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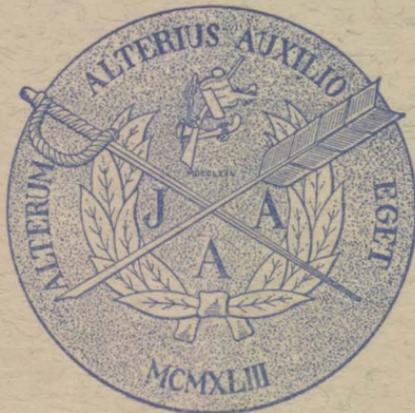
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IMPORTANT: Nominating Committee Report on Page 35

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Publication Notice

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

TABLE OF CONTENTS

	PAGE
ABA Program for Lawyers in the Armed Forces.....	1
Senator Thurmond Introduces ABA President at Hearings on Incentive Pay Bill.....	5
Statement of ABA President to Senate Armed Services Committee Supporting S. 1165.....	7
Justice For the Good Citizens of the Navy.....	11
The Role of the Judge Advocate General of the Navy in the Field of Disability Retirements.....	13
The Law Officer's Preparation For Trial.....	18
Recent Decisions of the Court of Military Appeals.....	24
What the Members Are Doing.....	31
In Memoriam.....	33
1958 Annual Meeting To Be Held at Los Angeles.....	34
Report of the Nominating Committee—1958.....	35
The Public Stake in Military Justice.....	38
Law Day—U.S.A. at Shaw AFB.....	41

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ABA PROGRAM FOR LAWYERS IN THE ARMED FORCES

By Charles S. Rhyne *

Following the decision of the United States Supreme Court in the Girard case, newspaper headlines screamed for weeks about the injustice to an American G.I. in allowing him to be tried in a Japanese court. The concern of these headline writers was, of course, that Girard might not receive the fair trial and adequate defense which is such a proud tradition here in America. Actually, due to an unfortunate and growing situation existing in our military legal corps, Girard may have received a better defense and been better off to be tried as he was with an experienced civilian defense counsel, rather than in a military court with inexperienced counsel.

This statement is certainly not meant in derogation of some of the nation's finest lawyers who devote their lives to military service nor to the many fine young men who do their very best to see that men in service receive good legal advice. But the cold facts are that close to 50 per cent of our military lawyers are inexperienced and only recently graduated from law school. This sad state of affairs is caused by young lawyers not desiring to make a career of the military service because of (1) inadequate pay;

(2) lack of promotion; and (3) lack of prestige. There are undoubtedly other factors, but these are the most important. By reason of the post-college years he must spend in law school and preparation for his bar examination, the military lawyer commences his career three to four years later than does his college contemporary in the line and most of the other staff corps. Under present law this causes him to remain permanently behind his contemporaries in both promotion eligibility and longevity pay. It makes him three to four years older upon reaching the retirement eligibility age. In the event he is retired for physical disability, his retirement pay at a given age is less due to the longevity factor. All during his career, the military lawyer loses up to four years longevity pay credit and receives approximately fifty dollars per month less than his line officer contemporary. It should also be noted that military lawyers are required to finance their own professional education.

Since virtually every young lawyer gets out of the service as soon as his required tour of duty is completed, obviously he would not have come in at all if it were not for the fact that this is less distasteful

* President of the American Bar Association, a member of the bar of the District of Columbia.

than performing his military obligation under the Selective Service Act as an enlisted man. Concurrently, many of the career military lawyers have indicated an intention to voluntarily retire at the end of twenty years service (when they first become eligible for retirement benefits) because of the dim outlook for promotion and pay increase. If this trend is allowed to continue, the only military lawyers on active duty will be those who have just graduated from law school and have no legal experience. Such young lawyers are not fully ready to practice law. The gap between law in practice and law in the books has not been adequately bridged by our law schools. There should be a period of internship.

Nevertheless, necessity will compel young inexperienced lawyers to represent the United States Government in matters concerning the freedom, life or death of our servicemen in this country and in foreign lands; in matters of procurement, contracts, patents, etc. involving the billions of dollars being spent on research and development as well as maintenance and operations of our Armed Forces; and in matters of litigation and claims in favor of and against the Armed Forces. Brilliant as a young lawyer may be, without experience and maturity he is not completely competent to be the adversary of the highly skilled and experienced counsel who represent private contractors in their dealings with the military departments. The additional cost to the United States Government in terms of dollars will be in the millions; the impact on

the morale of our fighting men cannot be measured.

The American Bar Association has become aware of this situation and recognizing its seriousness has activated a vigorous program directed towards bringing about some badly needed changes in the treatment and status of military lawyers. For by striking at the source of the trouble and eliminating many of the present inequities, military legal service can become an inviting and rewarding career.

Through the Committee on Lawyers in the Armed Forces and the Committee on Federal Legislation, tremendous efforts are being exerted to promote passage of vital federal legislation to improve the pay, promotion and prestige of military lawyers. Surveys among members of the bar disclose that Senate Bill No. 1165 and H. R. 4786 which provide for professional pay, additional service credit, and earlier promotion to place military lawyers on an equal footing with their military contemporaries will, if enacted into law, go far toward solving this whole problem. It is pertinent to note that the Congress solved a similar problem concerning military career doctors and dentists with the passage of the Medical and Dental Career Incentive Act of April 30, 1956.

Senate Bill No. 1093 and H. R. 4787 providing in part for each Judge Advocate General to serve in the grade of lieutenant general or vice admiral will, if enacted into law, raise the prestige of the military lawyer by recognizing the importance of the duties performed by The Judge Advocates General. Each

acts as the senior member of one of the world's largest law firms. For example, one Judge Advocate General supervises a staff of over 1200 military lawyers, 100 civilian lawyers, 500 enlisted personnel and 1100 civilian employees such as stenographers, court reporters, clerks and the like employed in approximately 400 different legal offices throughout the world. During a normal year, his service will prosecute in the name of the United States more criminal cases (184,348 military justice cases from all three services in 1956) than are filed by all of the United States attorneys in all of the United States District Courts (31,554 in 1956). These cases will be participated in by military lawyers and the records of these trials will be judicially reviewed by various appellate agencies within the structure of his department. This tremendous responsibility in the field of criminal law is equaled if not surpassed by the many facets of his civil law responsibilities—claims, military affairs, patents, litigation and procurement counseling. The responsibilities of the position of The Judge Advocate General are to say the least, equal to those positions in the military which have already been allocated the grade of lieutenant general and vice admiral.

In addition to supporting bills already introduced, the American Bar Association is now preparing proposed legislation to implement that portion of the report to Congress of the Hoover Commission which concerns the establishment of a JAG Corps in the Navy and the

Air Force JAGD. Physicians, dentists, civil engineers and chaplains have their professional staff units. It appears that the only way in which a strong professional spirit can be regained by lawyers in the Navy, with consequent benefit to the service, is by establishing a staff corps or its equivalent for legal specialists which would assure opportunities for career development in their profession. It is particularly important that the Navy Judge Advocate General and his assistants be selected from such a corps.

However, not only is the Association deeply concerned with the problem of status and recognition and compensation of the lawyer as a member of the armed services—the special charge of the Special Committee on Lawyers in the Armed Services—but we also try to keep current in the administration of justice within the Armed Services through the Special Committee on Military Justice, and ever since the establishment of the legal assistance program during World War II we have enthusiastically collaborated upon that program through our Special Committee on Legal Assistance.

There are several thousand lawyers in military service, and they constitute a very vital part of the American legal profession. The American Bar Association is proud of the great record of military lawyers and of the tremendous service which they constantly render in providing justice to service people.

The efforts of the Association to enhance the status and increase the pay of the lawyer in uniform and

to improve the administration of justice in the armed forces are not motivated by selfish motives—although such motives are quite legitimate. The interest is broader, and extends to the public at large. One of the most vital interests of the public at large is to have a strong legal profession in our Country. All over the World today the battle is going on to determine whether freedom and individual rights will survive. In today's world the legal profession is one of the strongest bulwarks on the side of individual liberty. From the time of our Government's inception to the present zenith of its power, lawyers have been the chief creators and defenders of individual liberty. Despite occasional public misunderstanding of the role of the lawyer, the American legal profession has

never shirked its duty to provide legal defense for unpopular causes and persons. Protection of individual rights and liberties is as important and essential to our Country as is the maintenance of our military might and our economic well-being. For the legal profession to continue to fulfill its historic role as the protector of individual rights it must jealously guard its dignity and prestige and be willing to insist that its members be rewarded financially as befits their profession's important status in our society. The American Bar Association is fighting hard to obtain this position for all military lawyers. For in a strong legal profession lies the liberty of the people of the United States and in the liberty of the people of the United States lies the hope of the World.



Nominating Committee—1958

Colonel Thomas H. King, President of the Association, has named the following members in good standing to the Nominating Committee for 1958: Col. John G. O'Brien, USA, Chairman; Brig. Gen. Robert H. McCaw, USA; Lt. Col. Francis J. Burkart, USAR; Cdr. Donald L. Garver, USN; Cdr. J. Kenton Chapman, USNR; Capt. William C. Hamilton, Jr., USAF; and Maj. John A. Kendrick, USAFR. The Committee has filed with the Secretary its report containing a slate of candidates for the offices and Board of Directors of the Association which is published in this issue of the Journal.

SENATOR THURMOND INTRODUCES ABA PRESIDENT AT HEARINGS ON INCENTIVE PAY BILL

Senator Strom Thurmond appeared before the Senate Armed Services Committee on March 12, 1958, in support of S. 1165, a bill to provide for the procurement and retention of judge advocates and law specialist officers for the Army, Navy and Air Force. This bill would provide certain incentives to make the career of uniformed lawyers in the Armed Services more attractive. Senator Thurmond made the following remarks in presenting Charles S. Rhyne, Esquire, President of the American Bar Association, to the committee:

MR. CHAIRMAN:

I appreciate the courtesy of the Chairman in making it possible for me to present the President of the American Bar Association at these hearings today. Before introducing The Honorable Charles S. Rhyne, there are several points which I would like to make in favor of incentive pay for the purpose of retaining and recruiting qualified attorneys in the military service. The facts and figures which I shall present very briefly were prepared for me by officers in the JAG Corps in the various services of the Defense Department, and can be verified if you wish to call these gentlemen to testify.

Here are my points:

1. I am alarmed that if the shortage of lawyers in the military services is permitted to continue, it may cost the taxpayers millions of dollars and jeopardize the rights and liberties of our servicemen both at home and abroad.

2. I am informed that 94 per cent of the regular career lawyers plan to retire as soon as eligible. This will occur within the next five years.

3. I am further informed that 97 per cent of the young military lawyers plan to leave the armed forces at the end of their three years of obligated service. Over 700 returned to civilian life in fiscal year 1957 and 435 so far this year.

4. Not only is the military losing lawyers in alarming numbers, but they are unable to recruit the number needed. During the same period (fiscal years 1957 and 1958, to date), they have recruited only approximately 800 lawyers. The losses exceed the gains by over 300.

5. The tremendous turnover in personnel is not only costly, but it has resulted in a 50 per cent inexperience factor among military lawyers. This deplorable situation results in inexperienced lawyers handling matters involving millions of dollars of taxpayers' money and de-

fending servicemen charged with serious crimes.

6. If this situation is permitted to continue, we will return to the conditions that prevailed during World War II when the rights of our servicemen were not being protected. The Congress, in enacting the uniform code of military justice to correct this, required that lawyers be provided. Therefore, the passage of the code will have been a vain act, unless Congress provides the necessary incentive for recruiting and retaining an adequate number of competent lawyers.

7. Any proposed legislation affecting military pay would be incomplete and would not be in the best interest of our National Defense unless it includes the same incentive pay for our military lawyers as is now accorded the military doctor, dentist, and veterinarian. Incentive pay has solved their problem.

8. I have sponsored legislation (S. 1165) which includes a similar provision for the military lawyer. It would solve their problem. A recent survey indicates that 92% of the career lawyers and 79% of the

young lawyers on obligated service, would remain on active duty if incentive pay as provided in my bill were included in the proposed legislation before you.

9. It would appear that the only alternative is to draft lawyers. This is not only unacceptable but would not provide the experienced lawyers so badly needed.

I take great pleasure, gentlemen, in presenting to you the Honorable Charles S. Rhyne of Washington, D.C., the President of the American Bar Association; the Honorable Osmer C. Fitts of Brattleboro, Vermont, Chairman of the American Bar Committee on Lawyers in the Armed Forces; and the Honorable Thomas H. King of Washington, D.C., past President of the Reserve Officers Association and President of the Judge Advocates Association. Mr. Rhyne, a distinguished graduate of Duke University and George Washington University School of Law, will present a statement to the committee and Mr. Fitts will answer any detailed questions the committee members may wish to have answered.



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.

Statement of ABA President to Senate Armed Services Committee Supporting S. 1165

Mr. Chairman, Members of the Committee, I am Charles S. Rhyne of Washington, D.C., President of the American Bar Association. I have asked to appear before you in order to review briefly the interest of the American Bar Association in military law and its support of the improvement and strengthening of the military legal services. The interest of this association in the field of military law is not new. One of the primary reasons for our existence is the improvement of legal services rendered to a client, whether corporate or individual. The military lawyer who serves probably the largest single client in the world certainly falls within our sphere of interest and, while we desire most earnestly to improve the lot of each member of the legal profession, our primary concern is the effective performance of legal services. This has been demonstrated to you in the past by the American Bar Association's participation in the formulation and implementation of the Uniform Code of Military Justice along with many other legislative matters affecting the military services.

Since the practice of military law with its many separate areas of specialization is a highly technical field, officer-lawyers of above average ability and experience are required in order that the necessary legal services be performed in an efficient and effective manner. There-

in lies the interest of the American Bar Association. The legal departments of the Army, Navy and Air Force are at this time providing legal services for their respective military departments with approximately fifty per cent inexperienced legal professional personnel. Lawyers who have only recently graduated and been admitted to practice law are, during the course of their three years of obligated service, making decisions which could conceivably cost the United States Government millions of dollars, or are defending an accused serviceman against a serious charge in a court-martial which could involve death as the most serious penalty. However, of grave concern is the fact that even this inexperience would not be available to the military were it not for the fact that young lawyers are vulnerable to selective service and consequently forced to choose between two years service as an enlisted man or three years service as a commissioned officer.

The inability of the services to retain any of these young officers is a matter of serious concern to the American Bar Association. There is no question that the efficiency of the legal services provided is impaired by the constant and expensive turnover of military lawyers. Not only is much of the time of these transient officers spent in processing, orientation, travel, necessary formal or

informal training as the case may be, and separation, but there is a serious loss of accumulated experience which the services can ill afford. In addition this instability detracts from the professional prestige of the military legal practitioner and tends to further aggravate the turnover rate.

In order to further illustrate this problem, the three services normally require approximately 2700 lawyers. During Fiscal Year 1957, over 700 of these officer-lawyers returned to civilian life. To date in Fiscal Year 1958, 435 officer-lawyers have separated from the military. In addition to this, senior officers in progressively greater numbers are facing retirement beginning in 1960.

In an attempt to determine the magnitude of this problem in the near future, the American Bar Association conducted a survey of military lawyers on active duty. The results of this survey indicate that, unless corrective action is taken, and taken immediately, the legal departments of the services will be unable to perform the services required of them by Congress.

Of 1045 career officer-lawyers who replied to this survey, 987 indicated positively that they plan to retire as soon as they become eligible, 94.4%. 956 of these officers indicated that pay was one of the primary factors in this decision, and 876 of these stated that adoption of the proposed pay scales which you are now considering will not alter their plans.

Although this fact is in itself alarming, of more serious portent is

the result of the survey of the young officers serving an obligated three year tour. Of 573 officers who replied prior to the established tabulation date, 568 stated that they planned to leave the service upon completion of their obligated tour. This is 99.1%. In addition, 483 of these officers stated that adoption of proposed pay legislation would not change their plans in this regard.

These figures reveal what lies ahead. At the present time the military legal departments are seriously understaffed in the intermediate grades of captain and major and equivalent grades in the Navy. With an almost complete turnover of lieutenants during the past few years and an even greater experience attrition rate established for the future, legal services required cannot be rendered efficiently, the point can and will be reached where military justice will return to its World War II status, government contracts can no longer be legally reviewed, and the rights of our servicemen overseas can no longer be protected.

In order that you can properly evaluate this matter, let me point out to you certain facts which I am sure you will find of interest. In Calendar Year 1956, military lawyers participated in 184,348 trials by courts-martial, of which 10,689 were general courts-martial. During Fiscal Year 1957, Air Force military lawyers reviewed for legal sufficiency government contracts amounting to over 8 billion dollars, in addition to patent cases valued at over 3 billion dollars. Also of interest is the fact that military

lawyers during 1957 attended 4437 trials of U.S. Armed Forces personnel by foreign tribunals as legal observers designated to safeguard the rights guaranteed by treaty.

These are only examples of the activities of the military lawyer. However, with these facts before you, it can be easily understood why experience must remain at a high level.

The services and the legal profession can do some things to help solve the problem of the disappearing military career lawyer. However, extensive study by the American Bar Association indicates that pay incentives and promotion credits must be provided by the Congress in order to make a career in the military attractive for lawyers and to permit the military to compete with civilian industry and the attractiveness of civilian law practice in securing and retaining outstanding young lawyers. Senator Strom Thurmond has introduced in the Senate and there is pending at the present time Senate Bill 1165 which is calculated to supply the essential requirements of which I have spoken. Four bills identical to Senate Bill 1165 have been introduced in the House of Representatives.

The survey conducted during February 1958 by the American Bar Association's Special Committee on Lawyers in the Armed Forces, which I have already indicated, shows almost 100 percent of military lawyers plan to leave the Armed Services at the earliest retirement age or at the end of their obligated tour of duty. This survey

also pointed out that legislation along the line of the Thurmond bill offered a possible solution.

Of regular officers and career reservists over 92 percent stated such financial and incentive legislation would cause them to change their plans to leave. This would hold the experienced mature officers in the service to the financial gain of the United States and the betterment of legal professional services of the Army, Navy, Air Force, Marine Corps and Coast Guard.

Of the officers serving a so called obligated tour of duty almost 80 percent indicated that such financial and incentive legislation would cause them to reconsider their intent to leave at the end of their obligated tour of duty. This is the aid in procurement and retention of military lawyers that seems to be needed.

Senator Thurmond's bill has been modeled after the present provisions of law providing incentive pay to physicians, dentists and veterinarians. Experience has demonstrated that what was a very dismal picture in the service medical departments has been alleviated by the provisions made for medical officers. The services are obtaining and retaining such people. Although this bill has been before the Congress for well over a year, the Defense Department has not yet submitted its report. Senator Thurmond also has introduced Senate Bill 1093 to provide three star rank for the Judge Advocates General and the Surgeons General. This bill is designed to raise the status of the lawyer and doctor in the services.

It is my view and the view of the American Bar Association consisting of almost 100,000 lawyers scattered throughout the United States and, through the House of Delegates which is the spokesman for over 200,000 of our country's lawyers, that a part of this very serious problem which I have discussed with you can be remedied by a simple amendment in the pay legislation which you are now considering to provide that the special pay for doctors and dentists be given to Judge Advocates of the Army and Air Force and to Legal Specialists of the Navy, Marine Corps and Coast Guard. I believe that consideration should also be given to the other features contained in Senator Thurmond's pay and promotion bill (S. 1165) and to the bill providing three star rank (S. 1093). Our studies demonstrate that all of these provisions are essential and we commend them to your favorable consideration.

There is present with me Mr. Osmer C. Fitts of Brattleboro, Ver-

mont, who is the Chairman of the American Bar Association's Special Committee on Status of the Military Lawyer. He has prepared, and has now available in draft form, a brochure which our special committee, after exhaustive study, has prepared to present a clearer perspective of the problem presently existing with respect to the procurement and retention of military lawyers in the Armed Services. He will be glad to answer any questions which any member of the Committee may wish to put to him as he has been in charge, for the American Bar Association, of the Committee which studied and completely analyzed this situation.

I want to express my appreciation and the appreciation of the American Bar Association which I represent for the courtesy of this Committee in permitting me to put before you a problem which is now of utmost seriousness and a problem which will become progressively worse unless the actions which I have suggested are taken promptly.



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Justice For The Good Citizens Of The Navy

By Richard Jackson *

The Navy is devoting much attention to a program for improving and speeding up the administration of justice—justice for those accused of crime. How about the great majority of our naval population—the good citizens? Do they not need assistance in securing justice?

The quickest way for a Navy man to secure the services of an attorney is to get accused of a serious offense. Thereafter, at every step in the pretrial, trial, and post-trial review, the individual's rights are safeguarded by lawyers supplied by the Navy. There are non-criminal fields, however, in which there is a crying need to have high caliber professional legal services made available to our good citizens. And these fields are not unimportant. They affect the morale and readiness of our personnel.

The more important of these fields are physical disability retirement, legal assistance, and personnel claims. While the field of legal assistance is generally limited to the strictly personal type of unofficial problem, the other two fields cover official matters of a personal nature. Obviously, the accomplishment of justice in these matters can be extremely important to our individual members. Congress has guaranteed certain rights to members of the armed forces in their individual capacities. These include both prop-

erty rights and personal rights arising out of their status as members of the armed forces.

These property rights are best illustrated in the field of claims. In the past there has been too much red tape and too little speeding up of the cause of justice in adjudicating the claims of our members against the Government for damage done to their property such as household effects. I am pleased to report that rapid progress is now being made in cutting through much of this red tape and in simplifying the procedures.

Our Personnel Claims Regulations have been completely redrafted for the first time since 1945. Among other things, these new regulations will eliminate the time-consuming requirement of securing appraisals where the total amount claimed is under \$100 and the damage to any single item is under \$50. Also, the requirement has been abolished that remedies against carriers or insurers must first be pursued before the Government will process a claim. In this field, therefore, I consider that satisfactory progress has been made in assisting the good citizens of the Navy.

When we come to legal assistance, persuasive proof is furnished that our good citizens need the help of lawyers. That this need is fully appreciated is demonstrated by the

* Assistant Secretary of the Navy for Personnel and Reserve Forces.

160,000 legal assistance clients which our Navy lawyers handle annually. (This compares to the approximately 3,000 military justice clients that our Navy lawyers have each year.) These clients were accused of no crime or military offenses—nevertheless they needed a lawyer. Their morale was improved by the fact that legal assistance was made available to them. I recognize, however, that the job we do in this field is hampered by the fact that the Navy only has about 430 full-time uniformed lawyers.

It is in the field of physical disability retirement that our good citizens need more justice. This field involves substantial personal rights and we have at least 8,000 physical evaluation retirements a year. When our people become physically unfit to perform their duties through no fault of their own, they certainly deserve no less in the way of qualified legal counsel, a full and fair hearing, and justice under law than the man accused of wrongdoing.

One aspect of the physical evaluation system which gravely concerns me is the lack of representation now afforded a party. Under present procedures, we give full legal service only to the mentally incompetent parties. They are the only ones who can count on having assigned coun-

sel. Not only do we fail to supply counsel in many disability cases where they are sorely needed, but the ones we do supply are spread so thin that I fear that they do not have time to do a fully adequate job.

There are other aspects of physical disability cases (as in almost all retirement situations) on which expert legal advice is needed. These aspects encompass such matters as pay computations, veterans' rights, survivors' benefits, employment, and income tax questions.

Although the physical evaluation system is fundamentally sound, improvements are obviously needed. For that reason, a study of the system and the governing directives is currently underway. Procedures must be set up which will protect as fully as possible the substantial rights of the individual, equally with the dollars of the Government.

With the present shortage of full-time professional Navy lawyers, we can go little beyond the bare minimum that the law requires when it comes to representation. It will be one of the prime objectives of my office to see that all the good citizens of the naval service have counsel to assure them that they will attain justice—justice in every sense of the word.



The Role of the Judge Advocate General of the Navy in the Field of Disability Retirements

By Penrose Lucas Albright *

The function of the Navy JAG in naval disability retirements and separations extends beyond that of either the Army or Air Force JAG's. In contrast to the other Armed Services, the authority of the Secretary of the Navy to make the final determinations in this field has been delegated directly to the Navy JAG. It should be pointed out, however, that this is neither a new nor a novel job for the Navy JAG. Historically he has long been charged with the responsibility to "receive, revise, and have recorded" retirement proceedings.¹ But irrespective of how the Navy JAG happened to get into the disability retirement business, the fact that he is presents a unique opportunity to study the effect the service lawyer may have upon administrative procedures.

The law requires that no member of the uniformed services shall be

retired or separated for physical disability without a full and fair hearing if he shall demand it.² In each of the armed services,³ the hearing is accorded by a Physical Evaluation Board, composed of one medical and two non-medical officers,⁴ which makes the required findings of fact. Uniformly the armed services give such a hearing to all active duty personnel pending disability separation or retirement unless specifically waived. Significantly, the Navy further accords a hearing, if requested, to inactive Reservists recommended for medical discharge.

In each of the armed services, the record of proceedings of the Physical Evaluation Board is forwarded to a Physical Review Council. There are many Physical Evaluation Boards in various locations over the United States, but each armed force

* The author, a member of the bar of the District of Columbia, served as a Lieutenant in the Promotions and Retirement Branch in the Office of The Judge Advocate General of the Navy from 1952 to 1957.

¹ 10 U.S.C.A. 5148

² 10 U.S.C.A. 1214

³ The Coast Guard is not included in this discussion as it more or less follows the lines of the Navy. Coast Guard Physical Evaluation Boards have a reputation for being very conscientious to insure full and fair hearings for its members.

⁴ The Air Force also has a modified Physical Evaluation Board consisting only of a medical member.

has only one Physical Review Council which is located in Washington, D. C. The Physical Review Council is not a Board, as such, and is composed of high ranking officers representing the Surgeon General, the JAG, and the office having personnel cognizance, i.e. the Adjutant General, Chief of Naval Personnel, etc. Board powers are vested in the Physical Review Council to substitute its findings for those of the Physical Evaluation Board. If the substitution is detrimental to the interests of the serviceman concerned, he can rebut and cause the case to be referred to an appellate board in each of the services. For most practical purposes in the Army and Air Force, the appellate body terminates the review possibilities and further action by the service deals solely with effecting the disposition required by the findings. However, in the Navy all records are transmitted to The Judge Advocate General where they receive an additional review.

Navy JAG's review of the Physical Evaluation Board records partakes of the nature of judicial review in that the JAG concerns himself primarily with questions of law and does not weigh the evidence except, of course, as necessary on

the question of sufficiency to support the findings.⁵ In this respect, his review is narrower than both the Physical Review Council and the Physical Disability Appeal Board, both of which reconsider the evidence of the Physical Evaluation Board on its merits. Only on rare occasions does the Navy JAG provide findings of his own. Records that reveal prejudicial error are generally returned to the appropriate board or the Physical Review Council for corrective action.

Another interesting departure from the procedure of the other services exists where a conflict develops between the findings of the Physical Review Council and those of the Physical Disability Appeal Board, the Navy's appellate body. In such cases, the facts and applicable law are briefed by the Navy JAG⁶ and are forwarded to the Secretary of the Navy⁷ for his personal consideration and resolution. This occurs with sufficient frequency so that the civilian Secretary maintains working cognizance of the naval disability retirements and separations program. In addition, the Secretary's decisions constitute the highest administrative precedent and can have far reaching consequences.

⁵ Under the broad delegation of authority, the Navy JAG could, if he wished, make findings of fact.

⁶ These briefs frequently contain valuable legal opinions and interpretations of the law. They form the basis for many of the Synopses of opinions of the Judge Advocate General in the field of physical disability retirements and separations which are available at all naval physical evaluation boards and cited as SYNOP's.

⁷ Usually this is the Assistant Secretary of the Navy (Personnel and Reserve Forces).

Before each Physical Evaluation Board, there are three main issues:

1. Is the party before the board unfit by reason of physical disability?

2. If unfit, was his disability incurred under the conditions which will entitle him to disability benefits?

3. If so incurred, what percentage is assignable for the disability under the Veterans Administration Schedule for Rating Disabilities?

On the question of unfitness, the services differ greatly among and within themselves. This is understandable as obviously, the same physical standards for retention cannot be applied indiscriminately to the infantry captain, the dental technician, the boatswain's mate, and an air force brigadier general. The Navy JAG exercises very little, if any, influence on the question of physical fitness. He has held, however, that irrelevant circumstances should be given no weight in making this determination. For example, the fact that the party under evaluation may also be facing imminent mandatory retirement or RAD is not germane to the question of physical fitness. His case should be considered and findings made as though this were not the case.⁸

In the determination of whether a disability was or was not incurred in the service so as to entitle the individual concerned to disability benefits, the Navy JAG's review has unquestionably resulted in a stricter

application of the presumption of service-incurrence in the Navy than in the Army or Air Force. Theoretically, all the services have a strong presumption in favor of finding service-incurrence of all disabilities found in the service. Supposedly this presumption can be overcome only by evidence on the order of clear and unmistakable evidence or accepted medical principles which establish pre-service origin of the disability. In practice, however, service connection is frequently denied by Physical Evaluation Boards on the barest of evidence indicative of pre-service origin. On this point, the Navy JAG has consistently demanded adherence to the basic evidentiary standards of competency and sufficiency. For example, the fact that a pre-service origin may be inferred from and consistent with the evidence and is considered as the most likely account of the origin of the member's disability has been held insufficient by the Navy JAG to make such a finding where other possibilities have not been excluded as unreasonable.⁹

The effect of the Navy JAG in naval retirements is most apparent when the application of the Veteran's Administration Schedule for Rating Disabilities is compared for the various services. Here, each service has gone its own way to the extent that it would now be the exception rather than the rule for any two of the services to arrive at the same rating for the same dis-

⁸ SYNOP 3.5.1, 3.5.5.

⁹ SYNOP 3.17.3.

ability. A striking but by no means isolated example of this is rheumatic heart disease. The very same disability could be rated 10% by the Army, 30% by the Air Force, and 100% by the Navy.

In defense of the armed services, it should be pointed out that the VA Schedule is far from a satisfactory vehicle for rating in service retirements. The VA can and does change ratings in a case as the circumstances dictate—several times a year if need be—and its Schedule is adapted for such changes. However, for service retirement, at best the rating can be changed only once. The rate of compensation for a person placed on the Temporary Disability Retired List can be changed only when he is eventually removed from such list. Thus ideally, what is needed for the armed forces is an initial rating to take care of a person while he is on the Temporary Disability Retired List and a final rating to reflect the average impairment in view of the expected vicissitudes of his disability for the rest of his life. Unfortunately, the VA Schedule does not do this. It is concerned primarily with the current average impairment in the earning capacity of the veteran. A number of its ratings are for convalescence and the like and are usually for a limited duration of several months to several years. The ratings for many disabilities such as tuberculosis

and the psychoses are made up almost entirely of such ratings.

The JAG of the Navy has held that as a matter of law the VA Schedule, being the only standard prescribed by Congress, must be followed *as is*—convalescent ratings included—and the Physical Evaluation Boards are without authority to deviate from its express terms. The Army on the other hand applies the VA Schedule *less* the convalescent ratings on the theory that only “permanent” ratings should be employed.¹⁰ The Air Force simply applies the convalescent ratings in some cases and not in others. As a result in the rheumatic heart disease case, the sailor is temporarily retired with a 100% rating as that is the same as the VA would rate him under an applicable six month convalescent rating and he will receive 75% of his basic pay¹¹ until removed from the Temporary Disability Retired List. The airman will be temporarily retired with 30% rating on the basis of a three year convalescent rating and he will receive 50% of his basic pay¹² until removed from the Temporary Disability Retired List. In the Army 10% is assigned and unless the soldier has completed over 20 years’ active duty he is separated with severance pay. Eventually the sailor and the airman will probably wind up with the same rating depending upon the progress of the disability.

¹⁰ The Army except from their rule Tuberculosis cases due to a DOD directive and malignancy cases in view of the extreme inequity of doing otherwise.

¹¹ 75% is the maximum allowed by law, 10 U.S.C.A. 1401

¹² 50% is the minimum under the law, 10 U.S.C.A. 1401

The soldier, however, has "had it". If his disability should become worse his only recourse is to the Veterans Administration.

It is difficult to find any legal basis to justify the inconsistent position of the Air Force, regardless of its equities. On the other hand, ostensibly strong legal arguments can be advanced to support the Army's practice. However, it savors too much of an ivory tower approach and seems to lose sight of the intent of the lawmakers. In contrast, the Navy's position has both a firm foundation in administrative law and reveals appreciation of the Congressional intent for long range implementation of the statute.

Another interesting variance between the services used to exist in respect to qualification for placement on the Temporary Disability Retired List. Early in the game, Navy lawyers opined that the Temporary Disability Retired List was to be employed when the percentage of disability was subject to change as well as when the individual concerned might become fit for duty. It was not until much later that the other services bought this concept. Unfortunately, there is now little that can be done to adjust the premature ratings assigned before acceptance of this position.

It is submitted that the Navy, due in large measure to the JAG's review, administers its disability retirements and separations in a manner more nearly contemplated by, and in conformance with, the law

than the other armed forces. This is true despite the fact that the sailor or marine is less likely to be represented before the Physical Evaluation Board by a qualified attorney than the soldier or airman due to the chronic shortage of legal specialists in the Navy.¹³

If administration of a statute having quasi-judicial requirements is to be consistent with legal precepts, then some type of appellate review on the JAG level seems desirable. Without such, the service lawyer who represents a party in a required hearing finds himself practically helpless in the face of accrued arbitrariness and misapplication of the law in higher administrative echelons. The occasional reference of problems to the JAG for opinion is not a satisfactory substitute. Too frequently, the really important problems never reach the JAG and when they do, too often the opinions rendered will have been prepared without a working knowledge of the subject matter or full appreciation of all the factors involved. It is difficult to provide an effective substitute for the direct legal review accomplished in the Navy by lawyers who are expert in the field.

A further and perhaps more important advantage gained from legal review of such proceedings lies in a juridical stability thus obtained which tends to level the different influences inevitable from different personalities and beliefs of the various officers administering the law.

¹³ This problem has been recognized by Assistant Secretary of the Navy, Richard Jackson. See *Justice for the Good Citizen of the Navy* in this issue of Journal.

THE LAW OFFICER'S PREPARATION FOR TRIAL

By Col. Jasper L. Searles *

The law officer is the catalyst which can and should be the most effective ingredient in improving the administration of justice at the trial level. This discussion will therefore be concerned primarily with the pretrial preparation by the law officer with the view to contributing to the result for which we are all striving—an adversary proceeding which is fair and just and which will result in the acquittal of the innocent and the conviction and appropriate sentencing of the guilty. We might entitle this case *Cursory versus Comprehensive Inspection of the File Prior to Trial*.

The principal participants in a trial by general court-martial should be well prepared. Merely because one is a learned and experienced lawyer or law officer does not relieve him of the responsibility for preparing for the trial of a particular case. The law officer or counsel who fails to prepare himself in advance of trial, in my opinion, fails to discharge his responsibilities. The law officer should examine the file

prior to trial. Since the file will generally contain only evidence for the prosecution it might be argued that the law officer will have formed an opinion of the case prior to trial. Such is not the case, however, because it is not necessary for him to study in detail the statements of prospective witnesses in order to prepare for his part in the trial.¹ A cursory inspection of the file is all that is required to alert the law officer to the possibility of harmful error being inadvertently injected into the record.

If, for example, the CID agent's statement contained in the file discloses an oral confession of the accused which includes references to other misconduct or to previous convictions, the law officer will be on his toes to assure that the agent does not testify to such prejudicial matters in open court. An out-of-court hearing is required with respect to the voluntariness of a confession when requested by the accused.² In court-martial trials such a procedure is authorized and encouraged³ and if the law officer in

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¹ English judges are furnished the file prior to trial (*The Proof of Guilt* by Glanville Williams).

² CM 397304, Floyd, 24 CMR —, 29 Nov 1957

³ Par. 57g(2), MCM, 1951; *United States v. Cooper*, 2 USCMA 333, 8 CMR 133; *United States v. Davis*, 2 USCMA 505, 10 CMR 3.

examining the pretrial file finds that some of the expected testimony with respect to the issue of voluntariness may disclose matters relevant to that issue but incompetent and prejudicial with respect to the issue of guilt or innocence, he should plan to have a preliminary out-of-court hearing on the issue of voluntariness. The necessity for declaring a mistrial might thus be averted. If the ruling of the law officer is adverse to the accused and the defense so desires, the accused may then present such evidence to the court for its determination as to the voluntariness of the confession. If the accused does not present this evidence on involuntariness to the court no instruction on the issue of voluntariness is required.⁴

If exhibits in the file disclose the possibility of a questionable search and seizure and it appears that some witnesses may testify on matters pertinent to the question of the reasonableness of the search and seizure but which might be incompetent and prejudicial with respect to the issue of guilt or innocence, the law officer by inspecting the file prior to trial will be alerted to the advisability of having an out-of-court hearing on the matter. Again, he may thereby avert the necessity of declaring a mistrial.

The examination of pretrial statements of the accused enables the law officer to see whether there appears to be a good defense so that he may

inquire thoroughly into the providence of any plea of guilty which might be entered by the accused. Evidence of an improvident plea also would indicate the necessity for a thorough out-of-court probing into the effectiveness of counsel. In one case⁵ presently before the Court of Military Appeals the accused pleaded guilty to two bad check specifications under Article 134. His individual defense counsel who was not qualified under Article 27(b) made an unsworn statement in extenuation and mitigation in which he remarked:

"* * * it was thought there was a general understanding among the poker players that these checks were not to be negotiated and merely to be treated as IOUs."

There was no action taken by the law officer at trial when this statement was made. The Government's reply to the petition for grant of review was that the cited statement did not contradict the possession of a criminal intent by the accused. However, the pretrial statement of the accused is that the accused told the party to whom he gave the checks that he had no money; also that there was an agreement that the check would not be cashed. The law officer apparently considered as inconsequential the remark of the defense counsel at trial but had he, prior to trial, looked over the state-

⁴ United States v. Dicarico, 8 USCMA 353, 24 CMR 163; Cf. United States v. Davis, 2 USCMA 505, 10 CMR 3.

⁵ United States v. Lenton (No. 9830), pet. granted 13 May 1957, argued 17 Oct 1957.

ments of expected testimony he surely would have seen the accused's statement which if true would be a defense. This would have alerted him to the possibility of an improvident plea of guilty requiring an out-of-court hearing for a thorough probing into the matter. In this case I doubt if anyone would deny that it would have been "good practice" to examine expected testimony of the accused prior to trial.⁶

The story is told by Sir Ellis Hume-Williams, once Recorder of Norwich, of how he once astonished an habitual offender:⁷

"[The man was] charged with stealing a rabbit, and from the private list of his previous convictions (which is supplied to the judge alone) I saw that the old rascal specialised in that particular occupation, for there were eight or ten previous convictions against him for the same thing. But this time he was in luck, for, from the depositions [pretrial statements of witnesses], I saw that the only evidence against him was that he was found with the rabbit in a sack, and that some farmer in the neighbourhood had lost a rabbit. No one had seen the prisoner take it or even seen him near the place from which it had disappeared, and there was no identification of the animal. Of

course, on such evidence he could not possibly be convicted. So when he was brought up into the dock I persuaded him with some difficulty to plead "not guilty." The case was tried, and when the evidence, or rather want of evidence, had been given for the prosecution, I directed the jury that there was no evidence on which the prisoner could properly be convicted, and they must return a verdict of not guilty. Thereupon the foreman stood up and said, 'We find the prisoner not guilty.' Never have I seen greater amazement on the human countenance. 'What,' said the old man in the dock, 'not guilty? Well I'm——'—and then taking his cap said to me, 'God bless you, sir. A merry Christmas.' And he marched out of the dock."

If the law officer in a recent case⁸ had inspected the file prior to trial he might have seen that he, himself, had signed as legally sufficient, pursuant to Article 65(c), the Special Court-Martial Order subsequently introduced to prove a previous conviction. Had he noticed that he might at trial thus become a witness for the prosecution he could have taken appropriate action at the trial to permit the defense an opportunity to challenge him for cause.⁹ At trial the accused pleaded

⁶ Cf. *United States v. Fry*, 7 USCMA 682, 23 CMR 146.

⁷ Hume-Williams, *The World, the House and the Bar* (London 1930) 43.

⁸ *United States v. Wilson*, 7 USCMA 656, 23 CMR 120; Art 26(a); par. 63, MCM, 1951.

⁹ Par. 63, MCM 1951; *United States v. Wilson*, supra; Cf. *United States v. Moore*, 4 USCMA 675, 16 CMR 249; *United States v. Beer*, 6 USCMA 180, 19 CMR 306.

guilty and the law officer apparently did not examine the document which was admitted in evidence without objection. Thus, as the result of the failure to inspect the file prior to trial, the long appellate processes were invoked resulting in the Court of Military Appeals ordering a rehearing on the sentence on the ground that at the time the document was admitted in evidence the law officer became a witness for the prosecution and therefore ineligible to participate further.

His inspection of the file may indicate to the law officer the existence of a companion case and the necessity for ascertaining whether the soldier in the companion case might testify as a witness for the prosecution and if so whether he was represented by the same defense counsel as the accused. The law officer will thereby be alerted, if such a witness is called to testify, to the necessity for an out-of-court hearing in order to determine whether the accused is aware of the existence of a possible conflict of interests, his right to unfettered assistance of counsel, and his express desires with respect to counsel. He may thus, by a pretrial examination of the file, obviate errors which have heretofore resulted in extended litigation.¹⁰

In preparing for trial, the law officer should draft tentative instruc-

tions and refresh his memory with respect to legal issues likely to arise during trial. He cannot possibly meet these requirements of preparation unless he has performed at least a cursory examination of the file.

But you say, "What about the holding in *United States v. Fry*¹¹—aren't law officers prohibited from examining the file prior to trial?" The simple answer is "No." The law officer in that case was challenged for cause because he had read the Article 32 report including statements of expected testimony. This he did for the purpose of determining his legal research requirements and for information needed to draft tentative instructions. He testified on *voir dire* that he had formed no opinions as to the innocence or guilt of the accused and knew of no "personal grounds" for disqualification. The defense contended that the law officer's pre-trial knowledge might influence him and deprive the accused of a fair trial. This in effect was an attempt to avoid the necessity of showing specific prejudice by invoking in this type of case the "appearance of evil" or "fair risk" of prejudice theories so successfully employed by accused in command influence cases¹² and in cases involving the question of the effective assistance

¹⁰ *United States v. Lovett*, 7 USCMA 704, 23 CMR 168; *United States v. Thornton*, 8 USCMA 57, 23 CMR 281; *United States v. Eskridge*, 8 USCMA 261, 24 CMR 71; *United States v. Grzegorzczuk*, 8 USCMA 571, 25 CMR 75.

¹¹ *Supra*, note 6.

¹² *United States v. Zagar*, 5 USCMA 410, 18 CMR 34; *United States v. Hawthorne*, 7 USCMA 293, 22 CMR 83.

of counsel.¹³ The majority of the Court of Military Appeals in holding that there was no prejudicial error in denying the challenge volunteered that the law officer should not "attempt to review the expected testimony prior to trial." Judge Latimer concurred in the result but stated that the pretrial preparation by the law officer was commendable. The principal opinion stated:

"As a matter of fact, we have already held that absolute ignorance of the prospective evidence is not even required of a court member, who actually detetrmines the guilt or innocence of the accused. *United States v. Edwards*, 4 USCMA 299, 15 CMR 299. No such ground of disqualification of the law officer is expressly provided by the Uniform Code or the Manual. The touchstone for ineligibility, therefore, is not mere knowledge of the evidence, but the effect that it has. If it produces a conviction of guilt, challenge for cause clearly exists. Manual for Courts-Martial, United States, 1951, paragraph 62f(1). *United States v. Deain*, 5 USCMA 44, 17 CMR 44."

The court reasoned that certain provisions in the Code and Manual relating to the disqualification of law officers indicate that Congress and the President deemed it advisable that one should not act as law officer if he has, before trial, gained a "comprehensive knowledge of the prospective evidence."¹⁴ The court acknowledged that a different rule exists in state and federal jurisdictions in which disqualification of a judge is limited to personal bias or personal interest but not to prior knowledge.¹⁵

The principal opinion does not hold that a law officer who *inspects* the pretrial file is ineligible to act as law officer but merely that "while not specifically prohibited by law, it was not good practice for the law officer to review¹⁶ the investigating officer's report and the testimony of the witnesses" thereby acquiring a "*comprehensive knowledge of the expected evidence*" which might result in the forming of an opinion as to the guilt or innocence of the accused.¹⁷ They did not hold it to be general prejudice to prepare for trial by becoming familiar with expected issues for the purpose of discharging his responsibilities as a

¹³ *United States v. Lovett*, supra; *United States v. Thornton*, supra; Cf. *United States v. McCluskey*, 6 USCMA 545, 20 CMR 261.

¹⁴ Article 26(a), UCMJ; pars. 62(f) (10), (13), MCM, 1951.

¹⁵ *Craven v. U. S.*, 22 F. 2d 605 (CA 1st Cir.) (1927), cert. den. 276 U. S. 627, 48 S. Ct. 321, 72 L. ed. 739 (same judge presided at first trial and rehearing); *People v. Chesbro*, 300 Mich. 720, 2 N.W. 2d 895 (trial judge was familiar with evidence taken at preliminary hearing).

¹⁶ "Review" means "to go over with critical examination" (Websters New International Dictionary, 2d ed.)

¹⁷ Par. 62f(10), MCM, 1951

trial judge. I do not believe that the decision prohibits a law officer from making a cursory inspection of the file prior to trial. It does hold, however, that a "review" of the file which results in the acquisition by the law officer of a comprehensive knowledge of the expected evidence and which is likely to and does result in prejudicing the accused will, if a challenge for cause is not sustained, constitute grounds for reversal. The implication in the principal opinion is that there is a "danger inherent in a too-extensive knowledge of the 'expected testimony'" and that a law officer with such a "comprehensive" knowledge of the available prosecution evidence, which of course cannot be gained by a cursory inspection of the file, will ask witnesses questions "* * * more by the impulse of the advocate than that of the judge." If you believe that your brief inspection of the file before trial will cause you to prejudge the guilt or innocence of an accused or to act unlike a judge by asking witnesses questions "more by the impulse of an advocate than of a judge" there is no doubt but that you are not endowed with the judicial attributes required of a law

officer and should use your talents in fields other than that of trial judge.

I would suggest that the law officer, immediately after announcing that the court is convened and prior to the arraignment of the accused, have an out-of-court hearing for the purpose of bringing to the accused's attention the fact that he, the law officer, has inspected the file;¹⁸ also, if such be the fact, that it appears that the law officer signed a document in the file which would, if introduced into evidence, make him ineligible to act thereafter unless there were an informed waiver, and any other matters disclosed by his inspection of the file and which might be inquired into at that time with the view of assuring a completely fair and impartial trial.

In order to eliminate any controversy or misunderstanding arising from *Fry*¹⁹ and for the purpose of advancing the law officer to the plane of a civilian judge, it is recommended that Article 26(a), Uniform Code of Military Justice, be amended by adding a provision which will specifically set forth that the law officer shall have access to the pretrial file.

¹⁸ Cf., *United States v. Beer*, supra.

¹⁹ *Supra*, note 6.



Recent Decisions

of the Court of Military Appeals

Boards of Review—Concurrence Required for Action

U. S. v. Hangsleben (Army), 25 October 57, 8 USCMA 320

The accused was found guilty of escape from confinement (Art. 95). When the case was referred to a Board of Review, the board consisted of three members; but, at the time of hearing, a fourth member was assigned to it as a replacement for one of the original three. Because the new member was being oriented in board of review procedures, he did not participate in the hearing or decision. The other three affirmed the conviction by a two to one vote. On petition to CMA, the accused contended, *inter alia*, that the Board of Review decision was invalid because only two members of the nominal four concurred in affirmance. CMA *affirmed*, stating that the Rules of Procedure and Proceedings before Boards of Review provide that a majority of the members of the board constitute a quorum; and, when a quorum sits, the decision need only be concurred in by a majority of the members participating.

Conspiracy—Acts of Co-actors after Withdrawal of Accused

U. S. v. Miasel (Army), 8 November 57, 8 USCMA 374

The accused was found guilty of an assault on a fellow soldier with intent to commit sodomy (Art. 134).

The evidence showed that the accused and other prisoners in a post stockade assaulted the victim with the view of having an unnatural connection with him but failed in the attempt and gave up. The other prisoners, but not the accused, later cornered the victim at another place and three of them committed the act. Evidence of these subsequent acts was introduced in accused's trial without objection, and the defense counsel did engage in cross examination of the witnesses on these acts to show accused's absence at the time and his lack of participation in the act. The convening authority approved the conviction; but, the Board of Review reversed on the ground that the admission of evidence of the later misconduct in which the accused did not participate was error. TJAG certified the case to CMA which affirmed the Board of Review. The Court stated that the admission of evidence of subsequent acts of sodomy was prejudicial error and there was no waiver by the defense counsel. Although all acts and statements of each conspirator are admissible against all co-conspirators during the conspiracy, the Board of Review, on sufficient evidence, found that the accused had effectively withdrawn from the conspiracy prior to the other acts upon the victim. Once a withdrawal from the conspiracy is

shown, subsequent acts and statements by the others no longer affected the accused and were inadmissible against him. Judge Lattimer dissented on the ground of waiver by the defense counsel's failure to object and by his cross examination of the witnesses.

The Convening Authority—Power to Assign Legal Personnel

U. S. v. King (Navy), 8 November 57, 8 USCMA 392

The accused was found guilty of several offenses under UCMJ. The pre-trial advice and the post trial review were prepared and signed by the "Assistant Legal Officer". It appeared that the convening authority had assigned the Assistant Legal Officer to act in this case so that the regular "Legal Officer" of the command could be certified to act as Law Officer in accused's trial. The Legal Officer had been certified as qualified to act as a law officer whereas the Assistant Legal Officer had been certified as qualified to act as counsel only. Intermediate appellate agencies affirmed. Accused contended on appeal to CMA that he had been denied the substantial right of the advice and review of his case by the Legal Officer of the command. CMA affirmed the Board of Review holding that Article 1 (12) UCMJ defines a legal officer as any commissioned officer of the Navy designated to perform legal duties for a command, that the "Assistant Legal Officer" was qualified and certified, and, therefore, he was the "Legal Officer" at the time of his action and the accused was not deprived of any rights. The

convening authority had utilized the services of one trained in the law and therefore the pre-trial advice and post trial review were prepared by one competent to perform these statutory duties. The convening authority acted within his power to make the Assistant Legal Officer the Legal Officer for the time he so acted.

U. S. v. Brady (Army), 13 December 57, 8 USCMA 456

Accused was found guilty of desertion (Art. 85). After the charges had been referred for trial, the trial counsel gave oral notice to the defense counsel that oral depositions would be taken in a distant city of an indefinite number of unnamed witnesses. The defense counsel objected to the taking of the uncertain depositions; and, in the alternative to the witnesses being subpoenaed for the trial, requested that he and accused be permitted to attend the depositions in person. The SJA denied the request and a formal motion to the convening authority was also rejected by the SJA. Under protest, the defense counsel prepared a memorandum guide for the person appointed to represent accused at the taking of the depositions. The depositions were taken and were admitted in evidence over objection. The Board of Review reversed the conviction. CMA affirmed the Board of Review holding that the depositions were inadmissible because of the improper representation of accused at the taking of the depositions. Article 49 UCMJ gives court martial authorities a limited right to designate counsel

for the taking of a deposition. The power is restricted to cases where the charges have not been referred to trial. The Article precludes designation of other counsel for the taking of depositions after the reference to trial and when the accused is already represented by counsel, in the absence of accused's consent. Consent was obviously absent here. Paragraph 117g of the MCM is in conflict with the UCMJ and invalid, the Court said.

Counsel—Denial of Right To Counsel U. S. v. DeLauder (Army), 31 January 58, 8 USCMA 656

The defense counsel for a pre-trial investigation (Art. 32) was not provided with a copy of the charges or advised of the time and place of hearing and further was directed not to communicate with certain prosecution witnesses. The conviction was set aside and remanded for appropriate proceedings. CMA held accused was deprived of his right to counsel during the Article 32 investigation.

Use of the Manual for Courts Martial by the Court

U. S. v. Rinehart (USCG), 15 November 57, 8 USCMA 402

The accused, on a plea of guilty, was convicted of a number of charges involving numerous forms of theft. After findings, the Court received considerable character evidence upon which the defense counsel made an argument for leniency in the sentence. In rebuttal, the trial counsel directed the Court to several paragraphs of the Manual for Courts Martial on inadequate

sentence (par. 76a (5)) and the danger to the military service and the morale of personnel when thieves are retained in the armed forces (par. 33h). After closing to deliberate on the sentence, the Court was reopened and the President requested information concerning several matters raised in the Court's mind by the several paragraphs referred to and others. The Law Officer denied the request. Intermediate appellate agencies affirmed the sentence which included a dismissal from the service. The accused contended before CMA that it was prejudicial error for the trial counsel to have referred the Court to the Manual. CMA reversed the Board of Review. The Court stated that the materials to which the court martial had been directed were in the nature of policy-directives, and since the Manual was promulgated by an executive order of the President, it must necessarily have influenced the Court and was therefore prejudicial on the matter of the sentence. The CMA then pronounced a rule that the practice of using the Manual by members of a general court martial or special court martial (except the president of a special court) during the course of a trial or during deliberations on findings or sentence must be completely discontinued saying: "All the law a court martial need know in order to properly perform its functions must come from the law officer and no where else."

In U.S. v. Boswell (Army), 19 July 1957, 8 USCMA 145, the CMA

voiced its disapproval of the practice of permitting court members to consult outside sources for information on the law. The duty of the law officer to *fully* instruct the court on the law was emphasized in *U.S. v. Wilson*, 7 USCMA 713. The duty of the law officer to instruct on the law was held not to be discharged by his referring the Court to portions of the Manual for their reading in *U.S. v. Gilbertson*, 1 USCMA 465, and *U.S. v. Richardson*, 2 USCMA 88. And the court martial was held to err where it consulted with cases referred to by the law officer in an effort to determine for themselves the law of the case in *U.S. v. Lowry*, 4 USCMA 448. In *Boswell*, *supra*, the Court said: "it is improper for court members to consult 'outside sources' for information on the law. In that respect the Manual is no different from other legal authorities. It too, has no place in the closed session deliberations of the court martial."

Entrapment as a Defense

U. S. v. McGlenn (Navy), 4 October 57, 8 USCMA 286

The accused was convicted of wrongful possession of marihuana (Art. 134). The evidence showed that a government informer by repeated importunities, at first rejected, prevailed upon accused to obtain some "reefers" from a peddler. The informer took half of them and asked the accused to keep the others for him. Later a CID agent on the informer's advice found the accused in possession of the other half of the purchase. The accused admitted that he had ob-

tained the marihuana cigarettes. There was no evidence that the accused had been suspected of being connected with narcotics prior to the incident with the informer. The conviction was affirmed by the intermediate appellate agencies. The defense of entrapment was reasserted on petition to CMA. *Reversing* the Board of Review, CMA said "the gist of the defense of illegal entrapment is that an agent conceives an offense against the law and then incites a person to commit that offense for the purpose of prosecution". In order to defeat the defense there must be a showing of a reasonable suspicion on the part of the officers that the party is engaged in the commission of crime or is about to do so; or the original suggestion or initiative must come from the accused. Here the evidence showed the origin of the offense in the informer's initiative and suggestion, and there was no showing that would indicate reasonable belief or suspicion that the accused was theretofore engaged in the narcotics traffic. The prosecution failed to meet its burden of proof to rebut evidence of the inducement.

Court Reporter—Participation in Closed Session

U. S. v. Moeller (Navy), 27 September 57, 8 USCMA 275

The accused was found guilty by a special court of failure to obey lawful orders and larceny and was sentenced to be discharged with a bad conduct discharge. The accuser served as court reporter. While the court deliberated on the sentence, the reporter was called into the

closed session and gave the court legal advice on the sentence and no record of the proceedings of this conference was made. The sentence, including a punitive discharge, was affirmed by the Board of Review. CMA reversed, finding three prejudicial errors: assignment of the accuser as reporter; presence of the reporter in a closed session of the court during deliberations on the sentence; and, the court's receiving legal advice from the reporter, and the sentence including a punitive discharge where there was a failure to make a record of the events and conversations of the closed session in which the reporter had been present and had participated.

Multiplicity of Charges

U. S. v. DeCario (Army), 1 November 57, 8 USCMA 353

The accused was charged with larceny of a sum of money (Art. 121) and with stealing letters from a mail room (Art. 134). The evidence showed that the money stolen was money enclosed in the stolen letters. The conviction was affirmed by a board of review. The accused contended before CMA, among other things, that he could not be separately punished for both charges as the law officer had instructed the Court. CMA reversed the Board holding, *inter alia*, that there was but one offense for punishment purposes. The Court adopted the rules that when several articles belonging to different persons are stolen at the same time and place, there is but one larceny, and, that a single theft

is committed when the thief takes one article containing other articles within it. To the same effect, see *U.S. v. Hood (Army)*, 13 December 57, 8 USCMA 473. But see *U.S. v. Real (Army)*, 31 January 58, 8 USCMA 644, where accused was convicted of two charges one alleging "opening and secreting letters from the mails and the second alleging stealing of money. On a contention of multiplicity, CMA there held that the charge of "opening and secreting" certain letters was simply an allegation of tampering with the mail and not larceny and therefore there were not two charges of larceny arising out of the same transaction.

In *U.S. v. Wooley (Navy)*, 31 January 58, 8 USCMA 655, accused was convicted of AWOL and missing movement, both offenses involving the same period of absence. CMA there held the AWOL was included in the offense of missing movement and it was error to fail to instruct on the effect of the multiplicity in arriving at an appropriate sentence. Likewise, see *US v. Walker (Army)*, 31 January 58, 8 USCMA 640, where accused was charged with robbery and aggravated assault and the evidence at the trial established that the assault was the force and violence of the robbery. CMA there held that the aggravated assault was the lesser included offense of the robbery and found error in the law officer's instruction to the court that the accused could be sentenced for both offenses. In *U.S. v. Morgan (Army)*, 1 November 57, 8 USCMA 341, CMA held, that when

one commits an assault with intent to commit sodomy and the assault results in the accomplishment of the act of sodomy, the wrongdoer is subject to punishment for only one or the other of the offenses, but not for both.

Res Judicata—Defense to Perjury Charge

U. S. v. Martin (Army), 1 November 57, 8 USCMA 346

The accused, at an earlier trial on charges of sodomy, testified that he was not present at the time and place alleged. The primary issue of that trial was the alibi; and, on proper instructions, the court martial acquitted the accused. In the trial of another person for a similar act at the same time and place, the prosecution witnesses testified that accused was present at the time. The accused, at that trial, again testified that he was not there at the time and place alleged. This second accused person was convicted. In the instant trial the accused was convicted of two specifications of perjury on the basis of his testimony respectively at the two earlier trials. The defense of res judicata, unsuccessfully asserted at the trial, was accepted by the board of review in reversing the conviction as to the specification founded upon the testimony of accused at his own trial. On certification by TJAG, CMA affirmed. The Court held that under the doctrine of res judicata, the acquittal of the accused at his own trial for sodomy precluded conviction of perjury based on his testimony at that trial. The acquittal

of the accused of sodomy was obviously based on a finding that his alibi was good. The subsequent prosecution for perjury involved a flat contradiction of the prior acquittal by an attempted showing of the falseness of the alibi. A perjury prosecution could not be founded on such testimony for that issue had already been decided. However, accused could properly be found guilty of perjury based on his testimony at the trial of the other person since the result of that trial did not involve a finding that the accused was not present.

The Law Officer—Duty of Impartiality

U. S. v. Kennedy (Army), 20 September 57, 8 USCMA 251

The accused was convicted of attempted sodomy (Art. 80). At the trial, the accused's alleged victim was called as the only prosecution witness and he denied any recollection of an attack on him by the accused. Prior to trial, the prosecution had reason to believe the witness would claim a lapse of memory and the SJA had been advised that the prosecution would fail if that came to pass, but nothing was done. Upon failure of the only witness for the prosecution to testify favorably, the prosecution rested and joined in the defense's motion for a finding of not guilty. The law officer acknowledged that there was no evidence; but, nevertheless, recessed the Court, and consulted with the SJA about the development, stating he would grant the Government a continuance if requested. The Court was recon-

vened, trial counsel asked for a continuance and the trial was continued for five days. During the delay, the SJA, his staff and the convening authority and others prevailed upon the unwilling witness to testify, using such persuasions as threats of prosecution, promises of immunity, and the services of an appointed counsel (although no charges had been filed) to act as an obstacle to defense counsel's access to the witness and also as a conduit for the prosecution's importunities. On reconvening the Court five days later, the witness testified and the conviction resulted. All intermediate appellate agencies affirmed the conviction and accused petitioned CMA. Here CMA reversed the Board of Review and ordered the charges dismissed. The Court said that the law officer had abandoned his role as an impartial judge and joined forces with the government in a concerted effort to compel a conviction. The law officer discussed with the SJA the facts of a particular case and the means by which the government could avoid an immediate dismissal outside the court room and without the presence of the accused, his counsel or a reporter. The Court castigated the law officer for his failure to meet his duties and responsibility and condemned the SJA and the convening authority for command control and unfair conduct.

Search and Seizure

U. S. v. Bass (Army), 11 October 57,
8 USCMA 299

The accused was found guilty of wrongful possession and use of narcotic drugs. The evidence showed that CID agents watched accused and a girl go to a known narcotics dispensary where the girl entered alone while accused waited outside until she returned, and then the two were followed to a hotel. The agents then entered a room in the hotel where they found the accused and the girl. An opened packet of morphine was found on the outside window sill of the room and an unopened packet was found at accused's feet. The hotel room had not been engaged directly or indirectly by the accused and he denied all knowledge or interest in the seized narcotics. The defense objected to receipt in evidence of the narcotic packets claiming they were the result of an illegal search and seizure. CMA affirmed the conviction. It said the evidence clearly established that the accused had no property rights in the goods seized or the premises searched. That was the import of his own testimony. The constitutional guarantee against unreasonable search and seizure is a personal right which can be exercised only by the owner or claimant of the property subjected to unlawful search and accused did not stand in that position.



What The Members Are Doing

Colorado

Col. Royal R. Irwin of Denver recently announced the association of his son, Royal R. Irwin, Jr., with him in the practice of law under the firm name of Irwin & Irwin. Their office is in the University Building, Denver 2.

District of Columbia

Penrose L. Albright recently announced the opening of offices for the practice of law at 708 Perpetual Building, 1111 E Street, N. W., Washington 4.

Nicholas E. Allen has recently become a member of the law firm of Armour, Herrick, Kneipple & Allen. The firm engages in the general practice of law with offices at 1001 Fifteenth Street, N. W., Washington 5.

Georgia

At the Southeastern Regional Meeting of the American Bar Association, Atlanta members arranged for a luncheon meeting of judge advocates. Among the many members of the Association present were Adm. Chester Ward, TJAG, Navy; Maj. Gen. Reginald C. Harmon, TJAG, Air Force; Maj. Gen. Stanley W. Jones, Deputy TJAG, Army; and Col. Thomas H. King, President of the Association. The luncheon was arranged by Hugh Howell, Jr.

Illinois

Hugo Sonnenschein, Jr., of the firm of Martin, Craig, Chester &

Sonnenschein, recently announced the removal of the firm's offices to Suite 640, The Field Building, 135 South LaSalle Street, Chicago 3.

Kansas

Jay W. Scovel of Independence has been elected President of the Bar Association of the State of Kansas. Col. Scovel has associated his son, Thomas R. Scovel, with him in the practice of law with offices in the Citizens National Bank Building.

New Jersey

Col. Aaron A. Melniker of Jersey City recently opened offices for the general practice of law at 408 Corlies Avenue, Allenhurst, New Jersey. Col. Melniker will continue to maintain an office at 26 Journal Square, Jersey City.

Maj. Irvin M. Kent, presently assigned to the JA Section, Headquarters, First Army, married the former Florence Miriam Skarbnik of Newark on December 19, 1957.

New York

Col. Alfred C. Bowman was recently appointed Staff Judge Advocate of the First United States Army with Headquarters at Governors Island. Col. Bowman, a former Los Angeles lawyer, has had a distinguished military career beginning with his active duty in 1942. He was commissioned as a Reserve Judge Advocate in 1934.

Leroy A. Rodman recently announced the removal of his law offices to 545 Fifth Avenue, New York City.

Rarely, but sometimes military counsel represent accused in a court-martial proceeding from the trial to the appellate level. Paul J. Abbate appeared for the defense in the Walinch case before the court-martial, the board of review and was on the brief before CMA. According to Abbate, justice prevailed, that is, the conviction was reversed. Mr. Abbate is now engaged in private practice with offices at 175 Fifth Avenue, New York City.

Samuel G. Rabinor of Jamaica has been designated lecturer by the Queens County Bar Association on the Preparation and Trial of a Negligence Case at the May 1958 meeting of the Queens County Bar Association's International Conference to be held at Nassau, B. W. I.

William J. Rooney of New York City announced the opening of a Westchester office for the general practice of law at 10 Mitchell Place, White Plains.

North Carolina

Captain Robert B. Wilson, Jr., of Winston-Salem, has been named Assistant Staff Judge Advocate of

the 30th Infantry Division, North Carolina National Guard.

Pennsylvania

Joseph A. Langfitt, Jr., recently announced the removal of his office for the general practice of law to the Frick Building, Pittsburgh 19.

Virginia

Col. Medford G. Ramey, organizer of the Army Reserve School in Richmond, was recently honored upon his retirement at a dinner given at the Commonwealth Club in Richmond. Maj. Gen. George W. Hickman, Jr., was the principal speaker upon the occasion. Col. Ramey has commanded The Judge Advocate General's School at Ft. Meade, Maryland, which conducts summer training for reserve judge advocates in the Second Army area, for the last seven years. Col. J. H. B. Peay, Jr., succeeds Col. Ramey as Commandant of the USAR School at Richmond.

Wyoming

Bruce P. Badley of Sheridan was installed as the first City Attorney under the new City Manager form of government of that city. Mr. Badley also teaches Business Law and Practical Law as a part of the Adult Education Extension Program of the University of Wyoming.



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 the 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.

Directory of Members—1958

The Association is preparing a Directory of Members for distribution this summer. All members in good standing will be listed in the Directory. If you have not yet paid your 1958 dues in the sum of \$6.00, make your remittance now. Your cooperation will greatly facilitate the preparation of the Directory. Members will be listed as their names and addresses appear in the Association's mailing list. If you have any instruction as to your listing or if the envelope containing this issue of the Journal carries your name and address incorrectly in any particular, advise the editor so that corrections may be made before the Directory is sent to the printer. Attention to this detail is very important because on it depends the correctness of your listing and the accurate and complete usefulness of the Directory.

In Memoriam

The members of the Judge Advocates Association profoundly regret the passing of the following members whose deaths are here reported and extend to their surviving families, relatives and friends deepest sympathy:

Colonel Lee S. Tillotson of Williamsville, Vermont, who died in July 1957 at the age of 83.

Lieutenant Colonel Harold D. Beatty of New York City, who died October 16, 1957, at the age of 66.

Colonel Charles C. Young of Clearwater, Florida, who died October 23, 1957, at the age of 58.

Captain Robert O. Muller of An-

derson, South Carolina, who died November 8, 1957, at the age of 47.

Captain Martin W. Meyer of Washington, D. C., who died December 30, 1957, at the age of 51.

Captain Edwin Kenneth Resseger of Cleveland, Ohio, who died in January 1958 at the age of 46.

Colonel Heber H. Rice of Chevy Chase, Maryland, who died February 8, 1958, at the age of 75.

Captain Philip A. Walker of Falls Church, Virginia, who died on March 23, 1958, at the age of 50. Captain Walker, at his death, was the Deputy Judge Advocate General of the Navy and was second vice-president of the Association.

1958 Annual Meeting to Be Held at Los Angeles

The Twelfth Annual Meeting of the Judge Advocates Association will be held at Los Angeles on August 26, 1958, during the week of the American Bar Association convention in that city. Captain J. J. Brandlin and Lt. Col. James P. Brice are co-chairmen of the committee on arrangements. These distinguished members of the practicing bar of California are prepared to roll out the crimson deep-piled carpet of welcome to all JAA members anxious to indulge in the famous hospitality of southern California. Without any intention of stirring up interstate rivalries, they jointly and severally assure each and all that California, and particularly Los Angeles, has more places to see and things to do than any other spot in the world. If you are from Missouri, or any other great state, and have to be shown that the Angelenos are not just parroting the local pride of the Southern California Chamber of Commerce,

come to Los Angeles with the JAA on August 26th.

The annual banquet will be held in the main dining room of the University Club on Hope Street in downtown Los Angeles on Tuesday evening, August 26. Before supper there will be the usual social hour with liquid refreshments available.

It is planned that the annual business meeting of the Association will also be held at the Club on the afternoon of the 26th. Further details concerning this annual event of the Association will be announced and reservations solicited at a later date. However, your interest in this annual meeting and your tentative plans to attend will materially help the committee on arrangements in their plans. You are urged to communicate with the national offices of the Association expressing your present thinking about being among the conventioning JAA members in Los Angeles in the last week of August.



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 \$6.00 per year, payable January 1st, and prorated quarterly for new applicants. Applications for membership may be directed to the Association at its national headquarters, Denrike Building, Washington 5, D. C.

REPORT OF THE NOMINATING COMMITTEE-1958

In accordance with the provisions of Section 1, Article IX of the By-laws of the Association, the following members in good standing were appointed to serve upon the 1958 Nominating Committee:

Col. John G. O'Brien, JAGC USA, Virginia, Chairman

Brig. Gen. Robert H. McCaw, JAGC-USA, Washington, D. C.

Lt. Col. Frank J. Burkart, JAGC-USAR, Washington, D. C.

Cdr. Donald L. Garver, USN, Virginia

Cdr. J. Kenton Chapman, USNR, Washington, D. C.

Maj. John A. Kendrick USAFR, Washington, D. C.

Capt. William C. Hamilton, Jr. USAF, Washington, D. C.

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

highest number of votes irrespective of their arm of service.

Members of the Board not subject to annual election are the three most recent past presidents of the Association, that is, Capt. Robert G. Burke, Col. Nicholas E. Allen and Col. Thomas H. King.

The Nominating Committee has conferred and has submitted the following report which has been filed with the Secretary of the Association as provided in Section 2, Article VI of the By-laws.

Slate of Nominees for Offices

Col. Frederick Bernays Wiener, JAGC-USAR, Maryland—President

Capt. Robert A. Fitch, USN, Virginia—1st Vice-President

Col. Allen G. Miller, USAFR, New York—2nd Vice-President

Col. J. Fielding Jones, USMCR, Virginia—Secretary

Lt. Col. Edward F. Gallagher, JAGC-USAR, District of Columbia—Treasurer

Col. Sheldon D. Elliott, JAGC-USAR, New York—Delegate to House of Delegates, ABA

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

Navy Nominees:

Lt. Cmdr. Penrose L. Albright, USNR, Virginia

Col. John E. Curry, USMC-Ret., District of Columbia

Cmdr. William R. Furlong, Jr., USCGR, District of Columbia

Cmdr. Donald L. Garver, USN,
District of Columbia

Capt. Mack K. Greenberg, USN,
District of Columbia

Cmdr. Kenneth B. Hamilton,
USNR, District of Columbia

Capt. William C. Mott, USN,
Virginia

Capt. Robert D. Powers, Jr.,
USN, Virginia

Admiral Chester Ward, USN,
District of Columbia

Capt. Franz O. Willenbucker,
USN-Ret., District of Columbia

Capt. S. B. D. Wood, USN, Cali-
fornia

Army Nominees:

Col. Joseph A. Avery, JAGC-
USAR(Ret), Virginia

Col. Franklin H. Berry, JAGC-
USAR, New Jersey

Maj. Gen. E. M. Brannon, JAGC-
USA(Ret), District of Columbia

Col. Smith W. Brookhart, JAGC-
USAR, District of Columbia

Brig. Gen. Charles L. Decker,
JAGC-USA, District of Columbia

Lt. Col. John H. Finger, JAGC-
USAR, California

Col. Osmer C. Fitts, JAGC-
USAR, Vermont

Col. James Garnett, JAGC-USA,
District of Columbia

Lt. Col. Oliver P. Gasch, JAGC-
USAR, District of Columbia

Col. George F. Guy, JAGC-
USNG, Wyoming

Col. John H. Hendren, Jr., JAGC-
USAR, Missouri

Col. John C. Herberg, JAGC-
USAR, Maryland

Maj. Gen. George W. Hickman,
JAGC-USA, Virginia

Col. William J. Hughes, Jr.,
JAGC-USAR(Ret), Maryland

Maj. Gen. Stanley W. Jones,
JAGC-USA, Virginia

Col. Alexander Pirnie, JAGC-
USAR, New York

Major Walter W. Regirer, JAGC-
USAR, Virginia

Major Samuel A. Schreckengaust,
JAGC-USAR, Pennsylvania

Lt. Col. Waldemar A. Solf, JAGC-
USA, Virginia

Col. Clio E. Straight, JAGC-USA,
Virginia

Col. Birney M. Van Benschoten,
JAGC-USAR, New York

Air Force Nominees:

Lt. Col. Louis F. Alyea, USAF,
Virginia

Major Marion T. Bennett,
USAFR, Maryland

Col. James S. Cheney, USAF,
Virginia

Capt. Robinson O. Everett,
USAFR, North Carolina

Major Carl J. Felth, USAFR,
District of Columbia

Col. Laurance C. Gram, USAFR,
Wisconsin

Capt. William C. Hamilton, Jr.,
USAF, Virginia

Major F. Ned Hand, USAF, Vir-
ginia

Maj. Gen. R. C. Harmon, USAF,
Virginia

Capt. Gerald T. Hayes, USAFR,
Wisconsin

Maj. Gen. Albert M. Kuhfeld,
USAF, Virginia

Col. Martin Menter, USAF, Texas

Lt. Col. Abraham S. Robinson,
USAFR, New York

Col. Clifford A. Sheldon, USAFR,
District of Columbia

Brig. Gen. Moody R. Tidwell, Jr.,
USAF, Ohio

Lt. Col. Sidney Ullman, USAFR,
Maryland

Under provisions of Section 2, Article VI of the By-laws, regular members other than those proposed by the Nominating Committee shall be eligible for election and will have their names included on the printed ballot to be distributed by mail to the membership on or about August 1, 1958, provided they are nomi-

nated on written endorsement of twenty-five, or more, members of the Association in good standing; provided, further, that such nomination be filed with the Secretary at the offices of the Association on or before June 1, 1958.

Balloting will be by mail upon official printed ballots. Ballots will be counted through August 25, 1958. Only ballots submitted by members in good standing as of August 25, 1958 will be counted.



Statement of Policy

The Judge Advocates Association, an affiliated organization of the American Bar Association, is composed of lawyers of all components of the Army, Navy, and Air Force. Membership is not restricted to those who are or have been serving as judge advocates or law specialists.

The Judge Advocates Association is neither a spokesman for the services nor for particular groups or proposals. It does not advocate any specific dogma or point of view. It is a group which seeks to explain to the organized bar the disciplinary needs of the armed forces, recalling, as the Supreme Court has said, that "An Army is not a deliberative body," and at the same time seeks to explain to the non-lawyers in the armed forces that the American tradition requires, for the citizen in uniform not less than for the citizen out of uniform, at least those minimal guarantees of fairness which go to make up the attainable ideal of "Equal justice under law."

If you are now a lawyer, if you have had service in the Army, Navy, or Air Force or are now connected with them in any capacity, active, inactive, or retired, and if you are interested in the aims herein set forth, the Judge Advocates Association solicits your membership.

The Public Stake in Military Justice

By Colonel J. M. Pitzer *

I feel a touch of the "horrors" whenever some military traditionalist implies that the administration of the Uniform Code of Military Justice is little or no concern of those "on the outside". In usual military talk, all civilians are "the outside". Ultra-traditionalists take that as a starting point and go on, variously, to exclude from the knowledgeable circle some military classes as well. To me, all these special pleaders, both the common and the ultra variety, are dangerously wrong.

The fact is, the primary requirement for the very existence of a Judge Advocate General's Corps is that it shall earn and receive, in good measure, understanding and acceptance by the American people. It ought to be borne in mind that the American soldiery are not only a segment of the American people but also are, in this regard, a most interested and influential segment. Military orders amount to something only when they are accepted as a basis for action by those to whom they are addressed. Such acceptance and action result, in principal part, from discipline which comes, in large measure, from morale which has, as an important ingredient, confidence in the justice of the system which issues the orders.

Public understanding is the main thing. We will get nowhere with an attitude that we know best, that civilians are incapable of understanding, or that our satisfaction with military - things - as - they - are should quiet all public doubts. We live in a considerably enlightened age, in which every single citizen is quite capable of formulating and expressing thoughts on basic human rights generally, and their treatment at the hands of military lawyers particularly. The nation has given us a well-intended, and generally good, system of law. As we administer it, openly and demonstrably, in the spirit in which it was written, we will gain in public understanding and acceptance. We will gain further when, our mistakes being pointed out by the legislature or the judiciary, we accept correction equably and apply it, too, in its intended spirit—and not just literally or evasively. It is the Defense Establishment of the United States, and not the private enterprise of any of its members.

What does the public ask of us? Essentially just one thing: Fairness. Few people, even lawyers, care a lot about the refined legalities of our practice. But everyone is concerned, and has some capacity to assess, the fairness of our procedures and punishments. This was

* Colonel Pitzer, a member of the bar of Nebraska, is Chief of the International Law Division and was formerly Chief of the Defense Appellate Division of the Army. The views expressed here are the personal views of the author.

established in the inquiries into military justice which followed World War II. There was little complaint that innocent men were convicted. The complaint was that the convicted ones, guilty of something though they might have been, were proceeded against arbitrarily or were punished unduly. Such is injustice, in the public eye, preventing civilian confidence and damaging soldier morale.

We have gained now the Uniform Code and the civilianizing influence of the Court of Military Appeals. But, over the last year or so, there has risen from our own ranks a cacophony of criticism of the Code and of the Court. This imitates the similar chorus directed by some at the U. S. Supreme Court. Both are inspired by a number of decisions which place higher-than-past value on the rights of man and which ameliorate the discipline sought to be imposed on him by society. It is not surprising that there should be such complaints. As was written by Judge Learned Hand in his 1950 decision of the Judith Coplon case (U.S. v. Coplon (CA 2d), 185 F.2d 629, 633):

“. . . All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and un-

purged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.”

I presume to suggest that what our Supreme Court and Court of Military Appeals have been up to during the past year is simply an application of the brakes on the national drift toward absolutism—a real, if unconscious, development of the last quarter-century.

In living up to the spirit of the law, and not just its letter, we have occasional judicial assistance. The Court of Military Appeals has set up its own early warning line in certain fields. Thus, last summer, we had the warnings of *Boswell* (8 USCMA 145) and *Cothorn* (8 USCMA 158). When we were a little slow about getting the Manual for Courts-Martial out of the court room and the desertion instructions cleaned up, the Court let us have it fair and square with its decisions in *Rinehart* (8 USCMA 402) and *Soccio* (8 USCMA 477). Recently the siren once more sounded in the decision of *Welker* (8 USCMA 647). And this is a real three-alarm affair since it embraces the whole guilty-plea program, somewhat more than half of the Army's general court-martial business. Expressing its irritation with repeated sloppiness in our administration of this, the Court in *Welker* said:

“A continuation of these trends may require re-examination of the

practice of negotiating agreement on the plea and sentence with the convening authority." (p. 649).

And those are not idle words. Courts of this stature do not speak idly. What is more, the judges of this Court more than once have indicated from the bench their doubts of the guilty-plea program, even were it faultlessly administered.

We all need to accept the decision of *Welker* wholeheartedly, without mental reservation or purpose of evasion. Here are a few things which I deem to be within its purpose:

(1) The charges must be reduced to their important essentials. This ought to be done before referral to trial. If not, it should be done in the negotiation for a plea. Multiplicity or overcharging will wreck a good many bargained pleas on appeal, and always has an evil appearance.

(2) The pretrial agreement is not an adjudication of anything. There is a tendency in some quarters to feel that it is, and that it would be inefficient or improper for the court-martial or a board of review to cut below it. Actually the agreement is no more than an ad hoc lowering of the maximum punishment, or the justiciable charges, or both.

(3) The trial defense counsel should encourage nearly all clients to request appellate defense counsel.

The last point, really, applies to all cases, not just those involving

negotiated pleas. If every accused, instead of just half (as in the Army), asked for appellate counsel, the Defense Appellate Division would have more cases but much less of an unpleasant type of work. Eliminated would be the considerable effort which is required when an accused discovers at the disciplinary barracks that a good many men who have had appellate counsel have gained some relief from the boards of review; whereas he, having had no appellate counsel on the advice of local trial counsel, has received no relief. Convicted men are rarely satisfied clients anywhere, but when they get the idea they've been "conned" into giving up a last chance their dissatisfaction is quite intense indeed.

I know that this point about encouraging requests for appellate counsel is not wholly in tune with the guidance which the Army put out in 1954 (Par. 47d, DA Pam 27-10, "The Trial Counsel and the Defense Counsel"), but I would say that advice is out of date. For one thing, boards of review recognize more clearly nowadays the responsibility which Congress gave them to assess the appropriateness of sentences. And, for another, even in the field of legal error the horizons today are somewhat broader than before—and always there is the unforeseen chance of new developments in the law, or just simply the chance that a fresh look by a different lawyer might identify an error which has gone unnoticed.

In sum: If they are to flourish, the uniformed law departments of the Armed Services must gain a

large measure of public confidence. To do that we must earn high marks in that which all the public understand: fairness. Those marks

are to be had in such things as complete forthrightness, vigorous defense, and cheerful acceptance of the spirit of the law.

Law Day-U. S. A. at Shaw AFB

As part of the Law Day—U.S.A. celebration held at Shaw AFB, South Carolina on May 1, 1958, a new Courtroom was dedicated with ceremonies attended by local lawyers and civilian and military officials. This celebration was typical of ABA and JAA inspired programs conducted at all military installations throughout the Country.

Opening the ceremonies, Colonel Harold F. Wilson, base commander, said: “. . . Today, when international law is being flaunted or perverted elsewhere, it is particularly appropriate that the people of America should proclaim anew their dedication to liberty within the framework of law . . .”. He said that no other facet of American life is better understood by the peoples of the world than “the meaning of liberty and opportunity for the individual citizen of this country”.

Brigadier General Stephen B. Mack, Commander of the 837th Air Division, said that the military is well aware of the fact that without the rule of law there can be only chaos or tyranny. He said: “. . . In this time of our history when tyrants and dictators have replaced law with force, we should reflect upon how adherence to the rule of law has benefited our nation and each of us individually”.

Among the distinguished persons

attending this Law Day—U.S.A. celebration were Hon. James H. McFaddin, Judge of the 3rd Judicial Circuit of South Carolina, Hon. L. E. Purdy, Judge of Civil and Domestic Relations Court of Sumter County; Mayor S. A. Harvin, Sumter; Mr. George Levy, President, Sumter Bar; Mr. C. M. Edmunds, Sumter City Attorney; Mr. Clifton G. Brown, City Recorder and Attorneys Charles Cuttino, W. M. Reynolds, O. Lang Hogan, Sumter Magistrate, Ira Kaye, R. Kirk McLeod, Solicitors, Third Judicial Court; Perry Weinberg, John S. Hoar, Ramon Schwart and Edward F. Atkinson. Lawyers stationed at Shaw AFB, South Carolina are Lt. Col. Emanuel Lewis, member of the New York Bar; Lt. Col. Carl F. Williams, member of the Georgia Bar; Major James M. Bumgarner, member of the Illinois Bar; Major Wilbur G. Hamlin, member of the Mississippi Bar; Major James W. Logan, member of the South Carolina Bar; Captain Richard E. Gray, member of the Florida Bar; Capt. Karl W. Stephens, member of the Idaho Bar; 1st Lt. William Garcia, member of the Florida Bar; 1st Lt. Robert D. Guy, member of the Michigan Bar, 1st Lt. Robert M. Oster, member of the New York Bar; and 1st Lt. Allen N. Rieselbach, member of the Wisconsin Bar.

