicide as to which no instruction was given, he was not harmed by the law officer's omission. In affirming the Board of Review, the Court suggested that had the trial court been adequately instructed on the lesser included offenses, the court martial could have found the homicide in question purely accidental and, therefore, acquitted the accused.

In *U. S. v. Stout* (Case No. 497, decided 27 August 1952) accused was convicted of willful disobedience of an order. The law officer at the trial failed to instruct on the included offense of failure to obey. The findings were affirmed by an Army Board of Review and CMA, on petition of the accused, after reviewing the record, stated that it showed adamant defiance of authority and not a neglect and omission, and since the record revealed no issue as to the lesser included offense, the fail-

ure of the law officer to give instructions thereon was not error.

In *U. S. v. Quisenberry* (Cases No. 329, decided 9 September 1952), a case of unpremeditated murder affirmed by an Army Board of Review, it was contended that the law officer failed to instruct on elements of lesser included offenses. CMA in affirming the Board of Review cited the rule that unless there is some evidence from which reasonable inference may be drawn that the lesser included offense was in issue, there is no requirement on the part of the law officer to instruct upon that. The Court found the record barren of any evidence of a lesser included offense.

In a case of conviction for willful disobedience, the law officer's failure to instruct upon the lesser included offense was held to be prejudicial error where the evidence tended to show matters which would have affected the existence or non-existence of requisite specific intent—willfulness — and the direction of the Court's attention to the Manual with respect to drunkenness was not sufficient to cure the error since the Court was left unguided on a material matter. *U. S. v. Simmons* (Case No. 505, decided 26 September 1952).

Army Boards of Review in affirming convictions in the following cases were reversed: *U. S. v. Lookinghorse* (Case No. 1124, decided 29 August 1952); *U. S. v. Wray* (Case No. 1307, decided 10 October 1952); and *U. S. v. Warren* (Case No. 1485,

decided 2 December 1952). In each of these cases the accused was charged with assault with intent to commit murder. In the Lookinghorse and Warren cases, the accused was convicted as charged, but in the Wray case, only with an assault with intent to commit voluntary manslaughter. In the Lookinghorse and Warren case, the law officer did not define murder or instruct on lesser included offenses. In the Wray case, the law officer failed to instruct as to the effect of intoxication on the specific intent required thus precluding consideration of the lesser offense of assault with a dangerous weapon which requires no specific intent.

In *U. S. v. Justice* (Case No. 1106, decided 28 August 1952), a conviction for desertion affirmed by an Army Board of Review was reversed by the Court because the law officer's instruction included elements of intention not framed by the specification. The specification alleged intention to remain absent permanently and the instruction included intent to avoid hazardous duty or intent to shirk important service.

#### *Jurisdiction over draftee*

In *U. S. v. Ornelas* (Case No. 446, decided 31 December 1952) the accused on trial for desertion moved to dismiss on the ground that the Court had no jurisdiction because he, as a draftee, had never become a member of the Armed Forces, having failed to take the oath of allegiance. The law officer denied the motion and the trial proceeded on

a not guilty plea and resulted in the accused being convicted. Conviction was affirmed by an Army Board of Review. The Court reversed the Board of Review and ordered a rehearing on the ground that a question of fact was raised by the accused's motion, which was for the Court to determine and was not an interlocutory question solely upon a question of law within the sole cognizance of the law officer.

In *U. S. v. Rodriguez* (Case No. 365, decided 31 December 1952), the accused was tried for desertion and challenged the jurisdiction of the Court on the theory that he had not been lawfully inducted. The motion was denied by the law officer and the trial proceeded, resulting in conviction which was affirmed by an Army Board of Review. It was not claimed in the Rodriguez case that the accused did not participate in the induction ceremony, but only that he did not take the oath of allegiance. He did undertake his duties following the induction and served for ten days. The Court in affirming the Board of Review held that under such circumstances, the accused was in no position to claim that he had not been lawfully inducted.

#### *Sufficiency of Evidence*

In *U. S. v. Harjo* (Case No. 585, decided 3 October 1952), the accused charged with desertion was found guilty of absence without leave for 233 days, which finding was affirmed by a Navy Board of Review. The Government's case was

based on a transfer order directing the accused to report to a certain station on a day certain and by the introduction in evidence of rosters of personnel arriving in station for several days following the date of the alleged commencement of unauthorized leave. The absence was terminated by the civilian arrest of the accused. The Court held that since there was no showing the accused had not arrived in station prior to the date of the personnel rosters, or for that matter at some date subsequent thereto, that there was no adequate showing of the beginning date of the absence and that since the sentence was dependent upon the length of the absence, the findings based upon such evidence were error and the Board of Review was reversed.

Unsigned and uninitialed extract copies of morning report entries being the sole evidence of an unauthorized absence in *U. S. v. Smith* (Case No. 1367, decided 31 December 1952) was held to be inadmissible evidence and the action of an Army Board of Review in affirming convictions of AWOL upon such evidence was reversed.

A conviction of larceny and sale of a military jeep was reversed in *U. S. v. Dodd* (Case No. 1044, decided 19 December 1952) for insufficiency of evidence.

In *U. S. v. Yarborough and Marshall* (Case No. 443, decided 12 September 1952), both accused were convicted on separate charges with

conspiracy to malingering and malingering and misbehavior before the enemy. The findings and sentence were affirmed by an Army Board of Review. The evidence showed that the two accused and another soldier were in a pup tent near the front line in Korea conversing about going back to Japan and possible methods of self-injury without detection and shooting of unloaded carbines. The active part of the conversation and the conduct accompanying it was taken by Marshall, whereas Yarborough was passive. Following these occurrences, Yarborough was wounded in the foot and Marshall in the finger by a single shot from the carbine while being held by Marshall, it appearing that Marshall's hand was on Yarborough's foot when the shot was fired. The Court with respect to Yarborough dismissed the charges and specifications upon the ground that the Government had failed to prove that Yarborough had deliberately allowed himself to be shot by Marshall. As to Marshall, the Court dismissed the specification alleging misbehavior through cowardice because the record showed no evidence that it was Marshall's fear of the enemy that impelled the action, but the Court did hold that there was no legal bar to conviction of Marshall for conspiracy to malingering and malingering. The Court reversed as to Yarborough and affirmed as to Marshall on those two counts.

In a case involving sufficiency of the evidence the Court in *U. S. v.*

Sperland (Case No. 366, decided 3 September 1952) gives a detailed history of the offense of misbehavior before the enemy. The Board of Review's action in affirming the conviction was affirmed.

In *U. S. v. Martin* (Case No. 451, decided 10 September 1952), a seaman, on board a vessel in Mediterranean waters, known to have a great number of cartons of cigarettes in his possession was warned to keep them for his personal use and not to use them for bartering. A few days later, accused was found on the fantail of the vessel in the company of two Italians supplying the vessel with oil, and a laundry bag containing 25 cartons of cigarettes with a heaving line attached was found nearby. The accused admitted that the cigarettes were his and that he needed the money. He was charged with disobedience of the order not to use the cigarettes for bartering purposes. The finding of guilty was affirmed by a Navy Board of Review, which was reversed by the Court, which stated that the gravamen of the offense charged was the violation of an order, but to show

the accused guilty of that offense, it would be necessary to show that he bartered the cigarettes, and there was no evidence to support that finding, even though some evidence of preparation to do so.

In *U. S. v. Knoph* (Case No. 605, decided 31 December 1952), the Court affirmed the action of a Board of Review in affirming findings of guilty for the offense of desertion, stating that the intention to remain permanently absent is a question of fact for the trial court and that there was sufficient evidence to support the finding.

The defense of statute of limitations was raised in a desertion case in *U. S. v. Nichols* (Case No. 302, decided 14 October 1952). The statute was held to be tolled.

The Court on mandatory review affirmed findings of guilty and death sentences in *U. S. v. Long* (Case No. 529, decided 17 October 1952); *U. S. v. Hunter* (Case No. 359, decided 17 October 1952); and *U. S. v. Marshall and Shelton* (Case No. 548, decided 14 November 1952). The charges involved were murder and rape.

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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.

## WHAT THE MEMBERS ARE DOING

## CALIFORNIA

Col. John Oliver was recently named Superior Court Commissioner for the Superior Court of Los Angeles County. Col. Oliver was SJA of the 7th Armored Division, ETO, during World War II, and following the war was Legislative Counsel to ROA. Until recently he has been engaged in private practice in Los Angeles. Col. Oliver has long been an active member of the Association and at one time a member of its Board of Directors.

Thomas E. Stanton, Jr. (3 O.C.) has recently announced the formation of the firm of Johnson & Stanton for the general practice of law with offices in San Francisco.

## DISTRICT OF COLUMBIA

Maj. Gen. E. M. Brannon was on motion of Col. Frederick Bernays Wiener admitted to the bar of the Supreme Court of the United States on November 24, 1952.

Col. Michael Leo Looney (6th Off. and S & F) was married in St. Patrick's, New York, to the former Miss Josephine Joanne Grybosh of Lansford, Pennsylvania, on October 26, 1952. The ceremony was followed by a reception at the Waldorf-Astoria. Mrs. Looney, of the Army Nurse Corps, is presently on duty at Walter Reed Army Medical Center, Washington. Col. Looney engages in the private practice of law in Washington.

Maj. Reginald E. Ivory presently

on duty in JAGO was married in Washington, D. C., to Miss Elene Bel-lavoir on March 2, 1953.

Lt. Col. Aldo Loos, well known to Judge Advocate officers in the Washington area, is now in charge of Far East Command Claims Service with headquarters in Japan.

## MISSISSIPPI

Frederick J. Lotterhos (9th Off.) of Jackson was recently named Associate Judge of the Supreme Court of Mississippi.

## MISSOURI

Col. John Ritchie, past President of the Association, presently Dean of the Law School of Washington University, St. Louis, has been recently named Dean of the University of Wisconsin Law School. He will take his office July 1, 1953.

John C. Baumann (9th O.C.), one-time Assistant General Counsel of the Board of Governors of the Federal Reserve System, recently announced the opening of offices for the general practice of law in Warrensburg, Missouri.

## NEW YORK

A. Chalmers Mole (6th O.C.) has been elected New York State Commander of AMVETS.

Michael C. Curci has just completed a tour of duty as Assistant SJA with the 82nd Airborne Division. As an Airborne JAG, Curci has made eight parachute jumps before jumping back into civilian practice

with the firm of Curci & Ranieri with offices in Brooklyn.

William J. Rooney (2nd O.C.) recently moved his office to 21 East 40th Street, New York 16, where he will continue in the general practice of law.

Leroy E. Rodman (7th O.C.) recently announced the removal of his offices for the general practice of law

to 25 Broad Street, New York 4, New York.

#### PENNSYLVANIA

Harold G. Reuschlein (11th Off.) has been recently designated Dean of the new Law School of Villanova College. Dean Reuschlein will take over his duties in June, 1953.

#### WASHINGTON

Bert C. Kale (4th O.C.) is now Judge of the Superior Court for Whatcom County in Bellingham.

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### BOOK ANNOUNCEMENTS

*Military Justice Under the Uniform Code*, by James Snedeker (Little, Brown and Company, Boston, Massachusetts, 1043 p.p., price \$15.00). In accordance with the publisher's announcement concerning this work, Brig. Gen. James Snedeker, USMC, Retired, has written an exhaustive treatise on military justice following the tradition established by Winthrop's *Military Law and Precedents*. The book is the first such extensive work since the enactment of the Uniform Code of Military Justice.

*Civilian Counsel in General Court-Martial Cases Under the Uniform Code of Military Justice*, Washington University Law Quarterly (Vol. 1952—No. 3, pages 356-383), by Lt. John S. Sellingsloh and Maj. Kenneth J. Hodson. This law review article provides a handbook of procedure for civilian lawyers defending accused in court-martial cases and covers procedure from pre-trial through appellate review. Copies of this article may be secured from Washington University Law Quarterly, Washington University, St. Louis, Missouri, price \$1.25.

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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.

## FIFTH ARMY NEWS

Col. Claude E. Reitzel, Jr., who has been The Judge Advocate for the Fifth Army since July 1, 1951, has been recently transferred to the Far East Command. Col. Willis A. Potter, formerly of the Office of The Judge Advocate, Far East Command, has become Judge Advocate of the Fifth Army. Col. Potter and Col. Reitzel are both Charter members of the Association.

Col. A. H. Rosenfeld, Jr., Chief, Legal Assistance Branch, Army JAGO, on February 24th presided at a meeting of all Legal Assistance officers of the 13-state Fifth Army area at Fifth Army Headquarters for a discussion of the legal assistance program, the broadening of the services, and making the availability of the services known to military personnel.

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### ANNOUNCEMENT OF ANNUAL MEETING

The annual meeting of the Association will be held in Boston, Massachusetts, on August 26, 1953. The annual banquet will be held on August 25, 1953. Col. Joseph F. O'Connell Jr., Chairman of the Annual Meeting Committee, has announced that the Association's functions will be held in the First Corps Armory, directly across the street from the Statler Hotel, which will be A. B. A. convention headquarters.

The annual banquet will be held on Tuesday, August 25th, preceded

by reception and cocktails beginning at 6:00 p.m. The committee has arranged for an excellent menu. Advance reservations or information can be obtained either by application to Col. Joseph F. O'Connell, Jr., 31 Milk Street, Boston, Massachusetts, or to the national headquarters of the Association. The annual meeting of the Association will be held also at the First Corps Armory beginning at 4:00 p.m. on August 26th. It is expected that a large number of the members of the Association will attend these functions.

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### *Recent Deaths*

Arthur E. Farmer (10th O. C.) New York, long a member of the Association, died on January 8, 1953.

Ray D. Grimes, Indianapolis, Indiana, a charter member of the Association, died November 17, 1952.

## Col. Wiener Completes the Circuit

Col. Frederick Bernays Wiener of Washington, D. C., charter member of the Association and member of its Board of Directors, has completed the circuit as instructor in military law of the three services.

Col. Wiener was invited to lecture at the U. S. Naval School (Naval Justice), Newport, Rhode Island, in October, 1952, on "Military and Naval Law Cases in the Civil Courts." In December, 1952, he lectured at the Air Command and Staff School, Judge Advocate General Division, Maxwell Field, Alabama, on "Constitutional Guaranties at Military

Law" and "Double Jeopardy at Military Law." To complete the circuit, he was invited to lecture at The Judge Advocate General's School in Charlottesville, Virginia, in January, 1953, at which time his lecture was on "Essentials of an Effective Oral Argument."

Col. Wiener has been a contributor to the Judge Advocate Journal, and is presently, in addition to being actively engaged in practice in Washington, D. C., Professorial Lecturer in Law at The George Washington University, teaching "Military Law and Jurisdiction."

