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

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POWELL ADDRESSES JAA ON “MUSCLES TO MISSILES”

The highlight of the 1959 Annual Meeting of the Association was the post-prandial remarks of Mr. J. Lewis Powell on what he called “Muscles to Missiles”. Mr. Powell, a member of the staff of the Assistant Secretary of Defense for Supply and Logistics, is a wonderfully gifted speaker with the faculty of delivering a serious message in a thoroughly enthusiastic and entertaining manner. All those who heard Mr. Powell enjoyed such an entertaining and informative experience that they would feel the Journal remiss if it did not share with the membership, not present, at least the gist of his talk. At this belated writing, the Editor will undertake to summarize Mr. Powell’s address, with a confession, however, that he was too engrossed to take notes and must here rely on recollection alone.

At the outset, Mr. Powell observed that within the last few years a stampede of technology has changed the dimensions of the world. Many proverbs of yesterday have lost their meaning. For example, “What goes up, must come down” doesn’t quite mean what it did before Sputnik. Accordingly, he pointed out, the problems of defense and the civilian economy both operate under conditions in which yesterday’s tried and true answers don’t necessarily apply. “Time is no longer the principal ingredient in progress.” There has been a “collapse of time”.

To point this fact up, Mr. Powell stated that most adults vaguely think this is an age of progress, little realizing that more technical progress has happened in their lifetime than in the previous history of the world. Technology has avalanched. To place technical progress in perspective, he urged his auditors to condense man’s 50,000 years of history into 50 years and came up with the startling compression of time and events that would have man now only 10 years from the existence of the cave man, only 2 years from the birth of Christ, only 20 days since the use of electricity, radio would be only 10 days from its invention and the jet aeroplane less than a day old. So, although man loves to fool himself into thinking he is living in the age of science, in truth he is merely plodding along the way from caveman to space man—like “a kind of Technological Adam” on the threshold of an age of science and technology. In a few years today’s tools will be made so obsolete by the avalanche of technology that they will be regarded as primitive implements of elementary technology to be relegated to museums.

To illustrate the “collapse of time”, Mr. Powell used a huge blackboard on which he plotted a graph of technology that showed the fantastic concentration of progress within recent years. On the

graph, he illustrated with cracker barrel "art" the profound and sometimes humorous saga of man's stumbling progress from "Muscles to Missiles". The graph ran from "Nero to Now" and used speed as the index of technological progress. From the graph he showed:

From the day the first horse was ever ridden until 1830, the speed of a horse was the top speed at which man could travel. (A permanent speed limit enforced by nature.)

How fast could a man go in Nero's time? He could go as fast as a horse could carry him or pull him. How fast can a horse go? If an oat-burner can go 35 miles an hour, it is an excellent \$2 investment at the track. Therefore, assuming that Nero had a winner, Mr. Powell plotted the curve of his graph starting at 35 miles per hour.

Proceeding through history, after pointing out there was no point in plotting year by year because for 49,800 years nothing had happened, Mr. Powell jumped ahead 15 centuries from Nero to where Columbus discovered America and asked: "How much faster could man travel in Columbus' time?" He observed that in Columbus' time man could go no faster than in Nero's time, that is, 35 miles per hour.

Moving ahead to the year of 1775, he stated, that in Paul Revere's time, history still depended on the speed of an oat-burner, and it could gallop no faster than in Nero's time. He quipped: "When you consider that man's speed limit was 35 miles an hour for thousands of

years, it's no wonder we have so many 35 mile an hour signs left, even on so called 'express-ways'."

Mr. Powell told his audience that in 1830 a tremendous thing happened: Man broke thru the "Oat Barrier". Breaking the "Oat Barrier" he said was the beginning of technology. Breaking the sound barrier was merely the shift into second, high is yet to come. For 49,000 years, man wasn't even approaching the "Oat Barrier", whereas we approached the sound barrier so fast, crashing it was inevitable.

Reverting to the graph, he showed that for the first time in 49,800 years the curve starts upward. In 1910, the United States bought it's first military airplane. The contract provided that the plane must do 40 miles per hour or the contractor was to be discounted, for each mile under 40. It made the incredible speed of 42 miles per hour.

Moving along the graph and around World War I, he indicated man was achieving speeds of 100 miles per hour; and, towards the end of World War I speeds of 150 m.p.h. were being reached. At the beginning of World War II, 200 miles per hour was "speed" and at the end of World War II the fantastic speed of 470 miles per hour had been reached.

It had taken 115 years to go from 35 miles an hour to 470 miles an hour, he pointed out; but, it didn't take 13 years to go from 470 miles an hour to satellites circling the earth at speeds of 18,000 miles an hour.

So a little over a year ago the highest possible speed that could be mentioned was 1,600 m.p.h., and now while we eat dinner, Sputniks, Explorers, Vanguarders circle the world a couple of times—ten times the fastest aircraft speed of a year ago, is now the speed of the slowest Sputnik.

This progress all started to happen he pointed out, when the graph turned the corner in 1945, the year of the big change—this is the year in which somebody drastically changed the world's dimensions so smoothly that most people don't realize that they are now living in a different world. Thus, many of our concepts and our organizations have been silently bypassed by progress.

In succession, the speaker contrasted progress in speed, explosives, and the range of missiles down through the ages against the blackboard graph. In each instance, the blackboard graph spectacularly illustrated that technology had created more progress in the last 20 years than in the previous 2,000 years. This stampede of technological progress had released an avalanche of obsolescence. National security no longer rests as firmly as it once did on stockpiled munitions and weapons, since today's electronic wonders—like today's newspapers, will be obsolete tomorrow.

Then Mr. Powell stated that as man swings from muscles to missiles, defense material goes from individual pieces of comparatively simple military hardware which can be produced by one plant to complete weapons systems of infinite techno-

logical complexity, which cannot be produced either by one producer or even by one industry. Once upon a time industrial logistics was like arranging for several musicians to play individual solos at the same concert. One plant produced one item. Now the industrial back-up of modern military preparedness requires that the potential of hundreds of individual plants and the capacity of many industries be coordinated and synchronized like the individual musicians and instrumental sections in a vast philharmonic symphony. Practically everyone old enough to be an executive in industry or government grew up during a period when progress advanced in an orderly manner. Now technological leapfrog has replaced the march of technology, and successive "Break-Thrus" have replaced the plodding advance.

These scientific "Break-Thrus" don't merely create new conditions, *they create new facts*, Mr. Powell said.

Mature industry and government executives both need to liberate themselves from the "Model-T Technology" of their college days in order to keep abreast of this on-rushing avalanche of technological advance which is constantly changing the dimensions of both the business and geopolitical world in which we live. Successive impacts of technological break-thrus constantly compound the industry-defense relationship, as well as drastically change other aspects of our economy and culture. There the speaker observed that technology has no

morals, it can be used for good or evil; by friend or foe; it will wipe out polio or people with equal efficiency. Therefore, the challenge of the second half of the twentieth century is "Does civilized man have the fundamental adequate moral integrity to harness this stampeding technology for the building of a better world"? To do this he must preserve peace.

Mr. Powell closed his remarks with a quotation of George Washington: "To be prepared for war is one of the most effectual means of preserving peace." This, he said, is still sound advice. Therefore, he challenged, the pace of progress demands that military and industrial

executives continue to explore these new technological frontiers, together as partners in preparedness.

Mr. Powell, we are advised, frequently speaks from the public platform on the "Collapse of Time" theme before civic, military and industrial groups all over the country. This summary does small justice to the content of his address and less to the speaker's insight, knowledge, philosophy and wit. If you missed hearing Mr. Powell at the Annual Meeting, and he does come to your city, by all means go hear him; we suspect you will find some of your fellow members of the Association who were at Miami Beach last August back for an encore.

FITTS NOMINATED AS CHAIRMAN OF ABA HOUSE OF DELEGATES

Colonel Osmer C. Fitts of Brattleboro, Vermont, long a member of the Judge Advocates Association presently serving as a member of its Board of Directors, was nominated for a two-year term as chairman of the House of Delegates of the American Bar Association at its mid winter meeting.

The House of Delegates is the policy making and legislative body of the American Bar Association. Colonel Fitts is the first New Englander and the first officer of the Judge Advocates Association to be named for that office. Formal election will take place at the annual meeting of the Association next August in Washington. Colonel Fitts, a senior partner of the law firm of Fitts and Olsen, has been president of the Vermont Bar Association, a member of the Board of Governors, ABA and reporter of the decisions of the Vermont Supreme Court. During World War II, he served in the Foreign Claims Service of The Judge Advocate General's Department of the Army in the European Theatre.

THE ANNUAL MEETING — 1959

The Annual Meeting of the Association was held at Bal Harbour, Miami Beach on August 25, 1959. About 150 of the members were present.

Colonel Franklin Berry, USAR, of Toms River, New Jersey, as president of the Association, presided at the business session and at the annual dinner. Among the distinguished persons present were Chief Judge Robert E. Quinn of the U. S. Court of Military Appeals, Mr. Robert Deckert, retiring general counsel of the Department of Defense and his successor, Mr. Vincent Burke, General Reginald C. Harmon, The Judge Advocate General of the Air Force, General George W. Hickman, The Judge Advocate General of the Army and Admiral Chester Ward, The Judge Advocate General of the Navy. Each of these gentlemen made annual reports to the Association on their respective offices.

At the conclusion of the meeting the report of the Board of Tellers was read and the following persons were announced elected and installed in their respective offices:

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1960 ANNUAL MEETING, JAA

The fourteenth Annual Meeting of the Judge Advocates Association will be held at Washington, D.C., on August 30, 1960 during the week of the American Bar Association Convention. Colonel Hugh Fullerton heads the committee on arrangements. The Annual Business Meeting will convene at 3:30 p.m., on Tuesday, 30 August in the Court Room of the United States Court of Military Appeals located at 5th and E Streets, N.W.

The Annual Banquet of the Association will be held at the Officers Club, Bolling Air Force Base in Washington, with reception and cocktails beginning at 7:00 p.m. The tariff will be \$7 per person which will include the cost of liquid refreshment, hors d'oeuvres, an excellent menu complemented by a good vintage wine. The committee has arranged for musical entertainment and has made tentative arrangements for an excellent speaker. Dress will be informal. Further details concerning this event will be distributed to all members of the Association at a later date with formal reservation blanks.

The committee is planning for the largest and finest meeting of JAGs in the history of the Association and looks forward to welcoming you to Washington in August.

YOU THINK YOU GOT TROUBLES?

By Lawrence H. Williams¹

A case² was decided in the Court of Claims last year that the Court characterized as "unusual". This characterization must rank as one of the great judicial understatements of all time.

The facts of the case are somewhat involved. John J. Egan, a first lieutenant in the Marine Corps Reserve, who in 1943 was stationed on Samoa, was taken to a field hospital for treatment for an attack of bronchitis. As stated by the Court, the story continues as follows:

"Shortly after his admission to the hospital for treatment, another patient in plaintiff's ward made a violent attempt with a dangerous weapon upon the life of a Naval physician. Plaintiff, who was not seriously ill, intervened and disarmed the violent patient. In the course of an investigation following that incident, the witnesses to what happened, who were patients in the hospital at the time, denied that anything of the sort had occurred. It was later fully established that these witnesses lied. Plaintiff was also questioned by hospital doctors concerning two previous injuries which he had

mentioned but which were not noted on his hospital medical record. Plaintiff had actually suffered the two injuries, had been treated for them by Army doctors, and had reported the injuries to the admitting physician of the hospital but, unaccountably, no record was made of this matter. The investigating physicians in the hospital made up their minds that plaintiff had imagined the ward encounter with the violent hospital patient and had also imagined the two injuries he claimed to have incurred. At about this time, plaintiff learned that his battalion had been ordered into combat. Plaintiff had recovered completely from the attack of bronchitis and asked to be discharged from the hospital to permit him to join his battalion. Hospital authorities refused to discharge plaintiff and his reaction was, naturally enough, quite violent. On February 17, 1943, the hospital physicians erroneously diagnosed plaintiff as insane and he was confined to the locked ward of the hospital.

". . .

¹ Major, JAGC, U.S. Army, Chief, General Law Branch, Military Affairs Division, Office of the Judge Advocate General. Member of the Bars of Colorado, the United States Court of Military Appeals, and the Supreme Court of the United States. The views expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General or any other Government agency.

² *Egan v. United States*, 158 F. Supp. 377 (Ct. Cl. 1958).

"Upon his arrival in Bethesda on June 7, 1943, plaintiff was placed in the locked ward of that hospital. On June 17, 1943, plaintiff was transferred to Saint Elizabeths Hospital for the Insane, Washington, D. C.

"During the five months of plaintiff's confinements in locked wards as an insane person, he attempted in every conceivable way to persuade the medical officers that he was not insane. His growing sense of frustration and his occasionally vehement protests only served to confirm the medical authorities in their opinion that plaintiff was insane. Throughout plaintiff's confinements no technical tests administered to him by doctors resulted in the manifestation of any symptom of a psychiatric origin, or of any physical condition of a psychogenic origin.

"Not long after plaintiff's admission to Saint Elizabeths Hospital, he escaped and later returned armed with reports of several medical examinations attesting to his sanity. Plaintiff then appeared before a group of psychiatrists at Saint Elizabeths and told them that if he was held at the hospital he would seek a writ of habeas corpus. He was finally permitted to leave the hospital on October 30, 1943.

"In the meantime, on July 30, 1943, a Board of Medical Survey convened at Saint Elizabeths Hospital and rendered a report which contained the following statement of so-called facts:

'On admission to this hospital the patient was obviously making an effort to be as pleasant as possible but failed to conceal very definite tension, speaking very rapidly and lighting one cigarette from the other. He was intent upon establishing that he had no mental disorder and that he had been mistreated. He presented his case with considerable circumstantiality and detail, and made an especial effort to smooth over his past behavior difficulties, giving explanatory and personal versions of a paranoid nature. [It is interesting to note in this connection that plaintiff's personal versions of what had happened turned out to be the correct versions.] Since then he has shown improvement. He is still however, preoccupied with explaining his psychiatric difficulties on the basis of errors on the part of the physicians, who have handled his case. He needs further hospital care. His physical condition is good.

'Verified history reveals that this patient was discharged from the U.S. Army on March 3, 1942, because of a mental illness diagnosed, "Psychoneurosis, Anxiety, Neurosis, with Schizoid Features." In the opinion of this Board the origin of the patient's present disability existed prior to appointment and has not been aggravated by service conditions.'

"The 'verified history' reported in the statement of facts of the

Board of Medical Survey was the service and medical history of another John J. Egan, not this plaintiff, who had indeed been discharged from the Army on March 3, 1942 as an insane person. Despite the asserted verification referred to, this other Egan had a service serial number different from the serial number of plaintiff, and his discharge from the Army antedated plaintiff's by several months. This astounding piece of misinformation and carelessness was transmitted to the Board of Medical Survey by the Adjutant General of the Army through the Bureau of Medicine and Surgery.

"On the basis of the remarkable and untrue findings of fact quoted above, the Board of Medical Survey, without further inquiry into the matter, recommended that plaintiff appear before a United States Marine Corps Retiring Board 'in order that his best interests be fully protected', inasmuch as he was deemed to be permanently 'unfit for service' by reason of an unclassified psychosis which had existed prior to his Marine Corps service and had not been aggravated by such service.

"On October 25, 1943, the Commandant of the Marine Corps notified plaintiff that as of October 28, 1943, he would be relieved from active duty and be assigned to the Third Reserve District; that upon his discharge from treatment at Saint Elizabeths Hospital, he should proceed

to his home in Connecticut. On October 28, 1943, plaintiff was relieved from active duty and his pay and allowances were discontinued. On October 30, 1943, plaintiff was discharged from treatment at Saint Elizabeths Hospital.

"On November 27, 1943, plaintiff was advised by the Commandant of the Marine Corps that:

'In view of the recommendation of the Board of Medical Survey convened in your case, which was approved by the Chief of the Bureau of Medicine and Surgery, it is the intention of the Commandant, U. S. Marine Corps, to recommend to the proper authority that you be discharged as an officer of the Marine Corps Reserve.'

"On April 11, 1944, the plaintiff was notified by the Commandant of the Marine Corps, that effective that date, he was, by direction of the President, discharged from the Marine Corps Reserve under honorable conditions, having been found not physically qualified for active duty. On the same date the Secretary of the Navy issued to plaintiff a Certificate of Satisfactory Service.

"Thereafter, plaintiff applied to the Naval Retiring Review Board, and, on March 10, 1945, that Board notified plaintiff that 'after careful consideration and review of all records' [including the er-

roneous army records of the other Egan], it had been unanimously decided that there was no reason to reverse the findings and decision of the Naval Retiring Board in any particular; that those findings and the decision had been affirmed, and that the President had, on February 28, 1945, approved the decision of the Naval Retiring Review Board." (Bracketed material is that of the Court of Claims.)

The Court also noted that the plaintiff's promotion to captain, effective 1 March 1943, was withheld because of his confinement under the erroneous diagnosis. The plaintiff went to the Board for Correction of Naval Records on 27 December 1947, which was established by Congress to correct records so as to correct errors or remove injustices.³ At the time of his hearing by that Board in 1948, he had been discharged from three positions when his employers discovered he had been confined in mental institutions. As stated by the Court in the Egan case, *supra*, the Board found as follows:

"Following diligent efforts by plaintiff and a long investigation and an oral hearing, the Board on March 17, 1948, made findings of fact, conclusions and a decision. The Correction Board concluded that plaintiff had at no time been mentally defective, nor had he ever suffered from any incapacity, physical or mental, which would

have prevented him from performing active duty as an officer in the Marine Corps; that the many diagnoses of insanity rendered by the various medical officers and boards were all completely in error and had been based on numerous false premises, including the mistaken reports from Samoa that plaintiff had imagined two minor injuries prior to his hospitalization for bronchitis in Samoa, and that he had also imagined the encounter with the violent patient in the medical ward in the hospital in Samoa. The Board found that plaintiff's accounts of those incidents, consistently disbelieved by the Naval physicians and officials, had been completely accurate. The Board also found that the Adjutant General of the Army and the Bureau of Medicine and Surgery of the Marine Corps had confused plaintiff's Army records with the Army records of another former Army officer whose name was 'Egan'; that on the basis of the Army medical records of the other Egan, Marine Corps officials were convinced that plaintiff had been found insane while serving in the Army and had been discharged from the Army as an insane person prior to his entry into the Marine Corps. In its decision, the Correction Board, after having carefully considered the true facts, concluded that plaintiff had never been insane; that all diagnoses of insanity had been negligently made and in error,

³ Section 207, Legislative Reorganization Act of 1946 (60 Stat. 837), now codified as title 10, United States Code, section 1552.

that plaintiff had at all times been mentally and physically capable of performing active service as an officer in the Marine Corps; that the discharge in 1944 of plaintiff because of mental incapacity for service was clearly erroneous and should be changed to an honorable discharge without any reference therein to such non-existent incapacity. The Commandant of the Marine Corps was ordered to cancel the previous illegal discharge and to issue to plaintiff a new honorable discharge in substitution therefor without any reference to physical or mental incapacity, together with a Certificate of Satisfactory Service. The Chief of the Bureau of Medicine and Surgery was directed by the Correction Board to add to plaintiff's medical records a certified copy of the Board's conclusion and decision as the last and final official entry in plaintiff's medical records. The decision of the Board was approved in every respect by the Secretary of the Navy on March 17, 1948."

However, at the time (1948) of the Board's findings and their approval by the Secretary of the Navy, there did not exist power to grant compensation in connection with the correction of records. Accordingly, Egan filed suit in the Court of Claims on 12 February 1951. However, prior to trial, the Congress enacted legislation⁴ authorizing payments based upon correction of records. Accordingly, Egan filed an ap-

plication with the Board seeking an administrative payment of the amount due based upon the prior correction of records. However, the then Secretary of the Navy refused to authorize full payment, including pay of the grade of captain, so Egan renewed his suit in the Court of Claims.

The Court held that the approved action of the Board voided Egan's release from active duty in October 1943 and discharge from his commission in 1944. Accordingly, Egan became entitled to pay and allowances from October 1943 to 7 April 1948, the date on which the Commandant of the Marine Corps issued Egan an honorable discharge from his commission in place of the Certificate of Satisfactory Service issued in 1944. The Court noted that it had the power to make such award without effecting a reappointment. The Court found that, except for his being hospitalized for insanity, he would have been promoted to captain on 1 March 1943. Although the Marine Corps had previously conceded this fact, the Government in defending the case attempted to show a lack of equity on the part of plaintiff to such promotion based upon his fitness (i.e., efficiency) reports. The Court stated as follows concerning this matter:

"An examination of the reports in the light of the whole record indicates that the three fitness reports were prejudiced and largely unwarranted by the true facts. Among other things, the rating

⁴ Act of 25 October 1951 (65 Stat. 655).

officers reported that plaintiff was in the habit of reporting sick and was developing into a sickbay soldier. It would appear from the record that plaintiff had good reason to feel ill and that the reason was no fault of plaintiff. While he was in training in Quantico, he was involved in a jeep accident and he severely injured his spine. (He later received a pension from the Veterans' Administration for traumatic arthritis caused by this injury.) Later while en route to Samoa aboard the USS Henry T. Allen, plaintiff suffered a head injury while in the process of cocking a 20 millimeter gun during an alert. He was treated in his quarters because there were two cases of spinal meningitis in the ship's hospital. Later, there was one of the mix-ups characteristic of this case, in connection with X-rays. Prior to his entry into the hospital in Samoa for treatment for bronchitis, plaintiff had been treated for this ailment by what appears to have been negligent overdoses of sulfathiazole—15 grains four times a day, 1800 grains in the 30 days of treatment. The toxic effect of this drug on plaintiff's kidneys and equilibrium undoubtedly contributed to his irritability and apparent inability to get along with some of his associates.

The Court concluded not unexpectedly as follows:

"Plaintiff is entitled to recover the difference between the active

duty pay and allowances of a captain and the active duty pay and allowances of a first lieutenant from March 1, 1943 to October 28, 1943, and to recover the active duty pay and allowances of a captain from October 29, 1943 to April 7, 1948, less his earnings from civilian employment during the latter period."

And what does this case prove. . . . Some may claim that the Egan case proves that the sometimes used psychiatric procedure of putting a man in a locked ward with insane people to see if this arouses his anger lacks a proper scientific basis upon which to base a diagnosis of insanity. Others may claim that all of this only goes to prove an old adage once stated to the author by the president of a court-martial to the effect that "anyone who voluntarily goes to see a psychiatrist ought to have his head examined." It is noted, however, that this statement was made at the end of a hot afternoon during most of which a psychiatrist would only testify concerning the accused "In the sense that Hamlet was sane, the accused is sane." It is believed, however, that all will agree with a statement attributed to Charles F. Kettering which is paraphrased as follows:

"Whenever you think a person is crazy, then you want to pay close attention. One of you is likely to be and you had better find out which one it is. It makes an awful lot of difference."

SOME RECENT CHANGES IN MILITARY JUSTICE

CONCEPTS

The Court of Military Appeals, from time to time, strikes down some of the time-honored policies and practices of the Military Services in the administration of military justice. In recent months, some of these changes have related to sentencing procedures.

It has long been the policy in the Services to suspend execution of punitive discharges pending appellate review or release from confinement, so that pending the happening of those events, the accused could be considered for rehabilitation and restoration, and if restored he would have no break in his period of service. This practice has been effectively discontinued under the decisions of the Court in *U. S. v. May* 10 USCMA 358 and *U. S. v. Cecil* 10 USCMA 371 where the court held that all suspensions create a probationary status that may not be disturbed except for cause and upon a hearing.

At least since World War I, Manuals for Court Martial have provided that a court could not adjudge a confinement at hard labor for more than six months without also adjudging a punitive discharge. In *U. S. v. Varnadore* 9 USCMA 476 and *U. S. v. Holt* 9 USCMA 471, the Court, by its interpretation of UCMJ Article 56, has changed that concept. Now, an accused may be sentenced to any period of confinement without the sentence necessarily including a punitive dis-

charge. Likewise, the old rule that a sentence of forfeiture of more than two-thirds of accused's pay for more than six months could not be adjudged in the absence of a punitive discharge has been held invalid by the Court in *U. S. v. Jobe* 10 USCMA 276.

Also, since World War I, a non-commissioned officer could not be sentenced to hard labor, with or without confinement, without a concomitant reduction to the ranks. This rule has been changed by the Court in *U. S. v. Simpson* 10 USCMA 229 and *U. S. v. Littlepage* 10 USCMA 245. The Court there held that a court martial may sentence a non-commissioned officer to confinement and a punitive discharge without a reduction in rank, and the effect of such a sentence shall not cause an automatic reduction.

In cases of disobedience of orders of a command lower than a major command, the accepted rule, for many years, has been that an accused may be held to have knowledge of such orders, actual or constructive. Constructive knowledge has been held to be present when the order was published and the accused, in the ordinary course of events, or by the exercise of ordinary care, could have knowledge of the order. The Court, in *U. S. v. Curtin* 9 USCMA 427 held that constructive notice is not a substitute for actual knowledge of such orders

of any command other than major commands.

Suspected servicemen have long been subjected to the risk of being detained and then ensnared in their maledictions by military police by the simple expedient of being required to produce a liberty pass. In *U. S. v. Nowling* 9 USCMA 100 the Court held that a serviceman

who is suspected of an offense may not be ordered to produce his pass without first being given an Article 31 warning. See, however, *U. S. v. Cuthbert* 11 USCMA 272 where a mail orderly suspected of stealing mail was ordered to produce mail from his pocket without being first warned under Article 31 and the Court affirmed his conviction.



STRAIGHT PROMOTED TO BRIGADIER

Clio E. "Red" Straight was appointed Brigadier General and was assigned to the position of Assistant Judge Advocate General of the Army for civil law in September, 1959. General Straight, a native of Iowa, received his law education at the University of Iowa and entered private practice in that State in 1930. Commissioned Second Lieutenant, Cavalry, in 1933, he was detailed to the Judge Advocate General's Department in 1937 as a Captain and came on active duty in that rank early in 1940. He was commissioned in the Regular Army in 1941. During World War II, he served in both theatres and he also served in Korea during the Korean Operation. General Straight is an active member of the American Bar Association and is a member of the Board of Directors of the Judge Advocates Association.

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.

CHANGED CONCEPT OF TORT LIABILITY IN PERFORMANCE OF OFFICIAL DUTIES

By Timothy G. O'Shea *

Contrary to generally accepted concepts as to the immutability of the *corpus juris*, practitioners are constantly being reminded, often through adverse judgments, that the modern jurist, purposely and clearly is tailoring the law to conform to life's realities. The taxation specialist, the international law scholar and tort expert will universally testify that constant vigilance is not a virtue but a necessity, in the imperceptible still certain pirouette of their legal specialities.

Of considerable concern to the military profession is an illustrative trend in the concept of liability for tortious performance of ministerial functions. Until recently the law was considered well settled in establishing liability of government servants for their "torts committed in the line of duty". To fully appreciate the transitions involved, a brief restatement of the earlier concept is appropriate.

Liability in tort is imposed whenever the invasion of a person's interests by another exceeds that which general notions of a well-ordered society approve. Hence, one engaging in such an excess invasion of another's interests is civilly liable therefor. Invasion of interests, "tortious" in character, cannot become the basis of liability where spe-

cial circumstances or conditions exist which make it socially desirable, or even necessary, for the actor to commit such invasions. When such an exceptional situation exists, the actor's conduct constituting an invasion is said to be "privileged", and such conduct cannot be made the basis of liability.

The term "privilege" has, thus, come to be regarded as expressing a general principle of social policy having widespread significance throughout the law of torts. Privilege, contemplates the existence of a situation in which the ordinary liability for the invasion of the interests of others is absent. It exists whenever the facts and circumstances of the invasion disclose the conflicting interests involved to be of such a character that public policy and the well-being of the general, social and economic order require a freedom on the part of the actor which goes beyond that usually allowed. Privilege, as a shield against a tort action, is a justification or excuse, and is available for reasons of public policy only.

Since the degree of protection which social policy is prepared to grant to the actor's interests, as against those of the person whose rights are invaded, varies, privilege affords variable degrees of protec-

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tion. Notwithstanding the fact that various writers on tort law distinguish several categories of privilege,¹ this author is of the opinion that to all intents and purposes there are only two types of privilege, to wit,

- (1) Absolute privilege, which is equivalent to immunity; and
- (2) Qualified privilege.

Absolute Privilege (Immunity)

When circumstances which give rise to the privilege are regarded as creating such an insistent demand for conduct that may, or actually does, invade the interests of others so as to completely overshadow them, then the *privilege* afforded the actor is *absolute* to the extent that he is "*immune*" from liability for such invasions. This is so, irrespective of the purpose for which the invasions are actually made. Thus, what Harper² terms "absolute privilege" is, in the opinion of this writer, equivalent to "immunity" such as is enjoyed by judicial officers, quasi-judicial officers, judges, prosecuting attorneys, executive and ministerial officials.³ "*Immunity*" may thus be defined as

the absolute exemption from liability for conduct which but for the exemption would be tortious.⁴

Qualified Privilege

"Qualified privilege", on the other hand, affords no absolute exemption. It is granted to lower administrative officers, whose functions are merely "ministerial", *i.e.*, amounting only to an obedience to orders or the performance of a duty in which the officer is left no choice of his own, such as for example, the registration of voters;⁵ the recording of documents;⁶ etc. Ministerial functions, if performed improperly, are accomplished at the actor's own peril, regardless of good faith. The protection or "privilege" is thus a qualified one, for this class of officers is absolved from liability only so long as they make no mistakes, and do not exceed their strictly limited functions. Their lot is a difficult one, for they may suffer for an honest and reasonable mistake in an effort to carry out their responsibility to the public.

Effects of Immunity and Privilege

In certain cases of conduct or action, on the part of officers and em-

¹ Harper, Fowler Vincent, *A Treatise on the Law of Torts* (1940), Sec. 46(a), Absolute privilege; complete conditional privilege; partial or incomplete conditional privilege.

² *Ibid*

³ *Hartline v. Clary*, 141 F. Supp. 151, 152 (D.C., E.D.S., 1956).

⁴ See Prosser, *Handbook of the Law of Torts* (2d ed.), 1955, p. 770.

⁵ *Lincoln v. Hapgood*, 11 Mass. 50 (1814).

⁶ *Rising v. Dickinson*, 18 N.D. 478, 121 N.W. 616 (1909).

ployees of the Government who enjoy immunity, the motives or purposes of their acts are entirely immaterial insofar as tort liability is concerned.⁷ Thus, judges enjoy absolute and unconditional immunity for harmful consequence to others occasioned while performing or purporting to perform their judicial functions.⁸ The same absolute protection extends to members of state and national legislatures,⁹ and to the highest executive officers of the federal and state governments.¹⁰

Considerations of public policy involved in the rule of immunity for these functionaries are obvious. Officers performing such important public functions must be protected against any and all kinds of external pressure regarding their judgment and conduct, and, to this end, it is felt that they must be guaranteed against the inconvenience and expense of private litigation. As declared by the Supreme Court of the United States with reference to the judiciary:

“. . . it is of the highest importance to the proper administration of justice that a judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions without

apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of his freedom, and would destroy the independence without which no judiciary can be respectable or useful.”¹¹

In the past the courts have developed a formula for determining when a public officer enjoys “absolute privilege” or “immunity” and when only a “qualified privilege”. This formula consisted in the distinction between acts involving “discretion” on the part of the officer, and acts purely “ministerial” in character. The distinction is important, and the rule may be stated as follows: If the officer is engaged in performing a “discretionary” act, he is immune from civil suit by any individual for any errors, mistakes of judgment or unwise decisions that he may make in exercising his discretion,¹² but if he is engaged in the performance of a duty purely “ministerial” in nature, he is not immune and may be liable to an individual for the malfeasance thereof.¹³

⁷ Bradley v. Fisher, 80 U.S. 335 (1871).

⁸ Fletcher v. Wheat, 100 F. 2d 432 (1938).

⁹ Kilbourn v. Thompson, 103 U.S. 168 (1881).

¹⁰ Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L. Ed. 780 (1895).

¹¹ Bradley v. Fisher, see footnote 7.

¹² Decatur v. Paulding, 39 US 497 (1840).

¹³ Army v. Supervisors 78 U.S. 136 (1870).

As regards the distinction between a function "discretionary" in nature and a "ministerial" one, a ministerial duty is characterized as one which is certain and imperative, with comparatively little left to the discretion of the officer,¹⁴ such as for example, levying a tax,¹⁵ making an arrest,¹⁶ or like actions, and in *First National Bank of Key West v. Filer*, 107 Fla. 526, 534, 145 So. 204, 207 (1933) a "ministerial" duty was defined as follows:

"A duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated."

As regards, however, "discretionary functions", unfortunately diligent legal research fails to produce a satisfactory definition of either the term or the scope thereof. In fact, even the Federal Tort Claims Act¹⁷ which excludes Government liability for any claim

"(a) based upon . . . the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused".¹⁸

contains no definition of the term. The concept of "discretionary functions" must, therefore, be traced from the case law which gives to federal officials an immunity from suits arising out of certain kinds of official acts, recognized by the courts as "discretionary" in nature. The cases permit the conclusion that discretionary functions may be the equivalent of policy-making functions, and are summarized by the opinion in *Dalehite v. United States*,¹⁹ the first opinion in which the concept of "discretionary function or duty" was interpreted by the United States Supreme Court. There, without determining just where the line should be drawn, the Court said at page 36:

"discretionary functions or duty" . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operation. *Where there is room for policy judgment and decision there is discretion.* (Emphasis supplied).

¹⁴ *Roberts v. United States*, 176 U.S. 221 (1899).

¹⁵ *Army v. Supervisors*, 78 U.S. 136 (1870).

¹⁶ *Moyer v. Peabody*, 148 F. 870 (1909).

¹⁷ 28 U.S.C. 2670-2680.

¹⁸ 28 U.S.C. 2680(a).

¹⁹ 346 U.S. 15 (1953).

The test, apparently, as enunciated by the Supreme Court in the *Dalehite* case, is, that whenever there is room for policy judgment and decision, there is discretion.²⁰

Assuredly, that test is difficult to apply, for the Supreme Court made no attempts to determine just where the line should be drawn, and it leaves open the question of just what kind of policy judgment the Court had in mind. In the light of this difficulty, the distinction made in *Bulloch v. United States*²¹ between "policy functions" and "operational functions" takes on more meaning. One could, of course, state with absolute safety that a function not "discretionary" in nature is "ministerial", and vice-versa, but this would "be begging the issue". A more appropriate name for the antithesis is the adoption of the term "operational", previously used

in *Bulloch v. United States*²² by the Supreme Court in *Indian Towing Co. v. United States*,²³ to define a "ministerial function". Thus, based on *Dalehite*²⁴ and *Indian Towing Company*,²⁵ it may be safely stated that the discretionary-operational distinction is vitalistic.

The differentiation between a "discretionary" and "ministerial" function, when made in a tort action against a Government officer or employee, has a dual effect, both procedurally and meritoriously.

(1) *Procedurally.*

In explanation of the distinction made by the Tort Claims Act,^{25a} Congress said that it is made

"to preclude application of the act to a claim based upon an alleged abuse of discretionary authority . . . it is neither desirable nor in-

²⁰ Other tests suggested, but not generally accepted, for determining whether the function is discretionary or not are: (1) The "governmental proprietary-test", as spelled out in the dissent in the *Dalehite* case, distinguishing between housekeeping and regulatory functions; (2) The "different from private industry function-test," as announced in *National Mfg. Co. v. United States* 210 F. 2d 263 (1954), to the effect that when a function is performed only by government, it is "discretionary" but not when it can be discharged by private industry; and (3) The "statutory language-test" which looks to the statute which denominates the function as discretionary or non-discretionary *Kline v. United States*, 113 F. Supp. 298 (1953).

²¹ 133 F. Supp. 885 (1955).

²² *Ibid.*

²³ 350 U.S. 61 (1955) (There the plaintiffs sought to recover for damages to a cargo aboard a barge which ran aground on an island in the Mississippi River, allegedly as a result of the negligence of the Coast Guard in failing to properly operate a light house on the island. The Supreme Court refused to exempt the United States from liability for negligence at what the court had described as the "operational level" of governmental activity).

²⁴ *Supra*, Footnote 19.

²⁵ *Supra*, Footnote 23.

^{25a} *Supra*, Footnote 17.

tended that . . . the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort . . ."²⁶

This intent of Congress has since been carried into practice by the courts which, upon determination that a discretionary act is at the foundation of a tort action, refuse to hear the claim dismissing it for *want of jurisdiction*. Thus, whenever the exercise of a discretionary function is alleged as the proximate cause of injury, the courts are unwilling to assert jurisdiction; for example, a claim for damages, alleged to have resulted from publishing information that plaintiff corporation was about to be investigated and by actually carrying on the investigation, was dismissed for want of jurisdiction.²⁷ And the same result was reached where the Secretary of the Interior, in prohibiting the hunting of wild geese, was held negligent in not providing for protection of crops which they were likely to eat.²⁸

(2) *Meritoriously.*

On the other hand, where the function exercised is "operational" in nature, the courts take jurisdiction and hear the case on the merits.

Recovery was, thus, allowed where injury resulted from negligent supervision of air traffic control tower personnel,²⁹ and negligent supervision of ammunition loading by a Coast Guard non-commissioned officer.³⁰

In effect, therefore, a tort action based on a discretionary act is always dismissed on the ground of *want of jurisdiction*, whereas one based on a ministerial function is heard by the court, but if dismissed, is so dismissed on its merits. This essentially, is the difference between the two types of functions from a practical point of view. Hence, where "absolute privilege" existed, no suit lies against the alleged tortfeasor, and the tort action is dismissed not on the merits of the case, but for want of *jurisdiction*. On the other hand, when an officer malperforms a ministerial act, the fact that it is done in an honest effort to perform his duty, albeit without malice, or evil intent, is no defense. When the act is ministerial, the officer acts at his peril, and if he performs improperly, he is outside the protection of the privilege and compelled to answer like any other individual on the *merits* of his case. If he succeeds with his defense of qualified privilege, the action is dismissed, not for want of jurisdiction,

²⁶ Hearing before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong. 2d Sess. 28 (1942).

²⁷ *Schmidt v. United States*, 198 F. 2d., 32 (1952).

²⁸ *Sickman v. United States*, 184 F. 2d., 616 (1950).

²⁹ *Union Trust Co. of D.C. v. United States*, 113 F. Supp. 80 (1953).

³⁰ *Pennsylvania RR Co. v. United States*, 124 F. Supp. 52 (1954).

as in the case of the immune officer, but for *failure* of the plaintiff to state a cause of action, *i.e.*, on the merits.

The Changed Concept

In the past, "immunity" or "absolute privilege", was purely personal. It could neither be delegated nor shared. Thus, the immunity of a judge with respect to acts done during the trial of a case was not shared by one who acted at his direction. Hence, a person who committed a tort at the command of a person who enjoyed immunity was not relieved from liability therefor merely by virtue of the fact that his conduct was pursuant to the command of an immune person.³¹ Hence, a serviceman, who injured a third party in carrying out an order of a superior who exercised discretionary functions, which affords the latter personal immunity, was not absolved from liability by virtue of the superior's immunity, for he neither shared in nor could he invoke same as a defense. Insofar as he was concerned, that immunity had no effect upon his liability. If he was to be freed from liability, it must have been by virtue of reasons other than his superior's immunity.

What then, might have been such a reason? Consider that a service-

man performed a ministerial function when he carried out an order of a superior who, himself, is vested with immunity. If the order issued by the superior to the serviceman (who is a ministerial officer) was regular on its face, showing no departure from the law, such order gave full and entire protection to the serviceman against any prosecution which the party aggrieved might institute against him. This was so, albeit, serious errors may have been committed by the superior officer in reaching the conclusion or judgment upon which the order was issued.³³ It follows, that while the immunity, of the superior officer was of no avail to the serviceman obeying and carrying out his harm-causing order, he could justify trespass under apparently valid orders of a superior.³⁴ Obviously this was not true if he knew or should have known that the act thus ordered was illegal.³⁵

Faced with what might be termed inequitable treatment of tortfeasor's participation in a given common happenstance, the federal courts, in 1956, started to extend the concept of immunity or absolute privilege, and departed from the idea that those operating under the ministerial function theory perform at their own peril.

³¹ Restatement, Torts, Section 888, "A person, whose conduct is otherwise a tort is not relieved from liability therefor merely by the fact that his conduct is pursuant to the command of or is on account of another."

³³ Thompson v. Baker, 133 F. Supp. 247, 253 (1955);

³⁴ Luther v. Borden, 48 U.S. 1 (1849).

³⁵ Mitchell v. Harmony, 54 U.S. 115 (1851).

In the new cornerstone case of *Cooper v. O'Connor*,³⁶ a Federal District Judge declared:

"We know that heads of the Federal departments do not themselves engage in such activities as are here involved. Their administrative duties make such participation impossible. There must be, necessarily, delegation of authority for such purposes. When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official action of the department; and the same reason for immunity applies as if it has been performed by the superior officer himself. *De Arnaud v. Ainsworth*, supra (24 App.D.C. 167) at pages 177, 181 (5 L.R.A., N.S., 163);

United States, to Use of Parravicino v. Brunswick, supra (63 App.D.C. 65, 69 F. 2d 383). To hold otherwise would disrupt the government's work in every department. 'Its head can intelligently act only through subordinates.' *Farr v. Valentine*, 38 App.D.C. 413, 420, Ann.Cas. 1913C, 821. The fact that our country has grown so great as to require a multiplication of governmental officials in some small measure proportionate thereto, cannot obscure the fact that the duties performed are the same as those once performed by heads of departments, and that fearless performance of official duty is as es-

sential today as it was yesterday."

Thus, it was clearly held that minor ministerial officers share the same cloak of immunity as their superiors while acting within the scope of their authority.

This realistic approach was soon followed and adopted in other federal courts, long troubled by the enigma of theoretical borderlines between the supervisor and the operating official. District Judge Williams in *Hartline v. Clary*,³⁷ for instance, developed the historical and evolutionary background of the immunity theory and concluded that, as a matter of law, the Internal Revenue agents (defendants in that case) enjoyed the same immunity granted to the Director of the Internal Revenue Service. He further contributed a set of standards and/or criteria through which courts could measure immunity status.

- "(a) It is sufficient if they are done by an officer 'in relation' to matters committed by law to his control of supervision."
- (b) . . . That they have 'more or less connection with the general matters committed to his control or supervision.'
- (c) . . . or that they are governed by a lawful requirement of the department under whose authority the officer is acting." (p. 158)

³⁶ 99 F. 2nd 135.

³⁷ 141 F. Supp 151 (1956).

This enlargement of the doctrine represents the "new look" of the courts in the adjudication of suits involving the performance of ministerial functions. Thus, recognition of the contemporary problems which

have predicated necessary expansion of legal doctrines by the courts, provides encouragement to the practitioner at the Bar for it serves as a constant reminder that the law lives and he may do much to form it.



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 the surviving families, relatives and friends, deepest sympathy.

Colonel John E. Blackstone of Montgomery, Alabama
Lt. Col. Edward Daly of Washington, D.C.
Major Herbert A. Davis of Okanogan, Washington
Colonel David S. Hecht of New York City
Colonel Harold D. LeMar of Omaha, Nebraska
Brigadier General Adam Richmond of Bethesda, Maryland
Captain David B. Stern, Jr., of Chicago, Illinois
Colonel Ryland G. Taylor of Las Vegas, Nevada
Lieutenant Philip E. Walter of Sterling, Colorado
Colonel Laurence D. Weaver of Hudson, New York

JUDGE ADVOCATE GENERAL SERVICE ORGANIZATION TOE 27-500D TEAMS*

By Lieutenant Colonel Byrnes F. Bentley and Major William E. O'Donovan **

The atomic battlefield dictates a greater need for flexibility, dispersion, and self-sufficiency of the fighting units. The Army, being charged with this modern concept of war, has undergone some radical changes.

Certain observations made at Division and Corps levels in Exercise SAGEBRUSH and at Army support and communication zone level in LOGEX 56 caused The Judge Advocate General's Corps to take a new look at itself. The mirror reflected that the judge advocate organization, in modern war, limited exclusively to Staff Judge Advocate Sections, was inadequate to perform all of the professional functions required. At the most, the mirror said, the JA section of five could field but one trial team, leaving the other two members of the section to handle the pre-trial and post trial reviews, render legal assistance, give advice on international law, procurement law, military affairs, and claims matters which arise in a combat zone base or advance section.

This observation caused the Corps to take an immediate self-appraisal and analysis in order to establish its self-sufficiency on the fields of future war. As a result of two years' work

by both The Judge Advocate General's School at Charlottesville, Virginia, and The Judge Advocate General's Office in the Pentagon, a Table of Organization and Equipment, Nr 27-500D, was authorized by order of the Secretary of the Army on 17 October 1958, and the first *Judge Advocate General Service Organization* was established.

It is believed that with the conception and birth of these lawyer teams, the objective of supplying legal requirements on the field of battle, where needed, can be accomplished with the least personnel.

TOE 27-500D Teams: Their Concept and Employment

Prior to World War II, the principal responsibility of the staff judge advocate in the field was to advise his commander on legal problems. There was no requirement that his section furnish trial counsel or even the law member. However, during the war his professional responsibility increased. This increase was most notable in the area of claims and in some instances in war crimes investigations.

After World War II and with the enactment of the Uniform Code of

* The opinions and conclusions presented herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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Military Justice, the judge advocate section was called upon to provide a law officer and certified counsel for the trial of general court-martial cases. In effect, judge advocates became trial lawyers and judges as well as counselors, and decisions of the United States Court of Military Appeals further extended the operational responsibilities of the organic section now established in the tables of distribution as five officers.

While it may be conceded that five judge advocates could adequately conduct the organic sections in time of peace, modern warfare with its flexibility and dispersion of the fighting units, dictates that under many situations the organic section would be under-staffed.

Rather than increase the judge advocate sections to a size, in the next war, large enough to carry out the greatest anticipated workloads, the team or small specialized units have been established for allocation, when required, to assist in handling peak workloads in divisions and to be sent from one division to another as the need develops. In other words, the mission of the organization of these units is to perform excess judge advocate functions in the field of combat situation and to dispose of unusual-type legal workloads generated under conditions of hostility. Aside from assisting the division in combat, the teams are also designed to augment, when the need arises, those variable strength organizations, such as, logistical commands and armies.

Since the teams are only utilized to perform excess functions in the

combat zone or to augment, when required, logistical commands, they must necessarily be employed by the theater army commander. Accordingly, he has the authority to allocate these units of the Judge Advocate General Service Organization. However, the supervision over the allocations and activities of these units passes to the theater staff judge advocate. If the capability of any given organic judge advocate section does not require the employment of a team of specialists, these units or team officers will have been so trained, in the event certain of them are surplus, to operate as individual judge advocates in any field of military law. They will never be idle in the theater. These officers of the teams, therefore, are judge advocates first and specialists second.

Obviously this team concept and its employment will greatly assist The Judge Advocate General's Corps and the Army to meet mobilization requirements. A total of 715 paid spaces in peacetime have been authorized in the Reserve forces troop basis as follows:

- 504 Officer Spaces,
- 12 Warrant Officer Spaces,
- 199 Enlisted Spaces.

Major General George W. Hickman, Jr., The Judge Advocate General of the Army, has said: "The establishment of these units will provide a larger number of our loyal Reservists with incentives of pay, promotion, training and a sense of belonging not heretofore available."

Types of Teams and Their Capabilities

As indicated, the teams will be assigned or attached in accordance with theater army directives. They will be theater army troops but will be assigned or attached normally to any army or corresponding logistical command and attached to lower echelons only for such periods of time as workloads justify. The capabilities of teams organized under the TOE 27-500D table will vary in size and groupings of teams used and their administrative and maintenance functions, not provided for in the table, are the responsibility of the commander to whose unit the Judge Advocate General Service Team is attached or assigned.

Detachment Headquarters Teams. The detachment headquarters teams are designed to perform administrative and operational control of one or more judge advocate teams. However, these detachment headquarters teams may also provide chiefs for sections of organic judge advocate sections if requested. Further, the personnel in the detachment headquarters teams may be employed as replacements for judge advocate casualties.

Claims Service Teams. The objective of these teams is to perform complete investigative service to include preparation for adjudication of all claims arising in the area to which assigned. These teams make the actual claims investigation, contact the claimant, and collect the evidence in individual claims. These teams are allocated to corps, armies

and troops in the communication zone. The over-all number of investigators required was fixed by experience factors of the claims service operating in France in World War II. Specific assignment within the combat zone and communications zone will depend upon the particular combat situation and troop disposition.

In addition to these operational teams, there are also adjudication control teams and control or supervisory claims teams which are designed to supervise the work of three to seven claims investigating teams.

War Crimes Teams. These teams perform on-the-scene investigation, interrogation, and gathering of photographic, documentary, and testimonial evidence in connection with the necessary war crimes investigatory work in the area to which assigned. All collation and evaluation of evidence will be performed in a central war crimes office which will be under supervision of the theater army judge advocate. Based on experience factors in the last World War, one investigating team is needed for every 15,000 troops in the communication zone. The specific location where the war crime units will be assigned will depend, of course, on the discovery of war crimes activities, war criminals, and witnesses to such activity. Here again, control teams will supervise the activities of the investigating teams and will facilitate the prompt dispatch of evidence to the central war crimes office for collation and evaluation.

General Court-Martial Teams. The number of general courts-martial is directly related to the number of troops in a command. However, the number of general courts-martial in divisions of identical strength may vary substantially and the number in a single division often varies greatly from month to month. An example of the month to month fluctuation is found in the reports of the Second Division while engaged in Korea. This division's monthly courts-martial cases ranged from an all time high of 47 cases to a low of one case. Further, because of the great fluctuation in cases, the teams will be attached at the time of peak case loads in order to offset any appreciable backlog. Experience has indicated that troops assigned to communications zone have a greater general court-martial rate than troops engaged in divisions, corps, and even armies. Therefore, the capability of and basis of allocation for the two teams are different for the combat zone and communications zone.

Legal Assistance Teams. These teams provide legal assistance to service personnel. The amount of legal assistance required, of course, varies with the size of command. However, experience has taught that the legal assistance requirements of 15,000 troops necessitate the full time service of one judge advocate in order to render competent and efficient legal service. The officers of these teams are to be made available to the troops by the theater army judge advocate by assignment to centers of troop population, such

as rest areas and hospitals, where they will be readily accessible to those in need. While these teams may have more or less fixed assignments at rest centers and other populated troop areas, they may also be employed as circuit riders to assist troops in areas not readily accessible.

Procurement Law Teams. The professional functions of the procurement law teams are actually specialties within a specialty. In brief, the capabilities of these teams are as set out below:

Contract Law Teams. The contract law teams review contracts and their related documents for legal sufficiency. In addition, these teams interpret the laws and regulations pertaining to contracts and furnish legal advice as to all phases of the administration of contracts. In furtherance of their mission, they also assist contracting officers in the general negotiations of contracts and contract clauses.

Property Law Teams. These teams are designed to dispose of legal problems concerning disposal, sale, lease, loan, etc. of property and use thereof in aid of military or civil authority. Also these teams interpret and promulgate necessary regulations and review industrial facilities and "Government Owned Contract Operated" contracts and render advice to all aspects of the administration of contracts.

Fraud Teams. The fraud teams take appropriate action on matters involving suspected criminal conduct or fraudulent activity on the part of

military personnel or civilian employees of the Department of the Army or by private companies, organizations, or individuals, in connection with procurement activities.

Labor Relations Teams. These teams act for commanders to prevent labor stoppages which might adversely affect military procurement. In addition, they consider non-compliance with labor laws by government contractors and maintain liaison with other government agencies in this field.

Fiscal Law Teams. These teams take appropriate action on all matters pertaining to taxes imposed by governmental taxing authorities against Army contracts and/or any instrumentalities. Appropriate action is also taken on government financing by advance payments and guaranteed loans and import, export duties, and excise taxes. Normally, the procurement law teams are assigned to Army, corresponding logistical command, or base section in a communications zone, as required by their particular missions.

Judge Advocate Unit Operations:

Maximum Flexibility

The Judge Advocate General Service Organization has been designed to permit the tailoring of elements for specific wartime missions. Under its framework, personnel economy can be effected and dual capacities of personnel can be employed where professionally and operationally desirable and practical. Above all else, it insures a maximum of flexibility demanded for

the armies of the atomic field of battle.

Past experience has pointed out some serious deficiencies in legal services being made available to the Army. World War II and the Korean War re-emphasized the need of trained legal personnel and the need to dispose of wasteful methods used in establishing legal services.

A close examination of the table of organization and equipment makes it apparent that the Corps can now more efficiently fulfill its duty of providing legal service to the Army in the field. Practical tests applied in LOGEX 57 formed the basis of these cellular units to provide the most efficient means of meeting peak caseload responsibility and accomplishing those duties found in an active combat theater. But the table was not enough. An organization on paper is one thing, an organization operating successfully in the field of combat is another. With the coming of the TOE 27-500D, there necessarily followed the responsibility to assure that the personnel designated therein were qualified to perform their assigned missions in the event of war. This training task naturally was fixed with The Judge Advocate General's School.

At the outset, both the planners for the training and those charged with preparing the instruction for the TOE 27-500D teams at the School were cognizant of the fact that they were confronted with the problem of planning and training for maximum flexibility. It was understood that under peacetime conditions and even normal combat con-

ditions, the organic judge advocate sections might have the inherent capability to accomplish adequately their mission. However, under certain conditions, judge advocate workloads may increase inordinately and this excess would have to be absorbed by judge advocate theater units. In this interest, the Reserve Activities and Plans Department and the Academic Department, The Judge Advocate General's School, coordinated their efforts to program for the summer of 1959 the first phase of training for the newly conceived teams.

TOE 27-500D Unit Corps Training Program: ANACDUTRA

In general the program provides training of all TOE 27-500D unit personnel—officers, warrant officers and enlisted men. It has long been determined that The Judge Advocate General's Corps officers not on active duty must be professionally trained and competent to insure that he is qualified to assume upon mobilization responsibilities commensurate with his branch and grade. Hence, the first statement that he will be a Judge Advocate General's Corps officer first and a specialist thereafter. General training in judge advocate responsibilities will be completed prior to or at least simultaneously with the commencement of specialized military training. It is also contended that every Judge Advocate General's Corps officer who is eligible should complete the General Staff Course of training.

Warrant Officers. Warrant Officers will receive on-the-job training

as unit legal administrative assistants designed to qualify the individual in his proper MOS and in the requisite ability to direct and supervise the operational work of enlisted men assigned to his unit.

Enlisted Personnel. The training of enlisted specialists will be directed to produce a physically conditioned basic soldier indoctrinated and drilled in the fundamentals of soldiery and qualified in MOS to carry out his TOE assignment immediately upon mobilization. Enlisted specialists of The Judge Advocate General's Corps service units must be trained within their specialties in the same manner and to the same extent as the officer members thereof.

Officer Training. The Judge Advocate Branch Departments, United States Army Reserve Schools, will be utilized to provide 24 periods of instruction to those officers now enrolled in a USAR school or who can be enrolled in such training program. An additional 24 periods of instruction will be accomplished by group team instruction in selected course material provided by The Judge Advocate General's School as announced annually in the Special Catalog, "Staff and Unit Nonresident Training Material for Reserve Components."

The common usage title "ANACDUTRA" means "annual active duty for training." Two training sites for the summer of 1959 were selected for TOE 27-500D ANACDUTRA—Fort Carson, Colorado, for team members assigned to units in the

Fourth, Fifth and Sixth United States Armies, and Fort Gordon, Georgia, for teams nominated in the First, Second and Third United States Armies. Training was conducted at Fort Carson from 28 June through 11 July 1959 and at Fort Gordon from 12 July through 26 July 1959. Three hundred thirty-five officers, three warrant officers and sixty-six enlisted personnel were present for training at the above sites.

It may be interesting to note that, at these training sites, aside from being given intensive instruction in the organization and functions of the specialized teams, the trainee was thoroughly trained in the background and development of the unit concept. Instruction included the requirements of total legal service in modern warfare, dispersion, decentralization and mobility essential for ground forces. In addition, time was devoted to the types and characteristics of the units in the Judge Advocate General Service Organization.

At both Fort Gordon and Fort Carson, representatives of The Judge Advocate General's office instructed in certain high level duties of that office, including the new Field Judiciary Branch of the Corps; and representatives from The Judge Advocate General's School conducted refresher courses in Military Justice and Military Affairs, The Status of Forces Agreement and in Civil Emergencies.

During the second week of the training period at each of the training sites, seminars were held and

attended by The Judge Advocate General's School representatives, Executives for Reserve Affairs of the six Army areas, and the TOE 27-500D Detachment Commanders. Problems involving organizational structure, procurement of qualified personnel, training programs, and administrative functioning of the Detachments were freely discussed and solutions were in most instances provided. Certain major problems which required further research, study and coordination at command levels were recorded and placed in the proper chain of command for appropriate action. The voiced opinion of the majority of the personnel attending the ANACDUTRA training at both sites was that much had been gained during the two week period and that many of the problems encountered during the activation of the units had been adequately resolved. It was also the majority view that a second encampment for all TOE 27-500D units be held at one central location during the summer of 1960. By so doing, it was believed that problems which would arise during the first full year of activation of the new units could be aired and solutions arrived at could be discussed to assist other units which may have had or may in the future encounter the same or similar situations.

LOGEX 59 and the Judge Advocate General Service Organization

LOGEX 59 was a command post exercise and map maneuver conducted during the second week in May for the administrative and tech-

nical service schools of the Army with the cooperation of the State Department, Navy and Air Force. Every year during this exercise nearly seven thousand United States service men and women engage in desperate, though bloodless, strife with a familiar enemy— AGGRESSOR.

In LOGEX 59 judge advocate interest was focused on four major problem areas:

- a. International law,
- b. Employment of judge advocate operational teams,
- c. Pilferage from depot stocks and black-marketing, and
- d. Machine records recording and procuring of courts-martial statistics.

Beginning 11 May 1959, the several judge advocate teams entered into the play and were constantly used as problems created their need. Compressed into the few short days of the exercise were a multitude of lessons in staff coordination that could be taught no other way. While the final report of The Judge Advocate General's School on LOGEX 59 is now being completed, agency observers have reported that the judge advocate operational units proved their value as theater and theater logistical troops. Further, LOGEX 59 was a vivid demonstration of the ever-increasing need of the field commander in modern warfare for adequate legal advice. The play of atomic weapons established beyond doubt that the teams, as used, were absolute requirements in all areas of the major commands.



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SUPREME COURT KNOCKS OUT ALL COURT-MARTIAL JURISDICTION OVER CIVILIANS IN TIME OF PEACE

Members of the Association will recall that, in 1957, withdrawing on rehearing its earlier 1956 opinions, the Supreme Court held that court-martial jurisdiction could not constitutionally be exercised in time of peace over civilian dependents charged with capital offenses. *Reid v. Covert*, 354 U.S. 1, withdrawing *Kinsella v. Krueger*, 350 U.S. 470, and *Reid v. Covert*, 350 U.S. 487. See *Supreme Court Reverses Self in Smith and Covert Cases*, 25 JAJ 32.

In 1957, only a minority of the Court (Warren, C.J.; Black, Douglas, and Brennan, JJ.) would have struck down all court-martial trials of civilians. Two Justices (Frankfurter and Harlan, JJ.) limited their concurrence to trials of dependents for capital offenses. Two others (Clark and Burton, JJ.) dissented, adhering to their earlier views.

This disposition left open numerous questions. What about civilian employees? And what about civilian dependents charged with non-capital offenses? Those queries have now been answered in a quartet of cases, decided on 18 January 1960, in which the Supreme Court held that there was no military jurisdiction in time of peace over any kind of civilian for any kind of offense. Here are the four cases:

1. *Kinsella v. Singleton*, 361 U.S. 234. This involved a dependent wife,

convicted by court-martial in Germany of manslaughter in violation of Art. 119, UCMJ, a non-capital offense. The military authorities and the Court of Military Appeals sustained the military jurisdiction. *United States v. Dial*, 9 USCMA 541, 26 CMR 321. On habeas corpus, the U. S. District Court ordered Mrs. Dial released. 164 F. Supp. 707. Since that order proceeded on the footing that Art. 2(11), UCMJ, was unconstitutional as applied to a non-capital case, the Government appealed directly to the Supreme Court. *Held*, that there was no constitutional difference between capital and non-capital offenses for purposes of court-martial jurisdiction. Judgment affirmed. Clark, J., wrote the opinion of the Court; Whittaker and Stewart, JJ., concurred on the ground that a civilian dependent was involved; Harlan and Frankfurter, JJ., dissented, on the ground that the offense was non-capital.

2. *Grisham v. Hagan*, 361 U.S. 278. Grisham, a civilian employee of the Army temporarily on duty in France, killed his wife, was charged with premeditated murder, and was convicted of unpremeditated murder. The Court of Military Appeals sustained the jurisdiction. *United States v. Grisham*, 4 USCMA 694, 16 CMR 268. Relief by way of habeas corpus was denied (161 F. Supp. 112; 261 F. 2d 204), and the Supreme

Court granted certiorari. *Held*, that there was no constitutional distinction for purposes of court-martial jurisdiction between capital offenses committed by civilian dependents and capital offenses committed by civilian employees. Judgment reversed. Clark, J., wrote the opinion of the Court; Harlan and Frankfurter, JJ., concurred on the ground that the offense was capital; Whittaker and Stewart, JJ., dissented on the ground that civilian employees were subject to military jurisdiction.

3. *McElroy v. Guagliardo*, 361 U.S. 281. The relator, a civilian employee of the Air Force in Morocco, was convicted by court-martial of non-capital offenses. *United States v. Hall et al.*, 25 CMR 874, review denied, 26 CMR 516. A District Court denied relief by way of habeas corpus (158 F. Supp. 171), but was reversed on the ground that Art. 2(11), UCMJ, was non-separable. 259 F. 2d 927. The Government sought and was granted certiorari. *Held*, that although Art. 2(11) is separable, there is no constitutional distinction for purposes of court-martial jurisdiction between various types of civilians; all have civilian status. Judgment affirmed. Clark, J., wrote the opinion of the Court; Harlan and Frankfurter, JJ., dissented because the offenses were non-capital; Whittaker and Stewart, JJ., dissented because the relator was a civilian employee.

4. *Wilson v. Bohlender*, 361 U.S. 281, decided together with the *Guagliardo* case in the same opinion. Here a civilian employee was con-

victed of non-capital offenses by a court-martial in the U.S. Sector of Berlin. Jurisdiction was sustained by the Court of Military Appeals (9 USCMA 60, 25 CMR 322) and by a District Court on habeas corpus (167 F. Supp. 791). The employee sought and was granted certiorari before judgment by the Court of Appeals. At each level—CMA, District Court, Supreme Court—the Government argued that jurisdiction could be sustained as an exercise of military government powers in occupied territory under Art. 18, UCMJ. *Held*, that since the charges were drawn in terms of Art. 2(11) power, and since jurisdiction was sustained on that basis, the alternative contention for jurisdiction must be denied, and the case disposed of like that of *Guagliardo*. Judgment reversed. Opinion by Clark, J.; Harlan, Frankfurter, Whittaker, and Stewart, JJ., dissented for the same reasons as in *Guagliardo*.

Thus, after over four years, the controversy concerning military jurisdiction over civilians, which began when Judge Tamm released Mrs. Covert on habeas corpus in November 1955 (see *Article 2(11) UCMJ Held Unconstitutional*, 21 JAJ 18), is finally concluded, adversely to the Government, and consistently with the views expressed by Winthrop, who wrote, more than 60 years ago (*Military Law & Precedents*, p. 107 of reprint), "a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."

Spearheading the drive for ultimate judicial acceptance of Winthrop's views was Col. Frederick Bernays Wiener. He handled the *Covert* and *Krueger* cases in the respective District Courts, through the 1956 reversal in the Supreme

Court, and then on rehearing to victory in 1957. Of the present four cases, he briefed and argued *Kinsella v. Singleton* and *Wilson v. Bohlander* in the Supreme Court and made the rebuttal argument in *Grisham v. Hagan*.



J.A. WIVES—COFFEE TIME

The Army Judge Advocates Wives' Club will hostess a coffee honoring the wives of Army Judge Advocates, reserve and retired, attending the annual meeting of the American Bar Association, and other invited guests on August 30 at Patton Hall, the officers' club at Fort Myer, Virginia, from 10 AM until Noon. It would be appreciated if wives of reserve and retired Army Judge Advocates who wish to attend would contact Mrs. William H. Churchwell, 4715 North Dittmar Street, Arlington 7, Virginia, telephone KE 6-6852.

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.

BOOK REVIEW

Military Evidence, Larkin and Munster, Bobbs-Merrill Company, Inc., Indianapolis, Indiana, 1959. Pages 562 Price: \$10.00

Military justice today covers the largest single system of criminal justice in our Country, and it portends to be just that, in peace as well as war, for the foreseeable future. The law of evidence, as applied by the military justice system, is an essentially important body of law upon which the success or failure of the whole structure of military justice stands.

The Uniform Code of Military Justice does not contain a code of evidence and, in fact, has only six articles specifically related to evidence. Most importantly, Article 36 provides that modes of proof, in cases before Courts-Martial may be prescribed by the President by regulations which shall, as far as practicable, conform to the rules of evidence generally recognized in the trial of criminal cases in United States District Courts. Under this statutory authority the Manual for Courts-Martial, United States, 1951 was promulgated. In some 90 pages, the Manual for Courts-Martial sets forth the basic rules of evidence in a general and undetailed fashion incorporating by reference "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with such rules, at common law." The Court of Military Appeals has, in many opinions, limited, interpreted and laid down evidentiary rules in spe-

cific cases, some of which are at variance with the Manual. It is patent that the law of military evidence is a huge and complex body of law and all those who participate in the administration of military justice, including criminal investigators, investigating officers, military and civilian counsel, members of boards of review and the judges of CMA have a job cut out for themselves to be thoroughly acquainted with the field. Surprisingly, until the authors, Captain Joe H. Munster and Captain Murl A. Larkin, both of the U.S. Navy, wrote *Military Evidence*, there were no text books specifically dealing with the military law of evidence. This work fills a real need and does it well.

In one modest sized volume and eleven chapters the authors have collected within the basic outline of the Manual's Chapter on the Rules of Evidence concise, nontechnical statements of the rules as found in the Manual and military case law and where the rule is obscure, ambiguous or not settled by USCMA they have selected federal and state decisions that would seem to control. In a word, *Military Evidence* puts a whole library of source material in a single handbook and its authors have indexed their work so completely that all those who must know the military law of evidence will find it an invaluable tool.

Recent Decisions

of the Court of Military Appeals

EFFECT OF SUSPENSION OF SENTENCE

U. S. v. May (Army) 24 April 1959, 10 USCMA 358

The accused was sentenced, pursuant to his plea of guilty, to a bad conduct discharge and total forfeitures. The Convening Authority reduced the forfeitures to \$50 per month for six months and approved the sentence as thus modified and ordered it executed, suspending the execution of the punitive discharge until completion of appellate review. No provision for automatic remission was made. The Board of Review modified the sentence by suspending the execution of the discharge for six months and providing for automatic remission at that time unless the suspension should be sooner vacated. TJAG requested review. CMA affirmed the Board of Review holding that although the Convening Authority's action did not provide for automatic remission, the legal effect of such action was to place the accused in a probationary status which could not be altered except as provided in UCMJ Art. 72 which means that his status as a probationer could not be changed to his detriment without independent cause and without a hearing at which he could be represented by counsel.

Unless the suspension is so vacated, the accused must be fully restored at the completion of the period of probation fixed in the action (Judge Latimer dissented.)

To the same effect, see *U. S. v. Cecil* (Army) 24 April 1959, 10 USCMA 371, in which case the accused was sentenced to dishonorable discharge, total forfeitures and confinement for two years. The Convening Authority reduced the sentence to a bad conduct discharge, total forfeitures, and one year confinement, ordering execution of the punitive discharge suspended until the accused's release from confinement or until completion of appellate review. The Board of Review affirmed. Here, on petition of the accused, CMA affirmed the Board of Review, repeating its view that UCMJ Art. 72 establishes a single type of suspension which constitutes the accused a probationer and contemplates full restoration to duty unless the suspension is vacated after a hearing. In this case, however, the probationary period had not yet expired and there was no indication that the discharge would be executed without a hearing and, therefore, the accused was not prejudiced, nor could he be in view of the decision in the *May* Case. (Judge Latimer dissented).

To the same effect, see *U. S. v. Holzhtuter* (Army) 24 April 1959 10 USCMA 374 and *U. S. v. DeVore* (Army) 24 April 1959, 10 USCMA 375.

STATUTE OF LIMITATIONS

U. S. v. Spann (Navy) 1 May 1959, 10 USCMA 410

The accused was charged with wartime desertion begun in 1945 and terminated by apprehension in 1958, and he was found guilty of AWOL. The charge sheet prepared and executed in 1958 had attached to it a 1947 order of the Secretary of the Navy, directing that the accused be tried by general court-martial on a charge of desertion in time of war, and also a 1958 order adding the date and manner of accused's return to military control. The Law Officer did not advise the accused of his right to plead limitations in bar of trial. The Board of Review set aside the findings and sentence on the ground that the Law Officer should have advised the accused of his right to plead limitations. Upon certification of the case by The Judge Advocate General, the Court reversed the Board of Review, holding that the accused's trial was not barred by the Statute of Limitations. Adding the manner and time of the termination of the absence could not be shown before the accused returned to military control and the amendment of the original charge and specification to show these matters did not change the nature of the offense, nor destroy the tolling effect of the earlier action.

IMPEACHMENT OF ACCUSED BY OLD CONFESSION

U. S. v. Moreno (Air Force) 1 May 1959, 10 USCMA 406

The accused was charged with taking indecent liberties with a child. For the limited purpose of contesting the voluntariness of a pre-trial statement, the accused took the stand and on cross examination, was questioned about a sworn statement made eight years earlier to an OSI agent in which accused had admitted communicating obscene remarks to a telephone operator. Over defense objection, the accused first stated that he did not remember the statement, but on being confronted with it, he changed his testimony, denying some of the statements and stating he had no memory of others. The trial counsel then called the OSI agent who testified he had taken the statement and that it was voluntary. Upon defense objection, the trial counsel abandoned the line of inquiry. The Law Officer admonished the Court twice and again in his charge to disregard the eight year old statement. Accused was found guilty and the findings were affirmed by a Board of Review. On petition, the Court of Military Appeals affirmed the Board of Review. The only proper basis for the evidence of prior misconduct was its reflection upon the accused's credibility. The prior misconduct was remote in point of time and inflammatory in its nature—it did not show commission of prior offenses but only a confession to such misconduct. It was improper

cross examination. Likewise, the OSI agent's testimony was inadmissible because it is not permissible to impeach a witness on the ground of prior crimes by evidence not amounting to proof of conviction in any other way than by cross examination of the witness. But, the Court said, no prejudice was done the accused in this case because the evidence of guilt was overwhelming and the Law Officer's instruction to the Court to disregard the testimony was explicit.

BAD CHECK OFFENSE

U. S. v. Brand (Air Force) 22 May 1959, 10 USCMA 437

Accused was found guilty of making and uttering four checks to the custodian of an officers' mess and failing to maintain sufficient funds in the bank for their payment. The evidence showed that the accused offered to redeem the checks before their dishonor, but was told by the custodian of the officers' mess to wait until they came back from the bank. The evidence showed that there was a very liberal check redemption policy at the air base in question. The Board of Review affirmed the findings of guilty and The Judge Advocate General certified the case to the Court. The Court reversed the Board of Review saying "in order to impose criminal liability, an accused's failure to deposit or maintain a sufficient bank balance for the payment of checks previously drawn upon his account must be dishonorable." This term

involves demonstrable bad faith or gross indifference and is characterized by evasion and false promises. Considering the evidence in this case: The liberal check redemption policy, accused's offer to redeem the checks, and assurances that the checks could be redeemed when they came back from the bank, it is clearly established that accused did not act in bad faith or with gross indifference in failing to deposit funds in the bank prior to dishonor of his checks.

LAW OFFICER'S DIRECTION OF FINDINGS ON GUILTY PLEA

U. S. v. Cruz (Army) 12 June 1959
10 USCMA 458

The accused pleaded guilty to certain charges and specifications. After ascertaining that accused had not made the plea improvidently, the law officer directed that a finding of guilty of all charges and specifications be entered on the record. The Court then considered only the sentence and passed sentence in the case. The Board of Review reversed on the ground that the Court had not voted on the finding of guilty. Upon certification, the Court reversed the Board of Review, holding the entry of findings of guilty by the Law Officer was an error in that it encroached upon the province of the Court-martial. It was an expedient used by the Law Officer, but none the less, in conflict with the Code; but, the accused was not prejudiced by this procedure and to hold the error prejudicial would be to insist upon form over substance.

LESSER INCLUDED OFFENSE OF ROBBERY

U. S. v. King (Navy) 19 June 1959
10 USCMA 465

The accused was charged with the crime of robbery by means of force and violence, and was found guilty of assault with intentionally inflicted grievous bodily harm, as a lesser included offense covered by the Law Officer's instructions. The conviction was affirmed by the Board of Review. On petition the defense contended that "assault with intent" includes an element not included in robbery that is, the intent to inflict bodily harm and, therefore, accused was convicted improperly. The Court of Military Appeals affirmed the conviction holding that the presence of a specific intent in an offense does not in and of itself preclude that offense from being a lesser included offense within a general intent crime. Having alleged a criminal intent, the Government may, in establishing a lesser offense, show the specific type of intent so long as the accused is not misled in his defense. The allegation of force and violence in connection with the robbery was sufficient allegation to apprise the accused of the included offense to which he had to defend.

COURT IMPEACHES ITS VERDICT BY RECOMMENDING CLEMENCY

U. S. v. Grich (Navy) 26 June 1959
10 USCMA 495

On accused's plea of guilty to AWOL a Special Court sentenced

him to a BCD and confinement at hard labor for six months. The Court on its own volition announced its recommendation that the accused be considered for an administrative separation and later the Court unanimously joined in a written recommendation that the sentence be set aside and accused be considered for an administrative discharge. Because of the conflict between the sentence adjudged and the clemency recommendation, the Board of Review set aside the sentence. On certification, the Court affirmed the Board of Review holding that the clemency recommendation of the Court impeached its own sentence verdict. (See also *U. S. v. Caylor* 10 USCMA 139 28 JAJ 53) and *U. S. v. Story* 10 USCMA 145.

WIFE'S TESTIMONY AGAINST HUSBAND EXCLUDED

U. S. v. Wooldridge (Army) 2 July 1959, 10 USCMA 510

Accused was convicted of forging his wife's signature on Class Q Allotment checks. Over defense objection, the wife was permitted to testify that she had not received her allotment checks and that the checks in evidence were not endorsed by her but in the hand of her husband who did not have her authority to sign her name. The evidence showed that the wife had refused to join her husband at his duty station despite his request for her to live with him there. The conviction was affirmed by the Board of Review. On petition of the accused, the Court reversed the con-

viction, holding that the Law Officer committed prejudicial error in denying the accused's asserted claim to privilege prohibiting the use of his wife as a witness against him. Recognizing the exception that where the offense charged against a spouse involves injury to the other spouse, there is no claim to privilege, the Court went on to find that the wife in the instant case was not injured by the offense charged against her husband. The allotment check is not the sole property of the wife, but a payment for the special purpose of providing for the serviceman's family and there is no showing in this case that the accused did not at least have implied authority to cash the check for that purpose, there being nothing in the record to show that it was cashed for any other purpose. See also *U. S. v. Wise* (Navy) 24 July 1959, 10 USCMA 539, to the same effect with regard to the forgery charge; but, there on an additional charge of bigamy, the wife could voluntarily testify against the accused.

MAXIMUM SENTENCE ON REHEARING

U. S. v. Jones (Air Force) 2 July 1959
10 USCMA 532

On a rehearing on sentence, the Law Officer over defense objection advised the Court of the penalties adjudged at the original trial and stated that the Court could not assess any punishment beyond that limit; but, he made no mention of the reduction of the sentence imposed at the original trial by the

Convening Authority. The Court of Military Appeals held that this instruction was prejudicial error. The Court stated that the maximum sentence which may be adjudged on any rehearing is limited to the lowest quantum of punishment approved by a Convening Authority, Board of Review or other authorized officer under the Code prior to the rehearing, so long as the reduction is not based on an erroneous conclusion of law. The Court should be told only of the maximum imposable sentence, and not how that limit was reached. See also *U. S. v. Eschmann* (Air Force) 11 Dec. 59, 11 USCMA 64.

MISTRIAL FOR PREJUDICIAL CONDUCT OF WITNESS

U. S. v. Grant (Army) 14 August 1959
10 USCMA 585

The accused, on trial for larceny and making false claims, testified exculpating himself and at considerable variance with his several contradictory pre-trial statements. In rebuttal, the trial counsel called the commanding officer of the garrison, a colonel, who testified that he had discussed the larceny with the accused and that the accused had admitted taking the money and offered to make restitution. The colonel went on to say that the accused had a habit of writing rubber checks and was a psychopathic liar. The defense moved for mistrial. The Law Officer denied the motion, but struck the testimony of the colonel from the record and instructed the court to disregard it. The accused was convicted and the conviction was

affirmed by the Board of Review. CMA reversed the Board. The Court held that the colonel's testimony amounted to a purported confession of guilt and there was no showing that compliance with Article 31 had been made. The Law Officer attempted to cure this error by striking the testimony and instructing the court to disregard it. However, a motion for mistrial is addressed to the Law Officer's sound discretion and he abused his discretion in denying the motion for mistrial in this case. Considering the witness's position as commanding officer and the damning effect of his testimony, the Court found it would be unlikely that the court martial could wipe the thoughts created by the colonel's testimony from their minds, and accord the accused a fair trial.

PUNISHMENT OF PRISONER UNDER ARTICLE 13 A BAR TO TRIAL

U. S. v. Williams (Air Force) 21 August 1959, 10 USCMA 615

Accused was found guilty of using disrespectful language to an NCO. The accused having been apprehended for other offenses was delivered to a guard house for confinement and there, while being processed, was disrespectful to the NCO in charge. Pursuant to Article 13, UCMJ and Air Force regulations, the accused was placed in disciplinary segregation on a reduced diet. Defense counsel moved to dismiss the charge on the ground of former punishment. The motion was denied.

The Court, recognizing that Article 13 provides that an accused in military confinement may be subjected to minor punishment for minor infractions of discipline, held that disciplinary segregation and deprivation of a normal diet were punitive measures. It further observed that disrespect to an NCO is a minor offense. The court concluded that disciplinary punishment to an accused for minor offenses bars any subsequent trial by court martial of the accused for the same infraction.

JURISDICTION OVER OFFENSES IN PRIOR ENLISTMENT

U. S. v. Martin (Army) 30 September 1959, 10 USCMA 636

The accused had enlisted for an indefinite period on 27 December 1950. In June, 1955 during the period of the indefinite enlistment, he presented false claims. On 4 January 1957, he applied for a discharge and immediate enlistment for a six year period. He was given an honorable discharge on 9 January 1957 and re-enlisted on 10 January 1957. Thereafter, being tried for the aforementioned false claims he was convicted. CMA affirmed the conviction. Conceding that a court martial loses jurisdiction to try a person who has been discharged and who has severed all connection with the military, the Court here found that since the accused's discharge did not interrupt his status as a soldier, court martial jurisdiction to try him for an offense committed during his indefinite enlistment did not lapse. Distinguishing the Hirsch-

berg case (336 U.S. 210), the Court further found that the court martial had statutory authority to try an accused for fraud against the Government even though he had received a discharge between commission of the offense and the institution of proceedings against him.

JURISDICTION OVER RESERVISTS

U. S. v. Wheeler (Air Force) 30 September 1959, 10 USCMA 646

While the accused enlisted man was on active duty with the Air Force in Europe, he allegedly committed a homicide. Later, upon being relieved from active duty, he was transferred to an obligated reserve status. While in this reserve status, after being warned of his rights under Article 31, he was interrogated concerning the homicide and made a statement. While in confinement in a civilian jail, the accused applied for recall to extended active duty, stating in the application his knowledge that he would be tried by court martial for the homicide. Upon a plea of guilty of premeditated murder, he was found guilty and sentenced to life imprisonment, reduced to twenty years by reason of a pre-trial agreement. On appeal to the Court of Military Appeals, the accused contended that he was not subject to court martial jurisdiction relying upon the Toth Case (350 U.S. 11). CMA distinguished the Toth Case on the ground that Wheeler did not enjoy the status of a civilian ex-soldier, wholly separated from the service like Toth; but to the con-

trary, he remained a member of the armed forces as a reservist, subject to serve on active duty "at the scratch of the presidential pen". The Court went on to hold that jurisdiction over service obligors, such as the accused, was necessary to maintain discipline and order in the service. Judge Ferguson, in a concurring opinion, found jurisdiction over the accused only because he had voluntarily returned to active duty at the time of his trial, but did not believe that there was court martial jurisdiction over a member of the reserve forces not on active duty for an offense committed while he was on active duty.

IMPROPER IMPEACHMENT OF ACCUSED

U. S. v. Britt (Army) 31 July 1959
10 USCMA 557

Accused was cross examined by trial counsel about other purported acts of misconduct in a series of some thirty questions designed to impeach his credibility. The trial counsel did not attempt to prove any of the many prior offenses which he inquired about and the Law Officer instructed the court not to draw any inferences from the questioning. In closing argument, trial counsel implied that only the rules of evidence had prevented the admission of guilt of the other offenses by the accused. CMA reversed the conviction. An accused may be impeached on cross examination by showing he has committed a crime which involves moral turpitude or which affects his credibility; how-

ever, such cross-examination must be predicated on fact and not mere suspicion or allegation of wrong doing. The trial counsel apparently had no factual basis for his interrogation and was only making allegations. The Law Officer's instruction to disregard the questioning did not cure the effect of such improper cross-examination.

IMPROPER ARGUMENT CONCERNING FAILURE TO CONVICT

U. S. v. Cook (Navy) 24 December 1959, 11 USCMA 99

At the trial of accused in the manslaughter of a Philippine National, the trial counsel, in closing argument emphasized the seriousness of the case and the impact that it would have on Philippine-American relations, particularly affecting the military forces stationed there. The defense contended that this line of argument was completely irrelevant and that the only issue at the trial was whether or not the accused was guilty beyond a reasonable doubt of the offense charged. The trial counsel, however, in rebuttal argument, urged the importance of a conviction to show the Philippines that justice was done. The conviction was reversed by a Board of Review because of the prejudice of the prosecution's improper remarks. On certification to CMA, the Court affirmed the Board of Review holding that the trial counsel's remarks exceed the bounds of fair comment and injected improper matter into the case. The court has no business predicating its verdict on the basis of the

probable effect of its actions upon the relations between the military and civilian community.

PRIVILEGE AGAINST SELF-INCRIMINATION

U. S. v. Bolden (Army) 22 January 1960, 11 USCMA 182

At accused's trial for attempted larceny, an alleged co-conspirator was called as a prosecution witness. Trial counsel asked the witness 46 questions, 17 of which evoked assertions of privilege against self-incrimination or were designed to elicit the reasons for the witness's silence. Accused's conviction was reversed by CMA which held that the trial counsel's examination was improper and that the Law Officer's failure to give instructions to the court to draw no inference from the witness' refusal to testify, prejudiced the accused. The accused was charged with acting in conjunction with the witness and there was risk the court would infer from the witness' silence that both were guilty of participation in the larceny.

ELIGIBILITY TO SIT ON COURT

U. S. v. Braud (Coast Guard) 29 January 1960, 11 USCMA 192

The special court which tried the accused was convened by the commanding officer of a Coast Guard cutter and was composed of three members, one of whom was an officer of the U. S. Public Health Service on active duty with the Coast Guard. The accused was found guilty, and the question of the legal

constitution of the court was certified by the General Counsel of the Treasury. CMA affirmed the conviction. The court held that Public Health Service officers serving on active duty with the Coast Guard are officers of the Coast Guard under Article 25 UCMJ.

ERROR IN COURT MEMBERS WRITING DOWN LAW OFFICER'S INSTRUCTIONS

U. S. v. Caldwell (Air Force) 19 February 1960, 11 USCMA 257

During the Law Officer's instructions to the Court, at the President's behest, one of the court mem-

bers undertook to write down the instructions of the Law Officer verbatim. There were many interruptions and requests for explanations as the instructions were given. Although the written instructions, as thus transcribed, were taken into closed session, they were not attached to the record of trial. The conviction was reversed by CMA on the ground that the court had in its closed session an unrecorded communication for its consideration; and, since Article 54a UCMJ requires that the record reflect all proceedings, the failure to include the purported transcribed instructions made by the court member was a prejudicial error.



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.

What The Members Are Doing . . .

District of Columbia

Members of the Association in the Washington Area met for cocktails and supper on 19 March at the Army and Navy Club to honor Major General Reginald C. Harmon, retiring Judge Advocate General of the Air Force. Approximately one hundred members of the Association attended this testimonial dinner. Captain Robert G. Burke, USNR, president of the Association, presided. Among those speaking briefly of General Harmon were United States Senator Ralph W. Yarborough of Texas, United States Senator Frank Moss of Utah, Judge George W. Latimer of the United States Court of Military Appeals, Major General George W. Hickman, The Judge Advocate General of the Army and Admiral Chester Ward, The Judge Advocate General of the Navy. Captain Burke in behalf of the members of the Association presented General Harmon with a testimonial certificate and General Harmon responded. General Harmon, who retired on 31 March 1960, will continue to live in the Washington area with Mrs. Harmon and their charming young daughter.

Major General Albert W. Kuhfeld has been appointed The Judge Advocate General of the Air Force to succeed General Harmon upon his retirement. Major General and Mrs. Kuhfeld live in Arlington, Virginia. Major General Moody R. Tidwell has been appointed The Assistant Judge Advocate General of the Air Force and will shortly be transferred

from his present station at Wright-Patterson Air Force Base.

Captain George H. Spencer, JAGC-USAR, announced recently the opening of offices for the practice of law in patent, trade-mark and copyright causes. His offices are located in the Munsey Building.

Colonel Frederick Bernays Wiener addressed The Judge Advocate General's School at Charlottesville, Virginia on 4 April 1960 on "Problems in Written and Oral Advocacy Presented by the Court-Martial Cases". In February, he spoke to a dinner meeting of the Junior Bar Section of the Birmingham, Alabama Bar Association on "The Aging Lawyer—Pleasures and Pitfalls" and also on the day following, Colonel Wiener spoke at the University of Alabama Law School at Tuscaloosa on "Constitutional Principles Underlying the Decisions Denying Court-Martial Jurisdiction over Civilians".

The D.C. Chapter of the Judge Advocates Association elected as its Chairman for the ensuing year, Colonel Samuel C. Borzilleri, USAFR at a meeting on March 19, 1960.

Illinois

Robert E. Mills of Ottawa, Illinois recently announced the removal of his law office to the Central Life Building in Ottawa.

Colonel Arnold E. Eger, formerly Director of the Academic Department of The Judge Advocate General's School at Charlottesville, Virginia was recently assigned duties as the Staff Judge Advocate of the Fifth U.S. Army at Chicago.

Maryland

O. Bowie Duckett, of Annapolis was recently appointed by the Governor of Maryland as Circuit Court Judge for the Fifth Judicial Circuit of Maryland sitting at Annapolis. Judge Duckett will be subject to election in November, 1960 and, if elected will enjoy a fifteen-year term of office. During World War II, Judge Duckett served as a Judge Advocate in the Pacific Theatre.

Massachusetts

Anthony Julian of Boston was recently appointed United States District Judge.

Michigan

Frederick R. Bolton of Detroit, a member of the Board of Directors of the Association recently became a member of the firm of Lacy, Lawson, Kirkby, Bolton and Hoffman, with offices in the Buhl Building.

New Mexico

Major Russell A. Burnett was recently elected National Judge Advocate of the Reserve Officers Association. Major Burnett is on active duty at White Sands Missile Range.

New York

Major Edwin M. Schmidt was recently assigned as an instructor in the Department of Law at the United States Military Academy at West Point. Since 1957, Major Schmidt has served in the Judge Advocate Section of Headquarters Fifth Army.

Samuel G. Rabinor of Jamaica, recently conducted a round table

conference of the Queens County Bar Association on the general practitioners' handling of negligence cases.

Oregon

Colonel Benjamin Fleischman of Portland, was recently presented a silver life membership card in the Portland Chamber of Commerce.

Virginia

General Franklin P. Shaw, formerly The Assistant Judge Advocate General of the Army, recently announced the formation of a partnership for the general practice of law under the firm name of Shaw and Rice with offices at 2062 N. 14th Street, Arlington. General Shaw will continue to have his office at Manassas, Virginia.

Lt. Colonel Joseph P. Ramsey was recently assigned to the staff and faculty of The Judge Advocate General's School at Charlottesville. Heretofore, he has been assigned to the Judge Advocate Section Headquarters Fifth Army.

Washington

Wheeler Gray of Seattle recently announced the formation of a new firm for the general practice of law under the style of Jones, Grey, Kehoe, Hooper and Olsen with offices in the Coleman Building.

Wyoming

Bruce P. Badley of Sheridan was recently elected president and chairman of the Junior Bar Conference of the American Bar Association for the State of Wyoming.

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